



**IN THE GRAND COURT OF THE CAYMAN ISLANDS  
FINANCIAL SERVICES DIVISION**

**Cause No. FSD 22 of 2018 (RPJ)**

**B E T W E E N:**

**(1) GEORGE ALLEN COWAN  
(2) GEORGE ALLEN COWAN, ON BEHALF OF EQUIS SPECIAL L.P.  
(PREVIOUSLY KNOWN AS EQUIS ASIA FUND SPECIAL L.P.)**

**Plaintiffs**

**- and -**

**(1) EQUIS SPECIAL L.P.  
(PREVIOUSLY KNOWN AS EQUIS ASIA FUND SPECIAL L.P.), ACTING BY ITS GENERAL  
PARTNER EQUIS SPECIAL GP  
(2) EQUIS SPECIAL GP (PREVIOUSLY KNOWN AS EQUIS ASIA FUND SPECIAL GP), IN  
ITS CAPACITY AS GENERAL PARTNER OF EQUIS SPECIAL L.P.  
(3) DAVID CHARLES RUSSELL  
(4) ADAM BERNHARD BALLIN  
(5) LANCE MICHAEL COMES  
(6) JOSEPH THOMAS CARMODY  
(7) RAJPAL SINGH CHAUDHARY  
(8) TONY GIBSON**

**Defendants**

**Before:** The Hon. Justice Parker

**Appearances:** Mr Thomas Grant KC and Mr Nicholas Dunne, Mr Brett Basdeo and Mr David Lee of Walkers for the Plaintiffs

Ms Anneliese Day KC and Mr Quentin Cregan, Ms Tiana Ritchie and Ms Mehreen Siddiqui of Maples for the First to Fifth Defendants and Seventh to Eight Defendants

**Heard:** 25 – 27 March 2024

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**Draft judgment** 9 May 2024  
**circulated:**

**Judgment delivered:** 22 May 2024

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## RULING

### *Introduction*

1. The First Plaintiff (“Mr Cowan”) brings these proceedings on his own behalf and derivatively on behalf of the Second Plaintiff (“Special LP”) (together, “Ps”).
2. The underlying dispute concerns the management and operation of a group of related private equity funds under the umbrella known as “Equis” (or the "Equis Group"). The focus of the funds was on renewable energy projects in Asia.
3. Mr Cowan is an engineer with significant experience in the Asian energy and power sectors. He was employed by the Equis Group in 2011 in connection with the establishment of the first Equis fund and was a Foundation Partner (as defined in the limited partnership agreement of Special LP (the "Special LPA")) (along with D3-D7) of Special LP.
4. Special LP is an Exempted Limited Partnership which was formed in the Cayman Islands under the Exempted Limited Partnership Act in October 2011. Mr Cowan and the Defendants (D3-D7) were limited partners in Special LP.
5. At all material times, it acted by and through its General Partner, D2 (“Special GP”). D8 was General Counsel to Equis Pte.Ltd., part of the Equis Group.
6. There are a number of summonses for determination on this application:
  - a) Ps’ summons dated 4 May 2023 (as amended on 6 September 2023), for:

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- (i) leave to amend their pleaded case in the form of the draft Re-Re-Re-Amended Statement of Claim attached thereto (“4ASC”) (“Amendment Summons”) (which the Maples Ds oppose);
    - (ii) permission to use in these proceedings the documents exhibited to Cowan 7 in Exhibit GAC-7 (“the Documents”) (“Documents Summons”) (which the Maples Ds do not oppose to the extent that the amendments are granted);
  - b) The First to Fifth and Seventh to Eighth Defendants’ (together “Maples Ds”) summons dated 4 September 2023 (“Security Summons”) against the First Plaintiff for security for their costs of these proceedings (which the First Plaintiff opposes). The Security Summons also seeks other relief in relation to a proposed mediation; and
  - c) The Maples Ds' summons dated 15 March 2024 ("Disclosure Summons") against the First Plaintiff for disclosure of the name of the party funding the First Plaintiff (which the First Plaintiff opposes).
7. By the Amendment Summons, Ps seek leave to amend their pleadings to introduce four new claims (“New Claims”) against Ds, which arise out of the exit of the various funds in which Special LP invested by way of a sale to an entity called Global Infrastructure Partners (“GIP” and "GIP Sale") organised by D3-8 in late 2017.
8. All the parties to the New Claims are already party to the existing claims. As regards the existing claims:
- a) In the derivative claims, Mr Cowan alleges that monies to which Special LP was entitled by way of investment and/or performance fees in respect of a number of the Equis funds were wrongfully diverted from it pursuant to an unlawful means conspiracy to which D3–D8 were party. This was allegedly done by an assignment from Special LP, acting by Special GP, to a parallel vehicle, which Mr Cowan alleges caused losses of approximately US\$90 million. The unlawful means used allegedly involved breaches of a series of contractual and fiduciary duties said to be owed variously by Ds to Special LP and to Mr Cowan himself, as well as other wrongdoing.
  - b) In his personal claims, Mr Cowan complains of the wrongful diversion by D3–D8 of monies to which he was entitled by reason of his position as a Foundation Partner and investor in the funds. This includes monies which would have been paid to him but for the wrongful diversion of monies from Special LP, via Special GP, and also other

distributions to which he says he was entitled from Special LP but which he says D3–D8 wrongfully caused to be withheld.

9. Mr Cowan says that these existing claims were formulated before he realised the true extent of the wrongdoing by D3-8. He first commenced these proceedings in February 2018 against D1-2 alone, and at that time his “*essential complaint was that [he] had not received the distributions owed to [him] under the terms of the Special LPA*”<sup>1</sup>.
10. The New Claims are:
  - a) The “Japan Solar Claim”, by which Ps allege that D3-8 induced Equis Asia Fund General Partner and Equis Asia Fund II General Partner to fail, in breach of contract, to distribute to Special LP sums due to it in respect of performance fees in relation to the Japan Solar investment;
  - b) The “Japan Wind Claim”, by which Ps allege that D3-8 conspired to misappropriate proceeds from the GIP Sale connected with and arising from the Japan Wind investment, which should have been held for the benefit of the funds which invested, to the detriment of the funds and investors (including Special LP and ultimately Mr Cowan);
  - c) The “India Wind Claim”, by which Ps allege that D3-8 conspired to misappropriate proceeds from the GIP Sale connected with and arising from the India Wind investment, which also should have been held for the benefit of the funds which invested, to the detriment of the funds and investors (including Special LP and ultimately Mr Cowan); and
  - d) The “Equis Renewables Claim”, by which Ps allege that D3-8 conspired to misappropriate further proceeds from the GIP Sale, which also should have been held for the benefit of the funds and investors (including Special LP and ultimately Mr Cowan), but which were instead falsely attributed to ‘management value’ allegedly built up outside the funds.
11. Ps allege that the investors defrauded in relation to the Japan Wind, India Wind and Equis Renewables Claims include Special LP, and thus also Mr Cowan himself, as a limited partner in Special LP.
12. The applications were heard over 3 days: 25, 26 and 27 March 2024.

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<sup>1</sup> *Cowan* 6 §8  
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Mr Thomas Grant KC appeared for the Ps.

Ms Anneliese Day KC appeared for the Maples Ds.

D6 (Mr Carmody) was represented on a 'watching brief' by Mr Bodden and took no active part.

*Ps case in summary*

13. In summary Mr Grant KC made the following submissions.

- a) All four New Claims are pleaded in detail and supported by the Documents. They are clearly not bound to fail.
- b) There will be no prejudice to the Maples Ds if the amendments are granted. There is no good reason to shut them out at this stage and in fact all Ds have previously consented to the amendments which introduce the Japan Wind, India Wind and Equis Renewables Claims and only objected to the Japan Solar Claim solely by reference to the *Henderson v Henderson* doctrine, and not because the claim itself was substantively demurrable.
- c) The Maples Ds invite the Court to conduct a 'mini-trial', based on thousands of pages of evidence 'cherry-picked' to support their case, but without the benefit of either a proper discovery process or thorough cross-examination at trial, and so summarily to reject Ps' serious allegations of fraud and conspiracy. That is an inappropriate course to suggest. If the Court allows the Amendment Summons the Maples Ds have no objection to the Documents Summons <sup>2</sup>.
- d) The Security Summons is obviously a tactical device. The Ds generally have been content to litigate these proceedings for 5 years without security for their costs. It was only after Ps filed their original Amendment Summons that the Maples Ds responded with their Security Summons. The Security Summons is a transparent attempt to put pressure on Ps because Ds are worried about the New Claims.
- e) In any case the Security Summons is fundamentally flawed. It should be noted that D6 has not issued a security summons.

