The Court of Appeal for Bermuda

CIVIL APPEAL No. 1 of 2019

B E T W E E N:

IMRAN SIDDIQUI

1st Appellant

-and-

STEPHEN CERNICH

2nd Appellant

-and-

CALDERA HOLDINGS LTD

3rd Appellant

-v-

ATHENE HOLDING LIMITED

Respondent

Before: **Clarke, President**
Kay, JA
Smellie, JA

Appearances: Alexander Potts QC, Kennedys, for the Appellants;
Kevin Taylor and Benjamin McCosker, Walkers, for the Respondent

Date of Hearing: **3rd, 4th and 5th June 2019**
Date of Judgment: **20 September 2019**

JUDGMENT

Claim by one Bermuda exempt company against another Bermuda exempt company and its two directors (former directors of the claimant) – allegation that the two former directors had, in breach of their fiduciary duties to the claimant, set up the defendant company with a view to it taking over "Company A", and had used the claimant's confidential information, relating to the possible acquisition of Company A by the claimant, for the benefit of the defendant company and themselves – whether the proceedings against the defendant company should be set aside, stayed or struck out on case management grounds or struck out on the grounds that the claims asserted against it disclosed no reasonable cause of action or were frivolous, embarrassing or an abuse of the process of the court – whether

leave should have been given to serve the two directors with the writ out of the jurisdiction.

CLARKE P:

Introduction

1. This consolidated appeal is against two rulings. The first is the ruling of Hellman J of **28 June 2018**, whereby he dismissed the application of Caldera Holdings Ltd, a Bermuda company ("Caldera"), the third defendant, to stay the action against it on *forum conveniens* grounds. Caldera seeks leave to appeal that decision and, if leave is given, it seeks an order allowing the appeal and imposing the stay sought.

2. The second is the ruling of Chief Justice Hargun dated **14 January 2019**, whereby:

(i) He refused to strike out the writ or summarily to dismiss it on the grounds that:

(a) it failed to disclose a reasonable cause of action against Caldera;

(b) the claim asserted against Caldera was frivolous or embarrassing for want of particularity; and

(c) the proceedings were an abuse of the process of the Court; and

(ii) He gave Athene leave to serve the Statement of Claim out of the jurisdiction.

(iii) He refused Caldera's application for leave to appeal the Ruling of Hellman J of 28 June 2018.

The Chief Justice gave leave to the appellants to appeal from the whole of his Ruling.

The Facts

3. The facts of the case are of some complexity and have been set out at length in the judgments below; and it is necessary to record them herein for the purposes of determining the appeal. I shall endeavour to confine recitation of them to that which is necessary for that purpose.

4. **Athene Holding Ltd** ("Athene") is an exempt Bermuda company. It was formed in 2009. It has what is said to be a "strategic relationship" with **Apollo Global Management LLC** ("Apollo"), a Delaware corporation, which is a publicly traded corporation, with a myriad of subsidiaries. The Apollo Group of companies is a huge entity with many billions of assets under its control. Athene Asset Management LP ("**AAM**"), an indirect subsidiary of Apollo, is Athene's investment manager. The Apollo Group has about 10% of the shares of Athene and controls 45% of the voting power. As at 31 December 2017 five out of twelve of Athene's Directors were employees or consultants of Apollo[1]. These presently include (since 2009) Mr **James Belardi** ("Mr Belardi"), who is Athene's Chairman, Chief Executive Officer and Chief Investment Officer, and a dual employee of both Athene and AAM.

5. Athene has since December 2016 been registered on the New York Stock Exchange. Prior to that it was owned by Alternative Asset Management, an affiliate of Apollo.

6. Athene describes itself (in its 2017 annual filing with the US Securities and Exchange Commission) as "*a leading retirement services company that issues,*

[1] The number of directors appear to have changed since the hearings at first instance. In the Award in respect of the Second JAMS arbitration (see [168] ff below) Apollo was said to appoint 6 of its 15 Board members.

reinsures and acquires retirement savings products designed for the increasing number of individuals and institutions seeking to fund retirement needs". According to that filing, Athene is based in Bermuda with its US subsidiaries' headquarters being located in Iowa.

7. The principal savings products are annuity contracts, of which it is now said to be one of the world's largest providers. It buys blocks of annuity contracts, which guarantee policy holders an income for life in exchange for a lump sum, and invests the assets tied to those contracts with the aim of generating a greater return than is necessary to make payments to annuity holders.

8. As of 1 January 2018 Athene, and its subsidiaries (its primary subsidiaries being insurance and reinsurance companies) had about 1,125 employees located in Bermuda and the United States. It had subsidiaries licensed to carry on insurance business in all 50 States of the Union and the District of Columbia. The subsidiaries were organised and domiciled in either Delaware, Iowa or New York.

9. Athene was intended to operate in a manner that would not cause it to be treated as being engaged in a trade or business within the United States or subject to US federal income tax on its net income. It was a holding company with limited operations of its own. Its insurance and reinsurances subsidiaries owned substantially all of its assets and conducted substantially all of its operations.

10. In Bermuda Athene had, at 31 December 2017, a (leased) office with 24 non-Bermudians working there (other than spouses of Bermudians, holders of permanent residents' certificates, and holders of working residents' certificates). Mr Belardi's evidence was that Athene had a real and significant presence "*on the ground*" in Bermuda and that the vast majority of its board decision-making occurred in Bermuda with the vast majority of its board meetings and official

executive committee meetings being held there. The AGM of shareholders takes place in Bermuda. None of its directors reside in Bermuda.

Mr Siddiqui

11. **Imran Siddiqui** ("Mr Siddiqui"), the first defendant, lives in New York. He joined Apollo in 2008. He was, according to the Statement of Claim in the Second JAMS arbitration, dated 3 May 2018 (i) senior partner of Apollo, (ii) a principal of Apollo Management LP[2], (iii) a Limited Partner of Apollo Advisers VIII LP [3]and (iv) served on the Board of Athene. He was not an employee of Athene. On or about **16 July 2009** he was appointed as an Apollo nominated director of Athene. He is said to have served, in effect, as the lead director in significant aspects of Athene's business, in particular including overall strategic direction, financial underwriting and identification, pricing and execution of strategic transactions: Amended Statement of Claim ("ASOC") [7].

12. Mr Siddiqui's evidence was that almost all of his work for Athene was performed in his capacity as a director of Athene and a partner and employee of Apollo, and almost all of it was carried out in the State of New York where Apollo was domiciled. According to Mr Siddiqui Athene maintained offices in New York and Iowa. He operated out of Apollo's New York office. He said that the day to day operations of Athene, including the vast majority of the business decisions and business activities took place by way of its officers carrying out their functions in the US. All the officers identified on its website lived in the US.

13. However, as Hellman J recorded, Mr Belardi noted that from 2012 until Mr Siddiqui resigned as a director of Athene, Mr Siddiqui travelled to Bermuda 20 times for Athene's board meetings. According to him Athene does not lease or own any office in the US; although some of its US subsidiaries had US offices.

[2] According to the Award in the Second JAMS arbitration he was an employee of this entity (page 7).
[3] Governed by an Amended Partnership Agreement of 24 November 2014.

Mr Cernich

14. **Stephen Cernich** ("Mr Cernich"), the second defendant, is a US citizen, resident in Kentucky. He joined Athene in June 2009. According to a separation agreement dated October 20 2016, he was employed by Athene Annuity and Life Company and its affiliates including Athene and AAM. He was employed in various positions including Chief Actuary and Executive VP, Corporate Development. In the latter role he is said to have been responsible for determining Athene's reserving practices and modelling, including with respect to potential acquisition targets: ASOC [8]. There is an issue as to whether Mr Cernich is to be regarded as an officer, as Mr Belardi describes him to be. In an action brought by him in Delaware against Athene he describes himself as having been an officer and there is plainly a seriously arguable case that he was.[4]

15. In his evidence Mr Cernich said that he believed that during his tenure with Athene the majority of strategic and other "*decision-making efforts*" took place at meetings in New York, Iowa and Los Angeles, and not Bermuda. These meetings often involved representatives of Apollo. Athene's principals maintained assigned office space in the US for which Athene reimbursed its subsidiaries.

16. Mr Belardi noted that from 2012 until Mr Cernich left Athene, Mr Cernich travelled to Bermuda 14 times for Athene's board meetings. Mr Cernich drew a distinction between board meetings and management meetings, the latter of which took place in the US.

Company A

17. According to the ASOC, from 2009 onwards Athene has had plans to acquire a company which has been described as "Company A". Mr Siddiqui and Mr Cernich prepared, assessed and managed Athene's plans for the acquisition of that

[4] Athene's Bye-Laws define "*Officer*" to mean "*any person appointed by the Board to hold an office in the Company*". Mr Cernich was Chief Actuary and an Executive Vice-President, Bye-Law 50 provides for a Register of Directors and Officers and Bye-Law 51 provides that the Board may appoint such officers as the Board may determine. We do not have the Register.

company. Until they left their engagements with Athene and Apollo, they spearheaded the negotiations for the acquisition of Company A.

18. Mr Siddiqui's evidence was that the vast majority of potential witnesses and relevant documents relating to the dispute between Athene and the defendants in relation to Company A are located in New York, as are the legal and financial advisers for both Caldera and Company A. He said that it was from New York that he "*communicated in connection with the transactions at issue by Athene's claim".*

Mr Cernich leaves

19. On **21 June 2016** Mr Cernich entered into a Separation Agreement and General Release with Athene Annuity and Life Company and its affiliates including Athene and AAM. Under this Agreement his employment was to terminate on **June 30 2016**, as it did.

20. By paragraph 7 of the Agreement Mr Cernich represented that he was familiar with and had carefully considered the Restrictive Covenants contained in various Share Agreements itemised in paragraph 3 of the Agreement by which Mr Cernich had been granted or had purchased shares in Athene. He represented that he was fully aware of his obligations thereunder, and agreed to the reasonableness of the Restrictive Covenants and that they were necessary to protect the Company's confidential and proprietary information, goodwill, stable workforce and customer relations.

21. Under paragraph 8 Athene gave Mr Siddiqui a release from all claims in relation to acts or omissions by him prior to the date when the Company signed the Agreement "*..provided, however, that the Company is not releasing you from or with respect to …any claims arising out of any criminal , fraudulent,* ***intentionally wrongful or reckless conduct*****"**. The release was subject to the law of New York,

22. Those terms were confirmed in a replacement agreement dated **20 October 2016** ("the Release") which superseded the earlier agreement.

Mr Siddiqui leaves

23. On or about **20 March 2017** Mr Siddiqui resigned from the Athene Board and tendered his resignation from the Apollo entities by whom he was engaged with effect from **18 June 2017**.

Caldera is formed

24. In **January 2017** Mr Cernich, to the knowledge of Mr Siddiqui, instructed Conyers, Dill to incorporate Caldera in Bermuda. In **July 2017** Caldera was incorporated in Bermuda as an exempt company. Mr Siddiqui and Mr Cernich were its sole directors and shareholders and Mr Cernich its CEO.

25. In the late summer of 2017 Mr Cernich began to discuss with Company A its possible acquisition by Caldera. Athene and Caldera are, as the judge put it, rivals for the hand of Company A and they cannot both succeed.

26. On **3 May 2017**, Athene's US attorneys wrote to Mr Cernich to warn him in relation to a company called Fidelity & Guarantee not to breach the Protective Covenants mentioned in the Release. In the latter part of 2017, there was an exchange of correspondence between Apollo and its US attorneys and Mr Siddiqui's US attorneys in which Apollo warned Mr Siddiqui in relation to Company A not to breach the similar post-employment restrictive covenants contained in the Limited Partnership Agreement of 24 November 2014 ("the Partnership Agreement").

The Litigation

The First JAMS Arbitration

27. On **9 January 2018** (i) Apollo, (ii) Apollo Management LP, and (iii) Apollo Advisers VIII LP (hereafter "the Apollo entities") began an arbitration under the Judicial

Arbitration and Mediation Services ("JAMS") scheme against Mr Siddiqui and Caldera[5]. The arbitration was brought pursuit to an arbitration agreement contained in the Partnership Agreement between Apollo and other affiliated entities and Mr Siddiqui, which provided for any dispute arising out of or relating to the Partnership Agreement to be settled by arbitration in New York applying Delaware law. The claim was based on the alleged breach by Mr Siddiqui of his post-employment restrictive covenants and of his fiduciary duties of confidence and other matters. The claim against Caldera was for tortious interference with contract. Athene was not a party to this arbitration. There were no causes of action based on Bermuda law.

28. The Chief Justice summarised the claim in this arbitration as follows:

> *"[35] In the First JAMS Arbitration, Apollo alleged that Mr Siddiqui was: (a) engaging in work with Caldera that violated his non-compete obligations; and (b) improperly touting new business that was "superior to Athene". Apollo further claimed that Caldera and Mr Siddiqui misappropriated Athene's strategies for purchasing assets in the insurance space and disparaged Apollo and Athene by suggesting a misalignment of interests and potential regulatory risk with respect to the unique business model used by Apollo with respect to Athene."*

29. By a Statement of Claim dated **9th January 2018**, and amended on **29th January 2018**, the claimants sought both a preliminary and a permanent injunction against Mr Siddiqui to prevent him from using confidential information or trade secrets belonging to Apollo relating to Company A. The Statement of Claim recognizes [6] that Mr Siddiqui provided investment advice to Athene and owed a fiduciary duty to Athene not to use its confidential information to its detriment as he was then currently doing.

