IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No.: FSD 111 of 2017 (RPJ)

IN THE MATTER OF THE COMPANIES LAW (2016 REVISION)

AND

IN THE MATTER OF THE WIMBLEDON FUND, SPC (IN OFFICIAL LIQUIDATION)

IN CHAMBERS

Appearances:	**Mr. Nick Hoffman and Mr. Lachlan Greig of Harneys on behalf of the Wimbledon Fund, SPC (In Official Liquidation)**
	Mr. Kyle Broadhurst and Ms. Kate McClymont of Broadhurst LLC on behalf of the Wimbledon Financing Master Fund Ltd (In Official Liquidation)
Before:	**The Hon. Justice Parker**
Heard:	**19 November 2018**
Draft Judgment Circulated:	**4 December 2018**
Judgment Delivered:	**8 January 2019**

HEADNOTE

Application for leave to commence proceedings under section 97(1) of the Companies Law - threshold test-exercise of discretion-choice of procedure-expert evidence FSD Guide-challenge to expert evidence-proceedings to be in New York-appropriate forum

JUDGMENT

Introduction

1. The joint official liquidator's (MF JOL's) of the Wimbledon Financing Master Fund Ltd (Master Fund) seek leave to commence proceedings in New York against the Wimbledon Fund, SPC (SPC Fund) concerning monies received by the SPC Fund segregated portfolio Class TT (Class TT). They do so by way of summons dated 21 September 2018 pursuant to section 97 of the Companies law (2018).

2. The purpose of the application is to apply to the New York Court in order to establish a priority claim to the monies that the joint official liquidators of the SPC Fund (SPC JOL's) otherwise intend to distribute. The SPC JOL's resist the application and wish to distribute the monies.

Factual background

3. These proceedings arise as a result of a number of frauds and other wrongs committed against the two Funds who contest this application. Each Fund has sought to obtain and enforce judgments in the United States against the wrongdoers.

4. The main background factual evidence is contained in the affidavits of Mr Walker (of Cole Schotz), Mr Homer (one of the MF JOL's) and Mr Pearson (one of the SPC JOL's). I take the summary which follows principally from these three affidavits.

5. There is also extensive expert evidence (six affidavits) on New York law from Messrs Matteo and Auslander for the MF JOL's and from Mr Hirsch for the SPC JOL's.

6. Mr Russell Homer is one of the MF JOL's. In his second affidavit sworn on 21 September 2018 (in support of the Summons by which this application is brought) he explains that on 25 January 2016 the Master Fund (also known as Wimbledon) commenced proceedings in the New York Court against David Bergstein, Graybox LLC and others (all alleged wrongdoers) seeking a "turnover" of funds that had been dispersed to Mr Bergstein and others.

7. On 17 July 2017 the New York Court issued a "Decision and Order" against Mr Bergstein and others in the amount of approximately US $8.5 million. On 21 July 2017 a corresponding "Judgment" was entered in the proceedings. The meaning and effect

of those documents is the subject of the extensive expert evidence on New York law on this application.

8. On the same day restraining notices were served on Mr Bergstein and Graybox LLC forbidding them from making any sale, assignment or transfer of the monies.

9. Graybox was also subject to an earlier injunction made on 29 September 2015 which had been obtained by the SPC Fund on behalf of the Class TT segregated portfolio. That injunction was obtained in proceedings in California and froze approximately US$ 2.4 million in funds (the frozen funds) belonging to Mr Bergstein which he had directed to be paid to Graybox. These proceedings were stayed on 9 January 2017 to await the resolution of criminal proceedings brought by the Department of Justice in New York against Mr Bergstein.

10. In December 2017 the attorneys for the MF JOL's, Kaplan Rice, discovered that despite the stay a stipulation had been granted in the California proceedings permitting the transfer of the US$2.4 million from Mr Bergstein's attorneys to Class TT in furtherance of a settlement that had been made in the Class TT proceedings. On 8 December 2017 Kaplan Rice wrote to Mr Bergstein's attorneys requesting information relating to the transfer and settlement.

11. On 13 December 2017 Kaplan Rice wrote to Class TT's US attorneys, Cole Schotz, providing them with copies of the New York judgment, restraining notices and other documents (but not, apparently, the Order) and requesting disclosure concerning the transfers, their knowledge of the judgment and restraining notices and information relating to the settlement. The MF JOL's assert that from no later than that date (13 December 2017) the SPC JOL's were on notice of the judgment and restraining notices.

12. It is to be noted that of the US$7.4 million paid under the settlement, US$5 million was paid 6 days after this date, on 19 December 2017. However, the frozen funds (US$2.4million) was paid to Class TT some four months earlier. On 21 August 2017, Graybox caused Mr Bergstein's lawyers to transfer the frozen funds to Cole Schotz (see Pearson, 12th affidavit, 15 September 2018 (paragraph 18).

13. The question arises as to whether Cole Schotz or their clients reviewed the publicly available New York docket before then. Mr Pearson says (paragraph 29 of his affidavit) that Mr Walker of Cole Schotz advises him that neither he, nor anyone at Cole Schotz, monitored the filings made in the New York action and that there was no reason for them to do so. He says that the SPC JOL's were similarly unaware of the stipulations until they were located during the course of preparing the distribution application.

14. On 20 December 2017 Class TT's attorneys wrote to Kaplan Rice denying having received earlier notice of the judgment or restraining notices and refusing to provide

a copy of the Settlement Agreement and other information on the basis that these matters were confidential.

15. On 5 February 2018 the Master Fund applied to hold Mr Bergstein and Graybox along with their legal counsel in civil contempt for the transfer in breach of the restraining notices.

16. On 7 February 2018 the MF JOL's wrote to the then voluntary liquidator of the SPC Fund, Mr Pearson, (of which Class TT is a segregated portfolio) informing him of the contempt proceedings and requesting that the US $2.4 million be held in escrow pending resolution of the matter. Mr. Pearson effectively agreed to do so confirming that no monies would be distributed without giving the MF JOL's 14 days notice.

17. On 1 March 2018 Mr Bergstein was convicted for the frauds that he had committed against Class TT, the Master Fund and others. He was later sentenced to eight years imprisonment and ordered to pay a fine in the sum of US$250,000 (see paragraph 56 of Mr Pearson's affidavit).

18. On 4 April 2018 during the hearing in relation to the contempt application, the New York Court directed Mr Bergstein's attorneys to produce a copy of the Settlement Agreement between Mr Bergstein and Class TT. It was disclosed to the Master Fund on 5 April 2018.

