UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	**Chapter 11**
MF GLOBAL HOLDINGS LTD., et al.,	:	**Case No. 11-15059 (MG)**
Debtors.[1]	:	**(Jointly Administered)**
MF GLOBAL HOLDINGS LTD., as Plan Administrator, and MF GLOBAL ASSIGNED ASSETS LLC,	:	
Plaintiffs,	:	
vs.	:	**Adv. Proc. No. 16-01251 (MG)**
ALLIED WORLD ASSURANCE COMPANY LTD., IRON-STARR EXCESS AGENCY LTD., IRONSHORE INSURANCE LTD., STARR INSURANCE & REINSURANCE LIMITED., and FEDERAL INSURANCE COMPANY,	:	**Ref. Docket Nos. 174, 14**
Defendants.	:	

DECLARATION OF JAYSON NATHAN WOOD
IN SUPPORT OF PLAINTIFFS' BRIEF IN OPPOSITION TO
DEFENDANT ALLIED WORLD'S MOTION TO DISMISS FOR IMPROPER SERVICE

[1] The debtors in the chapter 11 cases are MF Global Holdings Ltd.; MF Global Finance USA Inc.; MF Global Capital LLC; MF Global Market Services LLC; MF Global FX Clear LLC; and MF Global Holdings USA Inc. The Court entered an order of final decree closing the chapter 11 cases of MF Global Capital LLC, MF Global FX Clear LLC, and MF Global Market Services LLC on February 11, 2016.

I, **JAYSON NATHAN WOOD**, make this declaration based on my personal knowledge and pursuant to 28 U.S.C. § 1746. I hereby state as follows:

1. I am the head of the litigation and insolvency practice of Zuill & Co, a firm of barristers and attorneys in Bermuda. I was admitted to the Bar in Australia in 1989 and have more than 25 years experience in all aspects of corporate and insolvency litigation, with particular expertise in hedge fund collapses, shareholder disputes, corporate fraud, receiverships/liquidations, asset preservation and corporate reconstructions. I am admitted to practise as an attorney in Bermuda, the Cayman Islands and the British Virgin Islands.

2. I have been asked by U.S. Counsel representing MF Global Holdings Ltd ("MFGH") and MF Global Assigned Assets LLC ("MFGAA" and together, the "MFG Parties"), entities which my firm and I have acted for in related court proceedings in Bermuda, to provide counsel regarding Bermuda law on service of foreign proceedings in Bermuda. I am further advised that the questions arise out of proceedings in the U.S. Bankruptcy Court Southern District of New York against Allied World Assurance Company Ltd, an insurance company incorporated in Bermuda (hereafter referred to as "AWAC").

Service of foreign process in Bermuda under the Hague Convention, relevant laws

3. I understand from U.S. Counsel that there has been a recent change in U.S. law in relation to service by mail under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (the "Hague Service Convention"). I am advised that the US Supreme Court decided in Water Splash, Inc. v. Menon, No. 16-254, 2017 WL 2216933 (May 22, 2017) that in cases governed by the Hague Service Convention, service by mail is permissible if two conditions are met: 1) The receiving state has not objected to service by mail; and 2) Service by mail is authorized under otherwise applicable law of the forum jurisdiction. I am also advised by U.S. Counsel that Federal Rule of Civil Procedure 4(f)(2)(A), as incorporated by Bankruptcy Rule 7004, provides as well that service may be effected "as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction." I am further advised by U.S. Counsel that Federal Rule of Civil Procedure 4(f)(2)(C)(ii), as incorporated by Bankruptcy Rule 7004, provides that service may be effected "unless prohibited by the foreign country's law, by: using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt."

4. Taking each of these points in turn, first, Bermuda is a party to the Hague Service Convention via the United Kingdom and has not objected to Article 10 (a) "*the freedom to send judicial documents, by postal channels, directly to persons*". See Bermuda's Declarations / Reservations on the Hague Service Contention (showing that Bermuda objects to "paragraphs (b) and (c) of Article 10 of the Convention," but not paragraph (a) of Article 10) (attached as Exhibit A).

5. Second, as to the question of whether Bermuda law does not prohibit and/or affirmatively authorizes service by mail: Service of documents by post is authorized under Bermuda law except where personal service is required, pursuant to Order 65 Rule 5 (1) (b) of the Rules of the Bermuda Supreme Court 1985 (hereafter referred to as the "RSC") (attached as Exhibit B):

> "*65/5 Ordinary service: how effected*

Service of any document, not being a document which by virtue of any provision of these rules is required to be served personally, may be effected—

...

(b) by post…"

6. Personal service is dealt with under Order 10 of the RSC (attached as Exhibit C) and requires personal service of originating process "*subject to the provisions of any enactment*…" and Order 65 Rule 3 of the RSC (attached as Exhibit D) states that "*personal service of a document on a body corporate may, in cases for which provision is not otherwise made by enactment, [be] effected by serving in accordance with rule 2 on the president or vice-president of the body, or the secretary or other similar officer thereof."*

7. Under Order 1 Rule 4 of the RSC (attached as Exhibit E), "enactment" is defined as any statutory provision including any Act of Parliament of the United Kingdom having effect in Bermuda and would include provisions under the Companies Act 1981 (the "Companies Act").

8. Section 62A of the Companies Act (attached as Exhibit F) is the relevant provision in relation to service of documents on companies incorporated under the Companies Act, as AWAC is:

> "**A document may be served on a company by leaving it at the registered office of the company** or, in the case of a non-resident insurance undertaking the principle office in Bermuda, or in the case of a permit company, the principal place of business in Bermuda from which the company engages in or carries on its trade or business in Bermuda." [Emphasis added.]

9. Thus, in the case of a company, service may be effected by leaving the document at the registered office, which must be a physical office address. Section 62 of the Companies Act requires "*a company to have a registered office in Bermuda which shall not be a post office box*."

10. In Re Kingate Global Fund Ltd (in liquidation) [2010] Bda LR 57 (at 88) (attached as Exhibit G), the Bermuda Supreme Court explained that "*Section 62A was seemingly primarily enacted to lighten the burden of personal service on officers of a local company under Order 65 Rule 3*."

11. The validity of service in accordance with Section 62A is "virtually impossible" to challenge. In Gleeson v Marshall Diel & Myers Ltd and Others [2015] Bda LR 7 (at 33) (attached as Exhibit H), the Bermuda Supreme Court stated that *"[w]here service is effected by leaving a document at the registered office, it is virtually impossible for the company so served to successfully impugn the validity of service in accordance with the statute*."

12. Likewise, the Bermuda Supreme Court in Gleeson contrasted service on companies under the Companies Act from service on "natural person[s]," where "*the primary service rules are contained in the Rules*" [and as such require personal service, see paragraphs 5-6 supra]. (at 36).

13. The conclusion therefore is that Bermuda law affirmatively authorizes service of judicial process on a company by leaving the document at its registered office.

14. I have been asked in particular to opine whether service that was effected here would be deemed good service under Bermuda law. I am advised by U.S. Counsel that a set of the service documents was mailed directly through DHL by the MFG Parties to AWAC Bermuda's registered office. I am also advised by U.S. Counsel that the clerk of the Bankruptcy Court mailed another set of the service documents by DHL. In both instances, a DHL representative left the service documents with the receptionist at AWAC's Bermuda registered office, and she signed for them. I believe both methods of service are not prohibited and indeed would be deemed good service under Bermuda law because a DHL representative leaving documents with the receptionist at AWAC's registered office is exactly what the Companies Act, Kingate and Gleeson reference as permissible service. There is no requirement under section 62A of the Companies Act for service to be by "the plaintiff or his agent" (as there is for personal service under Order 10 Rule 1 of the RSC) and I am of the opinion that this mode of service would comply with the requirements under Section 62A of the Companies Act.

Chudleigh Declaration On Service Omits Key Statute And Cases

15. I have also been asked by U.S. Counsel to comment on the Declaration of Mark Chudleigh, filed in the U.S. proceedings (as referred to above at paragraph 2) and dated 28 December 2016, insofar as it deals with the requirements of service of originating process in Bermuda.

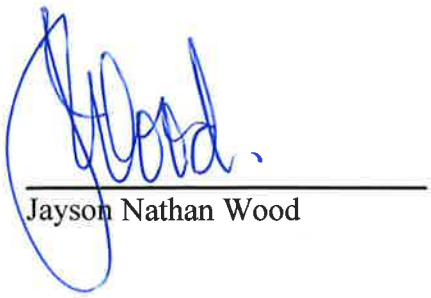
16. I note that the Chudleigh Declaration only purports to deal with the requirements for service in Bermudian proceedings involving natural persons and not companies. He states that "service of originating process by mail is not permitted by Bermuda's procedural rules" referring to Orders 10 and 65 of the RSC (as above) but fails to address the fact that both these Orders are subject to "*the provisions of any enactment*". Chudleigh Declaration, paragraph 19.

17. In only referring to the requirements for service under the RSC, Mr Chudleigh ignores the relevant provisions under the Companies Act, thereby leaving the incorrect impression that the more onerous requirements of personal service must be met when serving originating process on companies. Mr. Chudleigh must be familiar with the requirements for service on companies incorporated in Bermuda under section 62A of the Companies Act and he must also be aware of the commentary in Kingate [see paragraph 10 supra] (at 88) as his firm, Sedgwick Chudleigh, acted in that case.

18. In summary, the Chudleigh Declaration addresses only the issue of service on a natural person, not on a company. As such it is incomplete and inaccurate.

I declare under penalty of perjury under the laws of the United States of America and Bermuda that the foregoing is true and correct.

Executed: July 20, 2017
Hamilton, Bermuda



Jayson Nathan Wood

EXHIBIT A

EXTENSIONS

14: Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters

Entry into force: 10-II-1969

N.B. In case a particular territorial unit is not mentioned in this table of extensions, it means that the application of the Convention has not (yet) been extended to that territorial unit.

Territorial units	Extension	EIF	Auth	Res/D/N
Anguilla (UK)	3-VIII-1982	2-X-1982		D
Bermuda (UK)	20-V-1970	19-VII-1970		D
British Virgin Islands (UK)	20-V-1970	19-VII-1970		D
Cayman Islands (UK)	20-V-1970	19-VII-1970		D
Falkland Islands (UK)	20-V-1970	19-VII-1970		D
[former British territories]		19-VII-1970		D
Gibraltar (UK)	20-V-1970	19-VII-1970		D
Guernsey, Bailiwick of (UK)	20-V-1970	19-VII-1970		D
Isle of Man (UK)	20-V-1970	19-VII-1970		D
Jersey (UK)	20-V-1970	19-VII-1970		D
Montserrat (UK)	20-V-1970	19-VII-1970		D
Pitcairn (UK)	20-V-1970	19-VII-1970		D
Saint Helena (UK)	20-V-1970	19-VII-1970		D
Turks and Caicos Islands (UK)	20-V-1970	19-VII-1970		D

DECLARATION/RESERVATION/NOTIFICATION

Declarations

Articles: 5,6,9,10,15,18

(a) In accordance with Article 18 of the Convention the authority shown against the name of each territory in the Annex (hereinafter severally called "the designated authority") is designated as the authority in that territory competent to receive requests for service in accordance with Article 2 of the Convention.

(b) The authority in each territory competent under Article 6 of the Convention to complete the Certificate of Service is the designated authority.

(c) In accordance with the provisions of Article 9 of the Convention, the designated Authority shall receive process sent through consular channels.

(d) With reference to the provisions of paragraphs (b) and (c) of Article 10 of the Convention, documents sent for service through official channels will be accepted in a territory listed in the Annex by the designated authority and only from judicial, consular or diplomatic officers of other Contracting States.

(e) The acceptance by the United Kingdom of the provisions of the second paragraph of Article 15 of the Convention shall equally apply to the territories named in the Annex.

The authorities designated in the Annex will require all documents forwarded to them for service under the provisions of the Convention to be in duplicate and, pursuant to the third paragraph of Article 5 of the Convention, will require the documents to be written in, or translated into, the English language.

EXHIBIT B

BERMUDA

RULES OF THE SUPREME COURT 1985

GN 470 / 1985

[made under section 62 of the Supreme Court Act 1905 and brought into operation on 4 January 1988]

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(2) The hours during which the office of the Court shall be open to the public shall be such as the Chief Justice may from time to time direct.

ORDER 65

SERVICE OF DOCUMENTS

65/1 When personal service required

1 (1) Any document which by virtue of these rules is required to be served on any person need not be served personally unless the document is one which by an express provision of these rules or by order of the Court is required to be so served.

(2) Paragraph (1) shall not affect the power of the Court under any provision of these rules to dispense with the requirement for personal service.

65/2 Personal service: how effected

2 Personal service of a document is effected by leaving a copy of the document with the person to be served and, if so requested by him at the time when it is left, showing him—

(a) in the case where the document is a writ or other originating process, the original, and

(b) in any other case, the original or an office copy.

65/3 Personal service on body corporate

3 Personal service of a document on a body corporate may, in cases for which provision is not otherwise made by any enactment, he effected by serving in accordance with rule 2 on the president or vice-president of the body, or the secretary or other similar officer thereof.

65/4 Substituted service

4 (1) If, in the case of any document which by virtue of any provision of these rules is required to be served personally on any person, it appears to the Court that it is impracticable for any reason to serve that document personally on that person, the Court may make an order for substituted service of that document.

(2) An application for an order for substituted service may be made by an affidavit stating the facts on which the application is founded.

(3) Substituted service of it document, in relation to which an order is made under this rule, is effected by taking such steps as the Court may direct to bring the document to the notice of the person to be served.

65/5 Ordinary service: how effected

5 (1) Service of any document, not being a document which by virtue of any provision of these rules is required to be served personally, may be effected—

(a) by leaving the document at the proper address of the person to be served, or

(b) by post, or

(c) in such other manner as the Court may direct.

(2) For the purposes of this rule, the proper address of any person on whom a document is to be served in accordance with this rule shall be the address of service of that person, but if at the time when service is effected that person has no address for service his address for the purpose aforesaid shall be—

(a) in any case, the business address of the attorney (if any) who is acting for him in the proceedings in connection with which service of the document in question is to be effected, or

(b) in the case of an individual, his usual or last known address, or

(c) in the case of individuals who are suing or being sued in the name of a firm, the principal or last known place of business of the firm within the jurisdiction, or

(d) in the case of a body corporate, the registered or principal office of the body.

(3) Nothing in this rule shall be taken as prohibiting the personal service of any document or as affecting any enactment which provides for the manner in which documents may be served on bodies corporate.

65/6 Service on Minister, etc. in proceedings which are not by or against the Crown

6 Where for the purpose of or in connection with any proceedings in the Court, not being civil proceedings by or against the Crown within the meaning of the Crown Proceedings Act 1966 [*title 8 item 105*], any document is required by any enactment or these rules to be served on the Minister or on a government department or on the Attorney General, section 15 of the Crown Proceedings Act 1966 and Order 77, rule 4, shall apply in relation to the service of the document as they apply in relation to the service of documents required to be served on the Crown for the purpose of or in connection with any civil proceedings by or against the Crown.

65/7 Effect of service after certain hours

7 Any document (other than a writ of summons or other originating process) service of which is effected under rule 2 or under rule 5(1)(a) between four in the afternoon on a Friday and midnight on the following Sunday or after four in the afternoon on any other weekday shall, for the purpose of computing any period of time after service of that document, be deemed to have been served on the Monday following that Friday or on the day following that other weekday, as the case may be.

65/8 Affidavit of service

8 An affidavit of service of any document must state by whom the document was served, the day of the week and date on which it was served, where it was served and how.

65/9 No service required in certain cases

9 Where by virtue of these rules any document is required to be served on any person but is not required to be served personally, and at the time when service is to be effected that person is in default as to entry of appearance or has no address for service, the document need not be served on that person unless the Court otherwise directs or any of these rules otherwise provides.

65/10 Service of process on Sunday

10 (1) No process shall be served or executed within the jurisdiction on a Sunday except, in case of urgency, with the leave of the Court.

(2) For the purpose of this rule "process" includes a writ, judgment, notice, order, petition, originating or other summons or warrant.

ORDER 66

PAPER, PRINTING, NOTICES AND COPIES

66/1 Quality and size of paper

1 (1) Unless the nature of the document renders it impracticable, every document prepared by a party for use in the Court must be on paper of durable quality, having a margin, to be left blank on the left of the face of the paper and on the right side of the reverse.

66/2 Regulations as to printing, etc.

2 (1) Except where these rules otherwise provide, every document prepared by a party for use in the Court must be produced by one of the following means, that is to say, printing, writing (which must be clear and legible) and typewriting otherwise than by means of a carbon, and may be produced partly by one of those means and partly by another or others of them.

(2) For the purpose of these rules a document shall be deemed to be printed if it is produced by type lithography or duplicating.

(3) Any type used in producing a document for use as aforesaid must be such as to give a clear and legible impression and must be no smaller than 11 point type for printing or elite type for type lithography, duplicating or typewriting.

(4) Any document produced by a photographic or similar process giving a positive and permanent representation free from blemishes shall, to the extent that it contains a facsimile of any printed, written or typewritten matter, be treated for the purposes of these rules as if it were printed, written or typewritten, as the case may be.

(5) Any notice required by these rules may not be given orally except with the leave of the Court.

66/3 Copies of documents for other party

3 (1) Where a document prepared by a party for use in the Court is printed the party by whom it was prepared must, on receiving a written request from any party entitled to a

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BERMUDA

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9/4 Fixing time for hearing petition

4 (1) A day and time for the hearing of a petition which is required to be heard shall be fixed by the Registrar.

(2) Unless the Court otherwise directs, a petition which is required to be served on any person must be served on him not less than seven days before the day fixed for the hearing of the petition.

ORDER 10

SERVICE OF ORIGINATING PROCESS: GENERAL PROVISIONS

10/1 General provisions

1 (1) Subject to the provisions of any enactment and these Rules, a writ must be served personally on each defendant by the plaintiff or his agent.

(2) Where a defendant's attorney indorses on the writ a statement that he accepts service of the writ on behalf of that defendant, the writ shall be deemed to have been duly served on that defendant and to have been so served on the date on which the indorsement was made.

(3) Where a writ is not duly served on a defendant but he enters an unconditional appearance in the action begun by the writ, the writ shall be deemed to have been duly served on him and to have been so served on the date on which he entered the appearance.

(4) Where a writ is duly served on a defendant otherwise than by virtue of paragraph (2) or (3), then, subject to Order 11, rule 5, unless within three days after service the person serving it indorses on it the following particulars, that is to say, the day of the week and date on which it was served, where it was served, the person on whom it was served, and, where he is not the defendant, the capacity in which he was served, the plaintiff in the action begun by the writ shall not be entitled to enter final or interlocutory judgment against that defendant in default of appearance or in default of defence.

10/2 Service of writ on agent of overseas principal

2 (1) Where the Court is satisfied on an *ex parte* application that—

(a) a contract has been entered into within the jurisdiction with or through an agent who is either an individual residing or carrying on business within the jurisdiction or a body corporate having a registered office or a place of business within the jurisdiction, and

(b) the principal for whom the agent was acting was at the time the contract was entered into and is at the time of the application neither such an individual nor such a body corporate, and

(c) at the time of the application either the agent's authority has not been determined or he is still in business relations with his principal,

the Court may authorise service of a writ beginning an action relating to the contract to be effected on the agent instead of the principal.

