IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No: FSD 0113 of 2023 (JAJ)

IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)
AND IN THE MATTER OF GRAND COURT RULES, ORDER 67, RULE 6

BETWEEN:

THE ARMAND HAMMER FOUNDATION, INC.

Plaintiff

– and –

(1) HAMMER INTERNATIONAL FOUNDATION
(2) MARK ALFANO
(3) SAMUEL 1 LTD
(4) REX ALEXANDER
(5) MISTY HAMMER
(6) JEFF KATOFSKY
(7) RANDALL BARTON
(8) RAISHA PARK
(9) CECIL KYTE
(10) ALEXANDER MENZEL
(11) THE ATTORNEY-GENERAL

Defendants / Counterclaimants

– and –

(1) VICTOR HAMMER

(2) JIM FRASER

(3) PETER SANSONE

Third Parties

Appearances:	**Mr Graeme McPherson KC and Mr Tom Wright instructed by Collas Crill for the Plaintiff**
	Mr Bryan Little instructed by Travers Thorp Alberga and Mr John Harris instructed by Nelsons for the Second to Tenth Defendants
Before:	**The Honourable Justice Jalil Asif KC**
Heard:	**5 April 2024**
Judgment:	**9 April 2024**

CASE SUMMARY

(not part of judgment)

Late adjournment of trial—test to be applied—whether it would be fair to proceed with trial.

JUDGMENT

1. On Friday 5 April 2024, I heard argument on a summons filed by Travers Thorp Alberga on behalf of the Second to Tenth Defendants on 4 April 2024 seeking the adjournment of a seven-day trial due to commence on 8 April 2024. The First Defendant is the subject of the proceedings and is not taking any role within them. The Eleventh Defendant is the Attorney General of the Cayman Islands. Whilst the Attorney General has appeared at previous hearings, he did not appear at the hearing of the summons, and it was not clear that the Attorney General had been served with it. Given the need for counsel and witnesses to know where they stood before the weekend, I indicated my decision on the summons later the same day. I now provide my judgment on the summons.

2. At the outset of the hearing, I recorded that the Plaintiff's leading counsel, Mr Graeme McPherson KC, and I had been in Chambers together in London for about 17 years leading up to 2011. I was

satisfied, having regard to the review of the relevant law in the judgment of Justice Doyle in *Credit Suisse London Nominees Ltd v Principal Investing* (unreported, 21/11/22), that there was no basis for requiring me to recuse myself from hearing the matter, and no one in court suggested that I should do so.

Background to the application to adjourn

3. In very brief outline, the case due for trial is a dispute regarding the effect of certain corporate reorganisations in the US on the membership of a Cayman Islands company, the First Defendant, and whether certain corporate actions taken by the Second to Tenth Defendants regarding the First Defendant are valid or should be set aside.

4. The situation before me is somewhat unusual in that on 3 April 2024 Travers Thorp Alberga filed a summons for a declaration that they had ceased to act for the Second to Tenth Defendants, who I refer to in this judgment as *"the Defendants"*. That application remains outstanding. Mr Bryan Little, who appeared on behalf of the Defendants indicated that Travers Thorp Alberga had not had any recent communication with them and that he was therefore constrained in what he was able to say on their behalf in seeking the adjournment of the trial.

5. Also in court was Mr John Harris of Nelsons, who are the attorneys to whom Travers Thorp Alberga referred the Defendants when Travers Thorp Alberga determined that they would apply to come off the record. Mr Harris indicated that he did not have signed engagement letters from the Defendants and had not completed his firm's KYC and AML requirements but was in communication with the Defendants. In the circumstances, I invited him to address me on their behalf in addition to hearing from Mr Little, notwithstanding that Nelsons were not yet on the record.

6. The summons is supported by the second affidavit of Tia Whittaker, a paralegal employed by Travers Thorp Alberga. The evidence of Ms Whittaker is to the effect that Travers Thorp Alberga are unable to continue to act for the Defendants; that Travers Thorp Alberga had referred the Defendants to Nelsons; Nelsons had originally agreed to replace Travers Thorp Alberga, but then said they could only do so if the trial were to be adjourned because they would otherwise be in breach of Rule 1.07 of the CILPA Code of Conduct prohibiting an attorney from agreeing to

provide a service which they have insufficient time to fulfil; that Travers Thorp Alberga had therefore agreed to make the application to adjourn the trial and that Travers Thorp Alberga had requested the Plaintiff's consent on terms that the Defendants pay their costs, which was not forthcoming.