19. On 10 April 2018, as the Settlement Agreement provided for further payments to be made from Mr Bergstein to Class TT, the MF JOL's wrote to the SPC JOL's requesting a full accounting of Class TT's dealings with Mr Bergstein.

20. On 13 April 2018 Mr Pearson, who had by then become one of the joint official liquidators of the SPC Fund, responded to confirm that none of the relevant parties had paid any amounts other than the US $2.4 million 'frozen funds', and that no payments had been received since the 13 December 2017, which was the date that the restraining notices were sent to the SPC Funds lawyers.

21. However, in a letter submitted by Mr Bergstein in his criminal case he claimed to have paid US $7.4 million to Class TT as part of the settlement.

22. On 17 April 2018 the MF JOL's wrote to their counterparts for the SPC Fund requesting an explanation. On 2 May 2018 having received no response, the Master Fund's lawyers served an information subpoena on the SPC Fund's lawyers requiring disclosure by 9 May 2018.

23. On 4 May 2018 the New York Court handed down a decision and order on the Master Fund's application for contempt against Bergstein, Graybox and their lawyers. It was held that the Bergstein parties knowingly and wilfully violated the restraining notices

and had defrauded the California court in seeking permission to make the transfer of the monies without disclosing that the subject funds were encumbered by the restraining notices and that in addition there was no basis to contend that Class TT had any priority over the Master Fund as a result of the pre-judgment injunction. Mr Pearson says at paragraph 34 of his affidavit that the court chose not to hold the parties in contempt liable for payment of any portion of the settlement monies for the reasons given by Mr Walker at paragraph 28 of his affidavit, namely that the court deemed entry of such relief pointless as against the already incarcerated Bergstein and his entity Graybox, against both of whom the Master Fund had already secured a judgment.

24. On 7 May 2018 the SPC Fund's Cayman lawyers wrote to the Master Fund's Cayman lawyers disclosing that in addition to the US$2.4 million a further US$ 5 million had indeed (and contrary to the letter sent on 13 April 2018) been received by Class TT on 19 December 2017.

25. On 9 May 2018 the SPC Fund's New York attorneys confirmed the position and further disclosed that the monies were received by them and then subsequently transferred to the SPC JOL's in the Cayman Islands with the exception of US$ 500,000, which they retained.

Legal Issues

26. The legal issues which arise from these essentially agreed facts are:

    a) whether the Master Fund JOL's have a superior claim to the US $5 million than any claim Class TT may have to those funds arising out of the judgment obtained from the New York Court in July 2017 in the sum of US$ 8.5 million. The judgment had been served on Class TT six days prior to receipt of the funds on 19 December 2017. The MF JOL's seek leave to bring an action in New York, and a draft Petition concerning the US$ 5 million transfer is exhibited to Mr Homer's second affidavit; and

    b) whether the MF JOL's have a claim in relation to the US $2.4 million. That will depend upon whether Class TT or its attorneys were aware of the judgment obtained from the New York Court in July 2017 before they received the monies in August 2017. They seek leave to issue subpoenas for information and documents against Class TT and its attorneys concerning their knowledge of the judgment at the time the US $2.4 million was received.

27. Mr Homer says (see paragraph 35) that he believes the most appropriate method to determine these claims is through litigation in New York as they accrued subsequent to the liquidation of the SPC Fund. This he says makes it not possible for the MF JOL's to prove in the liquidation. Moreover, he says civil litigation and not the winding up

process is the appropriate way to establish these claims. If the MF JOL's are right in relation to the priority claims it would mean that they would have a superior interest in those funds which would not accordingly form part of the Class TT liquidation estate.

28. He goes on to say that New York is the appropriate jurisdiction to resolve them because the claims arise from a New York judgment and the rights and obligations arising from the judgment are governed by New York law. In addition the funds were transferred in the United States and any relevant evidence will be in the United States. Discovery and information from any third parties will also be in the United States and pleadings, discovery, witness statements and cross-examination will be required to determine the claims.

29. Mr Walker who is a partner of Cole Schotz (who act for the SPC JOL's and Class TT), by his first affidavit sworn on 11 September 2018 sets out in paragraphs 3 to 20 the detailed chronology of relevant events to describe the efforts of Class TT to obtain and enforce judgments against (among other persons) Mr Bergstein by way ultimately of the earlier California proceedings.

Mr Walker confirms at paragraph 12:

"The US $7.4 million was paid to class TT in two instalments. Class TT first received US $2.4 million-the frozen funds that had been deposited in BMK's trust account [BMK had acted as lead counsel for Bergstein] pursuant to the District Court's injunction order – on August 21, 2017.Thereafter, Bergstein caused to be made the second instalment payment required by the Bergstein settlement in the amount of US$ 5 million. Cole Schotz received the second instalment on December 19 2017 .....

30. Mr Richard Murphy is a Manager under the direct supervision of the SPC JOL's. By his fourth affidavit sworn on 26 October 2018, he sets out reasons why, if this court considers that leave should be granted, the claim should be resolved in the Cayman Islands and not in New York. In support of this contention he points to the fact that Cayman Islands companies (in liquidation) are involved, both sets of JOL staff are located in the Cayman Islands and that the settlement proceeds are in a bank in the Cayman Islands. He points out that significant fees would be incurred to contest a trial in New York which would take 5 to 7 full days. He further states that if the claim was successfully defended the SPC Fund would be unlikely to obtain an order for payment of its costs.

31. He sets out calculations concerning the comparative costs of the case should it proceed in New York or in the Cayman Islands and concludes that although also substantial, the fees for contesting the case in the Cayman Islands would be considerably less than those estimated to be incurred in New York. He concludes it would be more economical for the case to be heard in the Cayman Islands.

32. Having dealt with the nature of the application and the evidence which gives rise to the claim, and where it should be determined, I now turn to the contentions of the parties.

Argument

33. I summarise below the arguments made both by way of written argument and orally at the hearing.

34. Mr Kyle Broadhurst appeared for the MF JOL's. He submitted that it was clearly arguable as a matter of New York law that, where a judgment creditor had secured an order for payment of the debt from the judgment debtor, the creditor's interest in the debtor's property is superior to the rights of any transferee, except a transferee who acquired the debtor's property for fair consideration and without notice. He relied on the affidavits submitted as expert evidence of New York law from Mr Joseph Matteo and Mr Jay Auslander.