(2) An order under this rule authorising service of a writ on a defendant's agent must limit a time within which the defendant must enter an appearance.

(3) Where an order is made under this rule authorising service of a writ on a defendant's agent, a copy of the order and of the writ must be sent by post to the defendant at his address out of the jurisdiction.

10/3 Service of writ in pursuance of contract

3 (1) Where—

(a) a contract contains a term to the effect that the court shall have jurisdiction to hear and determine any action in respect of the contract or, apart from any such term, the Court has jurisdiction to hear and determine any such action, and

(b) the contract provides that, in the event of any action in respect of the contract being begun, the process by which it is begun may be served on the defendant, or on such other person on his behalf as may be specified in the contract, in such manner, or at such place (whether within or out of the jurisdiction), as may be so specified,

then, if an action in respect of the contract is begun in the Court and the writ by which it is begun is served in accordance with the contract, the writ shall, subject to paragraph (2), be deemed to have been duly served on the defendant.

(2) A writ which is served out of the jurisdiction in accordance with a contract shall not be deemed to have been duly served on the defendant by virtue of paragraph (1) unless leave to serve the writ, or notice thereof, out of the jurisdiction has been granted under Order 11, rule 1 or 2.

10/4 Service of writ in certain action for possession of land

4 Where a writ is indorsed with a claim for the possession of land, the Court may—

(a) if satisfied on an *ex parte* application that no person appears to be in possession of the land and that service cannot be otherwise effected on any defendant, authorise service on that defendant to be effected by affixing a copy of the writ to some conspicuous part of the land;

(b) if satisfied on such an application that no person appears to be in possession of the land and that service could not otherwise have been effected on any defendant, order that service already effected by affixing a copy of the writ to some conspicuous part of the land shall be treated as good service on that defendant.

10/5 Service of originating summons, petition and notice of motion

5 The foregoing rules of this Order (except rule 1(4)) shall apply in relation to an originating summons to which an appearance is required to be entered as they apply in relation to a writ, and rule 1(1) and (2) shall, with any necessary modifications, apply in

relation to an originating summons to which no appearance need be entered, a notice of an originating motion and a petition as they apply in relation to a writ.

ORDER 11

SERVICE OF PROCESS, ETC., OUT OF THE JURISDICTION

11/1 Principal cases in which service of writ out of jurisdiction is permissible

1 (1) Provided that the writ does not contain any claim to which Order 75, r. 4 applies, and is not a writ to which paragraph (2) of this rule applies, service of a writ out of the jurisdiction is permissible with the leave of the Court if in the action begun by the writ—

(a) relief is sought against a person domiciled or ordinarily resident within the jurisdiction;

(b) an injunction is sought ordering the defendant to do or refrain from doing anything within the jurisdiction (whether or not damages are also claimed in respect of a failure to do or the doing of that thing);

(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;

(d) the claim is brought to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or obtain other relief in respect of the breach of a contract, being (in either case) a contract which—

(i) was made within the jurisdiction, or

(ii) was made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction, or

(iii) is by its terms, or by implication, governed by the law of Bermuda, or

(iv) contains a term to the effect that the Court shall have jurisdiction to hear and determine any action in respect of the contract;

(e) the claim is brought in respect of a breach committed within the jurisdiction of a contract made within or out of the jurisdiction, and irrespective of the fact, if such be the case, that the breach was preceded or accompanied by a breach committed out of the jurisdiction that rendered impossible the performance of so much of the contract as ought to have been performed within the jurisdiction;

(f) the claim is founded on a tort and the damage was sustained, or resulted from an act committed, within the jurisdiction;

(g) the whole subject-matter of the claim relates to property located within the jurisdiction;

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65/1 When personal service required

1 (1) Any document which by virtue of these rules is required to be served on any person need not be served personally unless the document is one which by an express provision of these rules or by order of the Court is required to be so served.

(2) Paragraph (1) shall not affect the power of the Court under any provision of these rules to dispense with the requirement for personal service.

65/2 Personal service: how effected

2 Personal service of a document is effected by leaving a copy of the document with the person to be served and, if so requested by him at the time when it is left, showing him—

(a) in the case where the document is a writ or other originating process, the original, and

(b) in any other case, the original or an office copy.

65/3 Personal service on body corporate

3 Personal service of a document on a body corporate may, in cases for which provision is not otherwise made by any enactment, he effected by serving in accordance with rule 2 on the president or vice-president of the body, or the secretary or other similar officer thereof.

65/4 Substituted service

4 (1) If, in the case of any document which by virtue of any provision of these rules is required to be served personally on any person, it appears to the Court that it is impracticable for any reason to serve that document personally on that person, the Court may make an order for substituted service of that document.

(2) An application for an order for substituted service may be made by an affidavit stating the facts on which the application is founded.

(3) Substituted service of it document, in relation to which an order is made under this rule, is effected by taking such steps as the Court may direct to bring the document to the notice of the person to be served.

65/5 Ordinary service: how effected

5 (1) Service of any document, not being a document which by virtue of any provision of these rules is required to be served personally, may be effected—

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6	Matrimonial proceedings	Supreme Court Act 1905 section 62 [*title 8 item 1*]
7	Controverted election proceedings	Legislature (Appointment, Election and Membership Controversies) Act 1968 section 43 [*title 2 item 3*]
8	Proceedings relating to appeal against cancellation of licence or permit	Hotels (Licensing and Control) Act 1969 section 18 [*title 17 item 2*] Companies Act 1981 sections 141 and 276A, [*title 17 item 35*] under section 62 of the Supreme Court Act 1905
9	Civil appeals proceedings	Civil Appeals Act 1971 section 18 [*title 8 item 85*]
10	Planning appeals proceedings	Development and Planning Act 1974 section 54 [*title 20 item 1*]
11	Workmen's compensation proceedings	Workmen's Compensation Act 1965 section 41 [*title 18 item 3]*
12	Acquisition of land proceedings	Acquisition of Land Act 1970 section 26 [*title 19 item 2*]

(3) These Rules shall not have effect in relation to any criminal proceedings.

(4) In the case of the proceedings mentioned in paragraph (2), nothing in that paragraph shall be taken as affecting any provision of any rules (whether made under the Act or any other Act) by virtue of which the Rules of the Supreme Court 1985 or any provisions thereof are applied in relation to any of those proceedings.

(5) These Rules shall not have effect in relation to any proceedings taken in any cause or matter which was pending before the Court or a judge thereof immediately before the date appointed under rule 1(1) and any proceedings taken in such cause or matter shall be continued to final determination in accordance with the rules in force immediately before the date so appointed.

[Order 1/2 amended by BR81/1999 effective 1 January 2000 and by BR55/2005 effective 1 January 2006]

1/3 Application of Interpretation Act 1951

3 The Interpretation Act 1951 [*title 1 item 1*] shall apply to the interpretation of these rules as it applies to the interpretation of an Act.

1/4 Definitions

4 (1) In these Rules, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, namely—

"The Act" means the Supreme Court Act 1905 [*title 8 item 1*];

"an action for personal injuries" means an action in which there is a claim for damages in respect of personal injuries to the plaintiff or any other person or in respect of a person's death, and "personal injuries" includes any disease and any impairment of a person's physical or mental condition;

"attorney" means a person duly admitted and enrolled under the Act as a barrister and attorney and entitled under the Bermuda Bar Act 1974 [*title 30 item 3*] to practise law in Bermuda;

"cause book" means the book kept in the Registry, in which the year and number of, and other details relating to, a cause or matter are entered;

"enactment" means any statutory provision including any Act of Parliament of the United Kingdom having effect as part of the law of Bermuda;

"folio" means 72 words, each figure being counted as one word;

"the Matrimonial Causes Rules" means the Matrimonial Causes Rules 1974 [*title 8 item 1(b)*];

"officer" means an officer of the Supreme Court;

"originating summons" means every summons other than a summons in a pending cause or matter;

"pleading" does not include a petition, summons or preliminary act;

"probate action" has the meaning assigned to it by Order 76;

"receiver" includes a manager or consignee;

"Registrar" means the Registrar of the Supreme Court and except in relation to the jurisdiction of the Registrar under Order 32 rule 11, includes an Assistant Registrar;

"Registry" means the Registry of the Supreme Court;

"statutory rate" means seven per centum per annum or such other rate as may be prescribed under the Interest and Credit Charges (Regulation) Act 1975 [*title 17 item 22*];

"writ" means a writ of summons.

(2) In these Rules, unless the context otherwise requires, "the Court" means the Supreme Court or any one or more judges thereof, whether sitting in court or in chambers, or the Registrar; but the foregoing provision shall not be taken as affecting any provision of these Rules and, in particular, Order 32, rule 11, by virtue of which the authority and jurisdiction of the Registrar are defined and regulated.

1/5 Construction of references to Orders, rules, etc.

5 (1) Unless the context otherwise requires, any reference in these rules to a specified Order, rule or Appendix is a reference to that Order or rule of, or that Appendix

EXHIBIT F

BERMUDA

COMPANIES ACT 1981

1981 : 59

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PART VI

MANAGEMENT AND ADMINISTRATION

Registered office of company

62 (1) A company shall at all times have a registered office in Bermuda which shall not be a post office box to which all communications and notices may be addressed.

(2) On incorporation the situation of the company's registered office is that specified in a notice in the prescribed form given to the Registrar under section 69(2)(e).

(3) The company may change the situation of its registered office from time to time by giving notice in the prescribed form to the Registrar and such change takes effect upon the notice being registered by the Registrar.

(4) If default is made in complying with this section the company or every officer of the company who is in default shall be liable to a default fine.

[Section 62(2) to (4) substituted for subsections (2) and (3) by 2000:29 s.10 effective 11 August 2000]

Service of documents

62A A document may be served on a company by leaving it at the registered office of the company or, in the case of a non-resident insurance undertaking the principal office in Bermuda, or in the case of a permit company, the principal place of business in Bermuda from which the company engages in or carries on its trade or business in Bermuda.

[Section 62A inserted by 1992:51 effective 1 July 1992]

Publication of name of company

63 (1) Every company shall have its name mentioned in legible characters in all business letters of the company and in all notices and other official publications of the company, and in all bills of exchange, promissory notes, endorsements, cheques and orders for money or goods purporting to be signed by or on behalf of the company, and in all bills of parcels, invoices, receipts and letters of credit of the company.

(2) If default is made in complying with this section the company and every officer of the company who is in default shall be liable to a fine of five hundred dollars.

Restriction on commencement of business

64 (1) No company shall commence or carry on business or exercise any borrowing powers unless and until the minimum capital as stated in its memorandum in accordance with section 7 has been subscribed.

(2) If any company commences or continues business or exercises borrowing powers in contravention of this section every person who is responsible for the contravention shall without prejudice to any other liability, be liable to a fine of one hundred dollars for every day during which the contravention continues.

EXHIBIT G

In The Supreme Court of Bermuda

Commercial Jurisdiction 2009 Nos. 270 and 271

In the matter of Section 195 of the Companies Act 1981:

RE KINGATE GLOBAL FUND LTD (IN LIQUIDATION)

AND

RE KINGATE EURO FUND LTD (IN LIQUIDATION)

Dated the 20th August 2010

Mr C Hill and Mr C Foley for the Joint Liquidators

Mr J Riihiluoma for PricewaterhouseCoopers

BVI companies with assets and creditors in Bermuda - Jurisdiction of Court to order winding-up of overseas company - Madoff Ponzi fraud

The following cases were referred to in the judgment:

Focus Insurance Co Ltd v Hardy [1992] Bda LR 25
Intercontinental Natural Resources v Dill [1982] Bda LR 1
Informission Group Inc v Convertix Corp [2000] Bda LR 75
Re Electric Mutual Liability Insurance Co Ltd [1996] Bda LR 62
Deloitte & Touche AG v Johnson [2000] 1 BCLC 485
Strachan v Gleaner & Co [2005] UKPC 33
In re Dowling and Welby's Contract [1895] 1 Ch 663
In re Padstow Total Loss and Collision Assurance Association (1882) 20 ChD 137
D.E. Shaw Oculus Portfolios, LLC et al v Orient-Express Hotels Limited et al [2010] Bda LR 32
Roodal v The State [2003] UKPC 78
In re International Tin Council [1987] Ch 419
Re Impex Services Worldwide Ltd [2004] BPIR 564
Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc [2006] 3 WLR 689
Re Founding Partners [2009] Bda LR 35
Re First Virginia Reinsurance Ltd [2003] Bda LR 47

RULING of KAWALEY, J

A. Introductory

1. Kingate Global Fund Ltd. and Kingate Euro Fund Ltd ("the Companies") were incorporated in the British Virgin Islands ("BVI") on February 11, 1994 and April 19, 2000, respectively. The Companies' primary business activity entailed the investment of monies raised by share subscriptions with Bernard L. Madoff Investment Securities LLC ("BLMIS") in New York.

2. On June 4, 2009, the Companies were wound-up on their own petitions in BVI and William Tacon and Richard Fogerty, who had earlier (on May 8, 2008) been appointed as Joint Provisional Liquidators, were appointed as Joint Liquidators. On August 7, 2009, the Companies petitioned this Court to be wound-up under the Companies Act 1981. The petitions alleged that the only readily realizable assets of the Companies were located in Bermuda, as were service providers (who were actual or contingent creditors) and potentially significant documents and information (paragraphs 18, 20). The links with BVI were said to be "*of a formal nature only*" (paragraph 20). Paragraph 19 of the Petitions also averred as follows:

> "By virtue of the Orders of 4 June and 31 July 2009 of the BVI Court, the Joint Liquidators (in the BVI) were given the power to seek the winding-up of the Company in Bermuda. A draft of this Petition has been placed before and sanctioned by the BVI Court…."

3. Prior to the filing of the Companies' Bermuda petitions, in correspondence which became germane in the context of the present application, PwC Bermuda had suggested (in a letter written by their Bermuda attorneys and dated June 19, 2009) that any application to the BVI Court to compel the production of documents under section 284 of the BVI Insolvency Act 2003 "*would, inter alia, be subject to objection on jurisdictional grounds.*" It was against this back-drop that the Bermuda petitions justified their utility by reference to not just the location of assets but also information and documents here.

4. The Petitions were advertised in the Bermuda Sun dated August 21, 2009. As is customary, creditors and contributories were invited to appear at the hearing scheduled to take place on September 4, 2009 at 9.30am. One creditor of Kingate Global only is recorded as having formally appeared before Bell J. At the same hearing, Mr. Hill tendered written 'Submissions', six pages of which dealt with the jurisdiction of this Court to wind-up the Companies as overseas companies which were not permit companies. Bell J granted the winding-up orders sought and appointed John McKenna, William Tacon and Richard Fogerty as Joint Provisional Liquidators on September 4, 2009. On October 5, 2009, I appointed the same triumvirate as Joint Liquidators without a Committee of Inspection and dispensed with the need to convene the first meetings of creditors and contributories.

5. The BVI Joint Liquidators passed the PwC document and information collection baton to John McKenna as Bermuda Joint Liquidator of the Companies. By letter dated November 13, 2009, McKenna sought further documents from PwC noting that the September 4, 2009 Order of this Court removed any objections pertaining to the BVI Joint Liquidators' power to carry out investigations in Bermuda. By chasing letter dated November 30, 2009, the Joint Liquidator foreshadowed an application to court if the requested documents were not supplied. By letter dated December 14, 2009, Appleby responded in salient part as follows:

> "We are firmly of the opinion, and have so advised our client, that the Bermuda court has no jurisdiction to wind-up an Overseas Company or to appoint a liquidator in respect of an Overseas Company. We accept, however, that there are first instance decisions of the Bermuda court to the contrary. We believe these decisions are wrongly decided, and would, inevitably, be overturned on appeal if not distinguished or not followed at first instance.
>
> If you follow through with the threat contained in your letter of 30 November 2009 to apply to the court to obtain the requested information by compulsion, our client shall apply to set aside any order that you might obtain on the grounds that your appointment as liquidator is invalid."

6. On January 29, 2010, a Protective Writ was filed by the Companies against PwC Bermuda to preserve a cause of action which may have expired on January 30, 2010. This Court retrospectively approved the joint Liquidators actions in this regard on March 4, 2010.

7. It was against this background that: (a) the Joint Liquidators applied by Summons dated April 12, 2010 for an Order compelling PwC Bermuda to produce copies of various documents relating to their audit work in respect of the Companies; and (b) PWC Bermuda opposed the application both on jurisdictional and merits grounds.

8. At the conclusion of the hearing, it seemed clear that the Joint Liquidators were substantially entitled to the relief they sought under section 195 of the Companies Act 1981 on straightforward grounds. However, in the face of Mr. Riihiluoma's full-blooded assault on the legal foundations of first instance un-opposed judgments and academic writings upon which the conventional wisdom on this Court's winding-up jurisdiction in respect of overseas companies is based, it was necessary to reserve judgment on the entirety of the application.

B. Legal findings: applications by liquidators to obtain evidence for the purposes of investigating an insolvent company's financial position and recovering any property belonging to the company

9. Section 195 of the Companies Act 1981 is derived from section 268 of the Companies Act 1948 (UK). The modern British version of this provision appears to be section 236 of the Insolvency Act 1986, which according to the contents index to the 1986 Act deals with "*Getting in the company's property*". Section 195, so far as is relevant to the present application, provides as follows:

> "(1) The Court may, at any time after the appointment of a provisional liquidator or the making of a winding-up order, summon before it any officer of the company or person known or suspected to have in its possession any property of the company or supposed to be indebted to the company, or any person whom the Court deems capable of giving information concerning the promotion, formation, trade, dealings, affairs or property of the company.
>
> …
>
> (3) The Court may require such person to produce any books and papers in his custody or power relating to the company …"

10. The legal principles concerning the purpose of section 195 and its application were not in dispute. Controversy centred on whether the facts of the present case fell within or without the legally permitted sphere of inquiry. This controversy cannot be fairly resolved without directing one's attention to what the relevant legal principles are. As far as the purpose of section 195 is concerned, I can do no better than to reproduce the following submissions set out in the Applicants' Skeleton Argument:

> "The purpose of section 195
>
> 53. The essential purpose of an order under section 195 (like section 236) is to assist the beneficial winding up of the company. There are no express limitations on the purpose of the section, and the only implicit limitation is that the power may be invoked only for the purpose of enabling the office holder to exercise his statutory functions in relation to the insolvent company.
>
> 54. In particular, cases on section 236 make clear that the purpose of an order under the section includes enabling the office holder to investigate and decide whether to pursue, and generally to facilitate, proceedings against the respondent or others. For example:
>
> > 54.1 In *In re Gold Co*, Sir George Jessel MR stated that the object of (a predecessor to) section 236 was to '…enable [the office holder] to find out facts before they brought an action, so as to avoid incurring the expense of some hundreds of pounds in bringing an unsuccessful action, when they might, by examining a witness or two, have discovered at a trifling expense that an action could not succeed'.
> >
> > 54.2 In *In re Rolls Razor*, Buckley J said that the purpose of the section was to assist the office holder to: 'discover the truth of the circumstances in connection with the affairs of the company, information of trading, dealings, and so forth, in order that [the office holder] may be able, as effectively as possible, and, I think, with as little expense as possible … to complete his function as [office holder], to put the affairs of the company in order and to carry out the liquidation in all its various aspects …'. Accordingly, it was 'appropriate for [the office holder] … to be able to discover, with as little expense as possible and with as much ease as possible, the facts surrounding any such possible claim'.
> >
> > 54.3 In *In re Spiraflite*, Megarry J stated that the purpose of (a predecessor to) section 236 was to allow the office holder to investigate suspected misfeasance and other breaches of duty by

officers of the company and to decide whether or not to pursue litigation which the office holder was minded to bring against the respondent, or others.