*Maples Ds' case in summary*

14. Ms Day KC made the following submissions. She began by pointing out the procedural history:

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<sup>2</sup> *Ballin 3 §1.12*  
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- a) The proceedings were first served on 23 February 2018 as a straightforward case focused on the construction of the Limited Partnership Agreement of Special LP. Mr Cowan claimed to be entitled to certain additional investment proceeds as a limited partner of Special LP.
- b) On 25 June 2018, after what appeared to be the close of pleadings, Mr Cowan made a number of new amendments to expand his claim by bringing a parallel derivative action on behalf of Special LP. However, there was, at that stage, no suggestion of a claim against any other defendants, or any allegation of conspiracy.
- c) On 12 September 2018, a Re-Amended Writ of Summons and Statement of Claim was provided. This iteration of the claim sought to join seven new defendants to the proceedings (the Third to Eighth Defendants, plus a ninth defendant) and brought various allegations of conspiracy, including a claim in respect of Japan Solar valued at US\$350 million.
- d) On 24 September 2018 Ps obtained permission *ex parte* to serve the amended claim out of the jurisdiction (which included allegations of dishonesty, breach of trust, breach of fiduciary duty and conspiracy, in particular in relation to a series of renewable energy projects developed by Japan Solar LP.)
- e) On 3 October 2019, and upon Ds' application, Mangatal J set aside permission to serve out on the basis that (i) Mr Cowan was guilty of serious, sustained and inexcusable non-disclosures, including multiple misstatements and mischaracterisations; and (ii) the conspiracy allegations in relation to Japan Solar LP were in any event without factual basis and improper. Mr Cowan then served a Re-Re-Amended Statement of Claim on 18 March 2020, striking out the Japan Solar claims.
- f) Nothing further was heard in relation to pleadings until 13 July 2022 when, shortly before the hearing of Mr Cowan's disclosure summons (which was also dismissed), he indicated that he intended to make further amendments.
- g) On 16 August 2022, a further iteration of his claim was served in draft. This represented a further substantial reformulation and expansion of the claim, advancing numerous new allegations of conspiracy and fraud, some four and a half years after the initial claim was served.

- h) These ‘new claims’ were based on the Documents that were obtained (the Maples Ds say illegally) from the Equis Group by two former employees, Mr Rick Phoon and Mr Joseph Kuk.
- i) Ms Day KC emphasised that the Documents had been provided to Mr Cowan in April 2018 but their existence (and the fact that the Japan Solar claims were based on them) had never been disclosed to the Ds or to this Court.
- j) Mr Cowan had used the Documents to support the misconceived conspiracy allegations for which he obtained permission to serve out on 24 September 2018. However, he misled the Court both as to the nature of those claims (as Mangatal J found) and as to the fact that they were based on ‘stolen’ documents (which was a further material non-disclosure that Mr Cowan allowed to stand uncorrected before Mangatal J).
- k) Mr Cowan then sat on those documents for a further two years and 10 months (from the date of Mangatal J’s judgment until 16 August 2022.) He has now sought to rely on those documents to support yet further (and wider) conspiracy claims. No proper explanation for this deliberate concealment has been given.

15. Ms Day KC then argued as follows:

- a) Mr Cowan’s new allegations are themselves founded on basic factual errors, plain mischaracterisations, and broad-brush allegations of dishonesty that defy logical analysis. In many cases, he fails to recognize that his alleged conspiracy would have to involve numerous further Equis employees, none of whom had any particular personal stake in the transactions in question. The allegations have no reasonable prospect of success and the Amendment Application that seeks to introduce them should be refused.
- b) As to the security for costs application, Ms Day KC submitted that Mr Cowan advances very serious, speculative fraud allegations against a range of high-profile business people and professionals (Mr Gibson is a solicitor), funded on a grand scale, but without any meaningful adverse costs risk. That is not something that this Court should countenance. Mr Cowan should be ordered to provide security for costs, and to name the person who is funding these proceedings (allegedly on a purely altruistic basis).
- c) The Maples Ds have also applied for a mediation order, on the basis that it is simply not economic for them to continue to fight proceedings without (at present) any realistic prospect of recovering their costs. The Maples Ds consider that a judicial

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mediation would be desirable and are happy for that mediation to be listed on a date not later than 3 months after the close of pleadings.

*The evidence*

16. The Court has been provided with a huge volume of affidavit evidence which it has reviewed. The exhibits to these affidavits run to many thousands of pages.
17. The evidence has comprised:

*Amendment application*

- i. The sixth, seventh and ninth affidavits of Mr Cowan, dated 25 April, 6 September 2023 and 13 March 2024 ("Cowan 6", "Cowan 7" and "Cowan 9" respectively) with exhibits;
- ii. an affidavit of Vignesh Bandi, an Investment Director at Equis Australia, dated 1 March 2024 ("Bandi 1"), and exhibits;
- iii. a second affidavit of Lance Comes, the Fifth Defendant, dated 29 February 2024 ("Comes 2"), and exhibits, and a second (correcting) affidavit of Mr Bandi dated 22 March 2024; and
- iv. a third affidavit of Adam Ballin, the Fourth Defendant, dated 29 February 2024 ("Ballin 3"), and exhibits, and a fourth (correcting) affidavit of Mr Ballin dated 22 March 2024.

*Security and disclosure of funding applications*

- i. The affidavit of Adrian Davey, an associate at Maples, dated 1 September 2023 ("Davey 1") and exhibits;
- ii. The first, second and third affidavits of Tiana Ritchie, an associate at Maples, dated 29 February, 12 March, 13 and 19 March 2024 ("Ritchie 1", "Ritchie 2" and "Ritchie 3" respectively), and their exhibits;
- iii. The first, second and third affidavits of Philip Daval-Bowden, a Managing Partner at Masters Legal Costs LLP, dated 1 September 2023, 29 February 2024 and 12 March 2024 and the exhibits to those affidavits;
- iv. The fourth affidavit of Tony Gibson, the Eighth Defendant, dated 15 March 2024 and the exhibits to that affidavit;
- v. The eighth and tenth affidavits of Mr Cowan, dated 26 February 2024 and 19 March 2024 ("Cowan 8" and "Cowan 10") and their exhibits;



- vi. The second affidavit of Brett Basdeo, a partner at Walkers, dated 23 February 2024 and exhibit;
- vii. The first and second affidavits of Helen Green, a costs paralegal at Walkers, dated 26 February and 12 March 2024 and exhibits; and
- viii. The expert opinion of Chris Wong an executive partner at Gall Solicitors in Hong Kong, dated 27 February 2024 ("Wong 1").

#### *Mediation*

The Maples Defendants rely on Davey 1 at [53]-[57]. Ps responded via Cowan 8 at [11]-[15].

#### *The conduct of the parties*

18. The Court wishes to record that it is unreasonable to conduct litigation in a manner which results in such a huge volume of evidence being provided so late for these applications. The skeleton arguments of Leading Counsel were consequently hardly skeletal. They ran to many hundreds of pages. Even with the assistance of Leading Counsel at the hearing, the Court has been left with an enormous amount of material to sift through in order to separate the 'wheat from the chaff'. Such conduct places the Court under an intolerable burden and trespasses on the warnings not to conduct mini trials in relation to these types of applications.
19. The Court is aware of the particular challenges representing individual litigants. However, the attorneys involved are reminded of the Overriding Objective and their duty to assist the Court to hear cases in a just expeditious and economical way. That objective will not be achieved if they facilitate their clients to play unproductive 'ping pong', attempting to score points in relation to tactical matters which do not assist the Court to resolve the key questions. The history of this case shows that this has gone on for far too long and the Court is putting a marker down that this case should not be litigated in the way it has been litigated to date, where more emphasis is placed on 'heat rather than light'. The enormous costs incurred so far and those predicted to a trial reflect this unprincipled approach.

#### *The law*

#### *Amendment*

20. The Grand Court Rules (GCR) provide as follows.

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GCR O.20 r 5(1): “...the Court may, at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend that party’s pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.”

GCR O.20 r 12(1): “Notwithstanding the foregoing provisions of this Order any pleading in any cause or matter may, by written agreement between the parties, be amended at any stage of the proceedings.”