7. There is no evidence formally filed on behalf of the Plaintiff, primarily due to the speed at which matters had progressed in order to enable the court to hear the summons and make a decision before witnesses had committed to travelling to the Cayman Islands, which might otherwise be wasted time and costs. However, Mr McPherson referred me to a number of documents in the trial bundle, which I had available in court with me, in support of his submissions and referred in addition to some correspondence from the Plaintiff's US attorneys regarding the status of ongoing litigation in California and Florida, which he undertook would be exhibited to an affidavit and formally put before the court.

Submissions on behalf of the Defendants

8. The substantive submission made by Mr Little is that an adjournment should be granted because the Defendants would otherwise effectively have no representation at the trial. This is because they would have very limited time to obtain alternative representation and for those attorneys to get up to speed, and it is unreasonable to expect the Defendants to represent themselves at the hearing.

9. An unusual feature of the summons is that there is no evidence in support of the application to adjourn adduced from any of the Defendants themselves, whether through Travers Thorp Alberga or Nelsons. I am therefore somewhat hampered in understanding and assessing the Defendants' position as to why an adjournment is now required and the Defendants' position on the ultimate question of what is a fair outcome between the Plaintiff and the Defendants.

The Plaintiff's submissions

10. Mr McPherson noted as a preliminary point that the Attorney General is a defendant and had indicated at previous hearings that he wants the case to be progressed. Mr McPherson noted, however, that the Attorney General was not present, it is not clear whether he was served with the

summons and attempts to contact him had not succeeded, so the court did not have the benefit of knowing his position on the request to adjourn.

11. Mr McPherson forcefully advanced a number of submissions on behalf of the Plaintiff in opposition to any adjournment but also addressed what conditions I should impose if I were minded to grant an adjournment of the trial.

12. Mr McPherson first took me to three English cases which he said are instructive on the test to be applied. I raised with Mr McPherson whether the approach exemplified in these judgments needs to be qualified in its application in the Cayman Islands, given the difference in terms between the overriding objective applicable in the Cayman Islands and the version applied in England and Wales. His response was that in this particular area the difference is of no real impact since the touchstone of whether or not to grant an adjournment is fairness, and the additional requirement of the overriding objective in England and Wales of enforcing rules, practice directions and orders is of minimal relevance to the considerations on a late adjournment of a trial.

13. The first decision that Mr McPherson relies on is that of the Court of Appeal in *Bilta (UK) Ltd v Tradition Financial Services Ltd* [2021] EWCA Civ 221. Nugee LJ giving the leading judgment reviewed a number of authorities. Mr McPherson particularly drew my attention to the following passages in Nugee LJ's judgment:

a) First, at paragraph [38]:

> *"38. In* Teinaz v Wandsworth London BC *[2002] EWCA Civ 1040 ("**Teinaz**") the applicant had brought a complaint to the Employment Tribunal of racial discrimination and unfair dismissal, and applied to adjourn the hearing on medical grounds. The Tribunal had refused to adjourn it but the Employment Appeal Tribunal had allowed an appeal. On the defendant Council's further appeal to this Court, Peter Gibson LJ (with whom Arden LJ and Buckley J agreed) made some general observations on adjournments at [20]-[23], including the following:*
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> > *'20. … Although an adjournment is a discretionary matter, some adjournments must be granted if not to do so is a denial of justice. Where the consequences of the refusal of an adjournment are severe, such as where it will lead to the dismissal of the proceedings, the tribunal or court must be particularly careful not to cause an injustice to the litigant seeking an adjournment. …*
> >
> > *21. A litigant whose presence is needed for the fair trial of a case, but who is unable to be present through no fault of his own, will usually have to be granted an adjournment, however inconvenient it may be to the tribunal or court or to the other parties. That litigant's right to a fair trial under article 6 of the European Convention on Human Rights*

> *demands nothing less. But the tribunal or court is entitled to be satisfied that the inability of the litigant to be present is genuine, and the onus is on the applicant for an adjournment to prove the need for such an adjournment.'"*