54.4 In *Re Arrows (No. 2)*, the court said that the purpose of the section included facilitating the bringing of claims against other persons and companies.

54.5 In *British & Commonwealth* in the Court of Appeal, Ralph Gibson J said that the purpose of the power was: 'not confined to obtaining general information about the company's affairs but may be used to discover facts and documents relating to specific claims against specific persons which the office-holder has in contemplation and it is in itself no bar that the office-holder may have commenced or may be about to commence proceedings against the proposed witness or someone connected with him'. Further: 'it is neither easy nor cheap nor expeditious to require the office-holder in all cases to proceed on such information as the company had, or could lawfully demand, in order to determine by legal proceedings whether the company has a valid claim against one or more third parties if the information which would enable the office-holder to discover what apparent claims exist, and the prospects of success upon them, could be fairly obtained by an order for production of documents or for examination of a witness'.

55. Accordingly, it is established that an office holder may obtain an order under section 236 even if the sole or principal reason for doing so is to obtain evidence for use in possible proceedings against the respondent under the Company Directors Disqualification Act 1986 (UK)."

11. As far as how section 195 is applied in practice, I again adopt the submissions set out in this regard in the Applicants' Skeleton Argument:

"The correct approach to section 195

56. It was once considered that the court could not make an order under section 195 (section 236) after the office holder had issued or served a writ on the respondent. However, in Cloverbay Ltd v Bank of Credit and Commerce International SA, the Court of Appeal made clear that the mere fact that the office holder has commenced, or is about to commence proceedings against the respondent is not an absolute bar to an order under the section. Further, whether or not the office holder has made a firm decision to pursue proceedings against the respondent is not the test. As will be seen, it is merely a factor to be weighed in the balance in the exercise of the Court's discretion under section 195.

57. It was also once considered that the purpose of section 195 (section 236) was confined to enabling the office holder to obtain sufficient information to reconstitute the knowledge the company should possess, and did not extend to putting the company in a better position than it would have enjoyed had insolvency not supervened. However, in British & Commonwealth, both the Court of Appeal and the House of Lords made clear that there is no such limitation. Under section 195, the Court has a general, unfettered discretion and the exercise of that discretion is not limited to reconstituting the company's knowledge. Reconstituting the company's knowledge is not the test. Accordingly, an order under section 195 can extend to all documents and information which the office holder reasonably requires to carry out his functions.

58. Instead, it is now established that the correct approach to the exercise of the Court's general, unfettered discretion under section 195 is to balance, on the one hand, the reasonable requirements of the office holder to carry out his functions against, on the other, the need to avoid making an order which is

oppressive to the respondent. There must be a proper case for an order, and there will be a proper case where (in the case of an order for the production of documents) the office holder reasonably requires to see the documents requested to carry out his functions, and production of those documents will not impose an unnecessary or unreasonable burden on the respondent, in the light of the office holder's requirements. For example:

> 58.1 In *Cloverbay*, Sir Nicolas Browne-Wilkinson VC said: "The words of the Insolvency Act 1986 do not fetter the court's discretion in any way. Circumstances may vary infinitely. It is clear that in exercising the discretion the court has to balance the requirements of the liquidator against any possible oppression to the person to be examined. Such balancing depends on the relationship between the importance to the liquidator of obtaining the information on the one hand and the degree of oppression to the person sought to be examined on the other".
>
> 58.2 In *British & Commonwealth* in the Court of Appeal, Ralph Gibson J said: "(i) Section 236(2) of the Insolvency Act 1986 confers a general discretion on the court … [N]o … simple test has been or can be substituted because the words of the section do not fetter the court's discretion in any way. (ii) Nevertheless guidance given by the courts as to the proper basis for the exercise of the discretion involves the balancing of the requirements of the office-holder to obtain information against the possible oppression to the person from whom the information is sought".
>
> 58.3 In *British & Commonwealth* in the House of Lords, Lord Slynn said: "… the discretion must be exercised after a careful balancing of the factors involved – on the one hand the reasonable requirements of [the office holder] to carry out his task, on the other the need to avoid making an order which is wholly unreasonable, unnecessary or "oppressive" to the person concerned … The protection for the person called upon to produce documents lies, thus, not in a limitation by category of documents ("reconstituting the company's state of knowledge") but in the fact that the applicant must satisfy the court that, after balancing all the relevant factors, there is a proper case for such an order to be made. The proper case is one where [the office holder] reasonably requires to see the documents to carry out his functions and the production does not impose an unnecessary and unreasonable burden on the person required to produce them in the light of [the office holder's requirements".

59. In applying this approach, the Court should consider, first, whether the office holder has made out a reasonable requirement for an order under section 195. If a reasonable requirement is made out, the court must then carry out a balancing exercise, weighing the office holder's reasonable requirements against the risk of oppression to the respondent."

Findings: have the Joint Liquidators made out a reasonable requirement for an Order under section 195?

12. In my judgment the Joint Liquidators have clearly established a reasonable requirement for an order. The requests for information about how the audit was conducted were made against a background of a notorious and large-scale fraud which was admittedly not detected and the issue of proceedings against other PwC entities in other jurisdictions for breach of duty in failing to protect investors from the Madoff Ponzi scheme. The present application was made in response to a distinctly cagey and adversarial stance adopted by PwC Bermuda which has made limited voluntary disclosure and raised jurisdictional objections to the Joint Liquidators' standing under

both BVI and Bermuda law. The material sought is described in the Summons as follows:

"1.1 Audit planning memoranda in respect of the Company for each year in which PwC Bermuda conduct an audit of the Company.

1.2 Full audit files, including all working papers and documents relating to the identity, grade and hours charged by each of the individuals who conducted this work, in respect of the Company for each year in which PwC Bermuda conducted an audit of the Company.

1.3 Any documents relating to audit work undertaken for or on behalf of the Company in New York and/or in respect of Bernard L. Madoff Investment Securities LLC ("BLMIS") and/or in respect of Mr. Bernard Madoff, including any documents relating to meetings in New York with BLMIS and/or Mr. Madoff during the course of or for the purpose of an audit of the Company. In particular, any documents relating to:

1.3.1. the PwC office, identity, grade and hours charged by each of the individuals who conduct this work;

1.3.2. the specific audit work undertaken by individuals and PwC office;

1.3.3. the findings drawn from this work

1.3.4 any review notes arising the review of audit work undertaken, and

1.3.5 any briefing materials arising out of these meetings or this work.

1.4. All documents relating to the Company sent to or received from:

1.4.1. FIM Advisors LLP or FIM Limited;

1.4.2. Kingate Management Limited;

1.4.3. BLMIS;

1.4.4. Any other PwC office or any other audit firm

1.4.5. Tannenbaum Helpern;or

1.4.6 O'Neill [sic] Webster.

1.5. All invoices from PwC Bermuda to the Company.

1.6. Any audit guidance notes issued and/or held by PwC Bermuda relating to the level of audit work required when a fund being audited uses the services of BLMIS or uses one investment adviser with sole control over all of the fund's assets.

1.7. All other documents sent to or received from the Company relating to the audits of the Company."

13. The application is supported by the McKenna Affidavit of April 7, 2010 which acknowledges receipt of "*documents generated externally to the audits*…[which]… *do not advance the investigation of what PwC actually did or the basis upon which they reached their conclusions*" (paragraph 20.5). The deponent avers that:

"24. I believe that the documents generally are likely to reveal:

24.1 exactly what PwC Bermuda did to audit the Funds' financial statements in each of the relevant years , and in particular what work and they conducted and the audit evidence they relied upon;

24.2 conversely, what PwC Bermuda did not do in auditing the Funds;

24.3 whether PwC Bermuda were or should have been alerted to the 'red flags' surrounding the operation of BMLIS and whether (and if so, how) they failed to heed them;

24.4 why PwC Bermuda failed to discover and report Mr. Madoff's fraud; and

24.5 how PwC Bermuda were able to satisfy themselves that it was appropriate to issue unqualified audit opinions on the financial statements for each audit year."

14. Why documents relating to meetings between the auditors and Mr. Madoff and/or BMLIS in New York are likely to be relevant is also explained. Without simply accepting these assertions uncritically at face value, it requires little analysis to readily conclude that the information sought is reasonably required within the statutory purposes of section 195(1). A contractual agreement, evidenced by the letter of engagement dated November 6, 2007 that the audit working papers are the property of PwC Bermuda, was not suggested to and could not in any event limit the statutory obligation to produce documents reasonably required by the Joint Liquidators. Nor was it possible to accept the suggestion the Joint Liquidators had sufficient information to plead a case of negligence. As the same letter of engagement shows, PwC Bermuda have a contractual right to be indemnified and held harmless for any claims "*except to the extent finally determined to have resulted from the wilful misconduct or fraudulent behaviour of PricewaterhouseCoopers relating to such services.*"

15. This indemnity means that any statement of claim which fails to particularize allegations of wilful default or fraud would be liable to be struck-out : *Focus Insurance Co Ltd (In Liquidation) v Hardy* [1992] Bda LR 25 (CA); *Intercontinental Natural Resources v Dill et al*, Court of Appeal for Bermuda, Civil Appeal 1981: No.14, July 5, 1982. Accordingly, the mere fact that the Joint Liquidators can presently identify potential allegations of negligence is not sufficient to require them to actively pursue the litigation they have formally commenced and await ordinary discovery to obtain the information they now seek.

16. PwC Bermuda relied upon the Affidavit of Neville Conyers sworn on May 20, 2010 in opposition to the section 195 application. This essentially rehearses the jurisdiction argument and the quasi-legal contention that the information requested falls outside of section 195. It does little to undermine the opposing assertions that the requested information is reasonably required for section 195 purposes.

C. Findings: does the risk of oppression outweigh the joint liquidators' reasonable requirements?

17. The Conyers Affidavit characterises the Joint Liquidators' application as oppressive because the documents are sought: (a) "*in connection with their efforts to pursue claims against PwC Bermuda*" (paragraph 25); and (b) "*to give the Bermuda JLs as advantage in litigation which would not exist but for the Funds* [`] *insolvency namely to plead their Statement of Claim around the private internal documents and work papers of PwC Bermuda*" (paragraph 27). I reject these assertions on legal and factual grounds.

18. Firstly, there is as a matter of law no objection to liquidators seeking to ascertain whether they have a viable claim before expending the resources of the estate on potentially costly litigation. It cannot be oppressive for the Joint Liquidators to invoke a statutory power which is designed to give them a "leg up" because they are acting for an insolvent estate. It would only be oppressive and a misuse of their investigative powers if the Liquidators do not objectively require the information sought to determine whether or not they can and should actively pursue the claims preserved by a merely protective writ. The Affidavit of Mark Chudleigh sworn on February 25, 2010 in support of the application for retrospective leave to file the Protective Writ makes it clear that the further evidence is not sought to bolster a claim which the Joint

Liquidators have already decided to bring. Rather it is to determine whether or not such a claim can be viably pleaded.

19. Secondly, the acquisition of information about a potential claim against the contingent debtor of an insolvent company is clearly information "*concerning the promotion, formation, trade, dealings, affairs or property of the company*". This is because the claim of the Companies is a chose-in-action, a species of property belonging to them.

20. I find that there are no sufficient grounds made out for refusing the application on discretionary grounds.

D. The jurisdiction of the court to grant the joint liquidators relief under section 195

21. The challenge to the jurisdiction of the Court to grant relief under section 195 of the Companies Act 1981 to the Joint Liquidators has two elements to it. Firstly, one is bound to consider whether it is open to PwC Bermuda to contend that (a) the winding-up order could not validly have been made, and accordingly (b) the Joint Liquidators were not validly appointed as such by this Court when neither order has been or is sought to be formally set aside.

22. Secondly, assuming the winding-up order and the liquidators' appointment order can be challenged at this stage and in the unusual manner contended for, the substantive question of whether a non-permit overseas company is amenable to the statutory winding-up jurisdiction of this Court falls to be considered. This question has never received the benefit of full argument before this Court; however the established view for a decade has been such jurisdiction does exist, and the impugned orders were based on this conventional wisdom. Mr. Riihiluoma submitted that the case of *Informission Group Inc v Convertix Corporation* [2000] Bda LR 75 was wrongly decided.

1. Does PwC Bermuda possess the standing to challenge the jurisdiction of this Court to wind-up an unregistered overseas company after a winding-up order has been made otherwise than by way of appeal?

23. PwC Bermuda's Counsel's Skeleton Argument did not address the inconvenient but fundamental question of whether it is permissible to launch a collateral attack on a winding-up order in the manner contended for. The Joint Liquidators' Skeleton Argument made the following initial response to the jurisdiction argument:

> "12. The Applicants' first response to this contention is that it is simply not open to the Respondent on this application. The Applicants have in fact been appointed under the Winding Up Orders and, given those orders, the jurisdiction under section 195 is necessarily engaged. The Respondent cannot advance by way of defence on this application a collateral attack on extant orders of this Court. Particularly in the case of a winding up, which potentially affects the rights and obligations of a range of creditors and other interested parties, it is an abuse of process to mount an indirect challenge in the course of separate proceedings. Absent any application to appeal or set aside or review the Winding Up Orders, it is inappropriate for this Court to consider the correctness of its earlier orders on this application.

24. Absent authority, this submission accords with common sense and established principles of insolvency law. Because of the great ramifications of a winding-up order for all persons interested in a company and its affairs, winding-up petitions are advertised so that creditors, in particular, can appear in support or opposition of the petition. It is settled Bermuda law, as I put to Mr. Riihiluoma in the course of argument, that even debtors can appear in opposition to a winding-up petition: *Re Electric Mutual Liability Insurance Co. Ltd* [1996] Bda LR 62. In any event, PwC Bermuda is also clearly a contingent creditor, as Mr. Hill contended, having a potential claim against the Companies under the indemnity clause in the contract under which the firm was engaged as auditor. The Bermuda winding-up proceedings were commenced after the Respondent to the present application challenged the

jurisdictional competence of the BVI Joint Liquidators to carry out investigations in Bermuda.

25. The Respondent had constructive notice of the hearing of the winding-up petition by virtue of the August 21, 2009 advertisement of the hearing and ought, had they wished to raise the jurisdictional point, to have appeared in opposition to the petition at the September 4, 2009 hearing. In addition, the rules require every appointment of liquidator to be advertised (rule 40(6)), so the appointment of the provisional and permanent liquidators on September 4 and October 5, 2009 ought to have been advertised. I have no reason to doubt that such further advertisements occurred; it was not suggested that this did not occur.

26. In my judgment it would be an abuse of the processes of this Court to permit the Respondent to an application under section 195 to effectively set aside the final winding-up order made by this Court in circumstances where: (a) the winding-up hearing was duly advertised and the Respondent had actual or constructive notice of the hearing and failed to appear to oppose the making of the order; and (b) the joint liquidators had been in office and carrying out their functions in reliance on the validity of their appointment and the winding-up order for over three months before the challenge was first raised. Mr. Riihiluoma submitted that it was always incumbent upon a Court asked to exercise a statutory power because "*the court has no jurisdiction to exercise a statutory power except on the application of a person qualified by the statute to make it.*": *Deloitte & Touche AG v Johnson* [2000] 1 BCLC 485 (at page 5 of the transcript). In the case counsel cited, an accounting firm involved in the preparation of the insolvent company's accounts were sued by the liquidators. The accounting firm, like the Respondent to the present application, was a debtor of the company which applied to remove the liquidators on conflict of interest grounds. The relief sought in *Deloitte & Touche AG* was on its face surprising, but not as startling as the present submission which entails a collateral attack on a final winding-up order. The Judicial Committee of the Privy Council agreed with the Caymanian Court of Appeal that the firm lacked the standing to complain of the liquidators' conduct. Lord Millett opined as follows:

> "The appellants are not merely strangers to the liquidation; their interests are adverse to the liquidation and the interests of the creditors. In their Lordships' opinion, they have no legitimate interest in the identity of the liquidators, and are not proper persons to invoke the statutory jurisdiction of the court to remove the incumbent office-holders."

27. Even though the Respondent is not (as a contingent creditor) wholly a stranger to the liquidations in this case, the cited analysis applies with even greater force to an application made in the capacity as a potential debtor of insolvent companies to refuse to assist the Joint Liquidators' investigations of a potentially significant claim for the Companies' estates on the grounds that the Companies were improperly wound-up and, as a result, the liquidators were invalidly appointed. PwC Bermuda clearly (a) has the standing to oppose a section 195 application on its merits, but (b) lacks the standing to challenge the jurisdiction of this Court to make a winding-up order which has already been finally made, otherwise than by way of appeal. In a case not referred to in argument, *Strachan v Gleaner & Co. Ltd.* [2005] UKPC 33, Lord Millett (giving the judgment of the Board), opined as follows:

> "32. The Supreme Court of Jamaica, like the High Court in England, is a superior court or court of unlimited jurisdiction, that is to say, it has jurisdiction to determine the limits of its own jurisdiction. From time to time a judge of the Supreme Court will make an error as to the extent of his jurisdiction. Occasionally (as in the present case) his jurisdiction will have been challenged and he will have decided after argument that he has jurisdiction; more often (as in the Padstow case) he will have exceeded his jurisdiction inadvertently, its absence having passed unnoticed. But whenever a judge makes an order he must be taken implicitly to have decided that he has jurisdiction to make it. If he is wrong, he makes an error whether of law or

fact which can be corrected by the Court of Appeal. But he does not exceed his jurisdiction by making the error; no[r] does a judge of co-ordinate jurisdiction have power to correct it."

28. Because of the significance of the *Strachan* case, I afforded the Respondent's counsel an opportunity to respond to the passages extracted from it above. Mr. Riihiluoma by way of response placed before the Court the English Court of Appeal decision in *In re Dowling and Welby's Contract* [1895] 1 Ch 663. In this case, an order was made by the Leeds County Court winding-up an unregistered company and vesting all of its assets in the Official Receiver and Liquidator. When the Liquidator sought to sell the property of the company, the purchaser challenged the liquidator's title on the grounds that no jurisdiction to wind-up existed. The Liquidator applied to the Court for directions, and the High Court and the Court of Appeal each found that the county court judge had no jurisdiction to make the winding-up order and that the purchaser was not bound by it so as to be able to get good title to the company's property. I decline to follow this merely persuasive authority for three principal reasons.