[5] It was described in the heading as "Company XYZ"; later discovered to be Caldera; and never served,

30. On **23 January 2018** Mr Siddiqui filed a document headed Counterclaims, Third Party Claim, and Response to Statement of Claim in which he denied Apollo's allegations and alleged that Apollo was acting in (in Hellman J's words) bad faith. Hellman J cited paragraph 7 of the pleading as an example of the flavour of his case. In it Mr Siddiqui alleged:

> "*Apollo's wholesale refusal to deal fairly (if at all) with Mr Siddiqui is revelatory of Apollo's true intent: to deploy its virtually unlimited resources to manufacture a claim that is a cover for a money-grab, while stifling legitimate marketplace competition with a non-covered company in which Apollo invests and from which it derives excessive management fees [i.e. Athene].*"

Settlement of the First JAMS Arbitration

31. On **21 February 2018** there was a settlement of the First JAMS arbitration as between the relevant Apollo entities and Mr Siddiqui. Under the Settlement Agreement and Mutual Release ("the Settlement Agreement"), which was governed by the laws of New York, the Apollo entities released "*Mr Siddiqui and his affiliates, employers, and any company formed by Mr Siddiqui (the Siddiqui Released Parties")*" from all claims, complaints, demands or causes of action relating to the Action[6] and/or the Restrictive Covenants that existed as of, or which ever had existed, at any time up to and including the Effective Date (February 21 2018). Mr Siddiqui agreed to continue to be bound by paragraph (e) of the Restrictive Covenants in the Apollo Advisers VIII Limited Partnership Agreement which relates to Confidential Information. Under paragraph 4 of the Agreement Mr Siddiqui agreed to return or destroy within five days all Apollo property in his possession or under his control.[7] On **23 February 2018** Mr

[6] Defined so as to include all the pleadings in the arbitration proceedings,

[7] It appears from the Second JAMS award that as part of the settlement Mr Siddiqui forfeited limited partnership interests worth nearly $ 15 million but Apollo agreed that he would receive over $ 7.5 million in additional distributions.

Siddiqui swore an affidavit attesting to the return or destruction of such property.

32. The Settlement Agreement stated that it was to be governed by the laws of the State of New York, without regard to the conflict of law provisions thereof, and that any disputes in relation to the Release should be resolved exclusively by arbitration conducted before a single arbitrator in New York County, New York.

33. Athene was not a party to the Settlement Agreement and received no consideration under it.

The Present Action

34. On **3 May 2018** Athene issued a Specially Indorsed Writ in the present action. In the Statement of Claim Athene claimed that Mr Siddiqui and Mr Cernich have, unlawfully and in breach of (a) their fiduciary duties; (b) their duties of confidence and (c) their contractual duties owed to Athene, used Athene's trade secrets and its confidential and proprietary information relating or relevant to the acquisition of Company A for the benefit of Caldera and themselves. The writ sought injunctive relief and damages.

35. In relation to Caldera it was said that it is an *alter ego* of Mr Siddiqui and Mr Cernich and that:

> *"By using the Confidential Information in its efforts to acquire or combine with Company A, including by assisting and abetting [Mr Siddiqui and Mr Cernich] in their misuse of Confidential Information, [Caldera] is a party to the breach of the Relevant Fiduciary Duties, the Duty of Confidence, and the Relevant Contractual Duties by [Mr Siddiqui and Mr Cernich]."*

In essence the claim is that Caldera was the corporate vehicle through which and for the benefit of which the breaches of fiduciary duty on the part of Mr Siddiqui and Mr Cernich were perpetrated.

36. The claims in the Bermuda proceedings were summarised by the Chief Justice in terms (many of which are direct quotations from the ASOC, verified by Mr Belardi[8]) which, with some minor additions, I gratefully adopt:

> *"32. In the Bermuda proceedings commenced on 3 May 2018, Athene claims that:*
>
> *(a) Since its inception in 2009, Athene has targeted potential acquisitions and strategic transactions with insurance companies that write fixed annuities. Athene's unique business model involves acquiring and managing US insurance companies and re-insuring fixed annuity liabilities to its Bermuda affiliates. [11][9]*
>
> *(b) Periodically from 2009 to the present, Athene and the target company identified as Company A, which writes fixed annuities, have discussed potential plans for an acquisition or other business combination. On multiple occasions including in 2010, 2012, 2014, and 2016, Athene reviewed acquisition transactions in respect of Company A in which Mr Siddiqui and Mr Cernich directly prepared, assessed and managed Athene's plans for the acquisition of same, including Athene's underwriting of Company A's financial position, pricing, reserves, distribution capabilities and operational capacity, as well as Athene's plans to finance the acquisition of Company A through reinsurance to Bermuda. Mr Siddiqui and Mr Cernich were both aware that Company A remained Athene's principal acquisition prospect up to the time they were no longer affiliated with Athene. [12]*
>
> *(c) As an example of the extent of the involvement of both Mr Siddiqui and Mr Cernich in Athene's potential acquisition*

[8] Paragraph 5 of Mr Belardi's first affidavit expressed the belief that Athene had a good cause of action in respect of the Claim for the reasons set out below it. Paragraph 6 set out what the Claim was. That seems to me an expression of belief that the matters claimed were true. Paragraph 42 of the second affidavit made the matter clear that that was so.

[9] These bracketed references are to the relevant paragraph in the ASOC,

*of Company A, on **18 February 2016,** Mr Cernich delivered a presentation to 22 of the most senior officers and executives of Athene, including Mr Siddiqui, regarding the potential acquisition of Company A. Mr Cernich's presentation incorporated 35 detailed slides discussing, among other topics, Athene's valuation of Company A and the methodology used to reach that valuation, Athene's assessment of the key risks and potential benefits of the acquisition of Company A, and Athene's assessment of the tax consequences and reinsurance opportunities associated with acquiring Company A. The presentation also discussed recommended approaches for Athene to take in pursuing an acquisition of Company A[10]. [16]*

*(d) In **January 2017**, whilst Mr Siddiqui was still a director of Athene, Mr Cernich, with the knowledge of Mr Siddiqui, gave instructions to Bermuda attorneys to incorporate Caldera. Mr Siddiqui and Mr Cernich have used, and are continuing to use, the Confidential Information to assist in their attempt to cause Caldera to acquire Company A. [2] – [4]; [19] – [21];*

(e) During the period in which Mr Siddiqui and Mr Cernich were directors and officers of Athene (and in certain respects, thereafter), they owed certain fiduciary duties to Athene. These duties included obligations of loyalty to Athene, good faith and avoidance of conflicts of duty and self-interest; and the duties set out in section 97 of the Companies Act 1981. Given that Mr Siddiqui and Mr Cernich were spearheading the relevant negotiations for the acquisition of Company A, they were bound by the fiduciary duties to abstain from obtaining for themselves, either secretly or without the informed approval of Athene, any property or business advantage belonging to Athene or for which it had been negotiating. [22] – [23].

(f) The relevant fiduciary duties did not come to an end upon Mr Siddiqui's and Mr Cernich's resignation or termination of their respective offices and in particular, the

[10] Paragraphs 14 and 15 of the ASOC give further details of the extent of the involvement of Mr Siddiqui and Mr Cernich in Athene's efforts to analyse and potentially acquire Company A by reference to the extent to which they had access to the full extent of highly confidential and commercially-sensitive information. Paragraph 18 pleads that the individual defendants have obtained Confidential Information regarding Company A's competitive strength and weaknesses including how Athene could best compete with Company A. The result of that is said to be that, if the Defendants acquired Company A, they would be in a position to "*leverage [Athene's] strategic analysis and models against [Athene]*".

acquisition of Company A was a maturing business opportunity which belonged to Athene. [24].

(g) During the period in which Mr Siddiqui and Mr Cernich were officers of Athene, and in all the time which has elapsed thereafter, Mr Siddiqui and Mr Cernich owed a duty of confidence to Athene in respect of the Confidential Information[11]. Caldera, as agent and/or nominee of Mr Siddiqui and Mr Cernich, owed an obligation of confidence to Athene not to use or disclose the Confidential Information. [25] – [27].

(h) Mr Siddiqui and Mr Cernich have, in breach of their fiduciary duties, used and are continuing to use the Confidential Information, including by disclosure, imputation or transfer to Caldera, in pursuing financing, and seeking legal, financial or other advice in furtherance of the Defendants' efforts and future plans to acquire or combine with Company A. Caldera has actual or imputed knowledge of the ownership of the Confidential Information and that it was imparted in breach of the relevant fiduciary duties, by virtue of it being the agent and/or nominee[12] of Mr Siddiqui and Mr Cernich and Caldera is, by assisting the individual defendants in their misuse of the confidential information itself in breach of the relevant fiduciary duties and the duty of confidence. [32] – [35].

(i) The original Writ also pleaded contractual duties of good faith and fidelity to Athene as implied terms of the contract of employment/service but that plea in respect of contractual duties has been deleted in the Amended Specially Endorsed Writ of Summons dated 16 October 2018.

(j) The Amended Writ also pleads that prior to their separation from Athene, Mr Siddiqui and Mr Cernich formed an intention to remove the Confidential Information from the Plaintiff and to incorporate a new corporate vehicle, Caldera, to hold said Confidential Information and compete with Athene for the acquisition of Company A. [3].

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[11] The definition of "Confidential Information" appears in paragraph 13 of the ASOC, which is quoted at [117] below.

[12] The original plea was that Caldera was the *alter ego* of the individual defendants.

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

37. Athene has not obtained leave to make as against Mr Siddiqui and Mr Cernich the amendment summarised in paragraph 36 (j) above. The amendment was made pursuant to Order 20 Rule 3 and the amended pleading has only been served on Caldera. The order giving Athene leave to serve them outside the jurisdiction relates to the statement of the case in the form which the court considered when giving leave. In *Punjab National Bank (International) Limited [2019] EWHC 89 (Ch)* a statement of claim was extensively amended before it was served, in a way which went much further than providing additional particulars of the existing claim. Chief Master Marsh held that the defendants had been served with a claim that had not been reviewed by the court and which was outside the terms of the order. He expressed the view (*obiter*) that if the claimant had chosen to make amendments which could properly be characterised as "*tidying up*" the claim the defendants would have been served with what was in substance the claim the court had considered and approved.

38. Here, of course, the individual defendants have not been served with the ASOC. I would, however, be disposed to regard the amendment as constituting further particulars of Athene's case and forming part of the material that we should consider in deciding whether there is a serious issue to be tried. The same applies to the amendment to (a) paragraph 17 which substitutes "*agent and/or nominee*" for "*alter ego*" - essentially a clarification as to what is meant; and (b) paragraph 22 which pleads that the "*fiduciary duties to the Plaintiff*" referred to in the unamended Statement of Claim include "*the statutory duties which define the duty of care of officers of Bermuda companies which are enumerated at section 57*

of the Companies Act 1981. As to (a) in circumstances where the basic contention is that Caldera was formed by the individual defendants as the means by which, using Athene's confidential information, Company A could be acquired for their benefit, there is plainly a serious basis for saying that Caldera was the agent or nominee of the individual defendants.

39. I do not accept the suggestion advanced by the appellants that the fact that Athene has failed to apply for permission to file and serve the ASOC as against and on the First and Second appellants, shows that it has no sincere intention in pursuing its claim against the appellants.

The Second JAMS arbitration

40. Also, on **3 May 2018** the Apollo entities and Apollo Capital Management VIII LLC began the Second JAMS arbitration against Mr Siddiqui. By the Statement of Claim in that arbitration the claimants allege that Mr Siddiqui has breached the Settlement Agreement of 21 February 2018 (pursuant to which the arbitration was invoked) by continuing to use and disclose Apollo's confidential information, which is defined thus:

> "*The term 'Confidential Information' refers to all confidential and proprietary information that is not generally known to the public in Apollo's possession, including information that Apollo has directly developed. Thus, the confidential and proprietary information that Apollo has obtained from its client, Athene, while providing investment advisory services to Athene falls within this definition of Confidential Information."*

41. Mr Siddiqui filed a Response to the Statement of Claim and a First Counterclaim dated **9 May 2018** and an Amended Response to the Statement of Claim dated **12 May 2018**. He denies breaching the Settlement Agreement and alleges that the arbitration is part of a campaign by Apollo and Athene to harm Caldera. Further, he alleges that under the Settlement Agreement Apollo released all

claims against him challenging his alleged use of confidential information to acquire Company A. He alleges that Apollo has pursued this "*sham arbitration*" solely to harm his and Caldera's investors and marketplace relationships, and seeks declaratory relief that in so doing it is Apollo, and not he, which has breached the Settlement Agreement. Mr Siddiqui also counterclaims for breach of contract, tortious interference with prospective business relations/prospective economic advantage, and defamation.

42. On **28 November 2018**, the last day of the hearing before the Chief Justice, a new arbitration was started by the Apollo parties against Mr Siddiqui, Caldera and Mr Ming Dang.

43. At the time of the hearings before Hellman J and the Chief Justice the arbitrator had given directions but he had not produced an Award. By the time of this appeal he had done so.

The New York action

44. On **3 May 2018** Caldera and two affiliate companies began an action in the Supreme Court of the State of New York against (i) the claimants in the Second JAMS arbitration, (ii) Athene, (iii) AAM and (iv) Leon Black, the CEO of Apollo. The case was begun by a Summons with Notice (akin to a Specially Endorsed Writ) in which Caldera alleged that there was a conspiracy between Apollo and Athene to manipulate the market for the acquisition of insurance companies. The defendants' misconduct is said to include, but is not limited to, "*unfair business practices, unfair competition, tortious interference with commercial relationships, commercial disparagement and other blatantly anticompetitive activities*". The claim was for damages of not less than $300 million together with punitive or exemplary damages.

45. On **23 May 2018**, the defendants other than Athene filed a Notice of Appearance and Demand for Complaint. On **24 May 2018** Athene filed a Notice of

Appearance and Demand for Complaint "*expressly reserv[ing] all of its rights and defences, including, without limitation, that service of the summons with notice was ineffective, and that there is no personal jurisdiction over Athene*". At the time of the hearing of the appeal there were pending motions to dismiss the action filed by Athene and Apollo.

Service of these proceedings

46. On **8 May 2018** Caldera was served with the writ at its registered office. On **17 May 2018**:

(a) Athene was given leave to serve the writ out of the jurisdiction;

(b) Caldera issued a summons for leave to enter a conditional appearance and sought an order to set aside, stay or strike out the Writ on *forum non conveniens* grounds, or stay it on case management grounds, pending the final determination of the Second JAMS Arbitration and/or the Caldera New York action;

(c) Caldera also sought to strike out the writ or summarily dismiss it on grounds that (a) the claims asserted disclosed no reasonable cause of action against Caldera; and (b) the claims asserted against Caldera were frivolous, or embarrassing for want of particularity or an abuse of the process of the Court.