Mr McPherson argues based on this passage that even in a case where the consequences of refusing an adjournment were severe, the Court of Appeal merely said *"the tribunal or court must be particularly careful not to cause an injustice"*, not that an adjournment should be granted.

b) Secondly, at paragraph [45]:

> *"45. In* Terluk v Berezovsky *[2010] EWCA Civ 1345 ("**Terluk**") the question was whether an adjournment should have been granted not on the grounds of the unavailability of a party or witness but to enable the defendant to obtain legal representation. It is of interest for two points made by Sedley LJ (on behalf of himself and Mummery LJ). First at [18]:*
>
> > *'Our approach to this question is that the test to be applied to a decision on the adjournment of proceedings is not whether it lay within the broad band of judicial discretion but whether, in the judgment of the appellate court, it was unfair. …'*
>
> *And second at [20]:*
>
> > *'We would add that the question whether a procedural decision was fair does not involve a premise that in any given forensic situation only one outcome is ever fair. Without reverting to the notion of a broad discretionary highway one can recognise that there may be more than one genuinely fair solution to a difficulty. As Lord Widgery CJ indicated in* Bullen*, it is where it can say with confidence that the course taken was not fair that an appellate or reviewing court should intervene. Put another way, the question is whether the decision was a fair one, not whether it was 'the' fair one.'"*

14. Lord Justice Nugee's conclusion commencing at [48] was as follows:

> *"48. I have undertaken this extensive review of the authorities in the light of the submissions we have received. As so often when a number of authorities are examined, it is possible to find differences of emphasis, but I do not myself think that it is difficult to identify the principles which should be applied. I can do so by reference to the propositions advanced by Mr Scorey and Mr Parker respectively.*
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> *49. Mr Scorey's propositions were as follows:*
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> *(1) Whether as a matter of the common law's insistence on a fair trial, or the requirements of Article 6, or the application of the overriding objective, the test is the same, namely whether a refusal of an adjournment will lead to an unfair trial.*
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> *I agree. This is a consistent thread from the early cases (*Dick v Piller*,* Green*) which refer to a miscarriage of justice or an injustice, through* Teinaz *('a denial of justice') to the more recent cases, which repeatedly identify the question as one of fairness: see in particular* Terluk *at [18] and Solanki at [32].*
>
> *(2) Although the decision is a discretionary one, the appellate court will adopt a "non-Wednesbury" review of the lower court's decision.*

> *There is undoubtedly support in the cases for describing the question of an adjournment as a discretionary decision, as in one sense it plainly is, CPR r 3.1(2)(b) (which is where the Court's power to adjourn is found) providing that the Court 'may' adjourn a hearing. But as pointed out by David Richards LJ in argument, if the question is whether the resulting trial will be fair, this is more of an evaluative question. Nothing turns in the present appeal on the precise classification and I prefer to say simply that the question on appeal is whether the lower court was entitled to reach the decision it did, and that in this particular context it is clear from the authorities that the appellate court must itself be satisfied that a decision to refuse an adjournment was not such as to cause injustice or unfairness. Again this is a consistent thread from the early cases through* Teinaz *and* Terluk *to* Solanki. *And I accept Mr Scorey's submission that insofar as* Dhillon *at [33(c) and (d)] suggests that the appellate court's review is similar to that of any discretionary case management decision, it is out of line with the other authorities.*
>
> *(3) When considering whether a particular outcome is fair, it should not be assumed that only one outcome is fair.*
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> *This is established by the authorities:* Terluk *at [20],* Dhillon *at [33(b)]. But equally in some circumstances there is really only one answer: see* Teinaz *at [20] ('some adjournments must be granted').*
>
> *(4) Fairness involves fairness to both parties. But inconvenience to the other party (or other court users) is not a relevant countervailing factor and is usually not a reason to refuse an adjournment.*
>
> *This is again established by the authorities. As to fairness involving fairness to both parties, see* Dhillon *at [33(a)],* Solanki *at [35]. As to the requirements of a fair trial taking precedence over inconvenience to the other party or other court users, see* Teinaz *at [21]. But Mr Scorey acknowledged, as can be seen from the earliest cases, that uncompensatable injustice to the other party may be a ground for refusing an adjournment."*