29. Firstly, although this distinction was not apparently made by the English Court of Appeal when declining to follow its earlier decision in the *Padstow* case, *In re Dowling and Welby's Contract* involved a superior court of record (the High Court, Chancery Division) reviewing a decision made by the County Court, which was neither (a) a superior court of record, nor (b) a court of coordinate jurisdiction with the High Court. The status of a winding-up order made by a superior court of record and the competence of a judge of coordinate jurisdiction to question its validity did not fall for consideration. Nothing in this decision persuasively undermines the reasoning in the *Padstow* case which was subsequently approved by the Privy Council in *Strachan*.

30. Secondly, a central factual underpinning of the decision in *In re Dowling and Welby's Contract* [1895] 1 Ch 663 was the fact that the purchaser who challenged the Liquidator's title to sell the company's property (based on a title derived from the vesting effects of the winding-up order) was a "stranger" to the liquidation who could in no sense be said to be bound by the order. As A.L. Smith LJ put it (at page 673):

"But then it is said that the winding-up order is a judgment against all the world. It may be that it is a judgment binding on those who were members of the company, and the company itself, but it is not a judgment binding on a person who is a stranger and who is now objecting to have title forced upon him through an order which the Court holds to be invalid and made without jurisdiction."

31. In the present case the Respondent is not in the same sense a stranger to the liquidation. The Respondent is not only a contingent creditor. PwC Bermuda is also a contingent debtor whose challenge to the Companies' BVI Liquidators' jurisdiction to seek information from the Respondent about the audit services it had supplied prompted the commencement of the present winding-up proceedings. PwC Bermuda had actual or constructive knowledge of the winding-up hearing which was advertised and possessed the standing as either a contingent creditor or a contingent debtor to appear at the hearing of the Petition and oppose the making of the order on jurisdictional grounds. In the present case I find that PwC Bermuda was bound by the winding-up order in any event. It would in this case and generally be an abuse of the process of the Court for contingent debtors of the company to allow a winding-up order to be made and then challenge the jurisdiction of this Court to make the relevant order when the liquidators are seeking to investigate the company's affairs or recover assets for the insolvent estate.

32. Thirdly, Lord Halsbury and Lindley LJ both doubted that a winding-up order was a judgment *in rem*, as Brett LJ had supposedly assumed in *Padstow*. Without exploring this point more than superficially, I would respectfully disagree. If one were required to choose whether to place a winding-up order into one of two categorical boxes, one labelled '*in rem*" and the other labelled "*in personam*", I would choose the former rather than the latter. The analysis in *In re Dowling and Welby's Contract* may seem

somewhat odd because in modern Bermudian and English insolvency law, the making of a winding-up order does not automatically vest all the company's assets in the liquidator. The assets of the company remain the assets of the company, and when a liquidator sells an insolvent company's assets, he acts as an agent on behalf of the company. So although questions might arise as to the validity of a liquidator's appointment, no sensitive questions of title to the assets themselves, linked to the validity of the winding-up order, would ever arise. So even if it is correct to say that a winding-up order cannot determine issues of title to property in a way which binds third parties, the Applicants do not contend that the winding-up order in the present case had such an effect.

33. Accordingly, I adopt the Judicial Committee of the Privy Council's reasoning in *Strachan,* which I consider in any event to be binding on this Court. In the present case Bell J explicitly determined that he had jurisdiction when he made the winding-up orders on September 4, 2009. While I could adopt a different view as a judge of coordinate jurisdiction in another case, it is not competent for me to effectively set aside Bell J's final order in the same case. Moreover, as noted above, there is also direct and ancient persuasive authority (cited with approval by the Privy Council in *Strachan v Gleaner & Co. Ltd.)* for the following specific proposition. A winding-up order made by a superior court against an unregistered overseas company to which the winding-up statute did not apply is not a nullity and can only be set aside on appeal. In *In re Padstow Total Loss and Collision Assurance Association* (1882) 20 Ch D 137 at page 145, Brett LJ observed as follows:

> "In this case an order has been made to wind up an association or company as such. That order was made by a superior Court, which superior Court has jurisdiction in a certain given state of facts to make a winding-up order, and if there has been a mistake made it is a mistake as to the facts of the particular case and not the assumption of a jurisdiction which the Court had not. I am inclined, therefore, to say that this order could never so long as it existed be treated either by the Court that made it or by any other Court as a nullity, and that the only way of getting rid of it was by appeal."

34. For the above reasons, I find that the Respondent lacks the standing to challenge the jurisdiction of this Court to wind-up the Companies and the competence of the Joint Liquidators to seek relief under their section 195 of the Companies act 1981 Summons.

35. In deference to the impressively cogent submissions of Mr. Riihiluoma on the substantive question of whether or not this Court has the statutory power to wind-up overseas companies which do not have a permit to operate in Bermuda, and having regard to the fact that this is the first occasion on which this important question has been fully argued, I will proceed to consider this issue.

2. Does the Bermuda Court possess the statutory jurisdiction to wind-up the Companies despite the fact that they are incorporated abroad and have no permit to operate from Bermuda?

The Applicants' submissions

36. Mr. Hill relied upon what has been for more than a decade the conventional wisdom as regards this Court's jurisdiction to wind-up unregistered overseas companies in Bermuda. It has been assumed based primarily on a judgment rendered by this Court following an ex parte hearing that the jurisdiction to wind-up an overseas company which has been carrying on business in Bermuda without a permit to do so does exist under the Companies Act 1981 as read with the External Companies (Jurisdiction in Actions) Act 1885. This is an argument with which I have been intimately involved, in various capacities, as the Applicants' counsel did not hesitate to point out.

37. The argument was advanced by me as counsel in *Informission v Convertix Corporation* [2000] Bda LR 42; followed by me in *Allen Walsh and Hans Taal v Horizon*

Bank International Ltd. (in liquidation) [2006] Bda LR 42 (at paragraphs 5)[1]; and supported by me in extra-judicial writings[2]. In the latter regard, however, I most recently opined in decidedly cautious terms as follows:

"Both these first instance decisions were made effectively on an ex parte basis and were reached without the benefit of full argument, so the position cannot necessarily be regarded as conclusively settled under Bermuda law. Assuming them to be correct, there still remains open for future consideration the question of what jurisdiction the Bermuda court possesses to open ancillary winding-up proceedings in respect of an insolvent overseas company where the only connecting factors are the presence of assets within the jurisdiction of the court."[3]

38. The learned authors of O'Neill & Woloniecki, '*The Law of Reinsurance in England and Bermuda*', 2nd edition (Sweet & Maxwell: London, 2004) at page 922, after reviewing the limited local case law were also prudent enough to caution:

"In both of these cases, the applications were not opposed and the scope of the winding-up jurisdiction of the Supreme Court has yet to be tested in the context of contested proceedings."

39. Convertix Corporation Ltd. was a company which was incorporated in the British Virgin Islands but which operated through a sole director in Bermuda without a permit. Horizon Bank Limited was incorporated in Saint Vincent and the Grenadines and carried out business in part in Bermuda through accounts in a Bermudian bank. Neither overseas company had a permit to operate in Bermuda, and so Part XIII of the Companies Act 1981 did not explicitly apply to them by virtue of section 4(1A)(b). In the absence of an explicit application of the winding-up regime to these unregistered overseas companies, a somewhat convoluted analysis was required to conclude that such companies could indeed be wound-up.

40. Firstly, it had been contended that Part XIII applied by virtue of section 4(1) of the Act, which states that the 1981 Act applies to local companies and "*any overseas company so far as any provision of the Act requires it to so apply.*" The difficulty with this argument was that it was far from clear on a simple reading of Part XIII of the Act which provisions required the application of that Part to overseas companies. Secondly, it had been contended that the 1885 Act, which, on superficial analysis, only unambiguously conferred jurisdiction in respect of ordinary civil actions over overseas companies with commercial operations in Bermuda, also conferred winding-up jurisdiction over such companies.

41. Mr. Hill for the JPLs contended that the Companies in the present case had greater formal connections with Bermuda, in that they had been lawfully operating under statutory exemptions from requiring a permit. In these circumstances it would be anomalous to hold that the Court had no jurisdiction to wind them up. This portion of the Applicants' Skeleton Argument merits reproduction in full:

"Part XIII of the 1981 Act applies to the Funds as mutual funds

17. Section 4(1) of the 1981 Act provides that the Act applies to companies registered or incorporated in Bermuda (known as "local companies": see section 2) and "any overseas company so far as any provision of this Act requires it to so apply". Section 2(1) defines "overseas company" as any body corporate incorporated outside Bermuda.

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[1] It was also cited by me with approval in *Re Dickson Holdings Ltd. (in Hong Kong liquidation)* [2008] Bda LR 34 (at paragraphs 20, 21).
[2] Gabriel Moss et al (eds.), '*Cross-Frontier Insolvency of Insurance Companies*' (Sweet & Maxwell: London, 2001), paragraph 3-07; Kawaley, Bolton & Mayor (eds.), '*Judicial Cooperation in Civil and Commercial Litigation: the British Offshore World*' (Wildy, Simmonds & Hill: London, 2009) at 218.
[3] '*Judicial Cooperation in Civil and Commercial Litigation: the British Offshore World*', *idem*.

18. Section 4(1A)(b) provides that Part XIII of the Act (which includes the Court's power to wind up a company, in section 161, and section 195) applies to "permit companies". Section 2(1) defines "permit company" as any company with a valid permit, and "permit" as a permit issued under section 134.

19. Section 134 provides that an overseas company without a permit may apply for a permit to engage in or carry on any trade or business in Bermuda. Section 133(1) provides that an overseas company shall not engage in or carry on any trade or business in Bermuda without a permit under section 134. Subsection (4) then provides that a company is deemed to engage in or carry on a trade or business in Bermuda if it makes known by way of advertisement, or by an insertion in a directory or by means of letter heads that it may be contacted at a particular address in Bermuda, or is otherwise seen to be engaging in or carrying on any trade or business in or from within Bermuda on a continuing basis.

20. There is an exception to section 133. Section 133A provides that section 133 has no application to a "mutual fund" if the conditions in section 133(2) are met.

21. "Mutual fund" is defined in section 133A(3) by reference to section 136(5). Section 136(5) provides that a "mutual fund" is a company incorporated outside Bermuda but having the characteristics set out in section 156A. Section 156A provides that a "mutual fund" is a company:

21.1 incorporated by shares, or having a share capital;

21.2 incorporated for the purpose of investing the moneys of its members for their mutual benefit;

21.3 having the power to redeem or purchase for cancellation its shares without reducing its authorised share capital; and

21.4 stating in its memorandum that it is a mutual fund.

22. To satisfy the conditions in section 133(2) the mutual fund must engage a person in Bermuda to be the mutual fund's administrator or registrar to perform any or all of the following services or activities for the mutual fund in Bermuda:

22.1 corporate secretarial;

22.2 accounting;

22.3 administrative;

22.4 registrar and transfer agency;

22.5 in relation to marketing or dealing with the holders of its shares, the activities referred to in section 136(4), namely:

22.5.1 offering of such shares for subscription or purchase by way of prospectus or otherwise;

22.5.2 acceptance of subscriptions for, or offers to purchase, or of applications to redeem, such shares;

22.5.3 distribution of shareholder information to the holders of such shares;

22.5.4 making known, by way of advertisement or otherwise, that it may be contacted at a particular address in Bermuda for the purpose of communication with the holders of such shares or the distribution and collection of shareholder information; and

22.5.5 any other dealing with the holders of such shares, with respect to any such shares held by them.

23. The Applicants submit that, as Part XIII of the 1981 Act applies to overseas companies carrying on business in Bermuda with a permit under section 133, it would be anomalous for Part XIII not also to apply to an overseas company carrying on business in Bermuda without a permit for the reason that the company was exempted from the requirement to have a permit under section 133A. So Part XIII must apply to such companies. Further, the Funds are such companies. In particular:

23.1 Being incorporated in the British Virgin Islands, the Funds are not local companies but overseas companies.

23.2 However, the Funds must be deemed to carry on business in Bermuda as, within section 133(4) they have made known that they may be contacted at an address in Bermuda. Each Fund's Information Memorandum (as amended and restated as at 6 October 2008) states that communications with the Fund should be directed to the Funds' administrator at the address set out in the 'Directory' section of the Information Memorandum. The Directory provides that the Fund's administrator is Citi Hedge Fund Services Ltd of 9 Church Street, PO Box HM 951, Hamilton, Bermuda, HM DX.

23.3 It is not in dispute that neither of the Funds has a permit under section 134.

23.4 However, the Funds are exempted from the requirement to have a permit by section 133A, as they are both mutual funds which meet the conditions set out in section 133A(2). In particular, it is clear from each Fund's Information Memorandum that:

23.4.1 each Fund was incorporated for the purpose of investing the moneys of its members for their mutual benefit;

23.4.2 each Fund has the power to redeem or purchase for cancellation its shares without reducing its authorised share capital;

23.4.3 each Fund's Information Memorandum states that it is a mutual fund; and

23.4.4 each Fund meets the conditions set out in section 133A(2) as both engaged a person in Bermuda to be their administrator and/or registrar to perform any or all of the listed services and activities, namely, their administrator, Citi Hedge Fund Services Ltd.

23.5 Accordingly, to avoid the anomalous application of the 1981 Act, Part XIII of the Act must apply to the Funds."

42. This argument initially appeared to me to be another variant of the broad policy contention that it would be absurd to find that an unlawfully operating overseas company cannot be wound up while a lawfully operating permit company can be. The mere fact that a statutory provision produces an absurd result can only be taken into to resolve an ambiguity, not to rebut the plain meaning of the Act. This argument ultimately invited the Court to construe the words "*permit companies*" in section 4(1A)(b) of the Act as including companies exempted from the need to obtain a permit. This argument is not as improbable as it first seems when one considers the fact that those provisions of the Act creating exemptions from the permit requirements in the Part of the Act to which the insolvency regime explicitly applies were added by way of amendment to the original permit regime in place when section 4(1A)(b) was enacted. This raises a genuine question as to whether Parliament must be presumed to have intended, when enacting the mutual fund permit exemptions, that section

4(1A)(b) would either (a) continue to apply only to overseas companies issued with a permit under section 134, or (b) in light of the amendments henceforth apply both to permit companies and companies which would, but for the exemption, have been permit companies. It seems likely that no actual consideration of this insolvency conundrum took place on the part of the drafters of the Act or those who approved it in Parliament.

43. Finally, Mr. Hill invited the Court to take into account, when construing the statutory jurisdiction to wind-up, the broad common law powers to assist foreign liquidators. This argument seemed both somewhat circular and imprecise and was not responsive in any meaningful way to the rigorously incisive attack launched by Mr. Riihiluoma on the sacred cow that conventional thinking on the jurisdiction to wind-up unregistered overseas companies has become. However, the common law position is ultimately a significant factor to be taken into account.

The Respondent's submissions

44. The full force of the Respondent's counsel's trenchant attack on the jurisdiction of this Court to wind-up an unregistered non-permit company only emerged in the course of Mr. Riihiluoma's oral submissions which were presented with admirable precision and clarity. At the end of his presentation, it seemed reasonably clear that the merits of the jurisdiction argument on the Companies Act 1981 would have to be determined in his client's favour unless some compelling reason could be found for departing from the natural and ordinary meaning of the relevant provisions of the 1981 Act; my view of the position under the External Companies (Jurisdiction in Actions) Act 1885 hung in the balance.

45. The starting point in counsel's analysis was to take the Court on an intellectual tour of the legislative history of the relevant provisions of the 1981 Act. It appears that the first Bermudian statute to deal expressly with winding-up companies was the Companies Act 1923. This dates back to the era when local companies had to be incorporated by private act of Parliament. Section 36 provided for winding-up by means of shareholder resolution, section 37 provided for winding-up by way of petition to the Court and section 38 provided that winding-up should take place in the same manner as occurred in England. It is clear from the definition of "*the Company*" in section 2(1), that the 1923 Act only contemplated local companies incorporated by private Act in Bermuda being wound-up.

46. From 1923 to 1977, it seems that Bermudian companies could be wound-up under the 1923 Act in accordance with English law but, subject to the interpretation of the 1885 Act, overseas companies could not be wound-up at all. In 1970, the Companies (Incorporation by Registration) Act 1970 was passed. This was not placed before the Court, and I assume for present purposes that it did not alter the scope of this Court express statutory winding-up jurisdiction in respect of overseas companies. In 1977, the Companies (Winding Up) Act was passed. The Act contains two potentially inconsistent provisions.

47. Section 2(1) provided most broadly as follows:

> "The United Kingdom law as it applies to England which makes provision for the winding up of companies shall apply to Bermuda and shall be deemed to have so applied since the 22nd February 1923..."

48. Did this incorporate into Bermuda law both Part V of the UK 1948 Act (on which our current Part XIII is substantially based) together with Part IX which deals separately with winding-up unregistered companies and which was omitted from the 1981 Bermuda Act? Section 2(2) provided that: "*With effect from the commencement of this Act the United Kingdom Provisions shall be subject to the amendments set out in the First Schedule.*" Section 1 provided as follows:

> "'United Kingdom Provisions' means section 210 and Part V of the United Kingdom Companies Act 1948 in force on 27th July 1967..."

49. Having regard to the fact that the First Schedule contains various amendments to Part V of the UK 1948 Act but not Part IX, Mr. Riihiluoma's submission that the power to wind-up unregistered companies was not imported into Bermuda law by the 1977 Act must be sound.

50. The next port of call for this journey into the legislative history of the 1981 Act is the Law Reform Committee's Report on Company Law in Bermuda. This report was based on the work of a sub-committee which first met in January 1975 and held 39 meetings before it submitted its Interim Report on a date which is unclear. The Sub-Committee was chaired by Charles Collis, and included John Butterfield, Ian Hilton and David Lines. The Sub-Committee was initially assisted by Parliamentary Counsel George Griffiths and later by Parliamentary Counsel, Law Reform, Ralph Dreschfield. The Report was largely responsible for Bermuda's modern company law structure under the umbrella of which international business rose from playing second fiddle to tourism as a major pillar of the local economy to its position today as the generator of an estimated 70% of Bermuda's foreign currency earnings. The least original aspects of the Act were those relating to insolvency (save for modifications to the preferential payments rules), which the Report described as follows:

> "PART XIII
>
> Winding Up
>
> Clauses 157-264
>
> This Part makes no substantial changes in the present law which follows the United Kingdom's 1948 Act but is somewhat simplified."

51. There is nothing in the Report which sheds light on whether or not consideration was explicitly given to the question of winding-up overseas companies which were operating in Bermuda with or without a permit. Section 4(1A)(b), which expressly provided that Part XIII of the Act applied to permit companies was only introduced by way of amendment in 1992. Neither the Report's recommendations nor the Act's provisions contain any express provision applying Part XIII of the Companies Act to overseas companies. Nor is it evident that any consideration was given to the implications of the External Companies (Jurisdiction in Actions) Act 1885 for this topic.

52. Had the drafters of the Report or the Act based on its recommendations referred to the commentary on section 399 of the UK 1948 Act ("*Winding up of unregistered companies*") in '*Buckley on the Companies Act*', 14th edition[4], they would have found no simple guidance on what approach to take in this regard. The commentary refers to cases which suggest that unregistered companies which ought to be registered are illegal and cannot be wound up, while questioning the logic of these decisions; it then goes on to say that overseas companies can be wound up if they have a branch or assets in the UK or if a winding-up would otherwise be beneficial. Since the Law Reform Committee Report recommended requiring overseas companies carrying on business in Bermuda to obtain a permit, doubts might well have existed as to whether it was feasible to provide for the winding-up of "illegally operating" overseas companies.