21. The relevant case law establishes that whether an amendment should be granted, if it is not agreed between the parties, is a matter for the discretion of the trial judge. The Court should be guided in the exercise of the discretion by the assessment of where justice lies.<sup>3</sup>
22. Generally speaking, Cayman law provides that amendments should be allowed in order that real questions in controversy between the parties are determined, unless the Court is satisfied that the party applying to amend was not acting in good faith, or through carelessness had caused prejudice to his opponent which could not be compensated for by costs. There is usually no injustice if the other side can be compensated by costs.<sup>4</sup>
23. It is obviously desirable that the Court has gathered before it all issues of importance that need to be determined so that a multiplicity of proceedings is avoided. The Court will identify amendments which clarify issues from those which raise new claims or defences for the first time<sup>5</sup>. However, raising a new claim or defence for the first time is not an automatic bar to the grant of leave to amend, however late.
24. It is important that the Court determines the rights of the parties and does not penalise them for incompetence or carelessness, assuming any prejudice can be compensated in costs.
25. The Court will always consider whether the amendments are material. If they are inconsistent or useless they will not be allowed, nor will amendments which raise a case which is bound to fail<sup>6</sup>.
26. It is not appropriate for the Court on an application for leave to amend to do more than satisfy itself that the case sought to be raised is fairly arguable. The evidence on the merits of the substantive claims will necessarily be incomplete and untested by cross-examination on an interlocutory application.<sup>7</sup> It is not appropriate to embark on a mini trial.

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<sup>3</sup> Brett, M.R. in *Clarapede & Co. v. Commercial Union Assn. (1)* (32 W.R. at 263)

<sup>4</sup> Brett, M.R. in *Clarapede & Co. v. Commercial Union Assn. (1)* (32 W.R. at 263)  
*Cayman Hotel & Golf Inc. v Resort Gems Ltd* [1992-93 CILR 372]

<sup>5</sup> per Lord Griffiths in *Ketteman v. Hansel Properties Ltd. (9)* ([1987] A.C. at 220.

<sup>6</sup> *Jones v. Hughes (8)* ([1905] 1 Ch. at 187 per Vaughan Williams, L.J.) and the judgment of the Court of Appeal of the Cayman Islands in *Iorgulescu v. Swiss Bank & Trust Corp. Ltd. (7)*.

<sup>7</sup> *In re Jokai Tea Holdings Ltd. (5)* ([1993] 1 All E.R. at 638)

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27. In cases involving allegations of conspiracy, it is also relevant to note the approach of Briggs J in *Bank of Tokyo-Mitsubishi UFJ Ltd v Baskan Gida Sanayi VE Pazarlama AS & Ors* [2008] EWHC 659 (Ch) in which he said:

*“...it is axiomatic that a case of conspiracy is rarely proved by documents recording either the relevant knowledge or the relevant agreement, all the more so in cases where, as here, the relevant transaction was carried out in secret. The question how much, if anything, an alleged conspirator knew and the extent to which he agreed to take part in the matters complained of is generally to be answered only upon a considered appreciation of the whole of the evidence after its deployment and testing at trial ...”*

28. It will still, in a fraudulent conspiracy case, be important for such allegations made in pleadings to be clear and sufficiently detailed and to be supported by sufficient evidence, so the Court can assess whether they are properly made and are fairly arguable.

29. Where a party seeks to amend a claim that has already been served out of the jurisdiction, the amendment will not be allowed if it adds a claim *“in respect of which leave could not, or would not, have been given to serve out”*<sup>8</sup>. There needs to be a serious issue to be tried, meaning a case with a real prospect of success.

30. The Court should try to ensure finality to litigation so that a party is not vexed twice in the same proceedings. The Court will seek to ensure that a party is not misusing or abusing the process of the court by seeking to raise before it an issue which could have been raised before in order to harass a defendant<sup>9</sup>.

### *Decision*

#### *Agreement to the amendments*

31. As stated above GCR O.20 r 12(1) provides: *“Notwithstanding the foregoing provisions of this Order any pleading in any cause or matter may, by written agreement between the parties, be amended at any stage of the proceedings”*.

32. The first question is whether or not the parties agreed to certain amendments for the purposes of rule 12<sup>10</sup>. Ms Day KC submitted that the rule required a written agreement as to consent, not written

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<sup>8</sup> *NML Capital Ltd (Argentina) v Republic of Argentina* [2011] 2 AC 495 at §77

<sup>9</sup> *Johnson v Gore Wood & Co* [2002] 2 AC 1 at p.31

<sup>10</sup> *Cowan* 9 at Section B

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consent. So, consent by way of letters (or one supposes emails) passing between the respective attorneys was insufficient. The Court does not agree.

33. On a plain reading there is no requirement for a 'written agreement'. The requirement is for written agreement '*between the parties*'.
34. The purpose of rule 12 is to facilitate the parties agreeing to amendments under the Rules as an alternative to applying for the permission of the Court. In the Court's view this is essentially a practical rule which does not require any particular form of written agreement, except that if there is an agreement it should be in writing to avoid subsequent misunderstandings or disputes. Oral agreements will not suffice. In the ordinary course written correspondence between attorneys will suffice, as the Court is certain it does with everyday practice. Any agreement recorded in writing between the parties can then be further formalised in a Consent order, approved by the Court.
35. If the Maples Ds did agree in writing, in accordance with GCR Order 20 rule 12, Ms Day KC's further submission was that they only consented, subject to certain conditions. The Maples Ds say they were clear that any consent was without prejudice to any right to strike the amendments out<sup>11</sup>. If that is right, she argues, the question as to whether each of the claims is arguable 'has always been live' and needs to be determined.
36. Again, the Court does not agree. If the Maples Ds did consent, having reviewed the correspondence, that is not in the Court's view properly to be regarded as conditional consent to the amendments. It is a reservation of a right to apply to strike out, having agreed to the amendments. It is also to be noted that the arguability of the three relevant claims was not articulated until the Maples Ds submitted extensive evidence in late February 2024 contesting the merits just three weeks before the hearing and which comprised three voluminous affidavits and almost 3000 pages of exhibited documents.
37. The Court has reviewed the extensive correspondence between the attorneys from 16 August 2022 to 30 December 2022. It has also read the relevant correspondence leading to the amendment summonses in 2023.
38. In their letter of 30 December 2022 Maples made it clear that they objected to the Japan Solar claim on the basis that it was an abuse of process.

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<sup>11</sup> See *Maples' letter of 30 December 2022 at paragraph 7*  
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39. They also wrote at §§ 7 and 9:

*“7. While it is our clients' position that they have strong grounds for opposing your client's proposed application for leave to further amend his claim, **they recognise the likelihood of leave being granted without regard to the substance of the proposed amendments and on the basis that our clients can be compensated for their costs. It is for these reasons that our clients are prepared to consent to the proposed amendments, save for the New Japan Solar Claim. Our clients will aggressively oppose any attempt by your client to seek leave to reintroduce that claim. Further, our client's consent is expressly without prejudice to their right to: (i) require further and better particulars of the proposed amendments, and (ii) seek an order that any of the proposed amendments be struck out or subject to an order for summary judgment in the usual way. (emphasis added)***

...

*9. Please provide us with a draft Consent Order enclosing a revised draft RRRASOC which excludes all allegations concerned with the New Japan Solar Claim.”*

40. D6 then also wrote, also agreeing to the amendments (bar those advancing the Japan Solar Claim) in Conyers' letter of 10 January 2023:

*“We can confirm that our client, the Sixth Defendant in the Proceedings, consents to your client's proposed amendments (save for the New Japan Solar Claim).”*

41. Maples then wrote on 19 January 2023:

*“Further, as noted in our letter of 30 December 2022, our clients' consent to your client's proposed amendments is without prejudice to their right to seek an order that any of the proposed amendments be struck out or subject to an order for summary judgment; in that event our clients will seek a further order that your client is not entitled to rely on the Dropbox Documents and to destroy or return all copies of those documents in his possession.”*

42. This it seems to the Court makes the position clear. Having reviewed the relevant evidence, the Court finds that there was a written agreement between the parties consenting to the amendments which was sufficient for the purposes of GCR Order 20 rule 12, apart from the Japan Solar claim. The Maples Ds had by the end of 2022 been in receipt of the amended pleadings for many months during which time questions could have been raised or points could have been taken that they were bound to fail or were unarguable. They could have articulated what their case in opposition was. Instead of doing so they consented to the amendments.