15. The second case that Mr McPherson relies on is *Fitzroy Robinson Ltd v Mentmore Towers Ltd* [2009] EWHC 3070 (TCC), a decision of Coulson J before the divergence in the wording of the overriding objective as applied in England and Wales. In a passage headed "*Relevant Principles*", the learned judge said:

> *"8. What are the relevant principles governing an application of this kind? It seems to me that the starting point is the overriding objective (CPR Part 1.1), the notes in the White Book at paragraph 3.1.3, and the decision of the Court of Appeal in* Boyd and Hutchinson (A Firm) v Foenander *[2003] EWCA Civ 1516. Thus, the court must ensure that the parties are on an equal footing; that the case – in particular, here, the quantum trial – is dealt with proportionately, expeditiously and fairly; and that an appropriate share of the court's resources is allotted, taking into account the need to allot resources to other cases.*
>
> *9. More particularly, as it seems to me, a court when considering a contested application at the 11th hour to adjourn the trial, should have specific regard to:*
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> *a) The parties' conduct and the reason for the delays;*
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> *b) The extent to which the consequences of the delays can be overcome before the trial;*

c) The extent to which a fair trial may have been jeopardised by the delays;

d) Specific matters affecting the trial, such as illness of a critical witness and the like;

e) The consequences of an adjournment for the claimant, the defendant, and the court."

16. Mr McPherson relies in particular on the following passages in the judgment, which he said apply by analogy in this case:

> *"12. Secondly, the delays have to be considered against the background of the defendants' earlier unsatisfactory conduct in the run-up to the liability trial. I have already mentioned their failure to address the causation/quantum elements of their case prior to the first hearing, an omission which has meant that there are more issues to be resolved at the forthcoming trial than there should be.*
>
> *...*
>
> *14. Thirdly, and perhaps most important of all, I note the complete lack of analysis of how and why, on the defendants' case, the delays in relation to the expert evidence may make a proper trial impossible. That is the assertion at the end of Mr Brownlie's witness statement. But there is no material, either in that statement or anywhere else, by which this bland assertion can be justified. ...*
>
> *15. For these reasons, I am driven to conclude that the defendants are seeking an adjournment for reasons which are not obviously connected to the delays to the expert evidence, but which are instead based upon their attempts to improve their own negotiating position. Furthermore, even if there was a genuine connection between this application and the state of the expert evidence, any difficulties would appear to be entirely the defendants' responsibility, by failing to involve Mr Miers earlier in the preparations for the trial. Accordingly, my conclusions as to conduct and the reasons for delay must be a factor against granting the defendants' application to adjourn."*

17. The final case that Mr McPherson brought to my attention was *Barclays Bank plc v Shetty* [2022] EWHC 19 (Comm), a decision of Henshaw J. The learned judge considered the applicable principles starting at [44], which included:

> *"44. The decision to adjourn a hearing to a later date is a case management decision, to be exercised in accordance with the overriding objective (White Book note 3.1.3). The overriding objective includes, so far as practicable, ensuring that the parties are on an equal footing (rule 1.1(2)(a)), saving expense (rule 1.1(2)(b)) and ensuring that a case is dealt with expeditiously and fairly (rule 1.1(2)(d)).*
>
> *45. If the Court concludes that it is necessary to adjourn a hearing in the interest of fairness, then it must be adjourned, for the court cannot countenance an unfair hearing.*
>
> *...*
>
> *50. While Bilta and Solanki concerned adjournment for medical reasons, the same framework, in particular the guiding principle of fairness, applies also when considering an application to adjourn so as to enable the applicant to be professionally advised and represented. In both Bilta and Solanki, the Court of Appeal, when setting out the applicable principles, cited Terluk: which, as noted above, concerned legal representation.*