53. But the Respondent's counsel's review of the legislative history of the Act in my judgment makes it impossible to fairly conclude that the need to provide a statutory basis for winding-up any overseas company was so obvious and simple a matter that Parliament must be deemed to have intended *not* to include it. If the original version of the Act did, through the obtuse words of section 4(1) (d) ("*This Act shall apply to- ...(d) any overseas company so far as any provision of this Act requires it to apply*") apply to all overseas companies, it is difficult to make sense of the 1992 enactment of section 4 (1A)(b). This expressly applied Part XIII of the Act to permit companies but

[4] (Butterworths: London, 1981) pages 841-851. The Companies Act Bill received the Royal Assent on July 16, 1981, but the previous edition would have been available to the Law Reform Committee and the drafters of the Act.

made no equivalent provision for non-permit companies. Unlike the provision of the 1981 Act considered by Chief Justice Ground in *D.E. Shaw Oculus Portfolios, LLC et al v Orient-Express Hotels Limited et al* [2010] SC (Bda) 25 Com (1 June 2010), it is far from clear that section 399 of the English 1948 Act was deliberately omitted. The Report only explicitly averted to that portion of the UK 1948 Act dealing with winding-up which had in 1977 been incorporated into Bermuda law. But as Ground CJ observed in a passage upon which counsel relied:

> "Whether the intention to legislate in those terms represents a deliberate expression of parliamentary intent or whether it was an oversight, is really neither he nor there, because Parliament's intent is expressed through legislation, and the absence of legislation can only mean that it has not addressed the matter."

54. The main focus of the Law Reform Sub-Committee was clearly regulating the establishment and operation of companies in Bermuda at a time when the importance of cross-border insolvency law had not yet surfaced on the local scene. This would not happen until the mid-to late 1980's. So it is entirely possible that consideration of the need to expressly provide for winding-up jurisdiction over overseas companies of any description was simply overlooked. It is equally possible that the topic was identified as a knotty one which ought to be deferred for future consideration. What consideration, if any, was actually given to the 1885 Act can only be a matter of speculation; it was not referred to at all in the Report.

55. Mr. Riihiluoma went on to deconstruct the argument that section 4(1)(d) can be read with the provisions of section 161(g) of the Act as empowering the Court to wind-up an overseas company wherever it is just and equitable to do so. Having regard to the statutory scheme of the UK 1948 Act from which section 161 is derived, I accept that section 161 merely lists the grounds upon which companies over which the Court has jurisdiction under other statutory provisions can be wound up. Further than this, counsel demonstrated that the scheme of the 1981 Act as a whole was to explicitly signify which provisions apply to overseas companies. I agree. Having regard to this wider statutory context, there is nothing in the 1981 Act which "*requires*" the winding-up regime to apply to non-permit companies.

56. Counsel further submitted that on the face of the Act Part XIII did not apply to an overseas company which was operating in Bermuda without a permit such as the Companies. Assuming the provisions of the Act must be construed according to the primary rules of statutory interpretation, I found the following submissions to be sound:

> "17. The term "company" is defined in Section 2 of the Companies Act as:
>
> "Company means a company to which this act applies by virtue of Section 4(1)"
>
> Section 4(1) of the Companies Act provides an exhaustive list of companies to which the Act applies:
>
> '(1) This act shall apply to:
>
> (a) all companies registered under it or registered before 1 July 1983 under the Companies (Incorporation by Registration) Act 1970;
>
> (b) all companies limited by shares incorporated by Act in Bermuda prior to or after 1 July 1983, except to such extent (if any) as may otherwise be expressly provided in the incorporating Act;
>
> (c) all mutual companies incorporated prior to 1 July 1983 to which Part XII applies; and

(d) any overseas company so far as any provision of this Act requires it to apply.

(1A) In respect of –

(a) non-resident insurance undertakings, section 2 and Parts XIII and XIV shall apply to them except those sections in Part XIII relating exclusively to members' voluntary liquidations and for the purposes of section 2 and Parts XIII and XIV "insurance business" has the meaning assigned to it in the Non-Resident Insurance Undertakings Act 1967 [title 5 Item 17];

(b) permit companies, section 2 and Parts III, V, XI and XIII except those sections in Part XIII relating exclusively to members' voluntary liquidations shall apply to them.

(2) Where the provisions of a private Act incorporating a company conflict with the provisions of this Act the provisions of the private Act shall prevail provided that –

(a) where reference is made in the private Act to any provision of an Act repealed by this Act then if there is a provision in this Act corresponding or nearly corresponding to the provision repealed then that provision shall apply;

(b) when reference is made in the private Act to any provision of an Act repealed by this Act and there is no provision in this Act corresponding or nearly corresponding to the provision repealed then that provision shall continue to have effect; and

(c) Notwithstanding any provision in the private Act from 1 July 1984 Parts VI (excepting section 91), VII, VIII, XIII, XIV and XV shall apply to the company.'

18. The term "overseas company" is defined in the Companies Act as any body corporate incorporated outside of Bermuda. "Permit Company" is defined as any company with a valid permit, allowing it to conduct business in Bermuda."

19. The Kingate Funds are plainly overseas companies within the meaning of the Companies Act. Neither of the Kingate Funds were permit companies.

20. The Kingate Funds operated lawfully in Bermuda under section 133A of the Companies Act. Section 133A of the Companies Act exempts overseas mutual funds from the requirement that overseas companies must obtain a permit to trade or carry on business in Bermuda. Section 133A (2) provides:

(2) A mutual fund is exempt if it engages a person in Bermuda to be the mutual fund's administrator or registrar to perform any or all of the following services or activities for the mutual fund in Bermuda —

(a) corporate secretarial;

(b) accounting;

(c) administrative;

(d) registrar and transfer agency;

(e) in relation to the marketing or dealing with the holders of its shares, the activities specified in section 136(4).

21. Section 4 does not on its face extend the winding-up provisions of the Companies Act to overseas companies. It does, however, give the Bermuda

court jurisdiction to wind-up a permit company licensed to do business in Bermuda."

57. Counsel finally submitted that this Court ought also to decline to follow Wade-Miller J's decision in *Informission v Convertix Corporation Ltd.* [2000] Bda LR 75, because the External Companies (Jurisdiction in Actions) Act 1885 plainly did not apply to winding-up petitions. The 1885 Act provides in material part as follows:

> "1 (1) Companies and corporate bodies incorporated out of Bermuda, for banking, insurance or other trading purposes, and doing business in Bermuda by agents or branches, may be sued in the Supreme Court for any cause of action, legal or equitable, arising in whole or in part in Bermuda, by the name whereby they are, or purport to be, associated or incorporated, or under which they carry on business, in Bermuda.
>
> (2) Service of any process, pleading, rule or notice on the agent, or any one of the agents, or manager, of the company or association in Bermuda shall be deemed good and sufficient service on the company.
>
> (3) All such suits may be prosecuted and carried on to judgment or decree in like manner as if the defendant company were formed, or incorporated, or established in Bermuda, or had its principal place of business therein:
>
> Provided that in all such suits and proceedings it shall be competent to the Supreme Court to make such orders with respect to pleading and practice as the Court may deem necessary for securing the defendant company against surprise or undue haste in prosecuting the suit or other proceeding."

58. There can be little doubt that when enacted in 1885, this Act did not contemplate winding-up proceedings. But statutes may also usually be construed in accordance with the rule that they are read as "always speaking"; they are not to be read as if since enactment the provisions have been in a state of suspended animation. Be that as it may, Mr. Riihiluoma challenged the soundness of the following portion of the Judgment in *Convertix*:

> "There is persuasive authority, argues Mr. Kawaley, for the proposition that the phrase 'suit and legal process' includes winding-up proceedings: Re International Tin Council [1987] Ch 419 as cited with approval by Derek French 'Applications to Wind up Companies' (Blackstone press: London, 1993) p.2.
>
> In my judgment although this point has not been fully argued it would seem from a plain reading of the provision 'suit and legal process' can include winding up proceedings."

59. In the course of argument I put to counsel the question whether interpreting these statutory provisions brought the need to avoid an unconstitutional construction into play and invited him to address this issue. A broad construction would include winding-up proceedings within the ambit of the 1885 Act, facilitating the right of access to the Court guaranteed by section 6(8) of the Bermuda Constitution and article 6 of the European Convention on Human Rights (ECHR). A narrow construction would impede the right of access to the winding-up jurisdiction of the court. Mr. Riihiluoma responded by contending that this principle applied to procedural impediments only where some substantive right of access existed. This submission is fundamentally sound, subject to the need to evaluate the significance of the common law jurisdiction to recognise and assist foreign liquidators.

3. Legal findings: does Part XIII of the Companies Act 1981 apply to overseas companies operating lawfully in Bermuda with an exemption from the permit requirements under section 133A?

60. Applying a literal approach to the relevant provisions of the Companies Act, I would find that this Court has no statutory jurisdiction to wind-up the Companies because: (a) the Act only applies to overseas companies to the extent that any provision

requires it to apply (section 4(1)(d)); (b) section 4(1A)(b) expressly applies Part XIII on winding-up to "*permit companies*"[5]; and (c) "permit company", is defined by section 2 of the Act as meaning "*any company with a valid permit*". The Companies are exempted from the need to obtain the permit as mutual fund companies under section 133 by section 133A, enacted in 2001. Had sections 4(1A) and 133A been enacted together, or had section 133A been in force prior to the express extension of the winding-up regime to permit companies in 1992, little doubt as to the scope of section 4(1A)(b) could fairly be found to exist. But when this exemption was granted, must Parliament be deemed to have intended to exclude the exempted entities from the ambit of section 4(1A)(b)?

61. Section 133 itself provides as follows:

"Overseas company not to carry on business without a permit

133 (1) An overseas company shall not engage in or carry on any trade or business in Bermuda without a permit from the Minister issued under section 134.

(2) under the authority of any Act other than this Act or the Non-Resident Insurance Undertakings Act 1967 [title 5 item 17] shall be deemed to be a permit issued under section 134 if valid on 1 July 1983 and for so long as it remains valid.

(3) For the purposes of this Part "engage in or carry on any trade or business in Bermuda" includes the engaging in or carrying on any trade or business outside Bermuda from a place of business in Bermuda.

(4) A company shall be deemed to engage in or carry on any trade or business in Bermuda if it occupies premises in Bermuda or if it makes known by way of advertisement, or by an insertion in a directory or by means of letter heads that it may be contacted at a particular address in Bermuda or is otherwise seen to be engaging in or carrying on any trade or business in or from within Bermuda on a continuing basis:

Provided that a company shall not be deemed to engage in or carry on any trade or business in Bermuda by reason only that—

(a) a travelling salesman representing the company who has been permitted to land in Bermuda as such establishes a temporary place of business in Bermuda; or

(b) meetings of its officers or members are held in Bermuda; or

(c) the company is buying or selling or otherwise dealing in shares, bonds, debenture stock obligations, mortgages or other securities issued or created by an exempted undertaking, or a local company, or any partnership which is not an exempted undertaking.

(5) A company shall be deemed to engage in or carry on any trade or business in Bermuda if it makes known by way of advertisement or by any statement on a web site or by an electronic record as defined in the Electronic Transactions Act 1999 that it may be contacted at a particular address in Bermuda or if it uses a Bermudian domain name."

62. In effect, any company which conducts business in Bermuda from a permanent physical or electronic base in Bermuda requires a permit. Section 133A, introduced in 2001, provides as follows:

"Mutual fund exempted from requirement of a permit

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[5] Section 4(1A)(a) applies Part XIII to non-resident insurance undertakings under the non-resident Insurance undertakings Act 1967.

133A (1) Section 133 shall not apply to a mutual fund exempted under subsection (2).

(2) A mutual fund is exempt if it engages a person in Bermuda to be the mutual fund's administrator or registrar to perform any or all of the following services or activities for the mutual fund in Bermuda–

(a) corporate secretarial;

(b) accounting;

(c) administrative;

(d) registrar and transfer agency;

(e) in relation to the marketing or dealing with the holders of its shares, the activities specified in section 136(4).

(3) In this section "mutual fund" has the meaning given in section 136(5).

63. This exemption from obtaining a permit conferred on mutual funds by section 133A of the Act appears to be designed to encourage mutual funds incorporated elsewhere to base their management functions in Bermuda. Its effect is that mutual funds which are in factual terms as connected to Bermuda as permit companies have permission to operate from Bermuda without having to acquire a permit. Was it intended in granting this exemption to also waive the application of section 4(1A) of the Act to such companies? This question reflects a genuine ambiguity in interpreting the meaning and effect to be given to this provision.

64. Section 4(1A) applies the following provisions of the Act to permit *companies:*

Part III ("PROSPECTUSES AND PUBLIC OFFERINGS") ;

Part V: ("REGISTRATION OF CHARGES");

Part XI: ("OVERSEAS COMPANIES");

Part XIII: ("WINDING-UP").

65. If companies to which section 133A applies were not intended to be permit companies for the purposes of section 4(1A)(b) of the Act, this would mean that none of the above Parts of the Act would apply. Part III regulates the issue of prospectuses. Section 133A contemplates overseas mutual fund companies which are exempted from obtaining a permit under section 133 carrying out the activities specified in section 136(4) in or from Bermuda. Section 136(4) provides as follows:

"(4) The activities referred to in subsection (3) are—

(i) the offering of such shares, interests or units for subscription or purchase by way of a prospectus or otherwise;

(ii) the acceptance of subscriptions for, or of offers to purchase, or of applications to redeem, such shares, interests or units;

(iii) the distribution of shareholder, limited partnership or unit-holder information to holders of such shares, interests or units;

(iv) the making known, by way of advertisement or otherwise, that it may be contacted at a particular address in Bermuda for the purpose of communication with the holders of such shares, interests or units or the distribution and collection of shareholder, limited partnership or unit-holder information; and

(v) any other dealing with the holders of such shares, interests or units with respect to any such shares, interests or units held by them."

66. Part III of the Act contains various regulatory requirements relating to the issue of prospectuses which are designed to protect the public, or that segment of the public likely to purchase shares issued by companies to which Part III applies, against misrepresentation and fraud. Sections 30 and 31 create criminal and civil liability for fraud. In my judgment it would lead to results which are manifestly contrary to public policy to construe section 133A as permitting mutual funds exempted from the requirements of obtaining a section 133 permit to be able lawfully to issue prospectuses from within Bermuda *without* being subject to the regulatory constraints contained in Part III of the Act. The cross-reference to section 136(4) in section 133A further supports the view that that the presumed legislative intent was not create a new species of unregulated non-permit company by granting the mutual fund exemption; rather it was to bring into the permit company fold a new category of company without requiring the "initiates" to pay for a permit.

67. It is perhaps far more obvious that the drafters of section 133A did not intend to exclude companies falling under its exemption umbrella from regulation under Part III than regulation under Part XIII; however the logic is essentially the same. I also cannot ignore the fact the activities section 133A companies are permitted to carry out in Bermuda embody all of the substantive activities which a mutual fund will ever carry out. Focussing on the likelihood of Parliament intending to deprive this Court of the statutory jurisdiction to wind-up alone, the results would be no less absurd and contrary to public policy. The Registrar of Companies, for instance, would be empowered to petition to wind-up a permit company which carried out a small portion of its total business in Bermuda; he would not be empowered to petition to wind-up a section 133A mutual fund which carried out all of its business activities in Bermuda.

68. Having regard to these broader contextual considerations, I accept Mr. Hill's submission that section 133A of the Companies Act cannot sensibly be construed in any other way than as modifying the narrow definition of "permit company" in section 2 of the Act so as include mutual fund companies which are authorised to operate as permit companies without having to formally obtain a permit pursuant to section 133 of the Act. In so doing, I apply the interpretative principles relating to repeal by implication which are set out below in the discussion on the 1885 Act.

69. I find that Part XIII of the Companies Act 1981 applies to the Companies and this Court (Bell J) did possess the jurisdiction to wind them up.

4. Legal findings: did this Court possess jurisdiction to wind-up the Companies by virtue of section 4(1)(d) of the Companies Act?

70. I accept Mr. Riihilouma's submissions that section 4(1)(d) of the Companies Act 1981 cannot fairly be construed as conferring a statutory jurisdiction to wind-up an overseas company operating in Bermuda which is not a "permit company" as defined in section 2 of the Act as modified by section 133A. I would decline to follow the contrary findings on this issue in the *Convertix* case.

71. Section 4(1) (d), it is worth remembering, provides that the Act generally applies to "*any overseas company so far as any provision of this Act requires it to apply*". I am unable to identify any provision of the Act which "*requires*" Part XIII to apply to overseas companies which are not permit companies, having regard to the scheme of the Act (notably section 4(1A)) which is to expressly indicate what provisions apply to overseas companies. While it is tempting to seek to engage a more purposive interpretative approach, having regard enhancing the right of access to the Court and the ability to regulate rogue companies, such interpretative tools may only properly be deployed to resolve ambiguities. In this context, there are no ambiguities which may fairly be found.

72. However, this conclusion only has any practical effect for present purposes if one assumes that the External Companies (Jurisdictions in Actions) Act 1885 has no application to winding-up matters; and the above findings are based on such assumption. The 1885 Act must next be considered.

5. Legal findings: did this Court possess jurisdiction to wind-up under the 1885 Act?

73. This issue, like the previous finding, does not in light of my primary findings strictly fall for determination. But in case my primary findings are wrong, I set out the conclusions I would have reached.

74. The crucial provisions of the 1885 Act bear setting out in full again:

> "1 (1) Companies and corporate bodies incorporated out of Bermuda, for banking, insurance or other trading purposes, and doing business in Bermuda by agents or branches, may be sued in the Supreme Court for any cause of action, legal or equitable, arising in whole or in part in Bermuda, by the name whereby they are, or purport to be, associated or incorporated, or under which they carry on business, in Bermuda.
>
> (2) Service of any process, pleading, rule or notice on the agent, or any one of the agents, or manager, of the company or association in Bermuda shall be deemed good and sufficient service on the company.
>
> (3) All such suits may be prosecuted and carried on to judgment or decree in like manner as if the defendant company were formed, or incorporated, or established in Bermuda, or had its principal place of business therein:
>
> Provided that in all such suits and proceedings it shall be competent to the Supreme Court to make such orders with respect to pleading and practice as the Court may deem necessary for securing the defendant company against surprise or undue haste in prosecuting the suit or other proceeding."

75. The 1885 Act clearly applies to ordinary civil actions against overseas companies. The critical question is whether the term "*may be sued*" includes the presentation of a winding-up petition. It is likely that when the 1885 Act was initially passed, no winding-up jurisdiction existed under Bermuda statute law. This not dispositive because of the "always speaking" canon of construction, most generally, and also because the Act has been retained in force through the process of two law revisions, one prior to the 1981 Act, and one after, in 1971 and 1989, respectively.