35. If he succeeded in this contention in the intended New York proceedings the claim, (which would be a proprietary claim) would not form part of the SPC Fund liquidation estate because it would be established as a matter of New York law that the Master Fund had a priority interest in the funds transferred. It would not be available for division among the general creditors if the true legal position as a matter of New York law was that the Master Fund was entitled to the money.

36. Indeed, Mr Broadhurst submitted that resolving the claim outside the liquidation process was the *only* available remedy to his client. The facts and matters in support of the claim occurred after the liquidation of the SPC Fund (see paragraph 35 of Mr Homer's affidavit). He further submitted it would inevitably be rejected even if submitted as a proof of debt from all the indications given by the SPC JOL's to date.

37. He argued that New York litigation was the natural way to establish the claim both because of the governing law, the location of the evidence and the nature of the case required to establish the claim.

38. He pressed the point that if I was to refuse leave the effect would be that I was summarily determining the claim against his client notwithstanding that there were real questions of New York law which arose for determination in addition to the questions of fact.

39. He dismissed the SPC JOL's fall-back position that were I minded to grant leave, the proceedings should be brought in the Cayman Islands and not in New York. In his submission New York was clearly the most appropriate forum.

40. He submitted these were genuine claims that were 'worth entertaining' and there were serious questions to be tried arising from the opinions of the New York lawyers.

41. He rejected as 'offensive' the attacks that were made by Mr Hoffman, who appeared for the SPC JOL's, as to the bona fides of Messrs Matteo and Auslander.

42. Mr Auslander was engaged for the sole purpose of providing an opinion on New York law and has no involvement in the various proceedings. Mr Matteo had given full disclosure of his involvement in the litigation and his evidence complied with all relevant rules and authority. There was in his submission nothing to suggest that they had produced false or misleading evidence.

43. He submitted that he comfortably exceeded the bar or threshold in relation to whether these were 'genuine' claims and that as a matter of fairness and justice his client ought to be granted the relief it sought.

44. Mr Nick Hoffman appeared for SPC JOL's.

45. He launched an attack on the expert evidence submitted by the MF JOL's. He argued that Mr Matteo's firm (as MF JOL's New York lawyers) were responsible for the position that the Master Fund finds itself in and that it was plain and obvious that the affidavits submitted in support of the application were effectively 'pleadings in their own defence'. Mr Matteo's personal interest in the outcome of this application and his duties to his client and to this Court were, he said, in irreconcilable conflict. If the effect of what was obtained was not a 'turnover order' under New York law, Mr Hoffman submitted that Mr Matteo would be answerable to his client as to why he did not obtain such a result. He also pointed to a success fee to be paid to Mr Matteo's firm under the terms of engagement with the Master Fund.

46. As to Mr Auslander, he submitted that the form and substance of his evidence strongly indicated that he had been impermissibly influenced by Mr Matteo's evidence.

47. He suggested that this collusion by Mr Matteo with Mr Auslander could be seen on a plain reading of the evidence. Both were 'tainted' in his submission and their opinions should be rejected.

48. His submissions were to the effect that the evidence had been tailored to support the best position for the Master Fund and was not independent or objective and not submitted impartially to assist the court on matters of New York law.

49. As a result, he said that the evidence was worthless as not only did it breach the Financial Services Division Guide on Expert Evidence and the relevant case law, it was plainly argumentative and flawed because of an improper motive.

50. He argued that I should disregard altogether, or in the alternative that I should give it almost no weight.

51. On the merits of the detailed opinions given in the evidence of Messrs Matteo and Auslander he was dismissive of all of them, pointing out that Mr Hirsch's analysis was clearly to be preferred.

52. As I remarked during the hearing matters of impropriety aimed at impugning the reputations of and evidence given by experts to assist the court are serious matters to allege. I have had no opportunity to see or hear the experts in this application or to have their evidence tested and have had to form a view on Mr Hoffman's submissions on the available written material.

53. As a result I have very carefully examined the details of the opinions and reasoning given in the six expert affidavits in this case and the relevant surrounding circumstances. I have also set out below summaries of the evidence in more detail than might be thought necessary so that the opinions can be properly identified, at least in outline.

54. He also made a number of points which were said to go to the 'bona fides' of the alleged claim. He argued that although the MF JOL's had made claims to the settlement proceeds since December 2017, they had not acted on them for some nine months and not until the SPC JOL's had made their Distribution Application. Then within days this application was brought.

55. In his submission, the application by the Master Fund should have been brought much earlier. They had been aware since December 2017 of the payment of the frozen funds to Class TT and since April 2018 that the second instalment was paid to Class TT, yet sanction was not obtained in the Master Fund's own liquidation proceedings to bring this case until 8 August 2018 and this application was not made until 24 September 2018.

56. He also made the following points:

-the Master Fund did not, despite having had ample opportunity and the procedural means to do so, ever assert a claim in California to the frozen funds (US$2.4 million) before they were transferred to Class TT. There was evidence to suggest that the Master Fund was aware of the California court's freezing order (made in September 2015) from mid-2016 because it was cited to in the New York Court proceedings.

-the Master Fund had undertaken enforcement action against Class TT US attorneys Cole Schotz which militates against the argument that a 'turnover order' had in fact been obtained and cast doubt on the effectiveness of the notice given on 13 December 2017.

-the arguments concerning the interpretation of the relevant New York law were only very recently articulated. Notwithstanding correspondence in December 2017 and in early 2018, it was not until 14 May 2018 that a passing reference was made to a 'turnover' order.

57. All of this Mr Hoffman says points to the conclusion that in around April/May 2018 the Master Fund appreciated that it had no claim to the settlement proceeds arising out of the breach by Bergstein and Graybox of the restraining notices and it was only then that it sought a way to establish such a claim and it did so by relying on personally conflicted US attorneys to support this application.

58. He accepted that the New York law position was primarily dependent upon the language employed in the Order and Judgment obtained in New York.

59. On this, the evidence of his expert Mr Hirsch was clearly, in his submission, the right analysis: neither document directs the defendants to 'deliver' or 'pay' any personal property. Rather both documents use the language of a money judgment. This means, according to Mr Hirsch, that they are not 'turnover' orders under New York law so there is no superior interest in the settlement proceedings (in the sense of being the personal property of the judgment debtor) over Class TT (being the transferee).