> ...
>
> *52. In* Steel & Morris v UK *[2005] EMLR 15, the applicants were sued by McDonalds after distributing a leaflet critical of the restaurant. McDonalds was represented by solicitors and counsel throughout; the defendants acted in person. The ECtHR held that the inequality of arms, due to unavailability of legal aid, meant that they were deprived of their right to a fair trial under Article 6. The proceedings in that case were very extensive and complex: ...*
>
> *54. Finally, as to the relevance of the apparent merits of the case, White Book note 3.1.3 includes reference to* Lloyds Bank v Dox *(CA 26.10.00), where the trial judge had refused an adjournment that would have given the defendant the opportunity to advance a reformulated counterclaim. The Court of Appeal held that an adjournment would have made no difference because the counterclaim, even in its revised form, would not provide a defence in law to the claim. Neither party submits that the apparent merits of a claim are a matter directly bearing on the decision whether to grant an adjournment: though, as I indicate below, the absence in this case of any arguable ground for resisting enforcement of the DIFC Judgment could have indirect relevance to the question of whether Dr Shetty's claimed inability to obtain legal representation is a genuine problem or a self-inflicted one pursuant to a strategy of delay."*

18. Turning to the relevant considerations in this case, Mr McPherson argues that:

a) The case is ready for trial, and there is no suggestion that it is not.

b) Whilst there is a lot of documentary material and many witnesses, the result of the directions already ordered is that there is only a small number of factual witnesses who will give live evidence and the topics on which they are to be cross-examined are limited. In addition, the expert evidence is largely agreed.

c) There is no suggestion that the relevant witnesses cannot or will not attend the trial.

d) There is a dearth of evidence regarding why Travers Thorp Alberga wish to come off the record. The only evidence put forward is that Travers Thorp Alberga cannot continue to act for the Defendants. Whilst the reasons for that may be privileged, the Defendants could waive that privilege to give the court a proper explanation of the circumstances if they wished but have chosen not to do so.

e) There are only really three reasons why Travers Thorp Alberga would come off the record: (i) a breakdown in trust and confidence between the Defendants and Travers Thorp Alberga; (ii) professional embarrassment on the part of Travers Thorp Alberga; or (iii) unpaid fees. If the reason for Travers Thorp Alberga parting company with the Defendants was (i) or (ii) then they would not be able to make the application to adjourn and would simply come off

the record, so I should infer that the real reason is that the Defendants have not paid Travers Thorp Alberga's fees. Accordingly, I should conclude that the Defendants have engineered a situation where an adjournment is sought in order to delay the determination of the case, by their own conduct in failing to pay fees.

f) The Defendants have sought to be obstructive throughout the history of the case, starting with: a failure to cooperate to agree directions in May and June 2023; capitulation as to the directions to be ordered shortly before the CMC listed on 28 July 2023; refusal during September 2023 to agree to attendance of witnesses for cross-examination; capitulation again at a further CMC on 6 October 2023 on the same question of attendance of witnesses for cross-examination; attempts by the Defendants to row back from what was apparently agreed at the CMC (described by Mr McPherson as a *volte face*); leading to a further CMC on 12 December 2023 at which the learned Chief Justice made an order for cross-examination of witnesses in the terms that the Plaintiff had sought all along; and the Defendants' filing in December 2023 of a summons under O.14A to try to divert the course of the case, which was dismissed.

g) In reality, the Defendants are doing whatever it takes to prevent the court from determining the case on the merits because their position is hopeless. The merits can be relevant if the reality is that the party is just kicking the can down the road: see the statements at [54] in *Barclays Bank plc v Shetty* set out earlier. Mr McPherson then took me briefly through the Plaintiff's case on the merits and concluded that the reality is that the Defendants know they are going to lose and so they are attempting to delay the inevitable.

19. Mr McPherson then addressed what was likely to happen if an adjournment were refused and if it were granted. As to the former, he asserted it is unclear whether the Second Defendant, who is the only one of the Defendants' witnesses required to attend in person for cross-examination, would actually attend the trial. The Defendants would be represented by Travers Thorp Alberga without the benefit of any instructions, would have to attend and represent themselves or would attend with Nelsons newly engaged but not up to speed on the issues. Mr McPherson said if the Defendants suffered as a result, that was "tough", but it was the Defendants' own fault.

20. He argued that the Defendants' difficulties would be reduced since the Sixth Defendant is a US-qualified litigation lawyer, so would not be a stranger to making submissions and conducting cross-examination. In addition, the Sixth Defendant represents many of the Defendants in linked proceedings in California and possibly does so also in the proceedings in Florida, so that he has real familiarity with the substantive issues raised in the proceedings as a result, and he appears to be the person coordinating the Defendants' overall position in the various litigations.