47. On **22 May 2018** Caldera was given leave to enter a conditional appearance and did so.

48. An order was also made that the strike out application should be adjourned until after the determination of the *forum non conveniens* and case management applications. In the event the former application was determined by Hargun CJ.

The Judgment of Hellman J

49. On **28 June 2018** Hellman J dismissed Caldera's *forum non conveniens*/case management stay applications.

50. In his judgment, after reciting the factual background, Hellman J set out the basic principles in relation to an application to stay in favour of the New York Court on *forum conveniens* grounds, beginning with the classic statement of Lord Goff in *Spiliada Maritime Corp v Capsule Ltd* [1987] 1AC 460 HL at 476 C:

> *"The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be more suitably tried for the interests of all the parties and the ends of justice."*

51. It was common ground that the New York Court had personal jurisdiction over the defendants in the Bermuda Action because, as he said:

> "*Mr Siddiqui is resident in New York; Mr Cernich has agreed to submit to the jurisdiction of the New York Court; and Caldera has commenced proceedings in the New York Court. It was not suggested that the New York Court did not have competent jurisdiction to try the subject matter of the action."*

52. The judge did not find it necessary to decide whether the New York Court would have competent jurisdiction, from a Bermuda perspective, over Athene because Athene would by definition be the plaintiff. He also decided that he was unable to say whether or not Athene had a presence in New York so that the New York Court would have personal jurisdiction over Athene [52].

Factors in favour of New York

53. The judge then went on to consider the factors in favour of New York and those in favour of Bermuda. He summarised the main factors in favour of New York as characterised by the defendants [60] thus:

(1) The Bermuda action duplicates the claims brought in the JAMS arbitrations by Apollo (same alleged facts; same allegedly confidential information; same alleged conduct). It is a reasonable and obvious inference that Apollo and Athene are working together, and that Apollo brought the arbitration proceedings, in part at least, on Athene's behalf.

(2) The most plausible (or least implausible) aspect of the claims against Mr Siddiqui and Mr Cernich are to be found in respectively the Settlement Agreement and the Release, both of which are expressed to be governed by New York law.

(3) New York is the centre of gravity for Athene's claims. Athene has many substantial connections with New York. Its shares are publicly listed on the New York Stock Exchange; it is regulated by the SEC, and on the defendants' case it has a presence in New York. The acts and transactions to which the litigation relates have mainly taken place in New York. Most of the witnesses, including any forensic expert witnesses, are likely to be resident in New York or elsewhere in the US, and that is where most of the documents are likely to be held. The New York Court could readily compel a reluctant witness, whereas the Bermuda Court would have to rely upon a cumbersome letters rogatory procedure to obtain their evidence.

(4) The New York action will proceed in any event. It is undesirable for the Bermuda Court to hear a duplicate action involving the same or substantially the same parties, issues, witnesses and documents, and giving rise to a real risk of conflicting judgments.

Factors in favour of Bermuda

54. The case put forward by Mr Taylor for Athene was, as the judge put it, rooted in the fact that both Athene and Caldera were incorporated as exempt companies in Bermuda which was said to be sufficient, in itself, to establish a strong connection between them and Bermuda.

55. Reliance was placed on the judgment of Ground J, as he then was, *in Arabian American Insurance Company (Bahrain) EC v Al Amarna Insurance and Reinsurance Company Limited* [1994] Bda LR 27. The plaintiff in that case sought a negative declaration that it was not the reinsurer of, or liable to the defendant in respect of, certain reinsurance contracts. It was a captive insurance company incorporated and registered in Bermuda but with no real operation or presence other than the minimum required to satisfy its statutory obligations. The defendant claimed that Kuwait was the appropriate forum.

56. Ground J disagreed. At paragraph 10 of his ruling he said:

> *"The defendant was put in a difficult position by this. Clearly its day to day connection with Bermuda is slight – it does not in fact operate here, and it maintains no offices or operational personnel here. On the other hand it has chosen incorporation in Bermuda for its own purposes and is subject to the requirements of Bermuda's Companies and Insurance Acts, including a requirement to maintain certain accounting records and a quorum of directors within the jurisdiction. I think that in such a case, although the company's connection with Bermuda is minimal, it is real and not to be regarded as fragile or easily displaced: indeed Bermuda is the place where it has chosen to have its seat and is, therefore, by necessary implication the place to whose jurisdiction it has chosen to be subject. I think that cogent grounds would be needed to supplant that choice.*
>
> *I am reinforced in this by the reasoning of the Court of Appeal in Banco Atlantico v BBME [1990] 2 Lloyd's Rep 504 at p.510 per Bingham LJ:*

> *'Although the Judge described BBME's connection with this forum as "not a fragile one", it is in truth very solid indeed. It must be rare that a corporation resists suit in its domiciliary forum. Rarely would this court refuse jurisdiction in such a case. In my judgment very clear and weighty grounds for doing so were not shown.'*

57. Hellman J recorded the further submissions of Mr Taylor in the following terms:

> *"[1] The claims against Mr Siddiqui and Mr Cernich were connected to Bermuda in that they were founded on duties which these defendants allegedly owed to Athene by reason of their roles as respectively former director and former officer and/or senior employee of the company.*
>
> *[2] On the present application, the task of the court was not to evaluate the merits of Athene's claims but to determine the forum in which those merits should be adjudicated. The claims for breach of fiduciary duty (including breach of statutory duty under the 1981 Act) and breach of confidence were governed by Bermuda law. Admittedly the claim against Mr Cernich for breach of the Release was governed by New York law, but Athene had no analogous claim against Mr Siddiqui for breach of the Settlement Agreement as it was not a party to that Agreement. The claim against Caldera was governed by Bermuda law (although in my judgment it could also be formulated under New York law, as mutatis mutandis it has been by Apollo in the Second JAMS arbitration).*
>
> *(1) Although Apollo, and various affiliates of Apollo and Athene, are parties to the Second JAMS arbitration and the New York action, they are separate and distinct legal entities to Athene. Moreover, Athene is not a party to the Settlement Agreement upon which the Second JAMS arbitration is founded and it is doubtful whether Athene would be able to enforce any award in Apollo's favour. However, I have no doubt that Apollo would enforce the award. Neither Mr Cernich nor Caldera are parties to the Second JAMS arbitration, and neither Mr Siddiqui nor Mr Cernich are parties to the New York action.*

> *(2) The fact that most of the witnesses are likely to be resident in New York or elsewhere in the US is not an obstacle to trying the action in Bermuda. There is easy access to Bermuda from New York and the US generally by plane. I interpolate that it would also be possible for the Court to hear evidence remotely by Skype or via a secure video link. There is no evidence that any potential witness would refuse to give evidence in Bermuda, and if they did the letters rogatory procedure would be a perfectly serviceable way to obtain their evidence. In large scale cross-border litigation, discovery often involves several jurisdictions and is often conducted electronically. The physical location of the discoverable documents therefore presents no impediment to the trial taking place in Bermuda. I should add that it is important not to elide New York and the US as a whole: at the state level, Iowa and California, where Athene's subsidiaries have a US presence, are separate jurisdictions to New York.*
>
> *(3) The New York action is at a very early stage. Whether it will proceed to trial is a matter for speculation. Mr Taylor submitted that the action was a rhetorical gesture filed as a response to the Statement of Claim in the Second JAMS arbitration. I am not in a position to rule on that point. However, if the New York action does proceed to trial, it will not necessarily do so in relation to Athene, as the New York Court has yet to determine whether it has jurisdiction over the company. Having commenced the New York action apparently in relation to the same underlying facts as the Second JAMS arbitration, it lies ill with Caldera to complain about a multiplicity of proceedings."*

58. Hellman J found Mr Taylor's submissions the more persuasive. He decided that Caldera had failed to establish cogent grounds as to why the Court should set aside, stay or strike out Athene's claim on *forum conveniens* grounds. He adjudged that Caldera had not been sued as a mere device to bring proceedings against Mr Siddiqui and Mr Cernich but as an alleged wrongdoer in its own right. These two defendants were sued because of their relationship to Caldera, their former relationship to Athene, and their actions in relation to those two companies. Their joinder as parties, he held, did not materially strengthen Caldera's claims that New York was the appropriate forum. Nor did the second

JAMS Arbitration, as Apollo and its affiliates were separate legal entities. One aspect of Athene's claim against Mr Cernich (for breach of the Release) was governed by New York law but on Athene's case the remainder of its claims against the three defendants were not. The location of documents and witnesses in New York and elsewhere in the US was no real impediment to a trial in Bermuda.

59. In relation to the claim to stay on case management grounds, the judge thought that neither the New York action, nor the Second JAMS arbitration, provided a good reason for a stay on those grounds. To accede to it would be to grant the *forum non conveniens* stay application "*by the back door*".

60. The appellants submit that this phraseology was inapposite since the temporal effect of a case management stay and a *forum non conveniens* stay are different. Since, however, as will become apparent, I am not persuaded that, in the light of the Second Award in the JAMS arbitration or the existence, for the moment, of the New York action that any different order should have been made, the question is moot.

61. On **12 July 2018** Caldera sought leave to appeal the decision of Hellman J. CJ Hargun declined to give leave.

The judgment of the Chief Justice on the application for leave to appeal from the decision of Hellman J.

62. In his judgment Hargun CJ referred to the fact that a decision whether or not to grant a stay on *forum non conveniens* or case management grounds was a discretionary one and that an appellate court was unlikely to interfere with the decision made unless the court had made an error of law. He referred to the decision of Sir Alastair Blair-Kerr P. in *Fordingbridge International Agencies Limited v American Centennial Insurance Company* (Bermuda Civil Appeal No. 15

of 1986), where he referred to the words of Lord Brandon in *The Abidin Daver* [1984] 1 AC 398:

> *"… Where the judge of first instance has exercised his discretion in one way or the other, the grounds on which an appellate court is entitled to interfere with the decision which he has made are of limited character. It cannot interfere simply because its members considered that they would, if themselves sitting at first instance, have reached a different conclusion. It can only interfere in three cases: (1) where the judge has misdirected himself with regard to the principles in accordance with which his discretion had to be exercised; (2) where the judge, in exercising his discretion, has taken into account matters which he ought not to have done or failed to take into account matters which he ought to have done; or (3) where the decision is plainly wrong."*

63. The observations of Lord Brandon are reflected in part of a relevant English practice direction[13] in relation to the test for the grant of leave to appeal against discretionary decisions:

> "*The Court of Appeal does not interfere with the exercise of discretion of a judge unless the court is satisfied the judge was wrong.* ***The burden on an appellant is a heavy one****…It will be rare, therefore, for a trial judge to give leave on a pure question of discretion. He may do so if the case raises a point of general principle on which the opinion of a higher court is required" (emphasis added).*

64. Mr Potts submitted to the Chief Justice, as he did to us, that Hellman J was in error in not determining the applicable law and should have determined that the applicable law in relation to the issue in the Bermuda proceedings was that of New York. As to that, it is plain that Hellman J did determine the applicable law.

[13] English Practice Direction (Court of Appeal: Leave to Appeal in Skeleton Arguments) [1999] 1 WLR 2 at paragraph 16 per Lord Woolf MR.

65. At paragraph 63 of his Ruling, Hellman J summarised Athene's submissions with respect to the governing law of the dispute as follows:

> "*The claims for breach of fiduciary duty (including breach of statutory duty under the 1981 Act) and breach of confidence were governed by Bermuda law".*

At paragraph 60 he summarised Caldera's submissions with respect to the governing law:

> "*The most plausible (or least implausible) aspect of the claims against Mr Siddiqui and Mr Cernich are to be found in respectively the Settlement Agreement and the Release, both of which are expressed to be governed by New York law".*

66. Then at paragraph 64 he concluded:

> *"I find [Athene's] submissions the more persuasive"*

Then he said at paragraph 65:

> *"It is true that one aspect of Athene's claims against Mr Cernich is governed by New York law. But on Athene's case the remainder of its claims against all three defendants are not".*

67. Hargun CJ accepted that, to the extent that Mr Cernich claimed that he was released from any claims as a result of the Release Agreement, that issue was governed by New York law, as was any issue as to whether Mr Siddiqui had been released from any claim under the Settlement Agreement. But Athene's claim, at least against Mr Siddiqui and Mr Cernich in respect to breach of fiduciary duty and confidential information, was likely to be governed by Bermuda law.

68. The suggestion that the judge should have found that all of Athene's causes of action were governed by New York law appeared to the Chief Justice to be unwarranted. Whether and to what extent they owed fiduciary and other duties to Athene in their capacity as directors and officers of Athene, either at common law or under section 97 of the *Companies Act 1981,* and whether there had been a breach of such duty was likely to be governed by Bermuda law. So was the related issue of whether Athene could maintain an action in the light of the indemnity and waiver provided to directors and officers under Bye Law 56 of Athene's Bye Laws.

69. The scope of the cause of action based upon breach of confidence and whether that had been breached was also, the Chief Justice found, likely to be governed by Bermuda law. So also, he held, was the scope of the recently pleaded additional cause of action based upon the assertion that prior to their separation from Athene, Mr Siddiqui and Mr Cernich formed an intention to remove confidential information from Athene and to incorporate a new corporate vehicle to hold the confidential information for the purpose of competing with Athene.[14]

70. In my judgment, the analysis of the Chief Justice on the applicable law was correct. The duties of directors and officers of Bermuda companies are governed by Bermuda law because matters of corporate governance are naturally to be governed by the law of the place in which the corporation is incorporated. As Ground CJ said in *Sino-Jp Fund Company Ltd v Pacific Electric Wire & Cable Company Ltd and Others* [2006] Bda L.R. 51 at paragraph 15 "*…in favour of Bermuda is the fact that the company is incorporated here, and that its internal governance is therefore subject to Bermuda law*".[15] The statutory duties which

[14] I rather doubt whether the formation of an intention as pleaded amounts to a different cause of action as opposed to a fact which supports the claims in breach of fiduciary duty and breach of confidence. The ASOC does not in terms make a claim in conspiracy or any cause of action not included in the original pleading. It may be necessary to consider hereafter whether that is what Athene is asserting; and, if so, whether leave is (a) needed and (b) should be granted against Mr Siddiqui and Mr Cernich.