60. He argued in addition that because there was no evidence to suggest that the settlement proceeds were located within the state of New York and/or that they were in the actual possession or custody of someone subject to the personal jurisdiction of New York, even if a 'turnover 'Order were obtained it did not apply to the settlement proceeds.

61. There is then the notice question which applies to the frozen funds (US$2.4million). There was no evidence to suggest that the SPC JOL's or their agents knew of the New York judgment before receipt of these monies.

62. Mr Hoffman submitted that the Master Fund had no claim 'worth entertaining' and it had not discharged the burden of establishing that it did. He submitted I should dismiss this application and the claim could and should be dealt with in the winding up process if needs be.

63. If the Court does grant leave, he submitted that it should be conditional upon the claim being brought in the Cayman Islands which would be less expensive than litigation in New York. As is well known the costs regime in New York is such that the winner of litigation is unlikely to recover costs from the loser and the costs which would be borne by the stakeholders of Class TT would be irrecoverable by defeating, in his submission, a hopeless claim.

Analysis

The law on granting leave

64. The Company's Law (2018) imposes a statutory moratorium on the commencement and continuance of legal proceedings against a company in official liquidation. Section 97(1) of the Companies Law provides that:

> *"When a winding up order is made or a provisional liquidator is appointed, no suit, action or other proceedings, including criminal proceedings, shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court may impose."*

65. In the ordinary course if the proposed action for which leave is sought raises issues which can be conveniently decided in the course of the winding up, then leave should be refused as there is an obvious benefit in having matters decided in liquidation proceedings which ought to be less expensive and faster than separate litigation. The Court is given a discretion to depart from this ordinary course to do what is right and fair in all the circumstances.

66. The threshold question is whether the applicant for leave has shown that he has a claim that is 'worth entertaining'. This test has been expressed in a number of ways. The rationale is that the company in liquidation and its liquidators should not be burdened by defending a futile claim.

67. Mervyn Davies J expressed the test as 'an arguable case' in *Re Exchange Securities [1983] BCLC 186.*

68. Jonathan Parker J in *Re Bank of Credit and Commerce International (no 4) [1994] 1 BCLC 419* observed of this decision:

> *"It appears to me that the learned judge on that occasion was doing no more than acknowledging that if, on the face of the matter as it appeared to the court, there was no claim or no claim worth entertaining, then plainly the application could not proceed because the grant of leave in such circumstances would be a complete waste of time and expense to all concerned."*

69. Again in *Enron v HIH [2005] EWHC 485* the court expressed the test as follows:

> *"Is the claim so bad that it would be a waste of resources to permit it to proceed to arbitration?"*

70. Expressed in these ways the threshold test would appear to be a relatively low one, akin to one of a "prima facie" case.

71. It is only if the court is satisfied that this threshold test has been met that it moves on to consider the question whether to grant leave (and if so whether to impose any conditions) and in this regard the Court's discretion is broad and unfettered.

72. In *Enron,* the court at paragraph 4 said:

"... fairness in this context is fairness in the context of the provisional liquidation or liquidation as a whole, and the ascertainment of what is fair necessarily involves a consideration the interests of the creditors as a whole and of the capacity of the provisional liquidators or liquidators to deal with the burden of the proposed litigation."

73. See also *Ahmad Hamad Algosalibi v SAAD [2010] 1 CILR 553 (SAAD)* where this court cited with approval the dictum of Brightman LJ from *In re Aro [1989] Ch.196* in which he referred to the English equivalent provision and (applying three earlier first instance decisions) said that the court has *'an equal freedom to do what is right and fair in the circumstances'.*

74. In *SAAD* (at paragraph 73) Jonathan Parker J's judgment in *BCCI* was again cited. It was said that in cases where there are competing claims to the assets, the essential question that a court must ask in determining whether to grant leave is:

"*What is the most appropriate method for determining the proposed claims- is it separate proceedings or is it the winding up process" see also Madison NICHE MNAF and MNOF 25 APRIL 2016 (unreported) per Smellie CJ.*

75. Applying these tests to the instant case it is clear that it is not appropriate for this court to attempt to resolve the conflicting views of New York law contained in the affidavit evidence. It is necessary to determine from the expert evidence submitted whether or not there is a real issue to be tried. Leave should not be given if the claim is not genuine and arguable since it would be a futile exercise to go to the time, trouble and expense of having it determined in litigation.

76. If the court is satisfied that there is a real issue to be tried ,the general discretion as to whether to grant leave is to be exercised by taking all relevant circumstances in to account in the assessment of a fair outcome to the parties.

77. This includes a consideration of whether there are fair, realistic and appropriate alternative methods to resolve the dispute either first (and as a matter of preference for economic reasons) within the winding up proceedings, or if not in the winding up

proceedings, in another jurisdiction to that proposed by the applicant, in this case the alternative proposed is the Cayman Islands.

The approach to expert evidence

78. As is well known the Financial Services Division Guide (2015) sets out the general requirements that apply to expert evidence in this Court.

79. The three relevant paragraphs are at B5.2 (b):

> *a) it is the duty of an expert to help the Court on the matters within his expertise. This duty is paramount and overrides any obligation to the party from whom the expert has received instructions or by whom he is paid*
>
> *b) expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced by the pressures of litigation or any party*
>
> *c) an expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness should never assume the role of an advocate or seek to promote his client's case*

80. These are a codification of the case law culminating in recent approval by the Supreme Court in the Scottish case of *Kennedy v Cordia* [2016] UKSC 6.

81. It is always desirable that an expert should have no actual or apparent interest in the outcome of proceedings. However, the presence of a conflict of interest does not automatically disqualify an expert. The question is whether, once the expert has made disclosure of any association or loyalties which might give rise to a conflict, the subsequent opinion is truly independent of the parties' interests and the pressures of litigation-see paragraph 102 of *Arpad v Jarman [2006] EWCA Civ 1028 Potter LJ.*

82. Where an expert has a material or significant conflict of interest, the court is likely to decline to act on his evidence, or indeed to give permission for his evidence to be adduced-see *Arpad* paragraph 100.

83. As was made clear in *Helical Bar v Armchair [2003] All ER (D) 436* the test of apparent bias is not relevant to the question of whether or not an expert witness should be permitted to give evidence. It is necessary to enquire into the extent of the interest or connection disclosed and whether or not the expert is aware of his primary duty to the court and whether he has (or has not) despite the interest or connection with the litigation or a party thereto, carried out that duty independently and objectively-see Nelson J at [29].