21. As to the other Defendants actively before the court:

    a) the Seventh Defendant is also an attorney albeit not a litigation lawyer;

    b) the Fourth Defendant is a non-lawyer professional banker and real estate developer, who has been intimately involved with the charitable foundations at issue for a number of years;

    c) the Second Defendant's profession or occupation is not stated in his affidavits, but his affidavits say he is the executor of Michael Hammer's estate, trustee of a trust, the director and shareholder of the Third Defendant company, and in his third affidavit sworn on 4 December 2023 he was clearly able confidently to describe and assert the Defendants' case without any apparent need to refer or defer to attorneys; and

    d) the Third Defendant is a company, owned and controlled by the Second Defendant.

    Accordingly, Mr McPherson submits that the Defendants will be well able to address the court on the issues that the court will need to determine. This will not be a case like *Barclays plc v Shetty* where the party will be so hopelessly out of their depth that it will be unfair to make them try.

22. Finally, Mr McPherson addressed what would happen if an adjournment were to be granted. He said there is no material before the court as to when the witnesses and experts will next be able to attend for trial. He is personally in difficulties due to other professional commitments from August until December 2024.

23. Mr McPherson said that in real terms there are five adverse consequences of an adjournment for the Plaintiff and the First Defendant that the court should bear in mind:

a) There are regulatory issues, particularly filings, affecting the Plaintiff due to the deadlock over its management that would still be unresolved: even though the Plaintiff has been in breach for 2.5 years already, it is required to comply and it is not acceptable for a charitable foundation not to be compliant and to expose itself to financial penalties as a result. Mr McPherson argued that if I were minded to order an adjournment, I should consider imposing a condition that the Defendants cooperate with the Plaintiff's attorneys so that the regulatory position could be addressed and alleviate any damage.

b) The Plaintiff has had its assets stripped and, because of TROs in California and Florida, it cannot fulfil its intended charitable purposes; and the First Defendant cannot do so either because all its assets are under restraint – effectively there are two charities that cannot fulfil their charitable purposes so long as the litigation is unresolved.

c) Considerable court time in the Cayman Islands has been wasted already and further time would be wasted if an adjournment were to be granted – Mr McPherson relied in particular on the three CMCs in July, October and December 2023 as well as the court time set aside for the trial in April 2024 which could have been used by other litigants.

d) The US proceedings are not stayed and there are a number of procedural steps that need to be taken in the coming few months.

    i) Mr McPherson indicated that the case in California is currently going through discovery, with an end date of 6 September 2024. The First Defendant (acting at the direction of the Second to Sixth Defendants) applied for a stay of those proceedings last year and this was refused.

    ii) The first set of proceedings in Florida is also going through discovery, with a cut-off date for fact discovery scheduled for 9 August 2024 and an estimated jury trial date of between 9 December 2024 and 10 February 2025. The Plaintiff's application for a stay was refused on 1 April 2024.

    iii) As regards the second set of proceedings in Florida, there is an on-going battle as to whether the case should proceed in State Court or Federal Court. The Plaintiff's application for a stay is currently pending.

The further procedural steps in the US would be avoided if the Cayman trial proceeds as planned. If not, then court time in the US and attorneys' fees would be wasted in addition to the waste in the Cayman Islands. Mr McPherson noted that the Defendants have refused to agree to stays of the US proceedings and that if I were minded to grant an adjournment then an appropriate condition would be that the Defendants take all reasonable steps to procure that stays of the US proceedings are ordered.

e) There would be substantial costs wasted in the Cayman Islands if the trial were adjourned. The Plaintiff's estimate is US $500,000. Whilst the Defendants have offered to pay the Plaintiff's costs of the adjournment on the indemnity basis, any costs order would not fully compensate the Plaintiff for the wasted expenditure incurred, which is a particularly important consideration as it is a charity and means that money intended for charitable purposes is not being used in that way.

f) Further, any costs wasted in the US could not be encompassed within a costs order made by the Grand Court.

g) None of the Defendants have put in evidence that they have the means to pay the costs promised. There is a real question mark whether the Defendants are good for the money, based on the evidence filed for the trial, including a complaint filed in the US alleging that the Sixth Defendant has a guarantee liability for over US $20 million and put assets into the name of his son to make himself judgment proof. Moreover, it appears that the Defendants may be funding the litigation from the First Defendant's assets: he referred to minutes of an EGM of the First Defendant at which the Defendants voted to approve their indemnification for the litigation by the First Defendant, which again engages the argument about misuse of funds intended for charitable purposes.