[15] In *Base Metal Trading v Shamurin* [2005] 1 WLR 1157, Arden LJ summarized the position at [69]: "*In my judgment, the law of the place of incorporation applies to the duties inherent in the office of director and it is irrelevant that the alleged breach of duty was committed, or the loss incurred, in some other jurisdiction".*

define the duty of care of officers to Bermuda companies are set out in section 97 of the Companies Act 1981 and are necessarily a matter of that law. I regard the proposition that the duties of Athene's directors and officers to Athene are governed by the law of New York as wrong or, at the very least, unlikely to be correct.

71. The second submission was that the judge failed to place any weight on the location of the parties' directors, officers, employees, agents and service providers. Hargun CJ pointed to the fact that the judge set out those factors at paragraphs 60 to 63 and, as an exercise of his discretion, he found the submissions made on behalf of Athene to be persuasive. That was his discretionary decision and it was to be assumed that he has taken these factors into account.

72. I agree with this analysis. It is plain that the judge took account of the appellants' submissions. One of the reasons why he found the appellants submission less persuasive is contained in paragraph 63 (4) of his ruling, which I now repeat:

> *"There is easy access to Bermuda from New York and the US generally by plane. I interpolate that it would also be possible for the Court to hear evidence remotely by Skype or via a secure video link. There is no evidence that any potential witness would refuse to give evidence in Bermuda, and if they did the letters rogatory procedure would be a perfectly serviceable way to obtain their evidence. In large scale cross-border litigation, discovery often involves several jurisdictions and is often conducted electronically. The physical location of the discoverable documents therefore presents no impediment to the trial taking place in Bermuda".*

73. In 2019, in an era of instantaneous communication and convenient air travel, that was a view he was entitled to take: see the comments of Ground CJ in *Universal Reinsurance Co Ltd v Holden & Co Inc* [2006] Bda L.R. 26, at page 7. Moreover, New York does not seem to me markedly more convenient. Mr Siddiqui

lives there. But Mr Cernich lives in Kentucky; any Athene records in Bermuda would have to be available in New York; and any Athene resident personnel who were needed would, themselves have to travel there.

74. The third submission was that the judge wrongly placed weight, or placed undue weight, on the fact that Caldera was a company incorporated in Bermuda. As to that the Chief Justice referred to the fact that in *National Iranian Oil Company v Ashland Overseas Trading Limited* (Bermuda Civil Appeal number 15 of 1987) the Court of Appeal rejected the submission that by the very nature of exempt companies in Bermuda, their connection with the jurisdiction, for the purpose of a *forum non conveniens* analysis should be considered fragile. In paragraph 44 of his judgment DaCosta JA said (rightly in my view):

> *"It is a trite observation that an exempt company incorporated under the provisions of the Exempted Companies Act, 1950, is a local statutory creature…It is* ***firmly anchored in Bermuda*** *though its activities may reach out to the ends of the Earth".*

75. Mr Potts submitted that this approach should no longer be followed. I would accept that there may be cases in which the firmness of grip on Bermuda of a Bermuda exempt company's anchor may be reduced because of factors that tug in a different direction; but this case does not seem to me to be one of them.

76. The Chief Justice observed that the cases relied upon on behalf of Caldera such as *Nilon Limited v Royal Investments SA* [2015] UKPC 2 and *Livingston Properties Equities Inc. v JSC MCC Eurochem* (Eastern Caribbean Court of Appeal, 18 September 2018) showed that other factors may point to another jurisdiction being the more appropriate forum than the place of the defendant. In *Nilon* the underlying dispute had no connection with the BVI other than that it was the place of Nilon's incorporation. As to that he observed:

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

77. I cannot regard Hellman J as having placed undue weight on Caldera being a Bermuda company. As Ground J (as he then was) said in *Arabian American Insurance Co (Bahrain) EC v Al Amana Insurance and Reinsurance Co Ltd* (above) in relation to a Bermuda captive reinsurer:

> "*although the company's connection with Bermuda is minimal, it is real and not to be regarded as fragile or easily displaced: indeed Bermuda is the place where it has chosen to have its seat and is, therefore, by necessary implication the place to whose jurisdiction it has chosen to be subject. I think that cogent grounds would be needed to supplant that choice".*

78. The fourth submission was that the judge failed to give any weight to the relationship between Athene and Apollo and the fact that Athene and Apollo were seeking substantially the same relief in a different jurisdiction based substantially on the same facts. As to that paragraph 60 (1) of Hellman J's ruling made it plain, the Chief Justice said, that he had taken this submission into account.

79. I would add reference to what Hellman J said in paragraph [67] of his Ruling:

> *"The undesirable consequence of two (or more) separate sets of proceedings is only relevant where the foreign forum is the appropriate one. See the leading judgment of DaCosta JA in the Iranian Oil Company case at page 47, analysing The Abidin Daver. As I am not persuaded that New York is clearly and distinctly the appropriate forum, the possibility of multiple proceedings is of little relevance to Caldera's forum non conveniens application".*

80. In addition, it is relevant to consider what Athene could have done to assert its rights. It was not a party to any relevant arbitration agreement. So, the alternative action suggested is an action in New York. It is difficult to see why that would have been markedly preferable to a claim in Bermuda. The fact that there was a pending arbitration between Apollo entities and Mr Siddiqui, to which neither Athene nor Mr Cernich nor Caldera were parties and which did not address any of the claims in the Bermuda action, did nothing to increase the appropriateness of New York for an action by Athene. Nor did the existence of Caldera's New York action, commenced on 3 May 2018, in respect of which the one and a half page Summons with Notice was in the most general of terms (saying that it "*arises out of Defendants' conspiracy to manipulate the market for acquisitions of insurance companies")* and to which neither Mr Siddiqui nor Mr Cernich were parties.

81. As to the case management stay the Chief Justice said[16]:

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

[16] This citation corrects certain misprints in the Chief Justice's judgment where he quotes from paragraph 60 of the judgment of Hellman J.

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

82. The Chief Justice was not satisfied that Hellman J fell into an arguable error of law and accordingly refused leave to appeal.

83. In my judgment neither Hellman J nor the Chief Justice are shown to have erred in law in relation to their approach to the forum conveniens/case management stay applications. The decision whether or not to grant a stay is a discretionary one. It was, in my judgment open to Hellman J to decide that New York was not shown to be the natural forum. The Chief Justice found no error of law in the ruling of Hellman J and nor do I. He, himself, decided that Bermuda was clearly the appropriate forum when deciding to give leave to serve out of the jurisdiction.

84. Neither of these decisions are surprising. Athene and Caldera are Bermuda companies. Athene is not a mere nameplate. It carries on relevant activity of substance here. The promoters of Caldera chose a Bermuda seat for it. The company's seat is where, generally speaking, it can expect to be sued. Mr Siddiqui was a director and Mr Cernich is said to be an officer of Athene. The nature and extent of their duties is likely to be governed by the laws of Bermuda. We have, thus, a claim brought by one Bermuda company against another Bermuda company and its former officers in relation to alleged breaches of duty and confidence owed to the claimant company in relation to a plan to buy another company, which company the defendant company also has it in mind to purchase. These facts do not mandate Bermuda as a jurisdiction but it would,

in my judgment, require strong grounds to justify staying a Bermuda action on the footing that New York was the natural forum. Like the judge I do not regard those grounds as having been made out. More significantly it does not seem to me that Hellman J has erred in law in reaching the conclusion that he did.

85. On **29 June 2018**, the day after the release of the Ruling of Hellman J, Mr Siddiqui and Mr Cernich filed a summons seeking an order that the Concurrent Writ which had been served on them be set aside, as against them, and that the order of 17 May 2018 granting leave to serve it out of the jurisdiction be set aside. To that application I now turn.

The challenge by Mr Siddiqui and Mr Cernich to the grant of leave to serve out of the jurisdiction

86. The Chief Justice began his judgment on this topic by referring to the general principles relating to service out of the jurisdiction as set out in the judgment of Lord Collins in *Altimo Holdings v Kyrgyz Mobil Tel Ltd*. [2012] 1 WLR 1804 at [71]:

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

Stolzenberg (No 2) [1998] 1 WLR 547, 555-7 per Waller LJ, affd [2002] 1 AC 1; Bols Distilleries BV v Superior Yacht Services [2006] UKPC 45, [2007] 1 WLR 12, [26]-[28]. ***Third****, the claimant must satisfy the court that in all the circumstances the Isle of Man is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction."*

Serious issue to be tried

87. Under this heading the Chief Justice considered a number of submissions as to why there was no serious issue to be tried, having set out a broad outline of the case against Mr Cernich and Mr Siddiqui in the following terms [47]:

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

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

Mr Cernich, owes an obligation of confidence to Athene not to use or disclose the confidential information.

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

88. The Chief Justice then proceeded to deal with a series of contentions on the part of Mr Siddiqui and Mr Cernich as to why the proceedings against them were defective, which it is necessary to consider seriatim.

Fiduciary duties

89. The first contention was that any fiduciary duties which Mr Siddiqui and Mr Cernich may have owed to Athene in their capacity as directors and officers of Athene came to an end once they resigned as officers and directors.

90. As to that the Chief Justice accepted [48] that it may be correct that fiduciary duties come to an end on resignation, but it was strongly arguable that an officer was not entitled to exploit a business opportunity which he had developed on behalf of a company for his own personal benefit after resignation from that company.

91. This topic was addressed by Cockerell J in *Recovery Partners v Rukhadze & Ors* [2018] EWHC 2918 in the following passages, cited by the Chief Justice:

"70 The starting point, which was not in issue is that:

i) It is not a breach of fiduciary duty for a fiduciary to resign from his post, regardless of how much damage it causes the company; CMS Dolphin at [87], [95]. British Midland Tool at [89]. Shepherd Investments Ltd v Walters [2007] FSR 15, Balston v Headline Filters Ltd [1990] FSR 385 at 412.

ii) In general, fiduciary duties do not extend beyond the end of the relevant relationship: "We do not recognize the concept of a fiduciary obligation which continues notwithstanding the determination of the particular relationship which gives rise to it. Equity does not demand a duty of undivided loyalty from a former employee to his former employer": Attorney General v Blake [1998] Ch 439 at 453. iii) As Snell puts it at 7-013, a fiduciary is not barred from "resigning and exploiting opportunities within the market in which his principal operates, where he did not resign from his fiduciary position with a view to exploiting such opportunities and where the opportunity was not one which his principal was pursuing at the time of resignation or thereafter."

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

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

73 The underlying basis of the liability of a fiduciary who exploits after his resignation a maturing business opportunity of the company is that the opportunity is to be treated as if it were property of the company in relation to which the fiduciary owed fiduciary duties. By seeking to exploit the opportunity after resignation he is appropriating for himself that property: CMS Dolphin at [96]."

92. The appellants submit that the Chief Justice misstated the law. Reliance is placed on paragraphs 60 and 61 of the Judgment in *Recovery Partners* where the judge said:

> *"60 Such limited guidance as the authorities provide indicate to me that a business opportunity may be regarded as "maturing" so long as there is contact between the principal and a third party with regard to future business and that contact has progressed to the stage where some outlines of future contractual relations are in play. There need not be a draft contract or any imminence of agreement. Such regimented requirements would be out of keeping with the very fact sensitive nature of these cases as pointed out by Rix LJ in Foster Bryant Surveying Ltd v Bryant [2007] EWCA Civ 200; [2007] BCC 804 at [76]) – a passage to which I shall return below.*
>
> *61 I should note that there is a certain controversy about the applicability of the "maturing business opportunity" criterion, arising out of the judgment of the Court of Appeal in Re Bhullar Bros [2003] EWCA Civ 424 [2003] BCC 711 where the Court of Appeal declined to apply it (see Prentice & Payne "The Corporate Opportunity Doctrine" in [2004] LQR 198) refusing to limit itself to maturing business opportunities which are being pursued. However, it was not suggested for the Defendants that the doubts expressed there are relevant here; and that implicit concession appears to me to be correct given that that case was a case of active steps entirely pre-resignation.*
>
> *62 I would also note that this approach to what constitutes a maturing business opportunity also seems to be consistent with the position on opportunities which are not likely to eventuate for the principal. Here the authorities indicate clearly that a fiduciary may be in breach by diverting an opportunity even if it is unlikely that the principal will be able to secure that opportunity: see for example Canadian Aero at p 383-4, Re Bhullar at 723D and most clearly perhaps IDC v Cooley [1972] 1 WLR 443 where the chances of the principal securing the opportunity were found to be no better than 10%."*

93. In the present case Athene's claim is that Mr Siddiqui and Mr Cernich spearheaded Athene's plans for the acquisition of Company A (as set out in [13] – 15] of the ASOC and as exemplified in the presentation on 18 February 2016 to 22 senior personnel pleaded [16] of the ASOC). In paragraph 12 of the ASOC it is claimed that:

> *"**periodically from 2009 to the present**, [Athene] **and Company A have discussed potential plans for an acquisition or other business combination**. On multiple occasions, including at least in 2010 2014 and 2016 Athene reviewed acquisition transactions in respect of Company A".*

94. In the light of that it would seem to me that, when Mr Cernich left in June 2016 there could arguably be said to be a maturing business opportunity. Mr Siddiqui stayed on the Apollo board working, as the Second JAMS Award puts it (page 7), "*on his next venture (which ultimately became Caldera) and was biding his time until Athene went public in a transaction in which Siddiqi received stock that he sold for at least $ 40 million"*, Caldera was then formed, pursuant to arrangements which started in January 2017, for, *inter alia*, a possible purchase of Company A. After Mr Cernich left Athene, Mr Siddiqui, as the Award revealed, leaked information to him. After Mr Siddiqui left Apollo in March 2017 the first attempt was made by Caldera to acquire Company A in late 2017 [page 9 of the Award]. In April 2018 Athene made a bid for Company A. The picture is of an opportunity which existed when Mr Cernich and Siddiqui were at Athene, which they left in order that Caldera might take it up. Paragraph 12 of the ASOC pleads in terms that "*The Officer Defendants were each aware that Company A remained the Plaintiff's principal acquisition prospect up to the time that they were no longer affiliated with [Athene] ".* The acquisition is one which Athene says that it still wishes to make if that can be done at the right price.