84. In this case although Mr Hoffman strongly objected to the expert evidence of the SPC JOL's he did not press his arguments on admissibility and accepted that I needed to review the evidence in full for the context. If overall I came to the view that the expert had an interest which was not sufficient to preclude his evidence from being admitted, I should go on to consider the weight that should be given to his evidence.

The expert evidence

85. As I have indicated given the attacks made on the expert evidence by Mr Hoffmann it is necessary to summarise some of the salient expert evidence in order to identify the main points of contention between the experts.

86. I summarise first the evidence of Mr Matteo dated 9 November 2018 (sworn in response to the first and second affidavits of Douglas Hirsch dated 17 September and 26 October 2018) and then the third affidavit of Mr Hirsch dated 13 November 2018 and response of Mr Auslander, by his second affidavit dated 16 November 2018, as this most conveniently sets out the main contentions and arguments.

Matteo

87. In Mr Matteo's first affidavit of 9 November 2018 he identifies that his firm is US litigation counsel to the MF JOL's and that he is lead counsel in the special proceedings that resulted in Wimbledon's judgment against Mr Bergstein and Graybox. He confirms that he has read section B5.2 of the Financial Services Division Guide (second edition) and that he has complied with those provisions in preparing his affidavit. He responds to the opinions in Mr Hirsch's first and second affidavits dated 17 September and 26 October 2017.

88. In his view Wimbledon has a strong claim that it has a superior interest in the second transfer, and may also have a claim that it has a superior interest in the first transfer pursuant to the New York Civil Practice Law and Rules (CPLR) 5202(b) depending on the outcome of further discovery through the New York courts.

89. By paragraphs 17 to 23 Mr Matteo deals with the contentions of Mr Hirsch in relation to the application of CPLR 5202(b), the jurisdiction question as to whether the New York Court can direct Class TT to bring the proceeds of the transfers to New York to satisfy the judgment obtained against Bergstein and Graybox and whether Cole Schotz received notice of the relevant order.

90. Mr Hirsch had opined that Wimbledon would not have a superior interest in either the first or second transfer because it purportedly obtained a money judgment rather

than a 'turnover order' against Bergstein or Graybox. In Mr Matteo's view the distinction that Mr Hirsch attempts to draw between a turnover of specific property and a direction to pay money is not one recognised under New York law.

91. He explains at paragraph 18 that Wimbledon had secured an order and judgment against Bergstein and Graybox for the proceeds of fraudulent conveyances that they had received from an entity against which Wimbledon had a prior judgment. They obtained that relief pursuant to CPLR 5225(b) which he says is often referred to as a 'turnover proceeding'.

92. This rule he says permits a judgment creditor to satisfy its outstanding judgment by recovering the proceeds of the fraudulent transfer made by the judgment debtor "*...against a person who is a transferee of money or other personal property from the judgment debtor, where it is shown that the judgment debtor is entitled to the possession of such property*".

93. He refers to the Petition filed by Wimbledon which is he says is clear on its terms that it is based on CPLR 5225 (b) and CPLR 5227 and seeks a 'turnover order' against Bergstein- see JAM-1 Pages 16 to 29. (I note in passing that the words "turn over " are used and also that the relief requests an order directing property and money be "turned over" to the sheriff to satisfy the judgment obtained.)

94. He also refers to a leading commentator on the CPLR, David Siegel, whose treatise he annexes pages 30-36 of JAM 1. In this the author notes that the primary remedy available to a judgment creditor is payment of money to satisfy a judgment and it is only if the transferee lacks sufficient money to satisfy a judgment does the court order the transferee to deliver other personal property to the sheriff. This he says is clear from CPLR 5225(b).

95. The analysis continues at paragraph 20 of Mr Matteo's affidavit which I set out below:

"*Paragraph 20.*
Once a party obtains relief under CPLR 5225 (b) the determination of priority as between a judgment creditor (like Wimbledon) and a subsequent transferee (like Class TT) is governed here by CPLR 5202(b), which provides that a judgment creditor has priority vis-à-vis a subsequent transferee if that transferee either (i) did not provide fair consideration or (ii) had notice of the order that the judgment creditor had obtained before receiving the proceeds of the transfer:

-Where a judgment creditor has secured an ***order for the delivery of, payment of****, or appointment of a receiver of* ***a debt owed to the judgment debtor or an interest of the judgment debtor in personal property****, the judgment creditor's rights in the debt or property are superior to the rights of any transferee of the debt or property, except*

the transferee who acquired the debt or property for further consideration and without notice of such order."
(emphasis added)

96. Mr Matteo argues that the terms of CPLR 5202(b) do not use the words "turn over" and apply the priority to any *"order for the.... payment of ...or an interest of the judgment debtor in personal property..".* Money he says, clearly constitutes personal property in which a judgment debtor has an interest and therefore a judgment directing the payment of money to satisfy an underlying judgment falls squarely within the provision.

97. He refers to the case of *P. A Building v Silverman* 298 A.D 2d 327 (2002) as authority for the proposition that judgment creditors with orders and related money judgments under CPLR 5225 (b) are accorded priority under CPLR 5202(b).

98. He points out that on appeal the New York Supreme Court Appellate Division First Department affirmed the trial court's decision holding that the petitioner/judgment creditor had priority vis-à-vis the transferee because the transferee had not provided fair consideration. It upheld the first instance judgment notwithstanding that the trial court had issued a judgment directing the payment of money. The First Department referred to the trial court's judgment as a turnover order. He notes that this is the Division that would hear any appeal arising from Wimbledon's claims against class TT. He exhibits the Appellate Division decision and trial court's judgment at pages 38 to 40 of JAM 1.

99. He also goes on to state at paragraph 24 of his affidavit that New York's highest court-the Court of Appeals-also construes judgments directing the payment of money as turnover orders under CPLR 5225 (b) and gives examples.

100. At paragraph 25 of his affidavit he states that Siegel in his commentary also draws no distinction between judgments directing the payment of money and any other type of order obtained under the judgment enforcement provisions of the CPLR, which are set forth in Article 52.

101. In paragraphs 26 and 27 he disagrees with the decisions on which Mr Hirsch relies to support his conclusions stating that the *Cook* authority does not support any distinction between money judgments and any other type of order pursuant to Article 52 of the CPLR.

102. In paragraph 27 he says that the remaining decisions upon which Mr Hirsch relies do not provide that a money judgment is not entitled to priority vis-à-vis subsequent transferees and that in his view there is no policy rationale (and that Mr Hirsch offers none) for such an 'arbitrary rule'.