76. It is noteworthy that when the Companies Act 1981 was enacted (and ultimately brought into force in 1983), the 1885 Act was not repealed. It was originally enacted as '*AN ACT relating to Suits against public Companies abroad having Agencies in these Islands*', but the title was then amended by 1951: 59 to the one it retains nearly sixty years later. Bearing in mind the exhaustive review of Bermuda company law carried out by the Law Reform Sub-Committee, it seems improbable that neither the Sub-Committee's members, nor the two punctilious Parliamentary Counsel associated with the law reform project, would have been aware of the existence of the 1885 Act. This tentative view is not undermined by the fact that Title 8: 74 of the Revised Laws, the Act was published under the Administration of Justice umbrella rather than Title 17 alongside other substantive company related legislation. It is ultimately to be presumed, as a matter of construction, that Parliament was aware of the existence of the 1885 Act when it enacted the 1981 Act.

77. Starting , as it were, with a blank slate and ignoring the decision in *Informission v Convertix Corporation Ltd.* [2000] Bda LR 75 where the point was not fully argued, the following issues fall for consideration: (a) whether the term "sued" and/or "suit" in sections 1 and 3 of the 1885 Act include or exclude winding-up proceedings having regard to the natural and ordinary meaning of the words in their context as read with the 1981 Act; (b) if there is any ambiguity as to whether winding-up jurisdiction is conferred, is the exclusion of the winding-up jurisdiction contended for by the Respondent so inconsistent with the right of access to the Court or Bermudian public policy as to justify resolving that ambiguity by finding that winding-up jurisdiction is conferred by the Act?

6. Does the 1885 Act unambiguously include or exclude winding-up proceedings from its operational scope?

78. On balance, I find that the term "sued" and/or "suit" in sections 1 and 3 of the 1885 Act includes winding-up proceedings having regard to the natural and ordinary meaning of the words in their context. In particular, the statute authorises suits in respect of "*any cause action, legal or equitable*", which are also broad enough to encompass a winding-up petition. After all, it cannot seriously be doubted that an appeal lies to the Court of Appeal against the granting or refusal of a winding-up order, and that such an appeal would qualify as a "*civil cause or matter"* for the purposes of section 12(1) of the Court of Appeal Act 1964.

79. I reject the suggestion that this ancient statute must today be construed based on the historical reason for its initial enactment, especially in light of its change of name in 1951. I am also guided by the following interpretative principles articulated by the Judicial Committee of the Privy Council in *Roodal v The State* [2003] UKPC 78:

"13…In any event, the question arises whether interaction between section 4 of the 1925 Act and the Interpretation Act must be approached as always speaking legislation to be construed in the world of today. This principle of construction was explained by the House of Lords in R v Ireland [1998] AC 147. How is it to be determined whether legislation is an always speaking or tied to the circumstances existing when it was passed? In *R v Ireland* the House of Lords held (at 158):

> '**In cases where the problem arises it is a matter of interpretation whether a court must search for the historical or original meaning of a statute or whether it is free to apply the current meaning of the statute to present day conditions. Statutes dealing with a particular grievance or problem may sometimes require to be historically interpreted. But the drafting technique of Lord Thring and his successors has brought about the situation that statutes will generally be found to be of the 'always speaking' variety …**'
>
> Section 10(1) of the Interpretation Act 1962 spells out this principle for Trinidad and Tobago by providing that "Every written law shall be construed as always speaking ...'.

14. Counsel for the respondent was not prepared to accept that this principle is applicable in the present case. But he was not able to point to specific features of the legislation which exclude the principle. Given that in R v Ireland the principle was applied to a Victorian criminal statute, it is difficult to see why it should not be equally applicable in the present context. **The Court of Appeal may have erred in searching for an original intent. The better view may be that the legislation "should be interpreted in the light of its place within the system of legal norms currently in force": Sir Rupert Cross, Statutory Interpretation, 3rd ed., (1995), p 52**." [emphasis added]

80. When section 1 of the 1885 provides that an overseas company "*may be sued*" and section 3 provides that such "suits" shall be pursued in the same manner as against local companies, the natural and ordinary meaning of the word "suit" encompasses not just actions for the recovery of money, but winding-up proceedings as well. According a modern online legal dictionary:

"**suit**
n. generic term for any filing of a complaint (or petition) asking for legal redress by judicial action, often called a "lawsuit." In common parlance a suit

asking for a court order for action rather than a money judgment is often called a "petition," but technically it is a "suit in equity."[6]

81. Not only does section 1(1) expressly refer to "any cause of action, legal or equitable", but section 1(3) also states that all "*such suits may be prosecuted and carried on to judgment or decree in like manner as if the defendant company were formed, or incorporated, or established in Bermuda, or had its principal place of business therein*…". This means that, assuming the 1885 Act applies to winding-up proceedings, no need to find provisions in the Companies Act conferring winding-up jurisdiction over overseas companies properly arises. Section 1(3) requires the Court to deem qualifying overseas companies to be local companies, for jurisdictional purposes in respect of the relevant "*suit*".

82. The juxtaposing of the word "judgment" with "decree" in section 1(3) seems to emphasise the breadth of proceedings the statute is intended to cover. Moreover, sections 3 and 4 also look to what happens after a judgment or other order is obtained:

"Enforcement of judgment

3 If judgment passes, or any decree or order is made, in any such suit or proceeding in favour of the plaintiff or person suing, or against the defendant company, then such judgment or decree shall be or shall create a charge on any real estate of the company in Bermuda, and execution or other process for enforcing such judgment or decree may be sued out in like manner and form against the defendant company as if such company were established or had its principal place of business in Bermuda, or as near thereto as circumstances may permit, or in such form as the Supreme Court or a Judge in Chambers, may sanction, and it may be served on the agent or manager, and shall bind the assets of the company in Bermuda or which then are in, or afterwards may come to, the hands or under the control of such agent or manager, subject always to the agent's or manager's lawful charges or commissions thereon.

Ascertainment of assets

4 After any judgment or decree is given, or any order is made, in any suit against the defendant company, the Supreme Court, or a Judge in Chambers, may cause the agents or managers of the company to be examined from time to time on oath before the Court or a Judge concerning the assets or property of the company in Bermuda; and the Court or Judge may make such order therein as to justice may pertain, and such order may, if the Court or Judge so orders, be enforced against any agent or manager personally."

83. Section 3 expressly provides that "*execution or other process for enforcing such judgment or decree may be sued out in like manner and form against the defendant company as if such company were established or had its principal place of business in Bermuda, or as near thereto as circumstances may permit".* This seems broad enough to encompass winding-up a company after a winding-up order has been obtained, although the term "*may be sued*" does not explicitly empower a company to petition for its own winding-up. The reference to the terms "*suit*" in section 1 and "*execution or other process*" in section 3 are not dissimilar to the words "*suit or legal process*" considered by Millett, J (as he then was) in *In re International Tin Council* [1987] Ch 419. This was the main judicial authority upon which Wade-Miller J relied in construing the 1885 Act in *Informission v Convertix Corporation Ltd.* Although the "primary"[7] finding was that winding-up proceedings were not a means for enforcing an arbitration award (there were, implicitly, strong public policy motives for preventing a major

[6] Law.Com Dictionary.
[7] In fact the primary and summary finding was that the relevant statute did not permit winding-up an international organization at all under section 665 of the Companies Act 1985.

international organisation from being wound up), this case provides some assistance to the interpretative task at hand in the present case. It supports the view that:

(a) the natural and ordinary meaning of the term "suit" includes winding-up proceedings;

(b) the proof of debt process which occurs after a winding-up order has been made is, as regards any judgment creditors, a species of judgment enforcement process, albeit a collective remedy entitling the judgment creditor only to a pari passu share of the insolvent estate.

84. The *International Tin Council* case was primarily concerned with an immunity from suit clause in an Order-in-Council, which the English High Court found should be construed in favour of immunity. A winding-up petition was also held to fall within the ambit of the immunity clause because it was not a means of enforcing an arbitration award, which would have been actionable. Nevertheless, in my judgment the views expressed by Millett J on the natural and ordinary meaning of the words "*suit or legal process*" are highly persuasive:

"It is not a 'suit, it was said, which is a word not normally used in English legal writings to describe a winding-up petition….But in my judgment there is no ambiguity. The phrase 'suit or legal process'…embraces all forms of adjudicative and enforcement jurisdiction, and clearly includes the winding up process…'suit' extending to all forms of the adjudicative, and 'legal process' to all forms of the enforcement, jurisdiction…"[8]

85. This analysis supports the finding that "suit" in section 1 and "other forms of process" in section 3 include an application to wind-up a company and the process after a winding-up order is made to settle the debtor's estate. In the present context, I find the following dictum of Brightman LJ (referred to in Millett J's judgment at page 454) supportive of construing section 3 of the 1885 Act as applying, according to its terms, not just to execution but the winding-up process as well:

"The liquidation of an insolvent company is a process of collective enforcement of debts for the benefit of the general body of creditors. Although it is not a process of execution, because it is not for the benefit of a particular creditor, it is nevertheless akin to execution because its purpose is to enforce, on a pari passu basis, the payment of the admitted or proved debts of the company. When therefore, a company goes into liquidation a process is initiated which, for all creditors, is similar to the process which is initiated, for one creditor, by execution."[9]

86. Section 4 of the 1885 Act, ironically in the present context, creates a procedure for examining the agents or managers of an overseas company about its assets. This jurisdiction would obviously overlap with both the Court's power under the Rules to order the examination of a debtor in the context of enforcing a money judgment and the Court's powers to order an examination in a winding-up under section 195 of the Act. Section 4 is quite possibly redundant in the modern legal context. Having zoomed in and looked at the language of the statute, it is necessary to step back for a broader perspective.

87. The primary object of the 1885 Act appears to be to achieve three broad policy goals. Firstly, the Act facilitates non-personal service on overseas companies which are not incorporated in Bermuda, obviating the need for service of process in the company's domicile, after obtaining leave to serve abroad. This was the only statutory provision permitting service on overseas companies here when the 1981 Act was enacted. It was only in 1992, by way of amendment, that permit companies could be served at their principal place of business in Bermuda under section 62A of the Companies Act:

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[8] [1987] Ch 419 at 453D,G.
[9] *In re Lines Bros. Ltd.* [1983] Ch 1, 20.

"Service of documents

62A A document may be served on a company by leaving it at the registered office of the company or, in the case of a non-resident insurance undertaking the principal office in Bermuda, or in the case of a permit company, the principal place of business in Bermuda from which the company engages in or carries on its trade or business in Bermuda."

88. Section 62A was seemingly primarily enacted to lighten the burden of personal service on officers of a local company under Order 65 rule 3 (or the local agents of companies under the 1885 Act). As far as permit companies are concerned, but not overseas companies operating in Bermuda without a permit where one is required, the service provisions of section 62A relax the corresponding service provisions of section 1(3) of the 1885 Act, which still require service on individuals rather than at an address.

89. Secondly, the 1885 Act confers personal jurisdiction over overseas companies based on their operations here, effectively providing that in relation to their local operations, they are deemed to be domiciled in Bermuda notwithstanding the fact that their "true" corporate domicile may be elsewhere. Section 1(3) provides that "*such suits may be prosecuted and carried on to judgment or decree in like manner as if the defendant company were formed, or incorporated, or established in Bermuda, or had its principal place of business therein*". This aspect of the 1885 Act facilitates, unarguably, the assertion of personal jurisdiction in civil proceedings over all categories of overseas companies, including those to which the 1981 Act unambiguously applies. If one accepts that section 1(3) applies to winding-up proceedings as well, their effect is to jurisdictionally treat qualifying overseas companies in the same manner as, *inter alia*, locally incorporated companies, nothing turns on the silence of the 1981 Act on winding-up overseas companies at all. The 1885 Act is the governing statute in this regard.

90. This aspect of the 1885 Act may also, less obviously, be read as buttressing the almost bare assertion in section 4(1A)(b) of the Companies Act that the winding-up (and other provisions mentioned) apply to permit companies. Section 1(3) may be construed as defining how the winding-up provisions apply: in the same manner as they do to companies incorporated in Bermuda. The manner of winding-up permit companies (and indeed non-resident insurance undertakings) is not expressly articulated in the 1981 Act; it is merely stated that Part XIII applies, save for those provisions relating to members voluntary liquidations. It is left to inference that the winding-up jurisdiction under Part XIII operates both (a) in the same manner as for local companies, but (b) without prejudice to winding-up proceedings elsewhere. Section 7 of the 1885 Act, meanwhile, explicitly provides that the jurisdiction conferred is limited to the assets of the overseas company within Bermuda:

"Saving for other rights

7 Nothing in this Act contained shall prevent any person from proceeding against any company or association of persons out of Bermuda, or against the assets, property or effects of any company or association of persons out of Bermuda, in like manner as if this Act had not been passed."

91. The 1885 Act may also fairly be construed as applying to winding-up proceedings (as well as other forms of civil proceedings) because its approach is, to some extent, conceptually similar to that of section 399 of the UK 1948 Companies Act, albeit that the UK provision deals exclusively with winding-up proceedings. Section 399 deems an unregistered company to be registered in the UK (England or Scotland) if it has a principal place of business there. Section 399 (3) of the UK 1948 Act provided as follows:

"(3) An unregistered company shall, for the purpose of determining the court having jurisdiction in the matter of winding up, be deemed to be registered in England or Scotland...and the principal place of business situate in that part of Great Britain in which proceedings are being instituted shall, for

the purposes of the winding up, be deemed to be the registered office of the company."

92. It must be admitted that section 4(1A)(b) in excluding the operation of the members voluntary winding-up regime to permit companies does to a more limited extent replicate section 399(4) of the UK 1948 Act, which excludes voluntary liquidation altogether from the regime for winding-up overseas companies. But there is still no obvious reason for viewing the 1885 Act as wholly incompatible with winding-up proceedings, Rather, the conundrum is how the Act can be construed as conferring a free-standing winding-up jurisdiction when the 1981 Act has explicitly provided for the application of Part XIII to permit companies and non-resident insurance undertakings.

93. The third important function of the 1885 Act is to confer on those who have obtained a judgment or other decree against an overseas company to which the Act applies with the same remedies, by way of "*execution or other process*", they would have in relation to a judgment against a local company. In my judgment it is difficult to rationally exclude the winding-up remedy from the range of enforcement remedies contemplated by section 3 of the Act, by implication alone. An unsatisfied judgment constitutes one of the three instances of deemed insolvency under section 162(b) of the 1981 Act. Can the 1885 Act be fairly read as permitting the enforcement of civil claims (particularly debt claims) by all means possible against local companies except winding-up (unless the Companies Act expressly confers such jurisdiction)?

94. The Act explicitly states that judgments against overseas companies can be enforced by execution or other process in the same manner as judgments against local companies. And if a judgment creditor of a an overseas company can have recourse to the winding-up jurisdiction in reliance on section 162(b) of the 1981 Act, why should a creditor who has not obtained a judgment not be able to petition for winding-up in reliance upon section 162(a) (statutory demand) and section 162(c) (insolvency) as well? Absent section 4(1A) of the Companies Act, the exclusionary argument would have been wholly implausible and could be summarily rejected.

95. Another serious difficulty with the exclusionary argument is that it requires a construction of the 1981 Act, and section 4(1A) in particular, which would have potentially interfered with vested rights of access to the Court by partially repealing the 1885 Act by implication. The historical position would have been as follows:

i. 1885-1923: as there was no known statutory jurisdiction to wind-up local companies, the 1885 Act probably in practical terms conferred no jurisdiction to wind-up the overseas companies to which it applied;

ii. 1923-1977: the 1923 Companies Act provided for local companies to be wound-up in accordance with the law and practice in England. The 1885 Act could without difficulty have been construed as conferring the jurisdiction to wind-up the companies to which it applied;

iii. 1977-1983 (when the 1981 Act came into operation): the 1977 Winding Up Act expressly applied the winding-up provisions of the UK 1948 Act (excluding the provisions conferring winding-up jurisdiction on overseas companies). The 1885 Act could still be construed without difficulty as applying, *inter alia*, to winding-up proceedings against overseas companies.;

iv. 1983-1992 (when section 4(1A) was enacted): the 1885 Act could still be construed without difficulty as conferring jurisdiction to commence civil proceedings including winding-up proceedings against qualifying overseas companies which were deemed for these purposes to be the same as local companies. On this basis, there was no need for the 1981 Act to make any express provision as regards winding-up for the Act's application to overseas companies. This interpretation of the legal position is consistent with both (1) the assertion in the Law Reform Committee Report that the law relating to winding-up was not substantially changed by the proposed new legislation, and (2) the interpretative presumption that the drafters of the 1981 Act

(including the very learned members of the Law Reform sub-Committee) were not ignorant of the existence of the 1885 Act;

v. 1992-to present (the status quo except for section 133A companies): it is only when one looks at the jurisdictional question through the lens of the post-1992 version of the Companies Act, that there is any credible basis for viewing the 1981 Act as being the sole statutory source for winding-up overseas companies. When the Act was altogether silent on this issue and one viewed the issue through the lens of the 1885 Act as the primary source of jurisdictional competence over overseas companies for all civil proceedings, it would in my judgment have been reasonably clear that jurisdiction to wind-up existed. This would particularly be the case when such jurisdiction was asserted by or on behalf of local creditors.

96. I find that prior to the enactment of section 4(1A) of the Companies Act 1981, the 1885 Act conferred jurisdiction on this Court to wind-up overseas companies to which the latter Act applied as if they were incorporated in Bermuda. This jurisdiction existed in tandem with the winding-up jurisdiction conferred in respect of local companies under the Companies Act 1923, the Companies Winding Up Act 1977 and the Companies Act 1981. This conclusion is consonant with the natural and ordinary meaning of the words of the 1885 Act as well as its manifest legislative purpose of affording protection to local creditors against "external" companies operating in Bermuda. Prior to 1992 when section 4(1A) was enacted, I find that there was no or no cogent basis for viewing the terms of the Companies Act 1981 (or the 1923 and 1977 Acts which it repealed) as being inconsistent with the construction of the 1885 Act as conferring winding-up jurisdiction over the companies to which it applied on the deemed basis that such companies had been established in Bermuda.

97. An inconsistency does arise, accepting Mr. Riihiluoma's analysis of how section 4(1A) ought to be construed in the context of the 1981 Act as a whole, ignoring the potential effect of the 1885 Act. The 1981 Act clearly provides that it applies to overseas companies when the provisions of the Act so require (section 4(1)(d)), and (b) section 41(A) states that various Parts including Part XIII apply to permit and non-resident insurance undertakings. The original status of overseas companies in the 1981 Act in winding-up terms was essentially neutral. It could not be suggested that section 4(1)(d) was so repugnant to the application of the 1885 Act to the winding-up of overseas companies, permit or otherwise, as to have repealed the earlier provisions by implication. The strong interpretative presumption against repeal by implication has been described as follows:

> "22. The court will not lightly find a case of implied repeal, and the test for it is a high one. Mr Craig properly took us to two well-known statements of principle to that effect. In *Seward v "Vera Cruz"(owner)* (1884) 10 App Cas 59 the Earl of Selbourne LC said, at p68:
>
> > 'Now, if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered or derogated from merely by force of such general words, without any indication of a particular intent to do so.'
>
> 23. In *Kutner v Phillips* [1891] 2 QB 267 at p 271 AL Smith J said:
>
> > 'a repeal by implication is only effected when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one that the two cannot stand together…..Unless two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time a repeal will not be implied and special Acts are not repealed by general Acts unless there is some express reference to the previous legislation, or unless there is a necessary inconsistency in the two Acts standing together.'