95. In my judgment the Chief Justice was entitled to take the view that Athene's case on maturing business opportunity raised a serious issue to be tried (as he

confirmed in his 15 March 2019 Ruling this was not the sole ground for holding that there was a serious issue to be tried). As he observed in that Ruling [90]:

> *"Whether a particular corporate opportunity is mature (or tangible) is clearly a fact sensitive issue which may depend upon what actions had been taken by the company in relation to that opportunity. It may also depend upon the nature of the corporate opportunity itself and whether the opportunity was being actively pursued by the company at the time the relevant directors resigned. As the decision in Recovery Partners v Rukhadze & Ors [2018] EWHC 2918 [60-61] recognises, this is a developing area of the law and not susceptible to fixed rules to be applied in all cases."*

96. The characteristics of a "*maturing business opportunity*" are debatable. Relevant considerations may, as it seems to me, include (a) the extent to which the claimant company has worked in developing the possibility of entering into the putative transaction; and (b) the extent to which the company has engaged with the proposed target. The court will also need to consider the length of time required, in the relevant market, in order for opportunities to "mature". Further, as the passage from *Snell* cited at 70 (ii) of *Recovery Partners* indicates, it may be relevant to consider whether the fiduciary in question resigned from his fiduciary position with a view to exploiting the opportunity and whether the opportunity was one which his principal was pursuing at the time of resignation or thereafter. The assertion made by Mr Potts *in arguendo* before us, and without supporting evidence, that Company A has since approached Caldera with a proposal for its acquisition by Caldera, may also, if correct, be a factor to be examined as to how it came about.

97. The Chief Justice appears to have rejected the argument that there was no basis for a claim for breach of fiduciary duty/confidence by reference to his description of Athene's factual case, as verified by Mr Belardi's sworn affidavit [42], in the following terms:

> *"[49] …. It is said that during the period whilst Mr Siddiqui and Mr Cernich were officers of Athene, they managed the assessment and evaluation of potential transactions and business opportunities for Athene, including, in respect of Company A. They were substantially responsible for and had significant oversight of Athene's "confidential and proprietary business plans and trade secrets, including, but not limited to, its method of valuation, transaction structuring, accounting, capitalisation, sources of capital, intercompany financing arrangements, reserving strategies, reinvestment opportunities, tax status, operational environment and capacity and reinsurance"*[17]*.*
>
> *[50] During 2016 and 2017, Mr Cernich and Mr Siddiqui vacated their offices with Athene and caused Caldera to be incorporated in or about July 2017, for purposes that included acquiring an interest in Company A. It is said that Caldera is utilising the confidential information acquired by Mr Siddiqui and Mr Cernich whilst they were officers of Athene."*

In my judgment he was entitled to do so.

Bye-Laws 56 and 57.1

98. Mr Siddiqui contended that any fiduciary duties he might have owed to Athene were expressly limited in scope because he was Apollo's nominated director and was entitled to rely on Bye Law 56 and 57.1 of Athene's Bye Laws.

99. Bye Law 56.1 indemnifies a director and officer of Athene in respect of any action taken against him and Athene waives any claim or right of action against a director and officer to take any action in the performance of his duties "*provided that such waiver shall not extend to any matter in respect of any fraud or dishonesty in relation to the Company or its Subsidiaries which may attach to such Covered Person*".

[17] The words italicised constitute the definition of "Confidential Information" in paragraph 13 of the ASOC.

100. The Chief Justice regarded it as strongly arguable that the pleaded conduct of Mr Siddiqui and Mr Cernich of (a) knowingly diverting a maturing business opportunity of Athene (developed by them whilst they were officers and directors of Athene) for their personal benefit after their resignation; (b) utilising the confidential information of Athene to achieve that purpose; and (c) prior to their separation from Athene forming an intention to remove the confidential information from Athene and to incorporate a new corporate vehicle to hold the confidential information and compete with Athene for the acquisition of Company A, is conduct which is "dishonest" within the meaning of Bye Law 56.

101. Bye Law 57.1, in material part, provides that:

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

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

102. The Chief Justice accepted that the effect of the first part of the Bye Law clarified the position that when a director or officer is presented with a business opportunity in his capacity as an officer, director or employee of the Apollo group, he is not obliged to offer that business opportunity to Athene and if he fails to do so, he will not be in breach of any fiduciary duty which he may owe to Athene. He is allowed to pass the business opportunity to another member of the Apollo Group.

103. But, as he held, if the business opportunity is presented to a director or officer, in his capacity as a director or officer of Athene, then he is duty-bound to present that opportunity to Athene. Bye Law 57.1 did not appear to him to allow an Apollo nominated director of Athene to divert such business opportunities for his personal interest; and to have no application to the factual situation where a director and officer of Athene, who is actively engaged in pursuing a business opportunity on behalf of Athene, diverts that opportunity for his personal benefit.

104. That was a (provisional) view to which, in my judgment the Chief Justice was fully entitled to come. I would add that it is, as it seems to me, questionable whether, when it was Athene which had been working on the plan to purchase Company A, its officers can properly be regarded as being presented with an opportunity to purchase that Company. It could be said that what they were doing was pursuing it themselves. It would, also, be particularly strange if Apollo could take a business opportunity being developed by Athene to itself in circumstances where one of its subsidiaries is Athene's Investment Manager.

Settlement Agreement with Mr Siddiqui

105. It was argued before the Chief Justice that any breaches of fiduciary duty by Mr Siddiqui had been settled as a consequence of the Settlement Agreement and

Mutual Release dated 21 February 2018. The Chief Justice observed that the precise scope of that agreement might depend upon the niceties of New York Law. But, in any event, Athene was not a party to it and could not, in consequence, be said to have settled any of its rights. He also noted that the provision in paragraph 3 that "*the parties further acknowledge and agree that Apollo shall not take any action to encourage or support Athene Holding Ltd. or its subsidiaries or affiliated in asserting any claims covered by or relating to this release or related to facts alleged in the Action*" appeared to acknowledge that the facts alleged in the arbitration proceedings which gave rise to the Settlement Agreement may provide independent causes of action on the part of Athene and that those causes of action on the part of Athene have not been compromised.

Separation Agreement and General Release with Mr Cernich

106. Mr Cernich claimed that the Release dated 20 October 2016 represented "*the full and complete agreement*" and that, as a result Athene had compromised any and all causes of action which it may have had against Mr Cernich. The Chief Justice accepted that, since the Release is governed by New York law, all issues of interpretation of the agreement were matters for that law. But, on the face of the document, it appeared to him to be an agreement whereby Athene agreed to make certain payments to Mr Cernich in relation to his termination of employment and Mr Cernich in return agreed to provide a general release to Athene. On its face there did not appear to be a release of any causes of action which Athene may have against Mr Cernich.

107. In his later judgment of 15 March 2019, the Chief Justice recognised that he had overlooked the limited release set out in the last sentence of paragraph 8 of the Agreement (on the second page on which paragraph 8 appears). But, as he there observed, the release is limited in that it is expressly provided:

> "*that the Company is not releasing you from or with respect to, and the foregoing release by the Company does not*

> *include, any claim arising out of…**intentionally wrongful**… Conduct by you.*"

108. As he observed, the precise meaning of this qualification is a matter of construction by reference to New York law. However, the pleaded conduct in relation to the wrongful use of confidential information and prior agreement to remove confidential information appeared to him to be expressly excluded by the last wording in the last sentence of paragraph 8. The same analysis would appear to apply in relation to the conduct aimed at diverting a corporate opportunity (subject to the maturity point).

109. It appears so to me also. What Athene pleads against Mr Siddiqui and Mr Cernich is intentionally wrongful conduct: as is apparent from the following quotes from the ASOC:

> *"Prior to their separation from the Plaintiff, the Officer Defendants formed an intention to remove the aforesaid confidential information from the Company and to incorporate a new corporate vehicle – the Third Defendant – to hold said confidential information and compete with the Plaintiff for the acquisition of Company A" [3].*
>
> *"…the Officer Defendants have used the Confidential Information, including by disclosure, dissemination, transmission, imputation and/or transfer to the Third Defendant and in pursuing financing and seeking legal, financial or other advice, in furtherance of the Defendants' efforts and future plans to acquire or combine with Company A" [32].*

Credibility

110. The Chief Justice was invited to accept the sworn evidence of Mr Siddiqui and Mr Cernich and conclude that what were said to be unparticularised allegations made in the Statement of Claim were bound to fail. The Chief Justice declined to accept that invitation and observed that there were aspects of Mr Siddiqui's

evidence which were clearly in conflict with the contemporaneous correspondence.

111. He referred to the fact that in paragraph 35 of his first affidavit Mr Siddiqui has said:

> "*After I had departed from both Athene and from Apollo in 2017 (but only afterwards), I also began to develop a business plan of my own. I then decided to join Mr Cernich, and together we founded Caldera Holdings Ltd. as an exempt company in Bermuda. As I have indicated, Caldera was incorporated on 11 July 2017, nearly 4 months after I had ceased acting as a director of Athene, and nearly a month after my resignation at Apollo became effective after a period of gardening leave*".

112. The clear impression sought to be given was that the idea of incorporating Caldera only materialised after Mr Siddiqui left Athene on 20 March 2017. But documentation recently disclosed in an affidavit of Benjamin McCosker cast doubt on that assertion. Mr McCosker exhibited an email chain which showed that in January 2017 Mr Cernich was instructing Conyers Dill and Pearman, Bermuda attorneys, to incorporate an exempt company and had selected the name Caldera Holdings Ltd. Mr Cernich forwarded this email chain to Mr Siddiqui on 27 January 2017.

113. Accordingly, it seemed to the Chief Justice reasonably clear (i) that Mr Siddiqui was at the very least aware in January 2017, whilst he was a director and officer of Athene, that his former colleague Mr Cernich was incorporating Caldera; (ii) that Mr Siddiqui had already decided in January 2017 to join Mr Cernich in this new venture; and (iii) that Mr Siddiqui was less than frank in his first affidavit in relation to this issue.

114. In addition, Mr McCosker disclosed further emails which showed that in January 2017, whilst Mr Siddiqui was a director and officer of Athene, he was

communicating with Mr Cernich in relation to the business affairs of Athene, using his private Gmail address. These emails suggested that Mr Siddiqui's current business association with Mr Cernich started before Mr Siddiqui terminated his relationship with Athene. The Chief Justice accepted that there was a reasonable inference to be drawn that these exchanges were intended to be hidden from Athene at a time when Mr Siddiqui was a director and officer of Athene.

115. In paragraph 62 of his judgment the Chief Justice said:

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

Confidential Information

116. Both before Hellman J, the Chief Justice, and us Mr Potts QC contended that the particularity of the Statement of Claim was woefully inadequate in specifying

the information which was said to be confidential and to have been misused. He placed particular reliance on the observations of Laddie J in *Ocular Sciences Ltd. et al v Aspect Vision Care* [1997] RPC 289, at 359-360:

> "*… It is well recognised that breach of confidence actions can be used to oppress and harass competitors and ex-employees. The courts are therefore careful to ensure that the Plaintiff gives full and proper particulars of all confidential information on which he intends to rely in the proceedings. If the Plaintiff fails to do this the Court* ***may infer that the purpose of the litigation is harassment rather than the protection of the Plaintiff's rights*** *and may strike out the action as an abuse of process…*
>
> *… Just as it may be an abuse of process to fail properly to identify the information on which the Plaintiff relies,* ***it can be an abuse to give proper particulars of information which is not, in fact, confidential. A claim based even in part on wide and unsupportable claims of confidentiality can be used as an instrument of oppression or harassment*** *against a Defendant. It can be used to destroy an ex-employee's ability to obtain employment or a competitor's ability to compete…*
>
> *…* ***The normal approach of the Court is that if a plaintiff wishes to seek relief against a defendant for misuse of confidential information it is his duty to ensure that the defendant knows what information is in issue*** *… for at least two other reasons. First, the plaintiff usually seeks an injunction to restrain the defendant from using its confidential information.* ***Unless the confidential information is properly identified, an injunction in such terms is of uncertain scope and may be difficult to enforce … Secondly, the defendant must know what he has to meet. He may wish to show that the items of information relied on by the plaintiff are matters of public knowledge.*** *His ability to defend himself will be compromised if the plaintiff can rely on matters of which no proper warning was given.* ***It is for all these reasons that failure to give proper particulars may be a particularly damaging abuse of process****"*
> [Emphasis added]

117. In *Vestergaard Frandsen A/S v Bestnet Europe Ltd [2013] UKSC 11* Lord Neuberger PSC drew attention to the need for the law to maintain a realistic and fair balance between (i) effectively protecting trade secrets and (ii) not unreasonably inhibiting competition in the market place.

118. Mr Potts submitted that the present case was a classic example of an attempt to oppress and harass competitors and ex-employees. In order to get a case off the ground it would be necessary to plead with particularity what exactly was the confidential information, seeking, if necessary, some form of Confidentiality Club order so that the pleading should not be publicly accessible[18]. But that was not done. The want of particularity was such that, together with other matters, the Court should regard the action as an abuse of process, and an attempt to stop Caldera from getting Company A, even if Athene could not acquire it itself.

119. The Chief Justice helpfully summarised the particulars of Confidential Information set out in paragraphs 12 – 18 of the ASOC as follows:

> *"64 …….In paragraph 13 it is pleaded that Mr Siddiqui and Mr Cernich together managed the assessment and evaluation of potential transactions and business opportunities for Athene, including in respect of Company A, and was substantially responsible for and had significant oversight of Athene's confidential and proprietary business plans and trade secrets, including its method for valuation, transaction structuring, accounting, capitalisation, sources of capital, intracompany financing arrangements, reserving strategies, reinvestment opportunities, tax status, operational environment and capacity and reinsurance. This information is referred to by Athene as confidential information and it is said that it took the form of not only physical and electronic information and documents, but also intangible, intrinsic knowledge imparted to Mr Siddiqui and Mr Cernich (and ultimately then on to Caldera) by virtue of*

[18] On 22 May 2018 Hellman J made directions in relation to the separate hearing of the stay applications and the leave to serve out application and ordered that the hearing on 22 May 209 and the hearing of the stay applications should be *in camera*.