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43. It is the case that they reserved their rights to ask for further and better particulars of the proposed amendments, and to seek an order that any of the proposed amendments be struck out or be subject to an order for summary judgment in the usual way. Those rights are still open to them, as Mr Grant KC acknowledged.
44. Notwithstanding that there were further issues as to costs, provision of the documents and a confidentiality club which were being discussed between the parties, the Court is of the view that on the evidence the Maples Ds and D6 unequivocally consented to the amendments in writing in accordance with GCR Order 20 rule 12, and the parties then proceeded on the basis they had been agreed, apart from Japan Solar. The request for a Consent Order at §9 of the letter of 30 December 2022 seems to the Court to be a matter of formality which would formalise the agreement reached.
45. Ps acted in reliance on the agreement as can be seen from Walkers letter of 9 March 2023 and by issuing their original Amendment Summons on 4 May 2023 in the form that they did as relating only to the Japan Solar claim<sup>12</sup>. When they expanded their summons to cover all 4 claims in view of the position taken by the Maples Ds, they did not thereby waive their contention that 3 of the claims did not need the permission of the Court as the amendments had been agreed in writing.
46. In the Court's view the Maples Ds and D6 cannot now resile from their written agreement to permit amendments of the Japan Wind, India Wind and Equis Renewables claims.
47. In addition, procedural fairness dictates that in these circumstances this application will not be considered by the Court to be a strike out hearing. The Defendants were provided with the proposed amendments in August 2022. In the covering letter of 16 August 2022, they were asked if objection was to be taken and if so to identify which aspects were objected to, explaining the basis for the objection, in order that issues could be narrowed or at least crystallised so that they could be determined in an efficient manner. There was no substantive response for over four months. When Ps original Amendment Summons was issued on 4 May 2023 permission was only sought in respect of the Japan Solar claim because Ds had already consented to the amendments for the other three new claims. When on 2 June 2023 the Maples Ds sought to resile from that agreement Ps filed an amended version of their summons on 6 September 2023 seeking permission in respect of the four new claims. Ds did not engage with this application, instead confining themselves to arguments concerning the provision of the Documents in their native format, until they served their evidence in response to the amendment summons on 29 February 2024.

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<sup>12</sup> *Cowan 6*  
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48. In all the circumstances the Court will not now allow those claims to be subjected to consideration on their merits. Having consented to the amendments it is not fair to the Ps to have a full scale merits case advanced by the Maples Ds so late before this hearing in the guise of a strike out application. If at a later stage, the Maples Ds wish to make applications in relation to those three claims they have reserved their position to do so.
49. Permission to amend the Japan Solar claim remains to be determined.

*Is the Japan Solar claim arguable so that leave to amend ought to be granted?*

50. A short history of the emergence of the New Claims first needs to be shortly set out for context.
51. The Ds complain that the New Claims were not disclosed to Mangatal J and then after her decision to set aside leave in 2019, for almost a further 3 years.
52. The factual explanation for this is contained in Mr Cowan's evidence<sup>13</sup>. The Maples Ds argue that there has been a pattern of deliberate concealment by Mr Cowan and no good explanation for the delays.
53. The Ps factual explanation is that in May 2018, Mr Cowan was approached by two individuals who worked for Equis who told him that "*Equis was the subject of a wide-ranging fraud*" in which D3-8 were involved. They told him they had "*reviewed his original Writ of Summons*" and "*realised that [he] did not know about the wrongdoing*" committed by D3-8, and that they had "*a number of documents*" which they said showed D3-8 "*had conspired to defraud*" Ps and other investors in the Equis funds "*out of potentially hundreds of millions of dollars*".<sup>14</sup>
54. These two individuals apparently provided Mr Cowan with the majority of the Documents via Dropbox in September 2018. Additional documents were later provided by them by Zipfile in December 2018. However, apparently neither Mr Cowan nor Walkers carried out "*any full or general review*" of them at that time.<sup>15</sup>
55. Following Mangatal J's Judgment in October 2019 Ps re-amended their case to remove the Japan Solar Trust Claim, and in due course obtained permission to and did serve out their new pleading on D3-8. The new pleading contained, amongst other things, the conspiracy claim pleaded against D3-8 at §§ 32A-32K.

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<sup>13</sup> Cowan 6 and 7

<sup>14</sup> Cowan 6 §§ 9-12

<sup>15</sup> Cowan 6 §§ 13-14, 16

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56. Permission was granted by the Court to serve the Re-Re-Amended Statement of Claim on Ds 3-5 and 7-8 out of the jurisdiction by order dated 27 July 2020.<sup>16</sup> D3-8 are therefore substantive defendants to the existing claims set out in the Re-Re-Amended Statement of Claim, which will proceed to trial irrespective of whether the New Claims are allowed to proceed.
57. As to the delays, according to Mr Cowan<sup>17</sup>, the Documents were not reviewed with a view to assessing whether they might give rise to new claims, until after July 2021.
58. That was due to: (1) his attorneys' mistaken belief that they no longer had access to the Documents provided by Dropbox, which endured until September 2020; (2) the need to determine that it was appropriate for Walkers to use such Documents once they realised they still had access to them; and (3) various other developments in the case.
59. Once the Documents had been reviewed by a new Leading Counsel, who was instructed in September 2021, it became apparent that they gave rise to the New Claims. Because the Documents apparently extend to some 17,000 pages, and relate to complex transactions and structures, this work was necessarily protracted and time-consuming.
60. It is not necessary for the Court to resolve these issues. Notwithstanding these delays the general conduct of Mr Cowan is not in the Court's view generally abusive, based upon the (albeit untested) explanations for the delays given.
61. As to the findings of Mangatal J in 2019 Mr Cowan says that he "*did not deliberately withhold any relevant information and, if [he] did so inadvertently, [he] must apologise*"<sup>18</sup>.
62. One of the arguments made to Mangatal J at the application to set aside leave was that the sudden emergence of the Japan Solar Trust claim was based on additional materials which were not identified in the evidence in support of the *ex parte* application or the skeleton argument and so there was not a fair presentation to the Court<sup>19</sup>. Another point taken was that it was a late invention by Mr Cowan and the Court should see straight through it as a 'try-on'<sup>20</sup>.
63. The seriousness of the non-disclosures and misrepresentations to the Court at the *ex parte* hearing were egregious and are not to be minimised. They are set out at §85 of Mangatal J's Judgment. However, the Court acknowledges that they occurred 5 years ago, and Ps responded to Mangatal J's Judgment by duly withdrawing the Japan Solar Trust Claim.

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<sup>16</sup> Permission was also granted by the Court to serve the Re-Re-Amended Statement of Claim on D6 out of the jurisdiction by order dated 12 January 2021.

<sup>17</sup> Cowan 6 §§ 15-25

<sup>18</sup> Cowan 1 §21

<sup>19</sup> §8 c of the Judgment

<sup>20</sup> §10 (5) *ibid*

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64. It is not clear, notwithstanding the voluminous evidential material on this application, whether there was material in the Documents which Mr Cowan and/or his attorneys knew about, and which should have been disclosed in 2019. That, it seems to the Court is not a useful line of enquiry that can be resolved on the available material and is not necessary for the purpose of determining this application.
65. In addition, the Court does not proceed on the basis that because Mr Cowan made a serious mistake once in this case, as was found by Mangatal J, that he will do so again.

*Approach to arguability of the Japan Solar claim*

66. The Court will not approach this application as a strike out application. The Ps application is for permission to amend.
67. The Court has carefully reviewed the Japan Solar claim to see whether it is intelligible, raises arguable contentions and is supported by the facts as pleaded. It has considered whether it is abusive, inconsistent and/or bound to fail.
68. The Court bears in mind, notwithstanding the (overly) voluminous evidential material on this application, that it is inappropriate on an interlocutory application such as this for the Court to conduct a 'mini trial' to test the merits of the proposed amendments. Regrettably the Court was taken to a huge amount of evidential material over three days and was then left to review more for itself once time at the hearing had run out.
69. The Court also bears in mind that discovery in these proceedings has not yet taken place and the Court does not yet have the full evidential picture. To some extent the parties have chosen the particular evidence they wish the Court to focus upon.
70. As the extensive affidavit evidence has not been tested by cross examination, where allegations of fraudulent conspiracy are made, the Court should be cautious before determining at this stage that the claim is bound to fail.
71. It is also correct to note that the Maples Ds and D6 face existing claims which are also based in fraudulent conspiracy and dishonest assistance, regardless of the outcome of the permission to amend the Japan Solar claim which permission remains necessary for the claim to proceed.

**Japan Solar Claim**<sup>21</sup>

72. The Japan Solar Claim is essentially a contractual claim. It alleges performance fees were due to Special LP in respect of the Japan Solar investments by Equis Asia Fund (“EAF I”) and Equis Asia Fund II LP (“EAF II”). These are funds in respect of which Special LP was a limited partner and the founder partner.
73. It is alleged that the General Partners of EAF I and EAF II failed to distribute to Special LP the sums due to it in respect of performance fees in relation to the Japan Solar investment. Ps’ case is that such failure was in breach of the relevant LPAs, and was induced by some or all of D3-8.
74. The main question as to whether this claim can be maintained is whether it is arguable that Special LP remained entitled to distributions under the amended EAF I LP, including in respect of EAF I’s investment into Japan Solar.