24. AL Smith J repeated that test in the following year in *West Ham Wardens v Fourth City* [1892] 1 QB 654 at p658:

> 'The test of whether there has been a repeal by implication by subsequent legislation is this: are the provisions of a later Act so inconsistent or repugnant with the provisions of an earlier Act that the two cannot stand together?'

25. In section 87 of his Statutory Interpretation (4th edition) Mr Bennion cites that passage with approval, and continues:

> 'This principle is a logical necessity, since two inconsistent laws cannot both be valid without contravening the principle of contradiction. The possibility of implied repeal goes wider however than is indicated by the principle of contradiction. Other interpretative criteria may indicate implied repeal, for example the commonsense construction rule or the presumption that Parliament wishes to avoid an anomalous result'

26. No authority is cited for the latter proposition, and I am not able to act on it. The presumption against anomaly is, as Bennion makes clear in section 315, a principle of construction, applied as such within the boundaries of an individual Act, and going much wider than the case of absurdity or impossibility of reading two Acts together that is the characteristic of implied repeal. To hold that an implied repeal arose when the combined result of the two statutes could not be characterised as anything worse than anomaly would be to fly in the face of the strong statements of principle set out in paragraph 19 above."

98. I find that there was no or no cogent basis for viewing the terms of the Companies Act 1981 (or the 1923 and 1977 Acts which it repealed) as being inconsistent with the construction of the 1885 Act as conferring winding-up jurisdiction over the companies to which it applied. Even when section 4(1A) is taken into account, all that results is no more than an anomaly. Companies which are operating in Bermuda on a formal basis (either as non-resident insurers regulated by the 1967 Act or as permit companies regulated by Part XI of the 1981 Act) are governed by various provisions in the 1981 Act (including the winding-up provisions) while other overseas companies (such as those operating in breach of section 133 of the Companies Act are not. Bringing some overseas companies under the regulatory umbrella of the 1981 Act is not repugnant to the notion of other overseas companies continuing to fall within the jurisdictional scope of the 1885 Act for winding-up purposes. On the contrary, it makes no sense that "rogue" companies should be exempt from the winding-up jurisdiction of this Court as it is precisely the "dodgy" overseas company which the 1885 Act is designed to afford creditors relief against. It is self-evident that the statute must also be construed as permitting winding-up suits by creditors or by the overseas company itself acting in the interests of its creditors, whether acting by its directors or by its foreign liquidators.

99. Although it is not without considerable analysis that one arrives at this interpretative conclusion, in my judgment the 1885 Act without ambiguity confers winding-up jurisdiction over overseas companies which is broadly equivalent to that exercised over local companies under the 1981 Act. In my view *Informission Group Inc v Convertix Corporation* [2000] BLR 75 was rightly decided to the extent that Wade-Miller J grounded jurisdiction on the External Companies (Jurisdiction in Actions) Act 1885.

On the assumption that it is ambiguous whether the 1885 Act confers the jurisdiction to wind-up overseas companies, how should the ambiguity be resolved?

100. In the context of the present application, the common law jurisdiction to recognise foreign winding-up orders and to assist foreign insolvency courts and the liquidators they have appointed by engaging the provisions of local insolvency law was not in controversy. The breadth of this common law jurisdiction has been recognised in the

Isle of Man (*Re Impex Services Worldwide Ltd* [2004] BPIR 564), by the Judicial Committee of the Privy Council on appeal from the Isle of Man (*Cambridge Gas Transport Corporation v Official Committee of Unsecured Creditors (of Navigator Holdings plc)* [2006] 3 WLR 689), and by this Court (*Re Founding Partners* [2009] Bda LR 35). In the *Navigator Holdings* case, Lord Hoffman opined as follows:

> "At common law, their Lordships think it is doubtful whether assistance could take the form of applying provisions of the foreign insolvency law which form no part of the domestic system. But the domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency. The purpose of recognition is to enable the foreign office holder ... to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum"[10].

101. So at common law, if an overseas company which has assets in Bermuda or has been trading through a branch office or agents in Bermuda without a permit is placed in liquidation in a court of competent jurisdiction abroad, its foreign liquidator acting on behalf of foreign and local creditors can invoke the winding-up jurisdiction of this Court. This is a substantive right of access to the Court which has arguably existed since the nineteenth century, although based on the materials placed before me, no local statutory winding-up jurisdiction existed until 1923. It is against this substantive law background that the competing constructions of the 1885 Act fall to be resolved, assuming the correct meaning is ambiguous.

102. The Respondent contends that the 1885 Act ought not to be construed as applying to winding-up proceedings at all. These are solely governed by the 1981 Act and section 4(1A) of that Act which extends Part XIII of the Companies Act to (a) non-resident insurance undertakings; and (b) permit companies. The Applicant contends that the 1885 Act should be construed as applying to overseas companies other than those designated by section 4(1A) of the Companies Act. If Mr. Riihiluoma's submission is correct, creditors of an insolvent "rogue" overseas company which has been operating in Bermuda without a permit can only access the winding-up jurisdiction of the Bermuda Court provided they first take one or more of the following steps:

i. winding-up the company in its place of incorporation, appointing a liquidator there and obtaining a letter of request from the company's home court seeking the common law assistance of the Bermuda Court; or

ii. commencing restructuring or liquidation proceedings in some other jurisdiction with which the company is linked and which has a more flexible statutory jurisdiction over insolvent foreign companies (e.g. the US Bankruptcy Court), and obtaining a letter of request from that court directed to this Court seeking judicial assistance at common law.

103. Construing the 1885 Act in this way would result in purely procedural impediments being placed in the way of creditors seeking to access the winding-up jurisdiction of this Court in respect of overseas companies to which section 4(1A) of the Companies Act 1981 do not apply. The common law right of access to the Court's winding-up jurisdiction is on any view unaffected by the 1885 Act, however construed. So the competing interpretations essentially involve a choice between (a) enhancing the right of access to the Court by providing a more convenient statutory procedure; and (b) passively restricting the right of access to the Court by leaving creditors with the existing and more cumbersome common law procedure. In *Re First Virginia Reinsurance Ltd* [2003] Bda LR 47[11], I favoured a construction of the Companies Act which facilitated the right of access to the Court rather than hindered it, but this was on an ex parte application.

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[10] [2006] 3 WLR 689 at 696.
[11] At pages 9-10. This case is also reported at (2003) 66 WIR 133.

104. A more compelling and prosaic interpretative presumption to invoke to resolve any ambiguity in the scope of operation of the 1885 Act is the presumption that Parliament does not intend to legislate in a way which is inconsistent with public policy. It would very obviously be damaging to Bermuda's economic interests as a jurisdiction the economy of which depends heavily on a reputation of sound financial regulation for no effective insolvency law relief to be available in respect of rogue overseas companies operating here. The position of the Companies which invested funds with the now notorious Bernard Madoff in New York is a classic case in point. It seems absurd that Parliament should be deemed to have intended (when enacting section 4(1A) of the Companies Act in 1992) to limit the winding-up remedy to those companies to which that section applied, presuming Parliament to have known that the 1885 Act already provided a more liberal jurisdiction in that regard.

105. Taking all of these matters into account, I would resolve any ambiguities as to whether or not the 1885 Act confers jurisdiction to wind-up overseas companies not falling within the ambit of the Companies Act's narrow jurisdictional provisions in favour of the liberal construction the Applicant contends for.

106. Of course these secondary findings are only recorded in case I am held to be wrong on my primary findings that (a) PwC Bermuda lacks the standing to challenge the validity of the winding-up order made herein save by way of appeal; and (b) the Companies are in any event "*permit companies*" for the purposes of section 4(1A) (b) of the Companies Act as read with section 133A.

Conclusion

107. Accordingly, the Applicants are entitled to an Order in terms of their Summons under section 195 of the Companies Act 1981, subject to any modifications which may be required to deal with points of detail which were overlooked at a hearing which focussed on the jurisdictional challenge.

108. The Respondent contended that this Court had no power to wind-up the Companies as they were not subject to the winding-up jurisdiction of the Court under section 4(1A) of the 1981 Act. The jurisdictional challenge was rejected on the grounds that (a) PwC Bermuda lacks the standing to challenge the validity of the winding-up order made herein save by way of appeal; and (b) the Companies are in any event "*permit companies*" for the purposes of section 4(1A) (b) of the Companies Act as read with section 133A. I find that section 133A has modified the original definition of "*permit company*" to include mutual funds permitted to operate in Bermuda without a permit.

109. Further and alternatively, I would in any event have found that the External Companies (Jurisdiction in Actions) Act 1885 (but not section 4(1)(d) of the Companies Act) empowered this Court to wind-up the Companies as overseas companies carrying on business through agents in Bermuda. To this qualified extent, I would have found that *Informission v Convertix Corp Ltd.* [2000] Bda LR 75 was rightly decided. I accept Mr. Riihiluoma's compelling submissions that the Companies Act 1981 is not, by itself, a source of winding-up jurisdiction over overseas companies which are neither (a) non-resident insurance undertakings, nor (b) permit companies.

110. Unless either party applies to be heard as to costs within 21 days by letter to the Registrar, the costs of the present application are awarded to the Joint Liquidators, to be taxed if not agreed.

EXHIBIT H

In The Supreme Court of Bermuda

Civil Jurisdiction 2013 No 133

BETWEEN:

THOMAS GLEESON Plaintiff

v

MARSHALL DIEL AND MYERS LIMITED

LUCIANO AICARDI

PARAGON TRUST COMPANY LIMITED Defendants

Dated the 14th January 2015

Application for leave to amend Writ and Statements of Claim – Substitution of names of parties – Mistake as to identity – Limitation of actions – Irregularity of service

Mr T Frith for the Plaintiff

Mr N Hargun for the Defendants

The following cases were referred to in the judgment:

The "Sardinia Sulcis" [1991] 1 Lloyd's Rep 201
International Bulk Shipping and Services Ltd v Minerals and Trading Corp of India [1996] 2 Lloyd's Rep 474
Adelson v Associated Newspapers [2007] EWCA Civ 701
Evans Construction Co Ltd v Charrington & Co Ltd [1983] QB 810
Coultard v Disco Mix Club Ltd [1999] 2 All ER 457
Paragon Finance PLC v Thakerar & Co [1999] 1 All ER 400
Gwembe Valley Development Co Ltd v Koshy [2003] EWCA Civ 1048
Leal v Dunlop Bio-Processes International Ltd [1984] 2 All ER 207
Amerada Hess v Rome [2000] TLR 185 (15 March 2000)
The "Goldean Mariner" [1990] 2 Lloyd's Rep 215
In re Regent United Service Stores (1878) 8 ChD 75
Re Bezier Acquisitions [2011] EWHC 3299
R v Soneji [2005] UKHL 49

RULING of KAWALEY CJ

Introductory

1. On April 25, 2013, the Plaintiff issued a Generally Indorsed Writ of Summons against the first two Defendants (D1 and D2) seeking various heads of relief. The claims advanced were based upon the professional dealings of "Marshall Diel and Myers" and D2 with the Plaintiff in 2007 in connection with the purchase of a certain property ("the Property"). On April 8, 2014 the 3rd Defendant (D3) was added by way of amendment and a Statement of Claim was filed in which detailed allegations were made against, inter alia, "the First Defendant('MDM')".

2. After entering an appearance on April 28, 2014 on behalf of D1 and D2, the following day the Defendants' attorneys issued a Summons seeking to set aside service on D3 pursuant to Order 12 rule 8. By Summons dated June 4, 2014, D1 applied to strike-out the claim against it "on the grounds that it is frivolous, vexatious or an abuse of process". By Summons dated June 18, 2014, the Plaintiff applied for leave to amend the Writ and Statement of Claim "to amend the names of the First and Third Defendants" to:

    i. "Marshall Diel & Myers (a firm)"; and

    ii. "BCB Paragon Trust Limited".

3. These three Summonses were heard together. They raised two key broad issues:

i. whether the failure to issue proceedings against the firm which was involved in the Property transaction to which the action related, as opposed to D1 (the limited company which was formed by some if not all of the firm's partners after the impugned transaction) either:

(a) a claim against the wrong party, which could not be cured by way of amendment after the expiry of the limitation period, or

(b) a simple error of nomenclature which could be cured by amendment at any time;

ii. whether service on D3 was so defective as to be liable to be set aside or was substantially effective and therefore valid.

The strike-out application

Factual background

4. This application is supported by the May 23, 2014 Georgia Marshall Affidavit which deposes that D1 was incorporated on December 18, 2009 and authorised to commence legal practice from January 13, 2012. Prior to this, a firm Marshall Diel & Myers carried on a legal practice and corresponded with the Plaintiff's former attorneys about the Property and the present dispute in September 2008. D1 did not exist in 2007 and could not have committed the acts complained of, it is asserted. None of this is disputed.

5. The Plaintiff's case, as set out in the Affidavit of Timothy Frith is that:

i. Georgia Marshall's affidavit makes it clear that D2 at all material times carried out the legal work complained of on behalf of the firm, which was the intended defendant;

ii. in naming D1 as First Defendant, "we have made a minor mistake as to the nomenclature" of the Defendant;

iii. D1 has not been misled in any way as its principals are well aware of what entity carried on the legal work in question and there was only one law firm practising under the name "Marshall Diel & Myers' at the material time.

6. In the 2nd Georgia Marshall Affidavit filed in reply, it is deposed that not all of the partners of the former firm are shareholders of the company and not all of the present corporate shareholders are former partners. Permitting the amendment would have the result of adding new parties to the action after the expiration of the limitation period. The deponent also points out that the Plaintiff's own attorneys formerly practised as a firm and then through a company incorporated after the 2009 changes to the Bermuda Bar Act. As a matter of law the Plaintiff must be deemed to have known that D1 could not have been the legal entity involved in 2007 before lawyers were permitted to incorporate by amendments to the Bermuda Bar Act 1974 passed in 2009. The Plaintiff's counsel did not attempt to refute these additional assertions.

Legal principles

7. The governing legal principles are found in paragraph (3) of Order 20 rule 5:

> " (3) An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued."

8. Mr Hargun submitted that a qualifying "genuine mistake" had to be limited to the name of the party as opposed to their identity: *The "Sardinia Sulcis"* [1991] 1 Lloyd's Rep 201; *International Bulk Shipping and Services Ltd v Minerals and Trading Corporation of India* [1996] 2 Lloyd's Rep 474. In this case the mistake was misleading because it was unclear whether the initial case was based on a case of successor liability; in addition, a conspiracy claim had been pleaded against D1 which could only validly be asserted

against a body corporate. It was unjust for the partners of a firm which no longer existed, who had adjusted their rights without reference to the present claim, to be joined to an action issued at the end of the limitation period and served a year later in circumstances where the delay was unexplained.

9. Mr Frith responded that the mistake was clearly merely one of nomenclature where the defendant was correctly identified but called by an incorrect name: *Adelson v Associated Newspapers* [2007] EWCA Civ 701; [2007] 4 All ER 330; and *Evans Construction Company Limited v Charrington & Co Limited* [1983] QB 810. These authorities clearly supported the application to correct the corporate name of D3, if the application to set aside service failed.

10. In the latter case the English Court of Appeal analysed the cases on the English equivalent of our Order 20 rule 5(3) and applied the same principles to the more widely drafted CPR 19.5(3)(a). Lord Phillips CJ summarised the case law where leave to amend was granted as follows:

> "57. Almost all the cases involve circumstances in which (i) there was a connection between the party whose name was used in the claim form and the party intending to sue, or intended to be sued and (ii) where the party intended to be sued, or his agent, was aware of the proceedings and of the mistake so that no injustice was caused by the amendment. In *SmithKline*, however, Keene LJ accepted that the *Sardinia Sulcis* test could be satisfied where the correct defendant was unaware of the claim until the limitation period had expired. We agree with Keene LJ's comment that, in such a case, the Court will be likely to exercise its discretion against giving permission to make the amendment."

11. There is also an additional requirement that a post-limitation period amendment would be just, which Mr Hargun correctly submitted arose under the following provisions of Order 20 rule 5:

> " (2) Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so."

Findings

12. I am bound to accept Mr Frith's evidence that his intention was to sue the law entity which acted for the Plaintiff in relation to the 2007 transaction and that a genuine mistake was made as to the legal status and name of that entity. The mistake does not clearly qualify for potential relief under Order 20 rule 5 (3) because not knowing if a body corporate which did not exist in 2007 or a partnership which did was involved in a transaction raises issues of identity and nomenclature. As a result, accepting the Plaintiff's submission that no mistake about the identity of the legal entity involved in the 2007 transaction occurred has a degree of artificiality about it.

13. However, it does not follow that the mistake, if viewed as merely one of nomenclature, (a) did not mislead the partners of the firm, and that (b) it would be just to entertain an application to join them undeniably made after any applicable limitation period had come to an end in any event.

14. I find that the mistake was misleading to those partners of the former firm who became aware of the present proceedings when the present proceedings were entered in the Cause Book in late April 2013 at the earliest or, alternatively, when the Writ was served approximately one year later. It was reasonable for the relevant former partners to assume that the Plaintiff did not intend to sue the former firm because, inter alia:

    i. the former firm was not mentioned at all and it would not have been obvious from the entry in the Cause Book that the Plaintiff intended to sue the former firm. It seems probable that those partners in the former firm who are not

presently directors of D1 only became aware of the Writ after the limitation period expired when the intention to join the former firm was first articulated;

ii. it ought to have been obvious to the Plaintiff's legal advisers that D1 did not exist in 2007 prior to the amendments to the Bermuda Bar Act 1974 in 2009 which permitted lawyers to practice through limited liability companies;

iii. it ought to have been obvious to the Plaintiff's legal advisers that the law firm with which D2 was practising at the material time was the firm, well known to any lawyer in Bermuda in practice at the time, of Marshall Diel & Myers (judicial notice is taken of the fact that Mr Frith himself was not a member of the Bar until after 2009);

iv. if the Plaintiff did in fact retain the former firm in relation to the impugned transaction, he would have actually known and/or must be deemed to have known not just the identity but the correct name of the legal entity which he had retained;

v. the general indorsement on the Writ referred to the former firm while D1 was named in the title to the action. This suggested a deliberate election to sue D1 in respect of the acts of the former firm. On the other hand, the Statement of Claim, which set out the Plaintiff's considered case, referred throughout to D1 alone, defined in the pleading as "MDM". This appeared on its face to clarify the position: D1 was alleged to be liable for the acts of the former firm;

vi. the conspiracy claim does not appear to be sustainable against the former firm at all; and/or

vii. to the extent that the Plaintiff did evince an intention to sue an individual former partner or employee of the former firm in relation to the 2007 transaction, D2 was personally named as a Defendant from the outset. He was referred to as the involved MDM lawyer in the Statement of Claim. This reinforced the impression that a conscious decision had been made not to sue the former firm and/or all of its former partners at all.