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

120. Hellman J had some criticism of the pleading, saying that there was force in Mr Potts' submission the Athene had failed to plead full and proper particulars of the allegedly confidential information and that the claim against Caldera was "*legally incoherent*"[19]; but observed that the defects could be cured by judicious amendments to the statement of claim. He regarded the confidential information as pleaded with sufficient particularity for him to understand in broad terms the nature of Athene's case which was sufficient for the hearing before him. The Chief Justice agreed with this view.

121. I do not regard either judge as having made any error of law in their approach. The matters pleaded cover a wide range and are pleaded in headline form and in broad terms. At the same time, the matters pleaded (or at least many of them) are inherently likely to be confidential to Athene. This does not seem to me to be inapposite in the circumstances. Athene has in effect pleaded the items of confidential information which it knows the defendants to have been working on when with Athene. The defendants will, in the nature of things, know exactly what that information was.

122. I would not regard it as right to reject the claim at this stage for want of further particularity, which can, itself, be addressed by an application for particulars

[19] This was a reference to the use of the phrase "*alter ego*".

later. Further, as the Chief Justice pointed out [113] the discovery process may reveal the extent to which the individual defendants have removed confidential information and the extent to which (if at all) they have made use of information confidential to Athene. The email exchanges exhibited to Mr McCosker's affidavit suggest that, whilst Mr Siddiqui was still a director and officer of Athene, he and Mr Cernich were exchanging emails regarding the business of Athene. Athene contends, with some force, that they were disclosing confidential information in breach of their fiduciary duties and duties of confidence.

Prior design

123. The Chief Justice observed that in paragraph 3 of the ASOC it was asserted that prior to their separation from Athene, Mr Siddiqui and Mr Cernich formed an intention to remove the confidential information from Athene and to incorporate a new corporate vehicle – Caldera – to hold the confidential information and compete with Athene for the acquisition of Company A. He regarded this new allegation as appearing to be supported by the emails exhibited to the affidavit of Benjamin McCosker which appeared to show that Mr Siddiqui was corresponding with Mr Cernich and others in relation to the incorporation of Caldera in January 2017, at a time when he was a director and officer of Athene. He was also discussing other business opportunities. and disclosing what Athene contended was its confidential information. That contention appears to be borne out by the finding in the Second JAMS Award: see [186] below.

124. Mr Siddiqui denied that the information was confidential or related to the acquisition of Company A. Mr Siddiqui accepts that after he left Athene proposals were made by Caldera to acquire Company A. In his first affidavit he says Caldera submitted various proposals to Company A beginning in or about September 2017.

125. The upshot of the Chief Justice's consideration of these disparate matters was his conclusion that there was a serious issue to be decided between Athene and

Mr Siddiqui and Mr Cernich, in the sense that Athene had a realistic prospect of success in relation to the pleaded case against those defendants. In my judgment that was a conclusion which he was entitled to reach.

The Order 11 Gateway

126. The Chief Justice then turned to consider the Order 11 gateways. Hellman J had given leave to serve out on two grounds;

(1) under Order 11, rule 1(1)(b): "*an injunction is sought ordering the defendant to… refrain from doing anything within the jurisdiction*"; and

(2) under Order11, rule 1(1)(c): "*the claim is brought against a person duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper party thereto"*

127. As to the first ground the submission on behalf of the two individual defendants was that the rule only addressed injunctions seeking to restrain conduct within Bermuda. Mr Siddiqui and Mr Cernich argued that there was no possible basis for Athene to assert that either they or Caldera would be taking relevant steps within the jurisdiction of Bermuda. The proposed acquisition of Company A and all associated acts and events would likely take place in the United States. Athene argued that it was likely to be necessary, in relation to any acquisition of Company A, for Caldera to instruct Bermuda counsel to draft the necessary Board resolutions and give the necessary legal opinions; and that Caldera may also have to instruct Bermuda accountants.

128. The Chief Justice was of the view that, even if technically the proceedings against Caldera could be said to come within Order 11 rule 1(1)(b), they did not come within the spirit of what is intended by this sub-rule and accordingly declined to give leave to serve out on this basis. Athene has not sought to appeal that decision.

129. As to the second ground, it was contended that there was no proper basis for characterising Caldera as a legitimate "*anchor defendant*" against whom Athena had a viable claim or a possible cause of action. As to that the Chief Justice observed that Caldera was being sued in its own right on the basis (a) that it was wrongfully utilising confidential information which belonged to Athene; and (b) for liability incurred as an agent or nominee of Mr Siddiqui and Mr Cernich in seeking to divert the maturing business opportunity (the acquisition of Company A) for its own benefit. Independent liability incurred by Caldera as an agent of Mr Siddiqui and Mr Cernich was sufficient for the purposes of serving Caldera within the Jurisdiction as an "*anchor defendant*" for the purposes of RSC, Order 11, rule 1(1)(c). The claims raised a serious issue to be tried as against Caldera. The proceedings against Caldera were not bound to fail nor had Caldera been sued as a device to obtain jurisdiction over Mr Siddiqui and Mr Cernich.

130. Accordingly, Mr Siddiqui and Mr Cernich were clearly necessary and proper parties, who would perfectly properly have been sued in the same proceedings if all the parties were subject to the jurisdiction of Bermuda. That that is the appropriate test appears from *Joliet 2010 v Goji Ltd* [2012] Bda LR 76 at [47]; and *Petroleo Brasilliero SA Mellitus Shipping Inc ("The Baltic Flame")* [2001] 1 All ER (Comm) 993 at [33].

131. In my judgment the Chief Justice was right in this conclusion. Athene's case is that Mr Siddiqui and Mr Cernich, in their capacity as directors and/or officers of a Bermuda company breached their Bermuda law governed duties to that company by incorporating Caldera, another Bermuda company, and seeking to confer upon it the benefit of the breaches of their duties to Athene. In circumstances where the claim is that Caldera was the vehicle by which the individual defendants intended to profit from their breach of fiduciary duty Caldera was an obvious defendant. If all three appellants were in Bermuda they

would almost inevitably be joined in the same proceedings and it would be desirable to do so in order to ensure that any orders again Caldera were effective.

Forum conveniens

132. The Chief Justice identified the factors which, it could be said by Athene and by the defendants as indicating that Bermuda was or was not clearly the appropriate forum.

Factors in favour of Bermuda

133. So far as Athene was concerned the factors identified by the Chief Justice (in terms which I summarise) were these:

(1) At the heart of the Bermuda action is the breach of duties owed by directors and officers (Mr Siddiqui and Mr Cernich) to a company incorporated in Bermuda pursuant to the Bermuda Companies Act 1981. Athene leases an office in Bermuda at which services are performed for Athene. The Chief Justice referred to the number of times from 2012 to 2017 in which Mr Siddiqui (20) and Mr Cernich (14) travelled to Bermuda to attend meetings of the Board of Directors of Athene.

(2) The breach of fiduciary duty alleged in relation to the diversion of a maturing business opportunity belonging to Athene is likely to be governed by Bermuda law and in particular the scope and interpretation of section 97 of the Bermuda Companies Act 1981. Common law fiduciary duties owed by a director to a company incorporated in Bermuda would in principle be governed by Bermuda law: see *Base Metal Trading v Shamurin* [2005] 1 WLR 1157 at [69].

(3) Mr Siddiqui and Mr Cernich had incorporated a company in Bermuda (Caldera) and were now its shareholders and directors and officers. Caldera seeks to acquire Company A in competition with Athene and is

named as the Third Defendant in the Bermuda proceedings. Caldera, incorporated in Bermuda under the Companies Act 1981 is subject to the jurisdiction of Bermuda and has been served with process as of right. This in itself is a strong connection with Bermuda: see what Bingham LJ said in *Banco Atlantico*, as to which see [56] above.

(4) In paragraph 9(b) of his fourth affidavit sworn on 16 November 2018 Mr Siddiqui says that any fiduciary duties he may owe under Bermuda law, including section 97 of the Companies Act 1981, were expressly limited in time to the period of his directorship and expressly limited in scope as a result of the fact that he was an Apollo nominated director. In support of that assertion Mr Siddiqui relies upon, inter alia, the wording of Bye Law 56 of Athene's Bye Laws. The meaning and scope of Bye Law 56 is governed by Bermuda law.

(5) In the same paragraph 9(b) Mr Siddiqui asserts that the scope of any fiduciary duties which he may owe to Athene under Bermuda law is also limited by Bye Law 57.1. The precise scope of Bye Law 57.1 was likely to be a matter of argument which was likely to take place on the basis that the Bye Law is to be interpreted by reference to Bermuda law.

(6) Bye Law 84 provided that:

> "*In the event that any dispute arises concerning the Act or out of or in connection with these Bye-laws, including any question regarding the existence and scope of any Bye-law and/or whether there has been any breach of the Act or these Bye-laws by an Officer or Director (whether or not such a claim is brought in the name of a Shareholder or in the name of the Company), any such dispute shall be subject to the exclusive jurisdiction of the Supreme Court of Bermuda".*

134. The terms of Bye Law 84 raise the question as to whether its terms could be enforced against directors or officers as contractual terms, bearing in mind that section 97 (2) of the Companies Act 1981 provides that every officer of a company shall comply with the 1981 Act, the regulations and the Bye-laws of the Company.

135. Hellman J took the view that Section 97 (2) did not have the effect that the individual defendants as directors and officers of Athene were bound by the exclusive jurisdiction clause. All that it meant, in context, was that in exercising his powers and discharging his duties, a director or officer should comply with the regulations and Bye-laws of the company. It did not mean that the individual defendants were contractually bound by the Bye-laws as if they were members.

136. As to that the Chief Justice cited the observation of Burnton J in *Globalink Telecommunications Ltd v Wilmbury* [2003] 1 BCLC 154 (which had not been cited to Hellman J) to the effect that the Articles of a company:

> "*may be expressly or impliedly incorporated in the contract between the company and a director. They will be incorporated in the contract between the company and a director. They will be incorporated*[20] *if the director accepts appointment "on the footing of the Articles", and relatively little may be required to incorporate the articles by implication: per Ferris J at para [26] of his judgment in John v Price Waterhouse [2002] 1 WLR 953*]".

Globalink has been followed in Bermuda in *Peiris v Daniels* [2015] Bda LR 16.

137. The Chief Justice took the view that Mr Siddiqui accepted that the terms of the relevant Bye-Laws could be enforced by and against the directors and officers of Athene since he now relied on and wished to enforce the terms of Bye Laws 56 and 57.1. The Court could assume, in the absence of any contrary evidence, that

[20] This passage is as cited in paragraph [85] of the judgment of the Chief Justice.

both the individual defendants took office as directors and officers on the basis that they could rely on those Bye Laws as contractual terms (this would seem to me particularly likely given the waiver and exemptions that Bye-Laws 56 and 57.1 provide for directors and officers) and there was no indication that they did so on the basis of accepting some Bye Laws whilst rejecting others.

138. Mr Potts said that what was being submitted to the Chief Justice was that if, which was denied, the Bye-Laws applied to Mr Siddiqui, then he was entitled to the benefit of the Bye-Laws. They were not conceding that the directors and officers were bound by the Bye-laws. I find it difficult to discern that from paragraph 9 (b) of Mr Siddiqui's fourth affidavit where he claims that his fiduciary duties:

> "*…were expressly limited in scope as a result of the fact that I was an Apollo-nominated director (including, but not only, as a result of the express wording of Bye-law 56 and Bye-Law 57.1….I note that Athene's Bye-Laws do not appear to have been put before the Court… at the ex parte hearing"*

139. This approach appears again in paragraph 13 b. iii of Mr Siddiqui's Fifth Affidavit where he says (in relation to the emails in January 2017 relating to the formation of Caldera:

> "*At the time these emails appear to have been sent and received, I was still an Apollo nominated director of Athene Holding Ltd. (although I resigned shortly thereafter, on 13 March 2017 with effect from 20 March 2017). Any duties that I might have owed to Athene Holding Ltd. at the* ***time were circumscribed by virtue of my relationship with Apollo, and by virtue of the circumstances of my appointment as an Apollo nominated director, as Athene Holding Ltd's own Bye-Laws recognise*****"** (Bold added).

140. It appears again in Mr Potts' supplemental submissions made for the purpose of the hearing before the Chief Justice in March 2019, where he said:

> "*7. The First and Second Defendants do not take issue with the proposition that some of the Plaintiff's Bye-Laws' provisions, as amended from time to time, are likely to be relevant – to some extent – to the totality of the disputes between the Plaintiff and the First and Second Defendants (and other interested or related parties)". (emphasis in the original)*
>
> *8. Indeed, the First and Second Defendants point out and submit that (in addition to the many other points that undermine the Plaintiff's own allegations, and which the First and Second Defendants will be entitled to rely upon by way of defences and counterclaims, if these proceedings move forwards, contrary but[21] without prejudice to the Defendants' current applications and submissions, and subject to the Defendants' rights of appeal)* ***the Plaintiff's Bye-Laws' own express provisions with respect to indemnification and exculpation (Bye-law 56), as well as business opportunities (Bye-law 57), make the Plaintiff's alleged claims against the First and Second Defendants for alleged breaches of fiduciary or statutory duties legally unsustainable (even on the assumption that Bermuda law is applied to such claims), absent properly particularised (and appropriately evidenced) allegations of fraud and dishonesty."*** [Bold added)

141. There seems to me no error in the Chief Justice's approach. It is tolerably plain from Mr Siddiqui's evidence that he sought to rely on the express wording of Bye-Laws 56 and 57.1, an approach which necessarily assumed their application to him. If those Bye-laws applied there is no apparent reason why Bye-law 84 should not also apply.

142. I would add that it seems to me that, if the individual defendants were under a statutory obligation under the Companies Act 1981 to comply with the Bye-laws, they were bound not to resist the provision in those Bye-laws that any such dispute as is referred to in Bye-law 84 should be subject to the jurisdiction of

Bermuda and nowhere else. Nor can I see any good reason to limit the application of Bye-law 84 to a derivative action in the name of the company or a shareholders' dispute with the company.