There is no developed case put forward by the Maples Ds in relation to Ps’ claims to distributions in connection with EAF II’s investment in Japan Solar pursuant to clause 13 of the EAF II LPA. It is said that all the points they make concerning EAF I hold good for EAF II, although no amendment was required for EAF II LPA to permit investment into Japan Solar and so the investors were never asked to consent.

75. Ps’ case in relation to EAF I is put on the following basis:

Acting by Special GP, Special LP was a party to the Limited Partnership Agreements (LPAs):

- a) EAF I, dated 18 December 2012 and known as the “EAF I LPA” or the “Fund Partnership Agreement” (the other initial party to which was Equis Asia Fund GP, which was the General Partner of EAF I); and
- b) EAF II, dated 18 November 2014 and known as the “EAF II LPA” (the initial other party to which was Equis Asia Fund II GP, which was the General Partner of EAF II);

Ps’ case is that Special LP was entitled to distributions in respect of investments made by EAF I and EAF II pursuant to the terms of those agreements.<sup>22</sup>

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<sup>21</sup> 4ASC §§ 52-69

<sup>22</sup> 4ASC §§ 52-54

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76. Under the EAF I LPA:

- (1) By clause 13.1, “*all Income Proceeds and Capital Proceeds of the Partnership*” (i.e., EAF I) were required to be distributed in a specific order of priority.
- (2) Pursuant to subparagraphs (c) and (d), “*the Founder Partner*” (i.e., Special LP) was entitled to distributions at the third and fourth stages of that waterfall; By clause 5.1(p) the obligation for making such distributions was that of Equis Asia Fund GP.

77. Similarly, under the EAF II LPA:

By clause 13.1, Special LP had entitlements to materially identical distributions; By clause 5.1(q) the obligation for making such distributions was that of Equis Asia Fund II GP.

*Change to allow investments in Japan*

78. Under the terms of the EAF I LPA, EAF I was not originally permitted to invest in Japan. That jurisdiction did not feature in the definition of “*Target Portfolio Companies*” into which investment was permitted by paragraph 1 of Schedule 1<sup>23</sup>. For EAF I to be able to invest via Japan Solar Limited Partnership<sup>24</sup>, the EAF I LPA had to be amended.

79. D3 (Mr Russell) wrote three types of letters on or around 12 November 2013 on behalf of Equis Asia Fund GP to each of the investors/limited partners in EAF I.

80. These comprised:

- a) A *cover letter*, describing the proposed investment (also known as ‘Project Samurai’). An example of such a letter, sent to the University of Texas Investment Management Company (known as “UTIMCO”) is at Exhibit GAC-7 pp. 16955-16956;
- b) A *consent letter* to be signed by each EAF I investor consenting to an amendment to the definition “Target Portfolio Companies’ in the EAF I LPA to include Japan for the purposes of the investment into Japan Solar. A returned copy of the consent letter, signed by Mark Warner on behalf of UTIMCO, is at Exhibit GAC-7 p.16958; and
- c) A *waiver letter* signed by D3 as authorised signatory of Equis Asia Fund GP which stated that, in relation to EAF I’s investment in Japan Solar, it would: (i) waive any

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<sup>23</sup> 4ASC §§ 55-56

<sup>24</sup> “JSLP”, which was created for this purpose: see GAC-7 pp. 4580-4648  
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management fee payable to it under the EAF I LPA in connection with Japan Solar; and (ii) distribute any amounts payable to Special LP in connection with Japan Solar under clause 13.1(c) and (d) of the EAF I LPA *to other investors instead*. An example of the letter sent to UMTICO is at Exhibit GAC-7 p.16957 (emphasis added).

81. Mr Cowan explains<sup>25</sup> that multiple copies of these letters (as sent to various investors) comprise the ‘Zipfile Documents’ relied upon to ground the Japan Solar Claim. They were provided to Ps in December 2018.
82. Pursuant to the Consent Letters returned by the other investors, the definition of “*Target Portfolio Companies*” in the EAF I LPA was amended so as to permit the Japan Solar investment to be made by EAF I.
83. Ps’ case is that clauses 5.1(p) and 13.1 remained unchanged in the Amended EAF I LPA dated 27 November 2013<sup>26</sup>. It is alleged that under the terms of the relevant contractual documentation as amended, Special LP remained entitled to distributions in respect of EAF I’s investment in Japan Solar.
84. The Maples Ds argue that Special LP’s agreement to waive performance fees in respect of the Japan Solar proceeds<sup>27</sup> was essential to the Japan Solar investment proposition. That was made clear to and known by all stakeholders, and was in the obvious interest of investors.
85. As part of this agreement Special LP “*waived its entitlement to distributions*” in respect of Japan Solar<sup>28</sup>. This they say was because certain Equis partners already had an interest in Japan Solar itself, so they might receive a ‘double windfall’ if they were also entitled to performance fees on the portion of Japan Solar owned by EAF I.
86. Ps acknowledge that this was proposed<sup>29</sup> but contend that this was not put into effect.
87. Mr Ballin says Special LP’s agreement to this is a common approach taken to co investments alongside fund vehicles to mitigate the risk of the manager achieving a double recovery at investors’ expense<sup>30</sup>. Special LP had committed its own capital to EAF I as an investor and made a return on that capital under clause 13. Special LP was not ‘cut out’ of the investment, rather the risk of double recovery was mitigated.

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<sup>25</sup> Cowan 6 §§ 35, 3

<sup>26</sup> 4ASC §§ 57-58

<sup>27</sup> but not fees due under clauses 13.3(a) and (b) of the EAF I LPA

<sup>28</sup> Ballin 3 §6.5

<sup>29</sup> 4ASC §57

<sup>30</sup> Ballin 3 at § 6.15

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88. The Maples Ds argue that Special LP's agreement to waive performance fees did not require amendment of the EAF I LPA. It was open to Special LP to simply agree to that. They point out that EAF I GP waived its own management fee.

89. The Maples Ds also rely on clause 6.26 and 6.27 of the EAF I LPA under the heading 'Side Letters:

*6.26 "All partners agree that the partnership, the Parallel Funds or the General Partner may enter into side letters or side arrangements with some or all limited partners and/or some or all limited partners in Parallel Funds which have the effect of establishing rights or altering or supplementing the terms of this agreement.(side letters)"*

*6.27 Where any Side Letter has the effect of establishing rights or altering or supplementing the terms of this agreement with respect to such limited partner, the partners agree that the terms of such Side Letter shall apply with respect to such limited partner notwithstanding any contrary provisions in this agreement."*

90. The Court agrees that these provisions purport to allow the named parties to agree by side letter to establish rights, or alter or supplement terms in the LPA. As a consequence, if Special LP did agree to the waiver, no amendment to the LPA was necessary.

91. Ps argue <sup>31</sup> under clause 21.1 (Variation of Partnership Agreement with consent) of the EAF I LPA no amendment of the nature described in the Waiver Letter could be made without the "written" and "affirmative" consent of Special LP. Ps say that no such consent was given, and the Court has not been shown any consent letter signed on behalf of Special LP. Mr Russell according to the Ps was only writing on behalf of Equis Asia Fund's GP, not Special LP.

92. The Court is persuaded that Special LP's consent was given. As Mr Ballin says it "... can be inferred from the fact that Special GP on its behalf approved the investment".<sup>32</sup> Special GP consented to the investment in Japan Solar on behalf of Special LP on the terms of the Amended EAF I LPA having signed the Amended LPA.

93. The Court notes that the EAF Investment Approval Request submitted on 16 November 2013 (and referencing the investment committee meeting date of 19 November 2013) says (on page 16 of 160): "To improve the alignment of interests between Equis and the Fund ,Equis has agreed to the following: Equis Asia Fund General Partner will waive the management and performance fees

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<sup>31</sup> 4ASC §59

<sup>32</sup> Ballin 3 §6.13

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*associated with the capital invested by Equis Asia Fund LP into Japan solar LP.*” That reinforces the evidence that this was disclosed to investors including Special LP.