103. At paragraph 29 he refers to litigation currently pending in New York in which Class TT themselves positively asserted that the proceedings against class C resulted in a turnover order. He refers to the fact that the judgment against class C also directed the payment of money to Wimbledon and has the same language as the judgment entered against Bergstein and Graybox "*.. that Wimbledon have judgment and recover against.. in the sum of ...$...*".

104. In paragraph 30 Mr Matteo deals with the opinion of Mr Hirsch that the New York Court would not be able to order the turnover of the transfers unless it could demonstrate personal jurisdiction over the bank at which those funds were held, which he says contravenes controlling New York law (as held by New York's highest court). He relies on the decision in *Koehler*. In that case he explains that the Court of Appeals examined the question of whether a New York Court could order a non - party garnishee to turnover out-of-state money or property to satisfy a judgment pursuant to CPLR 5225 (b). Finding that CPLR Article 52 contains no express territorial limitation which prevented the entry of a turnover order requiring a garnishee to transfer money or property into New York from another state or country, the court rejected the argument that the New York courts had to have jurisdiction over the money or property in question to order it to be turned over in New York. Instead the court found that a New York Court with personal jurisdiction over a defendant may order him to turn over out-of-state property regardless of whether the defendant is a judgment creditor or a garnishee.

105. Mr Matteo at paragraph 32 goes on to opine that Class TT, which he says controls both transfers, is subject to the personal jurisdiction of the New York Courts. He states that Class TT does not contest that it is and that indeed Bergstein and Graybox' counsel admitted that negotiations giving rise to the transfers occurred in New York and that Class TT's representatives and counsel attended those negotiations in person- see pages 82 to 94 of Jam-1 exhibiting the affidavit of Stephen Katzman (Bergstein and Graybox' counsel).

106. He distinguishes the authority relied on by Mr Hirsch-*Commonwealth of Northern Mariana* because Wimbledon in this case would be seeking a turnover of funds directly under the possession and custody of Class TT so that the New York Court can order a garnishee that is subject to New York's jurisdiction to deliver assets within its possession.

107. In *Northern Mariana* the lower court could not compel a New York bank subject to a turnover proceeding under CPLR 5225(b) to turn over property held by foreign subsidiary because the New York bank was not in possession or custody of the property held by the subsidiary as required under the rule. Mr Matteo says that this so-called 'separate entity' rule does not apply to the facts in the instant case.

108. He also refers to cases involving *Iran* and *Cuba* in which assets held in foreign countries could be turned over providing that the New York court's had jurisdiction over the party having control of the assets.

109. He deals with Mr Hirsch's opinion that Cole Schotz did not have notice of the turnover order at paragraph 36 and following of his affidavit. Mr Hirsch makes the point that the July 17, 2017 Order was not attached to the correspondence sent to Cole Schotz on December 13, 2017 whereas the corresponding judgment was. This he says does not matter because for the purposes of CPLR 5202(b) an order includes the judgment against a garnishee, notice of which gives the judgment creditor a priority as against subsequent transferees. Moreover he states that the judgment made expressly mentions both the nature of the Petition brought by Wimbledon and the resulting Order and he sets out the passages of the Judgment in support of that contention at paragraph 40 of his affidavit.

110. Finally at paragraph 41 he dismisses Mr Hirsch's opinion that Class TT had priority because it paid a fair consideration for the transfers as there could be no fair consideration where a transferor or a transferee acted in bad faith. The New York Court has held that Mr Bergstein knowingly and wilfully violated court mandates to cause at least the first transfer, and in his opinion a New York Court would be likely to find that there was a lack of good faith precluding a finding of a fair consideration for both transfers.

111. In any case he says both conditions in CPLR 5202 (b) need to be satisfied to give the transferee priority i.e. fair consideration and that the transferee took the transfer without notice of the order. Here Class TT through its agent had notice of the judgment before it received the second transfer so it could not have priority to those funds vis-à-vis Wimbledon. It remained necessary to determine Class TT's awareness of the judgment prior to receipt of the first transfer.

Hirsch

112. Mr Hirsch is a partner in the law firm of Sadis and Goldberg. In his first affidavit sworn on 17 September 2018 he explained why in his opinion he does not believe that Wimbledon (the MF JOL's) has a priority claim to the transfers.

113. Whilst Cole Schotz acts for Class TT in the US and advised Class TT on all US law aspects of Class TT's settlement with Bergstein Graybox and others, he explains that his firm was retained on behalf of Class TT on 26 March 2018 to act in the limited role of conflict counsel and provide advice on the settlement to the extent of any possible perceived or actual conflict between Cole Schotz and Class TT. He confirms that he has read section B5.2 of the Financial Services Division Guide and has complied with those provisions in preparing his affidavit.

114. In his third affidavit Mr Hirsch takes issue with the evidence of Messrs Matteo and Auslander that an order or judgment obtained under CPLR 5225 (b) directing the payment of money only is a turnover order and satisfies CPLR 5202 (b). This is because in his opinion the MF JOL's did not obtain an order or judgment directing the payment of money. The wording obtained was for the MF JOL's to 'recover' money from Bergstein and Graybox, not a direction for the 'payment' of money.

115. He makes the point that the word 'pay' or 'payment' does not appear in the decision or the judgment. The lack of the words 'pay' or 'deliver' meant that the requirements of CPLR 5202 (b) were not satisfied-see paragraphs 9-11.

116. This he says is critical because without the requirement of the payment of money mere money judgments would be awarded priority and in themselves they are not given any kind of priority as a matter of New York law.

117. He takes issue with Matteo and Auslander's interpretation of the *P.A Building* decision which stated that judgments containing the word 'recover ' instead of 'payment' have been held to be turnover orders. They stated that the judgment in that case contained the word 'recover' and the Appellate court had held it to be a turnover order. Mr Hirsch says this is mistaken as in his opinion the Appellate court's decision is based that on the trial court's Order directing the respondent to pay a sum of money, not the later Judgment which was merely a money judgment.

118. At paragraph 24 he deals with the *Koehler* case referred to by Mr Matteo and distinguishes it on the basis that in that case an order was made directing the bank to "deliver.. *money sufficient to pay the judgment*" whereas in the instant case there was no such language of 'pay' or 'deliver'. He opines at paragraph 27 that if CPLR 5202(b) intended to include money judgments it would say so and refers to the *Cook* decision.