143. On the basis that the exclusive jurisdiction clause in Bye Law 84 was a term of their engagement as officers of Athene, Mr Siddiqui and Mr Cernich were bound to submit to Bermuda jurisdiction,unless they could point to exceptional circumstances which could not have been foreseen: see *Antec International Ltd v Biosafety USA Inc* [2006] EWHC 47 at [7].

144. The Chief Justice held that in light of the exclusive jurisdiction clause in Bye Law 84 the significance of related arbitration and court proceedings in New York was questionable. Further the New York action, commenced by Caldera, was at a very early stage and whether it proceeded to trial was a matter for speculation. Athene did not accept that the New York court has jurisdiction over it.

145. I recognize that Bye-Law 84 had not been relied on for the purpose of seeking leave to serve out. But its terms cannot, in my judgment, be ignored for the purpose of deciding the appropriate forum. At the very least it shows the importance that Caldera attached to at least some disputes concerning whether Directors or Officers had complied with the Act or the Bye-laws being determined in Bermuda.

The Advisory Services Agreement

146. On **23 August 2016** Apollo Management Holdings LP (together with its affiliates who might provide services thereunder from time to time), defined as "Apollo", entered into an agreement with Athene and its subsidiaries, defined as "the Companies". The agreement was an agreement that Apollo would make available to the Companies Apollo employees or consultants to provide advisory services. Paragraph 4 (b) of the Agreement provided for an indemnity in favour of Apollo and its "*affiliates, directors, officers, Consultants, fiduciaries, managers,*

controlling persons, employees and agents" from any and all "*actions, causes of action, suits, claims , liabilities, losses, damages and our-of-pocket expenses*" arising out of or in any way related to the Services provided by Apollo to the Companies under the Agreement, provided that no indemnification should be available for liabilities arising from the relevant individual's "*wilful misconduct, gross negligence or fraud*". The Agreement provided in section 5 (b) for the Indemnitees to have freedom to pursue or engage in any business even if in competition with the Companies; or to do business with customers of the Companies; and not to be obliged to communicate or present to the Companies, but to be able itself to pursue, any corporate opportunities. The Agreement was subject to New York law and the non-exclusive jurisdiction of the state and federal courts of New York.

147. This Agreement and the sixth affidavit of Mr Siddiqui were submitted after the hearing before the Chief Justice had concluded, and Athene has not had an opportunity to respond to it. As the Chief Justice observed, the scope of this Agreement and the scope of the indemnity contained in Bye Law 56 are materially different. Bye Law 56, in broad terms, provided indemnity to directors and officers in relation to all actions and/or omissions unless the covered person acted fraudulently and dishonestly in relation to Athene. The Advisory Services Agreement on the other hand will not provide indemnity if the liability arose as a result of an indemnitee's "*wilful misconduct**, gross negligence** or fraud*". Paragraph 4(b) of the Advisory Services Agreement provides that the rights of the indemnitee to indemnification under the agreement will be in addition to any rights any such person may have under any other agreement or instrument to which such an indemnitee is or becomes a party (whether pursuant to contract, bye laws and charter or otherwise). Furthermore, in Bye Law 56.12 Athene acknowledges that the indemnitees have certain rights to indemnification as members of the Apollo Group separate from the indemnity provided for under Bye Law 56 and Athene agrees that it is the indemnitor of first resort and the

obligations of Apollo Group are secondary. In the circumstances, the Chief Justice held, the Advisory Services Agreement provides no real assistance for present purposes.

148. I rather doubt whether the points raised in the penultimate and pre-penultimate sentence of the previous paragraph take matters a great deal further. There are, however, as it seems to me, additional reasons why this Agreement is of no real relevance for present purposes. First, the scope of the Agreement is limited to "*Services*", which are so defined as expressly to exclude work performed by employees of, or consultants to, Apollo in their capacity as directors or employees of Athene. Section 5 (b) was, by 5 (b) (iii) to have no effect on any duties, obligations or liabilities of any Indemnitees in connection with the AAM services or as a result of their directorship positions on the board of directors of any Company (which would include Athene).

149. Second, it would not seem to apply to Mr Cernich, who was not an Apollo man, or to Caldera.

150. Third, as the Chief Justice pointed out, the indemnity does not extend to *"wilful misconduct or gross negligence"* and is thus not as wide as Bye-Law 56.

Factors in favour of New York

151. So far as Mr Siddiqui and Mr Cernich were concerned the factors relied on (in favour of New York as opposed to Bermuda) were summarised by the Chief Justice as follows:

> *"1 The Bermuda action duplicates the claims brought in the Second JAMS Arbitration by Apollo. It is said that the JAMS arbitration deals with the same alleged facts, same allegedly confidential information and the same alleged conduct. However, the fact remains that the Second JAMS arbitration is being conducted under the arbitration agreement contained in the Settlement Agreement between*

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

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

3 It is argued that New York is the centre of gravity for Athene's claims. It is said that Athene has many substantial connections with New York. For example, its shares are publicly listed on the New York Stock Exchange, it is regulated by the SEC, and the Defendants contend that it has presence in New York.

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

152. In paragraph 95 of his judgment the Chief Justice said that, having regard to all the circumstances of the case and the factors that he had outlined, he had come to the view that Bermuda was clearly the more appropriate forum for the trial of the action; and he would have taken that view even in the absence of the jurisdiction clause. The result of that clause was that Mr Siddiqui and Mr Cernich were contractually bound to submit to the jurisdiction and had to show exceptional circumstances, which could not have been foreseen, which justified departure from the agreed forum. This they had failed to do.

153. This was in my judgment, an assessment that the Chief Justice was entitled to make. The Court of Appeal should not set aside such an assessment unless satisfied that there has been some error such as one of those identified by Lord Brandon in *The Abidin Daver*. I detect no such error. In circumstances where a Bermuda corporation is suing its former director or officer for breaches of duties owed to the corporation, carried out for the benefit and through the medium of another Bermuda corporation, the link with Bermuda is very strong even without an exclusive jurisdiction clause. If there is such a clause the link is, absent exceptional circumstances, practically unbreakable.

154. Lastly, the existence of (i) the Caldera New York proceedings, which would not involve consideration of breach of directors' and officers' duties under Bermuda law, and to which neither Mr Siddiqui nor Mr Cernich are parties, (and which at the time of the Chief Justice's Ruling were, and, so far as we know, still are, subject to motions to dismiss filed by Athene and the Apollo parties); and of (ii) the Second JAMS Arbitration, to which Athene is not a party, and to which Mr Cernich was not a party at the time of the Chief Justice's Ruling, afforded no basis for saying that the decision of the Chief Justice on the appropriateness of Bermuda as a forum was misplaced.

Full and frank disclosure

155. Mr Potts submitted that Athene had been guilty of a breach of their obligation of disclosure in failing to disclose (a) the fact that Athene was not truly interested in buying Company A, and not in a position to make an offer without harming itself; (b) the proceedings which were taking place in foreign jurisdictions; (c) the considerations which pointed to a foreign jurisdiction as more appropriate including the location of witnesses and documents.

156. The Chief Justice reached the view ([96] – [103]) that Athene[22] did not fall far short of a fair presentation or full and frank disclosure in relation to the ex parte hearing in 17 May 2018.

157. He recorded that the complaint made to him was as follows:

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

158. The Chief Justice rejected the first complaint on the basis that a long letter from Kennedys for Caldera was provided by Athene to Hellman J in which Kennedys outlined Caldera's position in relation to the issue of jurisdiction and *forum conveniens*. The letter is set out at paragraph [99] of the Chief Justice's judgment. It is very full, includes reference to all the relevant proceedings

[22] The judgment says "Caldera",

outside Bermuda and the location of witnesses and documents, and was before Hellman J and considered by him.

159. As to the second complaint, Athene accepted that there was a typographical error in its skeleton argument where the quotation from Order 11 1 (1) (b) should have read "*within the jurisdiction*" but instead referred to acts "*out of the jurisdiction"*. The error was recognised by Hellman J and counsel for Athene confirmed the correct wording.

160. As to the third complaint the Chief Justice pointed out that, even after full argument, Hellman J took the view that the confidential information was pleaded with sufficient particularity for him to understand in broad terms the nature of Athene's case. The contention that Athene should have revealed that it was no longer interested in buying Company A would, according to Athene, not have reflected its position.

161. In my judgment the Chief Justice was entitled to make the assessment that he did.

162. The appellants complain about the observation made by the Chief Justice at paragraph 66 of his Ruling that Mr Siddiqui appeared to have been "*less than frank*" in the affidavit evidence that he had sworn in the proceedings. There is nothing in this complaint. The Chief Justice explained why he took that view (see paragraphs [110] – [115] above). He could have expressed himself more robustly. Athene would not have discovered that in January 2017 Mr Cernich was taking steps to incorporate Caldera had Mr Cernich not forwarded the relevant email chain to Mr Siddiqui's email address which he maintained as an employee of Apollo: isiddiqui@apollo.com. Apollo later disclosed that email chain in the Caldera New York action. I agree with the submission for Athene that it seems reasonably clear that, contrary to what Mr Siddiqui was saying in his sworn evidence, he was in January 2017, when still a director of Athene, aware that Mr

Cernich was involved in incorporating Caldera and had probably decided to join him in this new venture. Athene suggests that this correspondence is but the tip of the iceberg in relation to the exchange of Confidential Information, particularly in the light of the finding of the arbitrator referred to at [171] below.

The Application of Caldera to strike out the Writ and the Statement of Claim

163. Caldera's contention before the Chief Justice was that it was impossible to understand the basis upon which it was alleged that it was the *alter ego* (or the agent or nominee) of Mr Siddiqui and Mr Cernich, absent a properly particularised claim of dishonesty or fraud on the part of Mr Siddiqui and Mr Cernich (which would be (a) necessary to establish primary liability on the part of Caldera; and (b) necessary to establish any "veil piercing" so as to establish secondary or derivative liability on the part of Caldera).

164. The Chief Justice referred to the heavy burden resting on a defendant who sought to strike out a claim as frivolous or vexatious as confirmed in *Broadsino Finance Company Limited v Brilliance China Automotive Holdings Limited and Others* [2005] Bda LR 12, He noted that the claim advanced against Caldera, as noted by Hellman J was tolerably clear:

> "[28] *The factual allegation at the root of the statement of claim – that Caldera is the vehicle through*[23] *which Mr Siddiqui and Mr Cernich are misusing confidential information to acquire Company A – is consistent with Caldera being the agent or nominee.*
>
> [65] *Caldera has not been sued as a device to bring proceedings against Mr Siddiqui and Mr Cernich, but as an alleged wrongdoer in its own right".*

[23] The judgment records this as "to".

165. The Chief Justice observed that, as explained by Lord Sumption in *Prest v Petrodel Resources Limited* [2013] UKSC 34, the actions of a corporate entity, acting as an agent or nominee of the wrongdoer, attract personal and independent liability on the part of the corporate entity. Having considered the cases *of Gilford Motor Co Ltd v Horne* [1933] Ch 935 (discussed by Lord Sumption at [29] in *Prest*) and *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734, (considered at [31] in *Pres*t), the Chief Justice held that it was reasonably arguable that Caldera, incorporated by Mr Siddiqui and Mr Cernich and wholly owned by them, was acting as their agent or nominee for the purposes of acquiring Company A. In those circumstances it was reasonably arguable that Caldera may become independently liable to Athene if it was utilising Athene's confidential information for that purpose; and that, if Caldera is sued within the jurisdiction in relation to causes of action upon which it is independently liable, then it can properly be considered as an anchor defendant.

166. In all the circumstances the Chief Justice was not satisfied that the causes of action pursued by Athene against Caldera were bound to fail. Nor was he satisfied that the proceedings were being pursued against Athena for an improper collateral purpose.

167. These were both conclusions that he was entitled to reach. I would regard it as a misnomer to say that Caldera was being sued as a mere device to garner in the individual defendants to this action. It is their creature and the vehicle through which, if Athene's claims be well founded, they have sought to misuse Confidential Information and garner for themselves the opportunity to pitch for Company A.

The Second JAMS Arbitration Award

168. On **26 April 2019,** i.e. after the dates of the Rulings the subject of this appeal, the arbitrator produced his award in the Second JAMS arbitration. I set out

below a summary of what he decided insofar as it is relevant for present purposes.

169. The arbitrator recorded that discovery in that proceeding was "*difficult to say the least*" [page 2]. He had had to rule on countless discovery disputes and had appointed a forensic examiner to determine what, if any, Apollo confidential information was on Mr Siddiqui's electronic devices and whether any of that information had been disclosed to anyone. That examination did not reveal any evidence that was probative of Apollo's claims. The hearing of the arbitration, which had been combined with another arbitration against Mr Siddiqui, Caldera and a former Apollo employee named Ming Dang, took place over 6 days in March 2019 and was followed by "*voluminous"* post hearing briefs and reply briefs.

170. The arbitrator recorded [6] that there were "*serious credibility issues*" with respect to both Mr Dang and Mr Siddiqui. His award records [8] that, beginning in mid-2016, Mr Siddiqui and Mr Dang began to engage in conduct that violated both the letter and the spirt of the Apollo Code of Ethics. Starting in July 2016 and continuing thereafter Mr Siddiqui, while an Apollo employee began sending internal Apollo reports, decks and analyses from his personal Gmail account to the email accounts of Messrs Cernich, Daula (the Chief Risk Officer of Athene) and Dang. Information from these documents was incorporated into decks and models that Caldera used to solicit potential investors in itself. Many active steps were taken by Siddiqui and Dang to hide their involvement. After his resignation and in breach of various post-employment restrictions Siddiqui continued [9] to solicit investors and Caldera began its first active attempts to purchase Company A. Caldera made certain offers for Company A in late 2017; but no transaction was consummated at that time.

171. The arbitrator found [9] that the attestation completed by Mr Siddiqui (given under oath and penalty of perjury) that he had returned or destroyed all Apollo documents or other Confidential Information in his possession was false.

Discovery in the arbitration established that *"voluminous"* quantities of such information, dating back to 2016, remained under his possession, custody and control.