94. The Maples Ds also point to the letters which were sent to the ‘Investors’ in EAF I to confirm that the investment proceeds from Japan that would otherwise be distributable to Special LP under clauses 13.1(c) and (d) of the EAF I LPA would be distributed to the investors.
95. More than the requisite 75% of investors by value replied to confirm their consent<sup>33</sup>. The Court has reviewed examples of these letters which show that consent was given by investors to a package of measures including that there would be no distribution of performance fees to Special LP under clauses 13.1 (c) and (d) of the EAF I LPA.
96. The Maples Ds point to the fact that Special LP was a recipient of one of the said letters (as an ‘Investor’)<sup>34</sup>. The Court has reviewed the letter from Mr Russell to Ms Interdonato of Special LP dated 12 November 2013 enclosing a copy of the investor consent letter.
97. In addition, Equis Asia Fund Special General Partner (the company) in its capacity as General Partner of Equis Asia Fund Special LP (the partnership) passed a signed resolution recording that it was in the best interests of the “Company” (i.e. Special GP) to approve and execute the new amended EAF I LPA in its capacity as general partner of Special LP<sup>35</sup>. Mr Cowan was one of the directors who signed the resolution.
98. The Court is persuaded that in all the circumstances it is safe to conclude that Special LP thereby approved “*the transaction*”. The Court is persuaded that the evidence shows that Special LP knew of EAF I’s investment in Japan Solar and consented to the particular features of it.
99. The Court is not persuaded by Ps argument that those resolutions<sup>36</sup> are resolutions of Equis Asia Fund GP, not of Special GP which are distinct entities, and that matters because it is arguable that Equis Asia Fund GP was not entitled to act on behalf of Special LP. That argument has no real prospect of success given the evidence the Court has reviewed. The argument lacks conviction.
100. As Mr Cowan said in his first affidavit<sup>37</sup>

*‘On 23 September 2013 the LPAC met and considered the Japan Solar..... At that meeting the LPAC unanimously agreed that the investment team pursue the Japan Solar*

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<sup>33</sup> Ballin 3 6.10-6.13

<sup>34</sup> see Ballin3 at §6.13.

<sup>35</sup> which Mr Cowan also signed GAC -9 p 48

<sup>36</sup> Exhibit ABB-3 pp. 1336-1347

<sup>37</sup> Cowan 1 §31

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*LP investment and that the initial funds' investment mandate be amended to permit such investment, on a number of conditions including that the initial funds not be required to pay management or performance fees on their investments in Japan Solar LP'*

101. He also said in his first affidavit<sup>38</sup>

*"Investor consent to change the mandate of the Initial Funds was obtained by late November 2013, when signed consent forms were received from in excess of 75 percent of the limited partners of the Initial Funds, including from Special GP (for and on behalf of Special LP in its capacity as a limited partner of the Initial Funds)."*

102. The Court finds that it is not arguable that in failing to make distributions to Special LP in connection with the investment in Japan Solar: (1) Equis Asia Fund GP was in breach of the Amended EAF I LPA; and (2) Equis Asia Fund II GP was in breach of the EAF II LPA.

103. There are further strong arguments the Maples Ds deploy which reinforce the conclusion that the claim has no real prospect of success. Mr Ballin contends no distributions would have been due to Special LP in respect EAF I's investment in Japan Solar in any event, because the returns never reached the threshold for payment under the waterfall (due to the alleged poor performance of other investments).

104. The Maples Ds say Special LP was to receive (i) a distribution of 'Capital Proceeds' and 'Income Proceeds' amounting to 50% of all such proceeds after repayment to 'Investors' of outstanding commitments together with an amount equal to the 'Preferred Return' (9% annual return on investment) up to a cap, and (ii) a further distribution of 20% of all remaining amounts.

105. Capital and Income proceeds are defined under the LPAs as *"amounts determined by the General Partner after consultation with the Auditors to be in the nature of [capital/income] proceeds and available for distribution by the Partnership"*.

106. The Maples Ds say that the obligation under the LPAs is therefore defined by reference to capital or income of the fund as a whole as derived from all of the funds' many investments, where Special GP determined that amounts were available for distribution.

107. The LPAs did not provide Special LP with any contractual guarantee as to the performance fees that the funds would receive in respect of individual investments. Instead, they provided for the allocation of the funds' investment proceeds as between Special LP and EAF I LP's or EAF II LP's other Investors.

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<sup>38</sup> *Cowan I* §38  
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108. This analysis and whether distributions are to be calculated on a ‘fund as a whole’ makes commercial sense to the Court and it finds that Mr Ballin’s evidence seems credible.
109. For completeness, Ps’ case on Ds’ inducement of breaches of contract is not in the Court’s view sustainable. The Court finds that there is no arguable case that the Maples Ds knew that the Japan Solar proceeds EAF I and II were legally required to be paid to Special LP under the terms of the LPAs and intended to induce that obligation to be breached.
110. As to the dishonest knowledge pleaded<sup>39</sup>, having reviewed the allegations in detail the Court takes the view that they are not sufficiently particularised to found an inference of dishonesty. There are too many bare assertions without proper foundation.
111. It also is argued by the Maples Ds that it is inherently unlikely that they would have conspired to promote and prefer investors' financial interests over their own, as they were all limited partners in Special LP. That point also seems to have some commercial force.
112. The alleged breach of the implied contractual duties<sup>40</sup> under the Special LPA is also not sustainable. No steps are identified which would apply specifically to Mr Cowan's ability to obtain the benefits of being a limited partner of Special LP, as he was treated in the same way as all the other Special LP partners as regards Japan Solar.
113. As to the alleged duty not to frustrate Special LP's ability to enjoy the benefit of its investments and performance fees, the Maples Ds say were prevented by the specific terms of Special LPA from taking part in the operation of the partnership or the management or control of its business affairs.
114. There is, it seems to the Court, on Mr Ballin’s evidence also strength in the Maples Ds' argument that the decision to waive performance fees in respect of Japan Solar was made at a time when the funds and so Special LP had no interest in Japan Solar and so no investment was impaired. The Court accepts the argument on the basis of Mr Ballin’s evidence that the waiver facilitated the making of a profitable investment by the funds to the ultimate benefit of both the funds and Special LP as an investor.

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<sup>39</sup> 4ASC §§63 and 65

<sup>40</sup> 4ASC §32c

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*Abuse of process*

115. The Court is also persuaded that the Japan Solar claim is, given the history of its evolution, an abuse of process and leave to amend so as to bring it should not be given.
116. Mr Cowan's core contention in his original claim was that a trust in favour of Special LP existed over EDL's 20% shareholding in Japan Solar (the "Deemed Interest"). He alleged that the Defendants had conspired to divert those proceeds from Special LP (their rightful owner) to D3 (Mr Russell, the owner of EDL).<sup>41</sup>
117. The basis of Mr Cowan's original claim was therefore that Special LP was the true economic owner of the value of the 'Deemed Interest' (i.e. 20% of the equity in Japan Solar). It was said that was recognized by all stakeholders and this gave rise to a trust in favour of Special LP.
118. Mr Cowan repeatedly said in his first affidavit<sup>42</sup> that Special LP had validly waived any claim to performance fees under the Special LP LPA, and the Deemed Interest was created in order to replace the waived fees.
119. Mr Cowan thereby acknowledged and informed the Court that his understanding (as a limited partner of Special LP and as signatory of the Special GP resolution) was that by the signing of the consent form Special LP had agreed both to the change of mandate and to the terms on which the investors were willing for the funds to invest without performance fees.
120. He pleaded in his original case that Mr Russell and the 'Recipients' who received distributions from EDL in respect of its 'Deemed Interest' in Japan Solar (among whom were D4-D8) (i) knew of the existence of the trust in favour of Special LP and that the proceeds were received in breach of trust, (ii) knowingly assisted in that breach of trust, and (iii) dishonestly conspired to injure Special LP via that breach of trust<sup>43</sup>. The case therefore alleged that the Maples Ds knew that the deemed interest was held on trust for Special LP as a replacement for the performance fees that it had waived. That claim was struck out by Mangatal J.
121. The 'new' Japan Solar claim alleges that the same Defendants knew that the performance fees had *not* been waived. That is an entirely contradictory case in relation to the same performance fees in issue. In the Court's view that inconsistency on the same issue and facts makes the claim liable to be struck out on the basis of abuse of process.

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<sup>41</sup> *see Cowan 1*

<sup>42</sup> *Cowan 1 §§38,57,58,64 and 67*

<sup>43</sup> *As shown by the struck out text in the 4ASC at §§37L to 37R.*

122. Mr Cowan has sought to explain this by saying that he had understood that written consent had been obtained from Special LP<sup>44</sup>. However, he said in his first affidavit<sup>45</sup> that consent to the changes to the investment mandate also amounted to consent to the performance fee waiver. There is no evidence that the other limited partners of Special LP believed any differently.
123. No good explanation has been given to justify this fundamental change of tack. It appears to the Court that the reformulation arises directly from the original claim having been struck out. It is not a case where there has been an omission through carelessness or negligent oversight. This is a complete change of tack.
124. The Court has concluded that Mr Cowan should not be permitted to advance two mutually irreconcilable cases of fraud and conspiracy, based on two different evidential theories as to whether Special LP had or had not validly waived its entitlement to performance fees and what the Maples Defendants are alleged to have known at the material time. The Maples Ds, in the Court's view, should not be vexed unfairly again by the 'new' Japan Solar claim. It would in the Court's view be manifestly unfair to the Maples Ds to have to face this claim when there has been no significant or material change of circumstances or new facts which could not have been reasonably discovered by Mr Cowan from the material he was provided with many years ago.
125. Permission to amend to bring the Japan Solar claim is therefore refused.