119. In paragraphs 29 to 32 he gives another reason why the MF JOL's cannot successfully seek a turnover order against Class TT. The proceeding against Bergstein and Graybox under CPLR 5225(b) requested both a turnover and a money judgment against them as third-party garnishees not as judgment debtors. If they had sought a turnover order against them as judgment debtors they would have had to file under CPLR 5225(a).

120. In his opinion *Koehler* does not address whether the court could have directed garnishees to turn over property that was not in their possession or custody.

121. In paragraph 33 he relies on *Northern Mariana* for the proposition that the garnishee had to have possession or custody of the property -constructive possession or control was insufficient.

122. In paragraph 35 he concludes that even if the decision and the judgment obtained by the MF JOL's somehow constituted a turnover order they could not create a priority claim because the monies were not in the possession or custody of Bergstein or Graybox, but were in the possession or custody of the banks against whom a turnover order would have to be obtained to be effective.

123. In paragraph 41 he concludes that to bring turnover proceedings against Class TT the MF JOL's would have to show that banks in possession or control of the monies were subject to the personal jurisdiction the New York Court as per *Northern Mariana,* not simply that Class TT had control over the funds and was subject to personal jurisdiction.

Auslander

124. Mr Auslander is a partner at the New York law firm of Wilk Auslander. He has no prior relationship with Wimbledon or the MF JOL's and neither he nor his firm act for Wimbledon or the MF JOL's in any other matter or capacity.

125. In his second affidavit Mr Auslander confirms for the reasons he gave in his earlier affidavit (and in concurrence with Mr Matteo) that New York law provides no distinction between a CPLR 5225(b) judgment that directs the respondent to 'pay' or 'deliver' property and one that does not.

126. In his opinion the overwhelming weight of authority states that any order or judgment issued pursuant to CPLR 5225 grants a party a superior right over transferees under CPLR 5202 subject to certain exceptions. He says that he has examined the question and in that review has not found a single case, treatise, or practice guide treatment of CPLR 5225(b) which provides that certain judgements issued confer priority but others do not- see paragraph 13. He makes the point that if certain language was required directing the 'payment of' or 'delivery of' the subject property it would be natural for every treatise and practice guide to alert the legal practitioner to this issue.

127. He refers to a number of authorities and commentators in which not one states that only a sub-class of CPLR 5225(b) Orders including certain language were truly turnover orders-see paragraphs 15-17.

128. If the judgment obtained was merely an ordinary money judgement no different than that obtained in an ordinary non-CPLR 5225(b) case, he concludes that the successful party would be forced to file a second action against the same parties, alleging the exact same facts, arguing the exact same legal precedent, and meeting the exact same burden of proof, ensuring that the resulting order contained explicit directions for the 'payment of' or 'delivery of' the property. This in his view would be inconsistent with his experience and his understanding of well-established New York law-see paragraphs 18-20.

129. In any case in paragraph 23 he says:

> *"In my opinion there is no substantive difference between a judgment directing a respondent to pay or deliver property to a petitioner on the one hand and a judgment that permits the petitioner to recover that property from the respondent on the other. They are two ways of saying the same thing."*

130. At paragraphs 25 -27 he takes issue with Mr Hirsch's arguments relating to the *PA Building* case. Contrary to Mr Hirsch's opinion he states that the Appellate Court did review and affirm the judgment of the court below issued pursuant to CPLR 5225(b). The underlying Order in that case is not in evidence and he makes the point that there is no basis to conclude that it is any different to the turnover order issued by the New York Court in the instant case. He states that it is clear that Justice Kornreich of the New York Court believed that the order she issued was a turnover order as she explicitly said so- see paragraphs 47 to 50 of his first affidavit. This was consistent with the Petition which asked the court to order that the respondents turn over certain property to Wimbledon which was then referred to in the judgment-see paragraphs 48-49 of Auslander 1.

131. He also points out that the judgment in the *PA Building* case used identical language to that in the instant case: *"ADJUDGED that Petitioner.....recover of the Respondent"*

132. He deals with Mr Hirsch's arguments concerning whether or not Bergstein and Graybox were judgment debtors or third party garnishees at paragraphs 28 -31. In his opinion they will both judgement debtors of Wimbledon.

133. He explains in paragraph 30 that the court has already ruled that the funds subject to the restraining notices (and thus the judgment) are judgment debtor property. The restraining notices served in connection with the judgment were aimed at the judgment debtor's (i.e. Mr Bergstein's) property. That in his opinion is why the court had issued the contempt order against Bergstein. If the monies had not been subject to the judgment in his view the court would have had no basis to find that Mr Bergstein was in contempt as the property he caused to be transferred would not have been subject to the restraining notices.

134. He concludes that given Class TT is the transferee of these funds and CPLR 5225(b) expressly permits a judgment creditor (Wimbledon) to commence a special proceeding against transferees of judgment debtor (Bergstein) property, Wimbledon can bring such proceeding against Class TT seeking the turnover of the transfers-see paragraph 31.

135. Moreover since Class TT is subject to personal jurisdiction of the New York Court it can be ordered to deliver the funds to Wimbledon pursuant to CPLR 5225(b) even if those funds are not located in New York-see *Koehler.*

136. Having reviewed all three opinions of Mr Hirsch, Mr Auslander remains of the view that:

> *"The judgment obtained by Wimbledon is an 'order for the delivery of, payment of.... an interest of the judgment debtor in personal property' pursuant to CPLR 5202(b) and that, accordingly, Wimbledon has a priority interest in the second transfer and quite possibly the first transfer"(paragraph 40).*

Decision

The expert evidence

137. It is always desirable, as the Court of Appeal said in *Factortame (no 2) [2002] 4 All ER 97I*, that an expert should have no actual or apparent interest in the outcome of the proceedings. I have however come to the firm conclusion that the attacks on Mr Matteo's evidence are not justified.

138. I find that the attack on Mr Auslander's evidence also has no substance to it. As I have said I have formed this view on the written material alone having not had the benefit of hearing the evidence and it being tested in Court.

139. Their evidence clearly discloses their respective extensive experience, interests and relationships. They both have deposed to the fact that in complying with the FSD Guide they are aware of their primary duties to this Court which override any obligation to the parties which engaged them and that they are able to put forward independent and objective evidence. Having reviewed that evidence in detail I can find no support for the criticisms of Mr Hoffmann which amounted to an assertion that their evidence had been tailored to suit the outcome most favourable to the MF JOL's.