24. If any adjournment were to be ordered, it should only be on the strictest conditions, including: immediate payment of substantial costs on the indemnity basis; a payment on account of costs within 7 days; an order debarring the Defendants from advancing a positive case and their counterclaim if they default in making the payment on account; a requirement that the Defendants provide the necessary information to enable the Plaintiff to comply with its regulatory obligations; and the Defendants to use all reasonable endeavours to obtain a stay of all US proceedings.

25. Ultimately, if a fair trial can go ahead then it should.

The Submissions on behalf of the Defendants in reply

26. In reply, Mr Little urged me to accept that the apparent *volte face* following the CMC on 6 October 2023 was simply a misunderstanding between counsel as to what was agreed. The O.14A summons was not a delaying tactic but a genuine attempt to resolve the case and did succeed in narrowing the issues.

27. He said that the case is actually very complicated and that Mr McPherson's quick canter through the merits gave the impression that it is more straightforward than it actually is.

28. Mr Little argued that Travers Thorp Alberga would not appear at the trial and that Nelsons would not have time to prepare. Further, it would be unfair to require the Defendants to represent themselves: whilst some are US-qualified attorneys, none of them are Cayman-qualified and they would be unfamiliar with the different rules and approach in the Cayman Islands.

29. He said that it is for Ogier, as registered office for the Plaintiff, to pursue any outstanding regulatory aspects, not Collas Crill.

30. Lastly, the Grand Court should not try to look into whether or not the US proceedings are being advanced in the most efficient way, which is for the US courts to determine.

31. Mr Harris then took on the baton from Mr Little. He argued that:

    a) The US courts had already considered and refused the Plaintiff's application for a stay in two of the cases. They must have had good reasons to do so, and I should be very wary of intruding on the proper exercise of their case management powers. I should not give the Plaintiff by the backdoor what it has not obtained by application in the US, namely by requiring the Defendants to agree to a stay of the US proceedings.

    b) I cannot and should not draw any inferences about why Travers Thorp Alberga have applied to come off the record. I should not assume that it is the result of the Defendants' conduct,

particularly when the Defendants are unrepresented and not in a position to file any evidence.

c) There is no substance in the assertion of a history of misconduct on the part of the Defendants – the complaint appears to boil down to being that the Defendants should immediately have agreed to the Plaintiff's case management proposals. Mr McPherson had not identified any breaches of orders and the case *is* ready for trial.

d) The case has in fact advanced rapidly – 10 months from issue to trial for a complex dispute in the Financial Services Division is rapid.

e) The suggestion that the Defendants should represent themselves where there is the alternative of an adjournment is not fair.

32. As to the Plaintiff's claim for costs:

a) The suggestion that the Plaintiff's costs thrown away are US $500,000 is absurd. What costs can properly be considered to be wasted, and which will need to be incurred again if the trial is adjourned, cannot possibly be as large as US $500,000.

b) The Defendants are not required to give an account of their finances to demonstrate that they are "good for the money". The fact that they have not put such evidence before the court should therefore not be remarkable.

c) If the Plaintiff has a genuine concern about the sources of funds used by the Defendants, then that concern would apply equally to the costs of the proceedings generally. The Plaintiff could have made an application for appropriate relief but has not.

d) The Plaintiff should not be allowed to railroad through a trial, leading to a decision on the merits, without effective opposition or evidence, which would be the effect of refusing the adjournment.

e) The Plaintiff's complaint that the Defendants voted themselves an indemnity from the First Defendant is misplaced. It is a universal practice in the Cayman Islands and Mr Harris has never seen a case where a company has not provided an indemnity to its officers.

f) Even if a costs order is made on the indemnity basis, it is not inevitable that that will result in net costs payable to the Plaintiff – Mr McPherson's argument assumes that the Plaintiff will win at trial, which is not a given.