*Security for costs*

*The law*

126. Order 23 of rule 1 of the GCR provides as follows:

*“Where on the application of a defendant in an action or other proceedings it appears to the Court*

*(a) that the plaintiff is ordinarily resident out of the jurisdiction...  
then if, having regard to all the circumstances of the case, the Court thinks it just to do so,  
it may order the plaintiff to give security for the defendant's costs of the action or other  
proceedings as it thinks just”.*

127. The Maples Ds would not ordinarily be able to seek security for their costs to trial against Cayman Islands-resident plaintiffs on the basis that they were impecunious.

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<sup>44</sup> Cowan 9 §43b

<sup>45</sup> Cowan 1 §67

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128. In considering whether or not it is just to make an order for security, it is established law that Order 23 must not be applied in such a way as to discriminate against foreign personal plaintiffs<sup>46</sup>.

129. As a result, the discretion cannot be exercised in such a way as to protect defendants:

*“.....against risks to which they would equally be subject, and in relation to which they would have no protection, if the claim or appeal were being brought by a resident within the jurisdiction, merely because the claimant was outside of the jurisdiction”<sup>47</sup>.*

130. What must be shown by an applicant is:

*“... ‘on objectively justified grounds relating to obstacles to or the burden of enforcement’ there is a real risk that it will not be in a position to enforce an order for costs against the claimant/appellant and that, in all the circumstances, it is just to make an order for security. Obviously there must be ‘a proper basis for considering that such obstacles may exist or that enforcement may be encumbered by some extra burden’ but whether the evidence is sufficient in any particular case to satisfy the judge that there is a real risk of serious obstacles to enforcement, will depend on the circumstances of the case. [...]”<sup>48</sup>.*

131. This is based upon what Mance LJ had originally said in *Nasser*:

*“61...if the discretion to order security is to be exercised it should therefore be on objectively justified grounds relating to obstacles to or the burden of enforcement in the context of the particular foreign claimant or country concerned.*

....

*67. The risk against which the present defendants are entitled to protection is thus not that the claimant will not have the assets to pay the costs, and not that the law of her state of residence will not recognise and enforce any judgment against her for costs. It is that the steps taken to enforce any such judgment in the United States will involve an extra burden in terms of costs and delay, compared with any equivalent steps that could be taken here or in any other Brussels/Lugano state. Any order for security for costs in this case should be tailored in amount to reflect the nature and size of the risk against which it is designed to protect.”<sup>49</sup>*

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<sup>46</sup> see per Rix JA in *Walkers v Arnage Holdings & Ors* [2021] (2) CILR 277 at [39]

<sup>47</sup> *Nasser v United Bank of Kuwait* [2002] 1 WLR 1868 §58 per Mance LJ. Under the old rules impecuniosity could be taken into account (§§ 35 and 45). The CPR applying the Human Rights Act changed the analysis

<sup>48</sup> (per Gloster LJ at [76] of *Bestfort Developments LLP v Ras Al Khaimah Investment Authority* [2016] EWCA Civ 1099214 cited with approval by the Cayman Court of Appeal in *Arnage*)

<sup>49</sup> see also *Gong v CDH China Management Company* [2011] (1) CILR 57] applying *Nasser* per Jones J

132. A summary of the principles to be applied can also be found in the judgment of Hamblen LJ in *Danilina*<sup>50</sup>:

“(1) For jurisdiction under CPR r 25.13(2)(a) to be established it is necessary to satisfy two conditions, namely that the claimant is resident (i) out of the jurisdiction and (ii) in a non-Convention state.

(2) Once these jurisdictional conditions are satisfied the court has a discretion to make an order for security for costs under CPR r 25.13(1) if “it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order”.

(3) In order for the court to be so satisfied the court has to ensure that its discretion is being exercised in a non-discriminatory manner for the purposes of articles 6 and 14 of the Convention: see the *Bestfort* case [2017] CP Rep 9, paras 50–51.

(4) This requires “objectively justified grounds relating to obstacles to or the burden of enforcement in the context of the particular foreign claimant or country concerned”: see *Nasser's case* [2002] 1 WLR 1868, para 61 and the *Bestfort* case at para 51.

(5) Such grounds exist where there is a real risk of “substantial obstacles to enforcement” or of an additional burden in terms of cost or delay: see the *Bestfort* case at para 77.

(6) The order for security should generally be tailored to cater for the relevant risk: see *Nasser's case* at para 64.

(7) Where the risk is of non-enforcement, security should usually be ordered by reference to the costs of the proceedings: see, for example, the orders in *De Beer's case* [2003] 1 WLR 38 and the *Bestfort* case.

(8) Where the risk is limited to additional costs or delay, security should usually be ordered by reference to that extra burden of enforcement: see, for example, the order in *Nasser's case*.” \_

133. In the Cayman Islands Court of Appeal Rix JA in *Arnage* having reviewed *Danilina* said:

39. “...the jurisdiction to order security for costs is not founded on the risk of impecuniosity but (inter alia) on a plaintiff being ordinarily resident out of the jurisdiction. Therefore, a plaintiff resident within the jurisdiction cannot in general be made to provide security for costs simply because of the risk of its inability to pay such costs: this can only be done against a corporate plaintiff under the Companies Act. In these circumstances, jurisprudence has established that it is necessary to apply O.23 in a way which does not discriminate against foreign personal plaintiffs.”

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<sup>50</sup> *Danilina v Chernukhin* [2019] 1 WLR 758 (“*Danilina*”) at [51]  
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.....

61. “*Bestfort Developments has been considered and applied in two subsequent court of appeal decisions in England. In De Beer v. Kanaar & Co [2001] EWCA Civ 1318, [2003] 1 WLR 38, the court took into account the ease with which assets in Switzerland could be moved and that enforcement in the United States might be difficult or even impossible. It therefore concluded that there was a real risk that the defendant might be unable to enforce an order for costs “whether in part or at all, due either to lack of available assets against which such an order could be enforced, or to the enforceability of such an order in Florida, or both” (at para [90]), and therefore ordered security for the prospective costs of the action up to the end of trial. In the Danilina case, a similar order was made. In the judgment of Hamblen LJ in that case the court made clear that an order for security should be tailored to cater for the particular foreign claimant and country concerned, as well as for the relevant risk. So far as the latter was concerned, a distinction was to be made between merely additional costs and delay, and the risk of non-enforcement, such as in the form of “substantial obstacles”. In the former case, security would be ordered by reference to the extra burden of enforcement in the latter case, security would be ordered by reference to the costs of the proceedings (as occurred in both De Beer and Danilina)”.*..\_

134. It is therefore possible to take into account the real risk of non-enforcement in a foreign jurisdiction, such as in the form of ‘substantial obstacles’, in addition to difficulties with enforcement in the particular jurisdiction. In such a case it may be not simply the additional costs of enforcement which are taken into account, but in an appropriate case security can be ordered by reference to the costs of the proceedings.
135. However, what must be shown is a real risk of non-enforcement. That is distinct from a real risk of non-recovery because of insufficient assets, as has been made clear in the relevant jurisprudence.
136. Impecuniosity is not a permissible basis on which to order security for costs to trial against a foreign-resident plaintiff (because it is not a permissible basis to seek security against a Cayman Islands-resident plaintiff).

### ***Decision***

#### *Security for costs*

137. In the Court’s assessment the Maples Ds application for security is essentially advanced on the basis that it is just to make an order because they are facing a huge potential irrecovery of their
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costs assuming the matter proceeds to trial and they prevail. As they see it Mr Cowan has brought a wide ranging, reputationally damaging and expensive case without risk to himself. He has not offered any security, nor identified his lifelong friend who is said to be funding the case ‘with no strings attached’. This is not a case where ordering security would stifle his claim.

138. The Maples Ds say on quantum, assuming security is ordered, the decision on the evidence is between \$5 million and \$10 million.

139. The Court makes the following preliminary points:

(a) The application is made over five years since the proceedings were commenced. D6, Mr Carmody, makes no such application.

(b) The gateway relied upon is sub paragraph (a) of GCR O.23 r 1:

*“(1) Where, on the application of a defendant to an action or other proceedings it appears to the Court –*

*(a) that the plaintiff is ordinarily resident out of the jurisdiction; or [...]*

*then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceedings as it thinks just.”*

(c) Mr Cowan has revealed the assets which he has and has said that he would not personally be able to meet a multi-million-dollar costs order against him. If he loses, he stands to lose all that he owns and may even be bankrupted.