140. In Mr Matteo's case I can find no support for the contention that he was unwilling or unable to abide by his duty to the court by reason of him having acted as the Lead counsel in the case which produced the critical Order and Judgment. Nor do I find that any success fee payable to his firm would have had any impact upon his evidence.

141. In Mr Auslander's case I reject the suggestion that he has in some way 'copied' or been improperly influenced by the position set forth by Mr Matteo, or that he has colluded in some way with Mr Matteo. Reading his evidence against Mr Matteo's I find that he has formed his own independent and objective views, having properly set out his source material.

142. I do not find any evidence of partiality or lack of independence such that I should give Mr Matteo or Mr Auslander's evidence little or no weight. I take their evidence at face value and approach it in the same way that I approach Mr Hirsch's evidence.

143. All three experts in this case have substantial relevant experience to opine on the issues raised. That they disagree is perhaps not surprising. The issues are matters of interpretation and the application of technical procedural rules and case law.

144. I should add for completeness that I have found no untoward 'advocacy' in the expert opinions submitted either.

Decision

145. I go on to consider the threshold test. Has an arguable case been identified, bearing in mind the MF JOL's bear the burden of showing that it has? I have formed the clear view that it has.

146. As can be seen from my selective summary of the affidavit evidence, the issues of New York law are somewhat technical. Whilst I am not on this application forming a view upon the ultimate merits of the points at issue, the MF JOL's expert evidence raises points that seem to me to be plainly arguable as matters of New York law. Mr Hirsch's evidence does not amount to a complete or comprehensive answer to the points raised, such that I am able to say on this application that they are not points 'worth entertaining' or that any hearing of them in a New York court would be futile.

147. It is arguable in my view that the Master Fund obtained the type of relief to which CPLR 5202(b) applies and that it applies to the settlement proceeds. The SPC Fund certainly had notice as to the US$ 5 million and *may* have had notice as the US$ 2.4 million, depending upon the outcome of intended information requests, which in my view are also 'worth entertaining'.

148. I reject Mr Hoffman's submissions concerning delays, inconsistencies and the allegedly inappropriate way in which the Master Fund has dealt with this claim. Neither do I accept his argument that the Master Fund has not raised any complaint to the Californian court when it could have is material to this application. Those submissions laid the foundation for an argument of a lack of 'bona fides' on which to mount his bold submission relating to the expert evidence. I find that this argument has no proper basis. I do not regard the MF JOL's case as flawed because it could have been argued earlier, or in a different forum, or in a way which is more consistent with how it is now being advanced.

149. As to the exercise of my discretion, which as I have indicated is broad, I approach it on the basis of providing the right and fair outcome in the circumstances of this case. I

also take into account that the claim is a proprietary claim which in both *SAAD* and *Re David & Lloyd (1877) 6 CH. D 339* influenced the court to grant leave (*see also McPherson & Keay the Law of Company Liquidation (4th Edn 2018) at paragraph 7-078*).

150. As a choice of procedure it seems to me clear that it is not possible to attempt to have this claim properly dealt with in the winding up proceedings. The events that give rise to the claim occurred subsequent to the liquidation of the SPC Fund and accordingly should not be brought within the liquidation proceedings-see *section 139 (1) of the Companies Law and Order 16 of the Companies Winding Up Rules and Bristol Fund [2008 CILR 317) Smellie CJ .*

151. Whilst the SPC Fund originally maintained (and Mr Hoffmann submitted) that the claim should be determined within the proof of debt process, it is clear to me from the evidence that such a claim would be rejected-see Murphy (paragraph 19).The primary position of the SPC Fund is that the MF JOL's are not entitled to the settlement proceeds. The fall-back position is that the claim should be determined in the Cayman islands.

152. As McPherson J said in *Ogilvie Grant ACLR 669 in the Supreme Court of Queensland* the seriousness of the claim, the degree of complexity of the legal and factual issues involved, and the stage to which the proceedings may have progressed are all circumstances which go to the question of granting leave.

153. In the *Wimbledon MF,* a case decided earlier this year by *Segal J (unreported 9 July 2018)* FSD 59 of 2014, (where the same parties to this application were arguing the reverse positions) the question was whether to allow New York proceedings after a proof of debt had been lodged and rejected (and an appeal against the rejection had been filed). We are not at that stage in this case.

154. Justice Segal said at paragraph 9 (b):

"... The right approach is to consider what procedure is best suited to deal with the issues in dispute so as to dispose of the claim in the liquidation fairly, justly and expeditiously, taking into account the fact that [the proof of debt] appeal process is conducted by the Court within its jurisdiction over the insolvent estate and therefore the need for the cost-effective and timely administration of the estate and the interests of the creditors as a whole need to be taken into account."

155. In this case there are technical questions of New York law and facts to investigate which in my view make New York the natural and appropriate forum for this claim to proceed in-see *Spiliada v Cansulex [1987] 1.A.C 460.* A New York court is the best forum to be able to decide the effect and impact of its own orders and judgments and the interpretation of its own laws which are centrally at issue.

156. Both parties are frequent litigators in the courts of New York and have local counsel to allow them to deal with the case in that jurisdiction. I do not consider that the costs regime in New York would make defending this claim unfair or prohibitive. The factors which point to the claim being most appropriately determined in New York outweigh considerations for it to be resolved in the Cayman Islands. Importantly the experts are all lawyers based in New York.

157. Whilst the US costs rule may be comparatively disadvantageous to the successful party I do not consider that this has a material bearing on where this claim ought to be brought. Neither do I consider that the costs estimates of taking the case to a contested trial are so different between New York and Cayman to affect my decision, nor would the estimated costs of the New York trial be disproportionate given the sums at stake.

158. It follows that I have formed the view that both aspects of the application in relation to the two principal sums at stake from the settlement proceeds may be pursued. I have come to the conclusion that it is in the interests of justice to grant the relief sought in respect of both the claim to US$ 5 million and to US$ 2.4 million.

159. Accordingly, I grant the application for leave to issue the proceedings as outlined in the draft Petition exhibited to Mr Homer's second affidavit and to issue information subpoenas against the SPC Fund and its attorneys concerning their knowledge at the time the US$ 2.4 million was received.

THE HON JUSTICE RAJ PARKER
JUDGE OF THE GRAND COURT

GRAND COURT - CAYMAN ISLANDS