Post-hearing developments

33. Following the hearing, I requested that the parties make enquiries as to the availability of the witnesses and was told that all witnesses and counsel would be available for the week commencing 3 June 2024. Thus, if there were to be an adjournment, if would be for a little less than 2 months.

Discussion and decision

34. I accept Mr McPherson's argument that it is permissible to have regard to English authority on the proper approach to granting a late adjournment of a trial and that, in this regard, the difference between the terms of the overriding objective as applied in England and Wales and as applied in the Cayman Islands is not material.

35. Drawing on the reasoning in the English authorities relied on by Mr McPherson, the fundamental question for the court is, will the refusal of an adjournment lead to an unfair trial? If so, then the hearing must be adjourned because the court cannot countenance an unfair hearing: see *Fitzroy Robinson Ltd v Mentmore Towers Ltd* at [45].

36. In deciding that question:

a) The court must engage in an evaluative assessment of all the material placed before it.

b) The court does not assume that there can only be one fair outcome: different outcomes may still be fair but equally in some circumstances there may be only one answer in reality.

c) Fairness involves fairness to both parties. Inconvenience to the other party (or to other court users) is not a relevant countervailing factor and is usually not a reason on its own to refuse an adjournment unless there is truly uncompensatable injustice to the other party.

d) In assessing what is fair, the court will look at:

i) the parties' conduct and the reasons leading to the request for the adjournment;

ii) the extent to which the difficulties relied on in support of the adjournment can be overcome before the trial – even if significant work may be required;

iii) whether there are specific matters that have arisen affecting the trial, such as the illness of a critical witness, and whether they may be managed without losing the trial;

iv) the consequences of an adjournment for the plaintiff, the defendant, and the court.

37. Whilst Mr McPherson roundly criticised the Defendants' conduct over the procedural course of the case, I was not the judge with conduct of the CMCs in question and do not have any knowledge of the background leading to the need for three CMCs. On the other hand, as Mr Harris submitted, Mr McPherson did not identify any breaches of orders by the Defendants and the case *is* ready for trial, subject to the recent difficulty regarding the Defendants' representation at trial. This is not obviously a case of a party trying to drag matters out for tactical reasons or to put off the inevitable.

38. I accept that the Defendants are likely to face real difficulties in presenting their case if the trial were to proceed as planned:

a) their current attorneys consider that they are no longer engaged and have applied to come off the record;

b) the new attorneys they intend to engage will not accept that engagement if the trial goes ahead due to their professional responsibility not to offer services that they do not have sufficient time to fulfil;

c) whilst some of the individual Defendants are attorneys, none of them are Cayman qualified attorneys.

39. I am not satisfied on the evidence before me that I should conclude that the Defendants' situation is of their own making and that they should be required to lie in a bed that they have made for themselves.

40. Ultimately, in my judgment, it does not strike me as fair that the Defendants should be required to represent themselves at a trial involving complicated questions of Cayman Islands' company law in a situation where they had, until relatively recently, expected that they would have the benefit of experienced Cayman attorneys to prepare, conduct the examination and cross-examination of witnesses and put forward their arguments on their behalf. However involved clients are in the preparation for trial, there is a significant difference in being an interested participant at a trial observing the advocates and being the person who has to do the preparation and day to day work needed effectively to conduct it.

41. I am supported in this conclusion by the fact that it was agreed that the trial could proceed on 3 June 2024, so that the various areas of prejudice identified by Mr McPherson would be of short duration and of limited weight when set against the situation of the Defendants.

42. However, I accept Mr McPherson's argument that the Defendants should pay the Plaintiff's costs of the adjournment on the indemnity basis with a payment on account to be made within a short period. As the Plaintiff had not had sufficient time to prepare a fully detailed estimate of its wasted costs, and in light of Mr Harris's concern about the quoted figure of US $500,000, which I share, I adjourned that aspect with directions for evidence and submissions to be filed on both sides.

43. I am not persuaded that it is appropriate to order the other conditions advocated for by Mr McPherson.

Dated 9 April 2024

THE HONOURABLE JUSTICE ASIF KC
JUDGE OF THE GRAND COURT