(d) The Maples Ds would not be able to seek security for their costs to trial against a Cayman Islands-resident plaintiff on the basis that he was impecunious.

(e) GCR O.23 needs to be applied in a way which does not discriminate against foreign resident plaintiffs. Having insufficient assets to satisfy an adverse costs order is not a basis for obtaining security for costs to trial against a foreign resident plaintiff. That would be contrary to authority as set out above<sup>51</sup>. The Court cannot simply move on to matters of discretion and ignore the juridical basis to make such an order.

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<sup>51</sup> *Nasser v United Bank of Kuwait* [2002] 1 WLR 1868 ; *Gong v CDH China Management Company* [2011 (1) CILR 57] (“Gong”); *Bestfort Developments LLP v Ras Al Khaimah Investment Authority* [2016] 2 CLC 714 ; *Ahmed Hamad Algozaibi v Saad Inv Co* [2017 (2) CILR 602] ; *Danilina v Chernukhin* [2019] 1 WLR 758 ; *Walkers v Arnage Holdings Limited* [2021 (2) CILR 277]

- (f) The only security to which the Maples Ds are entitled under subparagraph GCR O.23 r 1 is security for the additional costs of enforcing a costs order against Mr Cowan outside of the jurisdiction, unless there is a real risk that an order for costs would be unenforceable in the relevant foreign jurisdiction. No such risk has been shown on the evidence (see below) and there is no particular attribute of Mr Cowan to objectively give rise to real risks of non-enforcement. To engage this exception what must be shown is a real risk of non-enforcement, as distinct from a real risk of non-recovery due to insufficient assets.

*The evidence*

140. The Court has reviewed the extensive evidence on the security and funding applications as set out above.
141. The Hong Kong law evidence in Wong 1 (served on behalf of Ps) sets out Mr Wong's opinion that there is no such risk of non-enforcement.<sup>52</sup> The evidence from the Maples Ds<sup>53</sup> does not gainsay his conclusion.
142. Although it is asserted that Mr Cowan would take advantage of any available opportunity to avoid or hinder enforcement against him<sup>54</sup> Mr Cowan points out that he has paid all the costs orders made against him in the proceedings so far.<sup>55</sup>
143. The Maples Ds are only entitled to the additional costs of enforcement in the relevant foreign jurisdiction. No additional costs, greater than the costs of enforcing in the Cayman Islands, have been shown on the evidence to arise. No serious risks relating to obstacles to or the burden of enforcement in Hong Kong have been put forward.
144. Mr Cowan has set out his financial position<sup>56</sup>. His evidence is that his only substantial assets in Hong Kong are his family home worth approximately US\$830,000, jointly owned with his wife on a long leasehold, the mortgage on which was paid off in 2012 and a Harley Davidson motorcycle worth approximately US\$8,000.

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<sup>52</sup> §2.6

<sup>53</sup> *Ritchie 1*

<sup>54</sup> *Ritchie 1* §14

<sup>55</sup> *Cowan 9* §§135-142 and *Cowan 10* §22

<sup>56</sup> *Cowan 8* §9

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145. He has limited additional assets in the US, no assets in the Cayman Islands, and no present source of personal income beyond amounts received from the friend who is funding these proceedings. He claims in these proceedings substantial amounts from the Maples Ds who he says have defrauded him.
146. No doubt if he loses his claim at trial and the Maples Ds obtain an adverse costs order against him they will enforce against his Hong Kong assets. They are not entitled, for the reasons given above, to be secured against the non-recovery of some of those costs.
147. The Court therefore dismisses the application for security in its entirety as there is no good basis for making such an order.
148. The Court has weighed what the Maples Ds say is the injustice of this outcome. As things stand, there is a real likelihood that the Maples Ds may not recover a large proportion of their costs even if they win. That does not change the Court's assessment of the right outcome in this case.

*Disclosure of funding*

149. As to his lifelong friend Mr Cowan says:

*“The only reason I have been able to pursue these proceedings for the past five years is because one of my life-long friends (my “Friend”) has supported me throughout this difficult process by meeting all of my legal costs as he believes I should be able to access justice through the Cayman Islands courts. My Friend has requested that he remain anonymous. As to this financial assistance (the “Pure Funding Assistance”):*

*(a) there is no contract of any sort between my Friend and I because the Pure Funding Assistance has arisen purely due to our life-long friendship; and*

*(b) my Friend will not receive a commercial return of any sort from the Pure Funding Assistance and only asks for the return of the amount funded (with no interest or other uplift) in the event I am successful in these proceedings. If I am unsuccessful then the financial assistance will be written off.”<sup>57</sup>*

150. Mr Cowan has not revealed his friend's identity out of what he says is respect for that friend's desire for anonymity. He has confirmed that the friend is not Mr Phoon.<sup>58</sup>

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<sup>57</sup> Cowan 8 §10

<sup>58</sup> Cowan 10

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*Identity of friend*

151. As the Court has dismissed the application for security the funding disclosure application arises. There is a discretion to award costs against a third party funder<sup>59</sup>. As Justice Doyle recently made clear the Cayman Courts have ancillary jurisdiction in appropriate cases to make orders requiring the disclosure of the identity of funders and details of funding arrangements.
152. The Maples Ds say details of Mr Cowan's friend and the funding ought to be disclosed to facilitate an application for a third party costs order. The Court acknowledges that the costs exposure can now be assessed as a result of the Court's decision on which claims are to proceed and taking into account the basis on which the three claims are allowed to proceed. The parties agreed the claims could be amended on the basis the Maples Ds could be compensated in costs for the amendments. There was no exercise of any discretion by the Court in relation to the amendments.
153. There is nothing to disturb Mr Cowan's evidence that the friend is a 'pure funder' on the terms he has set out or that he wishes to remain anonymous. It is not manifestly incredible in all the circumstances for this to be true and the matter has not been tested on this application by cross examination.
154. Moreover, for such a person to be prepared to personally fund this case is generally to be regarded as being in the public interest, providing that the purpose is to enable what the friend perceives to be a genuine case to be heard. Access to justice is thereby promoted. Another benefit is that fewer people will have to litigate in person, without the benefit of legal assistance.
155. This Court is not inclined to discourage such a friend from assisting a litigant in Mr Cowan's position to secure representation in facing the Maples Ds. Pure funding is not to be discouraged in such circumstances.
156. The Court is of the view that in all the circumstances the disclosure of the identity of the friend is not necessary for justice to be done in this case. Again, in coming to this view it has carefully weighed the injustice the Maples Ds say they would suffer in terms of costs exposure and the evidence they have put forward. They have not revealed their financial positions, and there is no reason for them to do so. The Court has noted the amounts they each personally received from the GIP Sale.

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<sup>59</sup> *Aiden Shipping Co Ltd v Interbulk Ltd (The Vimerion)* [1986] A.C. 965; [1986] 2 All E.R. 409) and *Arnage et al v Walkers*, FSD 105 of 2014 (DDJ), 27 July 2023


157. To order disclosure against the friend's request for anonymity would be likely to discourage like-minded people to fund litigants who have insufficient means to bring cases.<sup>60</sup> It would also be likely in the Court's view to put unfair pressure on the friend.
158. The disclosure application will not be granted on the evidence the Court has been provided with and is dismissed.

#### *Mediation*

159. Following the close of pleadings the Court would endorse the parties attending a mediation in order to settle their disputes. The three claims which have been allowed to proceed should be responded to and the Ps should have an opportunity to reply before the mediation, so the parties know the scope of matters in dispute. The mediation should take place within three months of close of pleadings. Unless the parties agree, the Court would be prepared to order a mediation under Practice Direction No. 3 of 2022.

#### **Conclusion**

160. Ps are refused permission to amend in the form of the Japan Solar claim.
161. The amendments in the form of the Japan Wind, India Wind and Equis Renewables claims have been agreed by the parties.
162. The Maples Ds have agreed that Ps may use the Documents exhibited in Exhibit GAC-7 in the proceedings for the purposes of these claims.
163. Maples Ds' security for costs summons is dismissed and the application for disclosure relating to the third party pure funder is also dismissed.
164. If the parties cannot agree the costs arising the Court will deal with the matter upon written submissions of no more than 5 pages in length.



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**THE HON. MR. JUSTICE RAJ PARKER**  
**JUDGE OF THE GRAND COURT**

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<sup>60</sup> *Hamilton v Fayed* [2003] QB 1175 per Simon Brown LJ at [40], [45]-[48]