172. In relation to the use of Apollo's confidential information after the Settlement Agreement, the arbitrator found [10] that in and around April 2018 Athene submitted a bid for Company A subject to due diligence. The due diligence, however, showed that, as a result of Company A's reserving practices, among other things, there was no basis for Athene making a bid at anywhere near the level of that bid. Its analysis showed that the only bid that could be made was one below Company A's market price. Internal management concluded that an acquisition of Company A would actually be quite harmful. He held that:

> *"Although Apollo and Athene continue to insist that they had a long-term interest in acquiring Company A and have continued to tell that to Company A the evidence does not support the conclusion that any such acquisition would be viable."*

173. In May 2018 an email exchange between senior Athene executives characterised the potential transaction as "*mortally wounded*". The arbitrator found that "*there is no credible evidence to suggest that the accuracy of this description has ever changed*".[24]

174. The arbitrator held that the effect of the Settlement Agreement was that any conduct by the Siddiqui Released Parties on or before February 21 2018 was released [11]. It was necessary in order for Apollo to prevail against Siddiqui and Caldera to prove that there was a violation of the terms of the Settlement Agreement.

[24] It is not clear whether the arbitrator was intending to find that the acquisition of Company A was not viable at any price (a dubious proposition). If he did, Apollo and Athene appear to have expressed a different view. Mr Taylor told us that Mr Belardi did not wish to qualify his affidavit and that Company A remained a target for acquisition.

175. The arbitrator found [12] that three out of four of Apollo's claims for breach of contract had merit but the fourth had not. The three that had merit were: (i) Mr Siddiqui's clear breach in failing to return or destroy all Apollo property; (ii) the submission of a false attestation that he had done so; (iii) Mr Siddiqui's solicitation of Mr Dang to work on Caldera material.

176. The claim in respect of which he held Apollo's proof to be deficient related to Mr Siddiqui's alleged use or disclosure of Apollo's Confidential Information which he was strictly forbidden to do under the Settlement Agreement. Mr Cernich brought his considerable knowledge and experience to formulate Caldera's bids and there was considerable unrebutted evidence [13] of his efforts to build Caldera, to consult with outside advisers to the extent necessary, and ultimately to make bids for Company A. But no witness at the hearing analysed those bids and presented evidence that the bids themselves reflected the use of confidential information obtained from Apollo or Athene.

177. The arbitrator had granted Apollo's request for a forensic examination of Siddiqui's electronic devices in order to determine whether there was disclosure of Apollo's confidential information to anyone after February 21 2018. There was evidence that Siddiqui had countless pre-release emails containing Confidential Information but no evidence that he accessed any of them **in the post release period**; or that any Confidential Information from those emails made its way into Caldera's 2018 bid for Company A or that Siddiqui or Cernich relied on them in any way. None of the specific examples of alleged use of Confidential Information put forward by Apollo had any merit.

178. Mr Dang had a liability for aiding and abetting Mr Siddiqui's breach of fiduciary duty (in collecting and transmitting Apollo and Athene's Confidential Information and soliciting investors to invest in Caldera rather than Apollo or Athene) through 2016 and until at least March 2017. Further Mr Dang was in breach of

his fiduciary duty from July 27 2016 to 26 October 2018, when he resigned, in spending time on Caldera's day to day operations and soliciting Apollo and Athene investors to invest in Caldera to the detriment of Apollo and Athene. Mr Siddiqui and Caldera were relieved of any liability for aiding and abetting by the Settlement Agreement but were liable in respect of the period from February 22 2018 (the day after the Settlement Agreement) until Mr Dang's October resignation.

179. The claim advanced by Mr Siddiqui and Caldera that Apollo had breached its promise in the Settlement Agreement not to "*take any action to encourage or support Athene*" in asserting any action relating to the facts alleged in the first arbitration was not established.

180. The arbitrator held that Apollo had suffered no damage from a failure on its part to acquire Company A. Athene could not justify offering the price that it did in May 2018. There was no evidence that Apollo suffered any damage from a failure on its part to acquire Company A. Nor was there any evidence that Apollo was damaged by the existence of any bid from Caldera. "*Even Apollo's expert witness could not distinguish between damage to Apollo as opposed to damage to Athene".*

181. The arbitrator awarded Apollo damages of $ 1 million against Mr Dang for breach of fiduciary duty and for aiding and abetting Mr Siddiqui's breach; and $ 75,000 against Mr Siddiqi and Caldera for aiding and abetting Mr Dang's breach of fiduciary duty following the execution of the Settlement Agreement on 21 February 2018. Mr Siddiqui was also ordered to pay punitive damages of $ 150,000. No damages awarded in the arbitration accrue (or ever could have accrued) to Athene.

182. The arbitrator also recognized the separate nature of the Bermuda action when, in relation to an application for the return by Mr Siddiqui of an advancement of fees which the arbitrator had ordered in relation to the Bermuda action, he said:

> "*That action is still in its preliminary stages and there has been no "final adjudication" that the actions of Siddiqui were made "in bad faith or with criminal intent". The Bermuda court will make its own determination based on the facts before [it] and applicable law, and it would be improper for the undersigned to make judgments about that. Furthermore, the entire basis for imposing … an obligation to advance fees in that case is that it made allegations concerning pre-release conduct which are not of determinative significance in this arbitration"*

183. The appellants submit that this Award changes the whole picture. It reveals that no evidence was found of the misuse of confidential information; that the Athene bid for Company A was unmaintainable; and exposes the abusive character of Athene's action.

184. I disagree for a number of reasons.

185. First, the Second JAMS Arbitration is an arbitration to which Athene was not a party; and Apollo cannot realistically be said to have been its agent in bringing the arbitration. Athene is not bound by any findings (or the lack of them) in an award in an arbitration to which it was not a party, and at which it made no case (although it did produce documents and two of its executives gave evidence). It is entitled to have the opportunity to make its own case in Bermuda, with disclosure from all three defendants. The relief claimed by Athene in the Bermuda action (damages for itself and an injunction) is different. The arbitrator made a preliminary ruling to the effect that he did not have jurisdiction to grant Apollo an injunction barring Mr Siddiqui and Caldera from "*pursuing or acquiring*" Company A because of the terms of the Settlement Agreement, whilst recognizing that he might decide to impose an injunction with respect to, *inter alia*, the use of confidential information. He plainly could not grant Athene one. Moreover, Athene has not, we were told, been permitted to review the evidence

adduced in the arbitration so that it is not aware as to exactly what Athene Confidential Information is in the possession of Mr Siddiqui and his associates.

186. The appellants submit that, for practical purposes, Athene and Apollo are the same and that it is unrealistic to suppose that there is a separate category of information confidential to Athene which was not confidential to Apollo. As to that, there may well be a substantial overlap between information which is confidential to Apollo and that which is confidential to Athene. It is not, however, self-evident that the two are coterminous.

187. Athene and Apollo are two distinct separate entities. Neither is the *alter ego,* nominee or agent of the other. Apollo and Athene's awareness that any cause of action of Athene was not impacted by the Settlement Agreement is apparent from the fact that in the Settlement Agreement Apollo agreed not to "*take any action to encourage or support [Athene] … in asserting any claims covered by or relating to this release or relating to facts alleged in the Action* [i.e. the first arbitration]" - a provision which the arbitrator found Apollo had not breached.

188. Second, the Second JAMS arbitration was concerned with the duties of Mr Siddiqui to Apollo under New York law. These are not the same as Mr Siddiqui's duties to Athene under Bermuda law. Moreover, the claim against Mr Siddiqui related to events **after** the date of the Settlement Agreement with him. It did not address any question of liability in respect of things done before then. Athene is not a party to that Settlement Agreement and the claim in the present action is not so limited. Athene can rely on any misuse of confidential information before or after February 2018. The fact that Apollo did not produce to the arbitrator an analysis that showed that a post February 2018 bid reflected the use of its confidential interpretation is not determinative.

189. Third, the arbitration was not concerned with Mr Cernich at all and he is not the subject of any finding. No disclosure appears to have been obtained from him.

190. Fourth, it is apparent from the Award that Mr Siddiqui had been squirreling away and transmitting Apollo and Athene's confidential information and has made false statements under oath. That does not encourage a conclusion that Athene's complaint of the misuse of its confidential information is ill founded. And it renders less compelling any claim that there has been inadequate particularisation. Mr Siddiqui must know what he took (and what the Arbitrator was referring to).

191. As the arbitrator put it [14]:

> *"There is considerable evidence that [throughout 2016 and at least until March of 2017], [Siddiqui] collected and transmitted Apollo's and Athene's Confidential Information, that he solicited investors in an attempt to persuade them to invest in Caldera rather than Apollo or Athene, that he competed with Apollo and Athene for acquisition targets, and that he remained on Athene's Board of Directors for the purpose of protecting his own personal interests"*[25]

192. One of the purposes of this collection and transmission of Confidential Information is likely to have been to obtain information useful for any attempt by Caldera to purchase or otherwise team up with Company A.

193. Fifth, it looks from the Award as if Mr Siddiqui accepted that he was not able to discharge his fiduciary duties to Athene once he had begun to compete with Athene for the acquisition of Company A. The Award records:

> *"[b]y 2016 Siddiqui was working on his next venture (which ultimately became Caldera) and was biding his time until Athene went public in a transaction in which Siddiqui received stock that he sold for at least $30 million…**Siddiqui admitted that he should have***

[25] Page 14 of the Award.

***resigned from the Athene Board before the company went public**" (emphasis added).*[26]

194. Sixth, whilst the findings of the arbitrator indicate that the April 2018 bid could not sensibly go ahead, it does not follow that no bid for Company A (or proposal for a link up) will fall to be made in the future by either Athene or Caldera or that confidential information will not be used by Caldera in any such bid.

195. Accordingly, whilst I accept that it is appropriate for this court to consider whether the advent of the Second JAMS Award, after the dates of the two Rulings the subject of this appeal, invalidates the approach or analysis adopted at first instance, I am not persuaded that it does so.

196. The Appellants have made a general submission that Athene has abused the process of the court in the following respects **(a)** not joining Apollo as a claimant**; (b)** beginning the Bermuda proceedings on the same day as Apollo began the first JAMS arbitration; **(c)** failing to provide adequate particulars of its claims for alleged misuse of confidential information and breach of duty; **(d)** claiming an injunction of broad and uncertain scope as a final remedy but failing to make any application for interim injunctive relief; **(e)** failing to give full and frank disclosure at the *ex parte* application for leave to serve out of relevant foreign jurisdiction and arbitration agreements and proper particulars of the confidential information allegedly in issue; (**f**) failing to give full disclosure of the facts as found in the Second JAMS Arbitration Award that due diligence had revealed that the acquisition of Company A on the terms put forward in May 2018 would be harmful; (**g**) amending its Statement of Claim on 16 October 2018 against the Third Appellant without leave but falling to apply for permission to make or serve any similar amendment against the First and Second Appellants; (**h**) trying to withdraw certain heads of claim against the Appellants; (**i)** making

[26] Page 7 and footnote 6 of the Award.

subsequently an unsuccessful application for release from the implied undertaking of confidentiality arising in these proceedings.

197. Many of these issues have been covered above. Suffice it to say that I do not accept that either Hellman J or the Chief Justice should have found that Athene was abusing the process of the Supreme Court or that we should do so either; let alone that such abuse is obvious. Athene is not jointly entitled with Apollo so as to be obliged to join Apollo to the Bermuda action. The fact that Apollo had legitimate access to Athene's confidential information does not mean that Athene has no separate entitlement in respect of its confidential information. Athene does not control Apollo so as to be able to compel it to join as a plaintiff; the relief sought in Bermuda and by Apollo in New York is not against identical parties and is, in any event, different; Athene is not party to any relevant arbitration agreement and could not join the JAMS 1 arbitration; the fact that the Bermuda action was begun on the same day is not abusive. The limited extent of the particulars does not amount to abuse; nor was it incumbent on Athene to seek interlocutory relief in the absence of any indication that Caldera was poised to make another offer. The fact that after due diligence, the April 2018 offer was regarded as unmaintainable is not determinative. Failure to seek leave to amend against two defendants and the withdrawal of one head of claim are not indicia of abuse. Nor is Athene's unsuccessful application to be released from an obligation of confidentiality.

198. In the light of developments since the hearing before the Chief Justice and, in particular the second JAMS Award we were invited to rehear the applications rather than to review the findings of Hellman J and the Chief Justice. I am not persuaded that the contents of that Award are such that we should rehear the matters from which the appeal is brought; or that, if we did so we would allow the appeal.

199. One of the grounds of appeal from the Ruling of the Chief Justice is that his conclusions and reasons were vitiated by apparent bias. The way in which the matter was put in the skeleton argument was:

(a) that the judge's interventions and comments during the course of the hearing (not identified) gave the impression that he had descended into the arena and had formed entrenched views on various issues in dispute before hearing full argument and oral submission;
(b) that various of his comments and statements made during the course of the Ruling, and his inaccurate and incorrect characterisation of the parties' pleadings, evidence and submissions in his Ruling, suggest that he had wrongly formed a premature (but apparently entrenched) view of the merits and relative credibility of the parties' positions;
(c) that he failed to consider properly or at all the consequences of his own finding that Athene had failed to give proper particulars of its claims.

200. These submissions were not developed in oral argument, save to the extent that Counsel made submissions as to where the Chief Justice was said to have gone wrong in his Ruling. I am quite satisfied that there is no basis for saying that there was any apparent bias or predetermination. It is apparent to me that the Chief Justice approached his ruling with very considerable care. Counsel is fully entitled to submit that he was in error (which I do not think that he was) but the assertion of bias is, in my view, entirely ill founded. Further the Chief Justice's conclusion was that the claim was not so insufficiently particularised that it should be disallowed.

201. For the reasons which I have set out above I would:

(a) refuse Caldera leave to appeal from the Ruling of Hellman J dated 28 June 2018; and

(b) dismiss the appellants' appeal against the Ruling of Chief Justice Hargun dated 14 January 2019.

KAY JA:

202. I agree

SMELLIE JA:

203. I, also, agree.

Clarke P

Kay JA

Smellie JA