15. It only became clear that the Plaintiff in fact intended to sue the former firm, and not D1, when Mr Frith swore his Affidavit on June 17, 2014 in response to the strike-out application. That Affidavit avers that instructions were received to issue a protective writ in September 2013, and does not deny that the 2014 amendment application seeks to add the former firm as a party after the expiration of the limitation period applicable to the relevant claims. No explanation is offered for the delay. It is clearly prejudicial to the partners in the former firm to be joined in the present proceedings and deprived of the ability to rely upon a limitation defence which would otherwise be available. The position is broadly the same as regards those partners who have been on notice of the present proceedings and any one or more partners who have not been on notice of the present action.

16. The Plaintiff's former attorneys expressed concern about the transaction in September 2008 and D2 on behalf of the former firm, essentially alleging that the firm had acted for the Plaintiff and then acted in favour of conflicting interests. By letter dated October 16, 2008, D2 denied that the Plaintiff ever retained the former firm in connection with the sale of the Property. There is no suggestion that the Plaintiff himself was not at that point in possession of sufficient information to issue the present proceedings against the firm while it was still in existence. It is impossible to believe that he himself did not fully appreciate that he was dealing with a law firm in 2007 at a time when corporate law firms did not even exist.

17. The present case is accordingly very far removed from the sort of situation which understandably leads to befuddlement about the correct name of a generally identified litigant. The Plaintiff is not a litigant who has dealt with a corporate group with various members in circumstances where it is unclear precisely which group entity entered into a particular transaction or series of transactions, and the true position can only be discovered as a result of complicate investigations by the litigant's professional advisers.

The claim was not pursued until the Writ herein was filed in April 2013 to prevent the limitation period expiring. The allegation that an oral retainer agreement was concluded between the Plaintiff and the former firm was first explicitly advanced in the 2014 Statement of Claim; it is difficult to see why the Plaintiff could not have instructed his attorneys to name the former firm when commencing proceedings in 2013. The now apparently time-barred claim has neither been asserted with any conviction nor pursued with any diligence.

18. Two claims are asserted against D1 and sought to be pursued as against the former firm: (a) breach of fiduciary duty, and (b) conspiracy. I accept Mr Hargun's submission that the proposition of a partnership being party to a conspiracy is legally misconceived. The Defendants' counsel conceded that the breach of fiduciary duty claim was an equitable claim to which limitation defences did not directly apply by virtue of section 37 of the Limitation Act 1984. However he relied upon the well- recognised rule of practice that where equitable claims correspond to similar common law claims, the common law limitation periods will be applied in equity by analogy: *Coultard v Disco Mix Club Limited* [1999] 2 All ER 457 at 477f-478c (Jules Scher QC); *Paragon Finance PLC v Thakerar & Co* [1999] 1 All ER 400 at 414a-b (Millett LJ). Mr Hargun also relied upon the following passage in the English Court of Appeal judgment in *Gwembe Valley Development Company Limited v Koshy* [2003] EWCA Civ 1048 (Mummery LJ):

> "111. In the light of those cases, in our view, it is possible to simplify the court's task when considering the application of the 1980 Act to claims against fiduciaries. The starting assumption should be that a six year limitation period will apply – under one or other provision of the Act, applied directly or by analogy – unless it is specifically excluded by the Act or established case-law. Personal claims against fiduciaries will normally be subject to limits by analogy with claims in tort or contract (1980 Act s 2, 5; see *Seguros*). By contrast, claims for breach of fiduciary duty, in the special sense explained in Mothew, will normally be covered by section 21. The six-year time-limit under section 21(3), will apply, directly or by analogy, unless excluded by subsection 21(1)(a) (fraud) or (b) (Class 1 trust) …"

19. Section 23(3) of the Limitation Act 1984, like section 21(3) of the 1980 UK Act, creates a six year limitation period for actions to recover trust property. Section 37 of the Bermuda Limitation Act 1984 preserves in statutory form, essentially in the same terms as section 36 of the Limitation act 1980 (UK) the approach once taken in equity alone. I find that the Bermudian law position is the same as the English law position and that a six year limitation period applies to the main (and only viable) claim sought to be asserted against the former firm, either directly or by analogy.

20. In all the circumstances the Plaintiff has failed to demonstrate that it would be just to permit him to add a former partnership as 1st Defendant to the present action in circumstances where it is implicitly conceded that the applicable limitation periods which would otherwise be available have now most likely expired. Of course if no limitation period applies at all or any applicable period has not expired, the Plaintiff can issue fresh proceedings against the former firm. Accordingly:

    i. the application for leave to amend to join Marshall Diel & Myers (a firm) is refused; and

    ii. the claim against D1 is struck out on the grounds that it is hopeless and bound to fail.

D3's application to set aside service of the Writ

Factual background

21. By Summons dated April 29, 2014, D3 sought an Order declaring:

> "1.that the Generally Endorsed Writ of Summons in the matter herein dated 25 April 2013 (amended 8 April 2014) has not been duly served upon the Third Defendant, Paragon Trust Company Limited (BCB Paragon Trust Limited) …"

22. Ms Evernell Davis deposed that she served the Amended 2014 Writ and Statement of Claim and the original 2013 Writ on the following persons:

    i. on April 16, 2014 at D1's offices, she served one set of documents on Timothy Marshall, who identified himself as a director of D1 and D3, personally as he was in a hurry and left the office. She left a second set of documents, seemingly by way of service on him as a director D3, at D1's reception desk;

    ii. on April 17, 2014 at D2's suggestion she served him personally at D1's offices where he was attending a meeting, rather than at D3's offices as she initially sought to arrange.

23. Mr Aicardi deposed that he was indeed served with one set of papers and that no mention was made by the process server either orally or in her indorsement of service on the Writ of his capacity as a director of D3. Mr Marshall deposed that he has not been director of D3 (now known as BCB Paragon Trust Limited) since 2011 and did not accept service on behalf of that entity which has no connection with D1 as it now has other lawyers. He agrees that he accepted service on behalf of MDM even though service was not effected on the company at its registered office. Mr Neil de Ste Croix deposes that the Writ has not been served by delivery to D3's registered office or by service on any of its directors.

24. It was conceded by the Plaintiff that service had not been effected on D3's registered office in accordance with section 62A of the Companies Act 1981. There was no positive evidence that any service had been effected on a current director of D3 in their capacity as such.

25. No evidence was filed by the Plaintiff explaining why D 3 was only added to the Writ by way of Amendment almost a year after the limitation period arguably expired.

Legal principles

26. Mr Hargun submitted that to the extent that the Plaintiff sought to cure any irregularity in relation to service under Order 2 rule 1, the appropriate test was the more stringent test applicable to renewing writs after an applicable limitation period had expired: *Leal v Dunlop Bio-Processes International Ltd* [1984] 2 All ER 207 at 215h (Slade LJ); *Amerada Hess v CW Rome*, Lexis Nexis Transcript January 19, 2000 (Colman J). In addition, he cited clear authority for the proposition that where one of several defendants was not served with a writ at all in circumstances where the party was given notice of the fact that he was being sued, the non-service was not a mere irregularity but constituted a nullity: *The 'Goldean Mariner'* [1990] 2 Lloyd's Reports 215 at 217-218 (Lloyd LJ). Lloyd LJ's views on this issue were, however, expressed by way of dissent to the contrary majority holding that even non-service could be cured under Order 2 rule 1 as an irregularity, at least in circumstances where the relevant party was served with an acknowledgment of service form but not the writ .

27. However Mr Frith did not concede that any irregularity as regards service had occurred in circumstances where it was clear that a current director of D3 had been served in his personal capacity so that the company had effective notice of the proceedings. Counsel's central thesis was that service pursuant to section 62A of the Companies Act 1981 was merely directory, not mandatory. He firstly relied on the following dictum of Baggallay LJ in *In re Regent United Service Stores* (1878) 8 ChD 75 at 80-81:

> "There is no doubt that the 3rd rule of the General Order provides for a service being made at the registered office of the company but that is not an imperative rule, which is never to be deviated from. I think that the general tendency of all the authorities is to show that if there is such a service as gives full and complete information to everybody to whom information ought to be given, it is sufficient, although provisions and rules of this kind, which are not part of the Act of Parliament, but are merely made for the purpose of carrying it into effect, may not have been literally complied with."

28. The Plaintiff's counsel also relied upon the following *dictum* from Thesiger LJ (at page 82) in the same case:

> "Now there have been a great number of cases decided in which the distinction has been recognised between provisions contained in Acts of Parliament (and the same observations would apply to rules made part of Acts of Parliament) which are merely directory, and those which are made by the legislature an absolute condition precedent necessary to the validity of any proceedings to which those provisions refer. And I may say from my own recollection that the tendency of the Court has been to hold provisions such as those contained in the rule to which I have referred to be merely directory, except in cases where it is further provided that in the event of their not being complied with subsequent proceedings shall be invalid."

29. The facts in this case were that a winding-up petition was never left at the company's registered office as required by the applicable rules. It was served on a creditor, who had been authorised by a board resolution to represent the company in relation to the winding-up proceedings in which the directors agreed to the initial appointment of a provisional liquidator. At the same board meeting, the petitioner's clerk was instructed to serve the petition on the company's agent who duly "accepted service of it, and undertook to appear on behalf of the company." Thereafter, a counsel appeared at the hearing to appoint an interim liquidator on behalf of the company. The validity of service of the petition was raised after this initial appearance by the company at a subsequent hearing of the petition.

30. This decision was followed in a more modern case upon which Mr Frith relied, the judgment of Norris J in *Re Bezier Acquisitions Ltd* [2011] EWHC 3299 (Ch). In this case, the question of whether a statutory service requirement rendered the non-complying act of purported service a mere irregularity or a nullity was held to depend on the consequences intended by Parliament. Norris J relied upon a case which has been frequently followed in the local courts[1], *R v Soneji* [2005] UKHL 49, [2006] 1 AC 340, [2005] 4 All ER 321. He held that a notice of intention to appoint administrators was validly served by the directors on the company's solicitors who had been formally instructed to commence administration proceedings, even though the formal requirement to serve such notice at the registered office had not been met: "There has in the present case been 'such a service as gives full and complete information to everybody to whom information ought to be given.'"

31. Mr Frith relied upon the permissive language of section 62A itself:

> "Service of documents
>
> 62A A document may be served on a company by leaving it at the registered office of the company or, in the case of a non-resident insurance undertaking the principal office in Bermuda, or in the case of a permit company, the principal place of business in Bermuda from which the company engages in or carries on its trade or business in Bermuda."

32. He also submitted, despite the absence of any evidence that any officer of D3 had in fact been served, that service on directors was authorised by the following provisions of Order 65 of the Rules of the Supreme Court:

> "65/3 Personal service on body corporate
>
> 3 Personal service of a document on a body corporate may, in cases for which provision is not otherwise made by any enactment, be effected by serving in accordance with rule 2 on the president or vice-president of the body, or the secretary or other similar officer thereof." [emphasis added]

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[1] See eg: *Roberts v Director of Public Prosecutions* [2008] Bda LR 37 at para 18 (Stuart-Smith JA); *Re an application to enforce an Arbitration Award* [2013] Bda LR 51 at paras 9-17 (Kawaley CJ); *Benevides v Corporation of Hamilton and Attorney-General* [2014] Bda LR 33 at paras 57-58 (Hellman J).

33. I accept Mr Frith's submission that failure to comply with the service requirements of section 62A of the Companies Act 1981 does not necessarily invalidate service. The converse position better reflects the true legal position. Where service is effected by leaving a document at the registered office, it is virtually impossible for the company so served to successfully impugn the validity of service in accordance with the statute. Where a plaintiff departs from the prescribed service procedure, it will be a question of fact in each case as to whether the relevant form of service deployed either:

    i. is not irregular at all because the fundamental requirements of service have in substance been met (i.e. informing the company that, in the case of originating process, that the proceedings have been actively commenced); or

    ii. is irregular because in more than purely technical terms effective notice of the active commencement of the proceedings has not been given to representatives of the company putting them on notice that unless they participate in the proceedings, default orders may be made against the company.

34. It is doubtful whether Order 65 rule 3 strictly applies to companies registered under the Companies Act 1981, but I need not decide this question as it does not strictly arise on the facts of this case because no officer of D3 was served at all. Be that as it may, depending on the facts in each case, service on a director may be sufficient service on a company as held in *In re Regent United Service Stores* (1878) 8 ChD 75 and *Re Bezier Acquisitions Ltd* [2011] EWHC 3299 (Ch). However, in both of those cases, the company unambiguously waived service at its registered office.

35. What is the test for curing any irregularities in service that have occurred after the expiry of a limitation period? I accept Mr Hargun's submissions in general terms, and adopt the reasoning of Sir John Megaw in *The 'Goldean Mariner'* [1990] 2 Lloyd's Rep 215 at 225-226 on this issue. This reasoning in my judgment applies with equal force to a situation where Order 2 rule 1 is not engaged in the strict sense because the irregularity consists of a failure to comply with service requirements contained in a statute, as opposed to the Rules themselves. Order 2 rule 1 provides in material part as follows:

    "1 (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

    (2) Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any steps taken in those proceedings or any document, judgment or order therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit." [emphasis added]

36. I see no reason why the principles which govern setting aside service irregularly made after the expiration of a limitation period should be different in the case of a company (where the primary service rules are contained in section 62A of the Companies Act as supplemented by case law on what constitutes substantial service) as opposed to the case of a natural person (where the primary service rules are contained in the Rules themselves as supplemented by case law on what constitutes substantial service). In *The 'Goldean Mariner'* [1990] 2 Lloyd's Rep 215, the English Court of Appeal apparently assumed that Order 2 rule 1 was engaged despite the fact that the validity of service exclusively concerned service on bodies corporate abroad. The Plaintiff's counsel did not suggest the position adopted by this Court should be different.

37. The relevant considerations, then, are primarily:

i. whether there is good cause or good reason for curing the irregularity after the expiry of the limitation period, by analogy with the position on an application to renew a writ;

ii. whether the defects in service caused any prejudice to the party served in an irregular manner.

38. As stated by the learned editors of the 1999 White Book at paragraph 6/8/6, the first stage of the analysis is (i); if good reason for the delay is shown, attention is then turned to (ii), the balance of prejudice and hardship. Examples given of good reasons for allowing the limitation period to pass are:

> "(a) a clear agreement with the defendant that service of the writ is to be deferred;
>
> (b) impossibility or great difficulty in finding or serving the defendant, particularly if he is evading service."

Findings

39. I find that an irregularity occurred as regards service on D3 in that:

i. the Amended Writ was not served at D3's registered office and no alternative form of service was expressly agreed by the company;

ii. D3 did not in any way prevent the Plaintiff from serving process at its registered office;

iii. there is no credible evidence that any attempt to explicitly serve an actual director on behalf of the company took place. There is credible evidence that the process server believed that Timothy Marshall was a director of the company, but no credible evidence that he represented to the process server that he was authorised to accept service on behalf of the company. As in fact Timothy Marshall was only a director of D1 and not a director of D3, it seems more likely than not that he accepted service on behalf of D1 and not D3;

iv. the fact that the process server left a second set of service documents at D1's reception desk constituted no more than an irregular attempt to bring the proceedings to the attention of D3 based on the mistaken belief that Timothy Marshall was a director of D3. It afforded no effective notice to D3 that it had been served;

v. the only actual director of D3 who was served (D2) was served with one set of documents and he was also a defendant in his personal capacity. There is no evidence that he was told that he was being served in both capacities or that he represented to the process server that he was willing to accept service on D3's behalf. It is more likely than not that Mr Aicardi was served in his personal capacity as D2;

vi. as D2 was not an officer of D3, no question of valid service in accordance with Order 65 rule 3 arises;

vii. against this confused background, although D3 had constructive knowledge of the existence of the proceedings, there was no reasonable basis for the Plaintiff's legal advisers or D3 to believe that D3 had been validly served. Such confusion occurs not infrequently in cases involving multiple defendants and the challenges of effecting service smoothly are only exacerbated when (1) bodies corporate are involved and (2) the agents of the company are acting in multiple capacities. Section 62A of the Companies Act 1981is designed to cut through this potential forest of difficulties;

viii. the service situation as regards D3 cried out for confirmation to be sought by the Plaintiff from an agent of D3 expressly acting on the company's behalf to confirm that D3 accepted that valid service had been effected. No such confirmation was sought or given.

40. It was not disputed that both the purported service and the addition of D3 to the Amended Writ both took place in April 2014 after the expiration of six years from the date of the breach of duty complained of in late April 2007. The Plaintiff is required to demonstrate some good reason for depriving D3 of the benefit of a potential limitation defence which explains why he was unable to join and serve D3 until nearly seven years after the events which form the subject of his claim. The Plaintiff personally filed no evidence at all. The Affidavit of Timothy Frith deals with the case against D3 in the following way:

    i. it is deposed in paragraph 4 as follows:

    "We were instructed to issue a Protective Writ in this matter in April 2013 and to serve an Amended Generally Endorsed Writ of Summons that included Paragon Trust Company Ltd as a further Defendant in March 2014.";

    ii. in paragraphs 18 to 24, the case for correcting the error of nomenclature in relation to D3 is clearly and convincingly put. An email is exhibited from Sinclair Realty to the Plaintiff dated June 10, 2008 advising him of the sale of the Property to a third party on May 29, 2007, based on public records.

41. No cause or reason, let alone a qualifying good cause or reason, was advanced for the delay in seeking to join D3. This was undoubtedly because no good cause or reason for the delay existed or could plausibly be advanced. It was admitted that the Plaintiff at the very latest was actually aware of the sale of the Property to D3 on June 10, 2008. The Plaintiff probably had constructive notice of the sale when the conveyance and related mortgage were registered, presumably at some point after May 29, 2007.

42. D3's application to set aside service succeeds on the grounds that D3 was not validly served and no good cause or grounds exists for permitting the Plaintiff to cure the irregularity in circumstances where such relief would potentially deprive D3 of a limitation defence.

Conclusion

43. The application for leave to amend to substitute the former law firm of Marshall Diel & Myers for D1 (Marshall Diel and Myers Limited) is refused. Although technically the mistake qualifies as one of nomenclature, on the facts of the present case the mistake is barely distinguishable from a mistake as to identity. In any event, the failure to name the former firm rather than its corporate successor was misleading and it would be unjust to allow the amendment despite the apparent lapse of the relevant limitation period after so many years of unexplained delay. The Plaintiff has validly served the former partner most intimately involved in the impugned transaction and may pursue his claim against D2 in any event.

44. The application on the part of D3 (BCB Paragon Trust Limited-incorrectly named in the Amended Writ as "Paragon Trust Company Limited") to set aside service is allowed. The amendment to join D3 was made and service purportedly effected almost a year after the expiration of the limitation period the Plaintiff instructed his attorneys to preserve by filing the original Writ in April 2013. Process was not served at D3's registered office and no alternative form of service was accepted by the company. No good cause for waiving the irregularity after the expiry of the limitation period was shown by the Plaintiff.

45. Unless application is made by letter to the Registrar to be heard as to costs, the Plaintiff shall pay the costs of D1 and D3, to be taxed if not agreed.