

Application to set aside leave to serve out of the jurisdiction

[2020]GRC040

**IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION**

Between:

HIGHLAND CLO FUNDING LIMITED

Plaintiff

-v-

JOSHUA TERRY

Defendant

Judgment handed down: 5th August 2020

Before: Sir Richard Collas, Lieutenant Bailiff

Advocate for the Plaintiff: Advocate G K Bell

Advocate for the Defendant: Advocate T W McGuffin

Cases, Texts and Materials referred to in the Judgment:

The Royal Court Civil Rules 2007, Rule 8

Credit Suisse Trustees Limited v Haggiag and Others (Royal Court 7 October 2015)

Flightlease Holdings (Guernsey) Limited v Flightlease (Ireland) Limited [2009-10] GLR 38

Instant Access Properties Limited v Rosser & Others [2018] EWHC BCC 751

Brent BC v Davies [2018] EWHC 2214 (Ch)

Base Metal Trading v Shamurin [2004] EWCA Civ 1316

Eurasia Sports Limited v Aguard [2018] EWCA Civ 1742

Spiliada Maritime Corporation v Cansulex Limited [1987] AC 460

Snell's Equity, 33rd Edition, paragraph 7-005

Revenue and Customs Comms v Holland [2010] 1 WLR 2793

Bristol and West Building Society v Mothew [1998] Ch 1

Farrar v Miller [2018] EWCA Civ 172

Procedural History

1. By application dated 17 August 2018, Highland CLO Funding Limited ("the Company") applied pursuant to Rule 8 of The Royal Court Civil Rules 2007 and the inherent jurisdiction

of the Royal Court for leave to serve a Summons on Joshua Terry (“Mr Terry”) out of the jurisdiction at an address in Dallas, Texas, USA.

2. By Act of the Royal Court dated 24 August 2018, I granted the Company’s application.
3. By an application dated 28 November 2018, Mr Terry applied to set aside the Act of Court dated 24 August 2018 on the ground that the matter was not properly justiciable before the Royal Court and that they were not proper documents for service out of the jurisdiction under Rule 8 of the RCCR. Alternatively, Mr Terry sought a stay of the Company’s application on the grounds that Guernsey is *forum non conveniens* for such an action. Mr Terry’s application came before the Royal Court on 7 December 2018 when orders were made for the exchange of materials and for the parties to liaise with the Greffe to set a hearing date.
4. By further application dated 15 April 2019, Mr Terry applied (1) to have the leave to serve out of the jurisdiction set aside on the basis of non-disclosure by the Company at the hearing on 24 August 2018 and (2) for that application to be heard as a preliminary issue on an expedited basis. The second part of that application came before me on 8 May 2019 and was dismissed by me with an order that the substantive hearing proceed as scheduled commencing 15 May 2019.
5. At that hearing I also had before me an application by the Company for leave to amend its cause.

Documents

6. The principal documents I have before me are:
 - 1) The Plaintiff’s skeleton argument in support of the application for leave to serve out dated 17 August 2018; supported by:
 - a) the First Affidavit of Jean-Paul Sevilla, counsel at Highland Capital Management LP, and an affiliate of the investment adviser to the Company, HCF Advisor Ltd dated 17 August 2018.
 - 2) Mr Terry’s skeleton argument in support of his application to set aside the service out order dated 5 December 2018; supported by:
 - a) the First Affidavit of Mr Terry dated 29 November 2018.
 - 3) The Company’s responsive skeleton argument re jurisdiction dated 22 February 2019; supported by:
 - a) the Second Affidavit of Jean-Paul Sevilla dated 18 February 2019;
 - b) the First Affidavit of William Scott, director of the Company, dated 15 February 2019; and
 - c) the First Affidavit of Heather Bestwick, director of the Company, dated 19 February 2019.
 - 4) Mr Terry’s responsive skeleton argument re jurisdiction dated 15 April 2019 supported by:
 - a) the Second Affidavit of Mr Terry dated 13 March 2019.
 - 5) Mr Terry’s skeleton argument re full and frank disclosure dated 14 April 2019.
 - 6) The Company’s skeleton argument re full and frank disclosure dated 1 May 2019; supported by:

- a) the Affidavit of Advocate G Bell dated 1 May 2019; and
 - b) the Third Affidavit of Jean-Paul Sevilla dated 1 May 2019.
7. Also available was the transcript of the hearing of the application for leave to serve out of the jurisdiction heard by me on 24 August 2018.

The Legal Test for Service Out

8. The legal principles that govern service out of the jurisdiction have now been well established both in the Royal Court and in the Court of Appeal and there is little dispute between the parties as to what they are despite almost total disagreement between them on all other matters.
9. The starting point is Rule 8 of the RCCR which states as follows:
- “8. (1) *The Court may give leave to effect service of a document out of the jurisdiction.*
- (2) *The Court shall not make an order under paragraph (1) unless satisfied (by affidavit or otherwise) that the matter to which the document relates-*
- (a) *is properly justiciable before the Court, and*
- (b) *is a proper one for service out of the jurisdiction.*
- (3) *An order of the Court under paragraph (1) shall state-*
- (a) *the form, manner and time in which, and conditions subject to which, service is to be effected, and*
- (b) *the minimum period which must elapse between the date of service and the date upon which the matter may be pursued.*
- (4) *Where the Court makes an order under paragraph (1), proof of service in accordance with the order shall be by affidavit or, where service was effected by the Sergeant, by the relation of the Sergeant.”*
10. The principles were summarised by Her Hon H Marshall QC, Lieutenant Bailiff in Credit Suisse Trustees Limited v Haggiag and Others (Royal Court 7 October 2015) as a three stage test, noting that the last stage has two limbs:

- “(i) *there should be serious issues of law or fact to be tried in relation to the overseas Defendants;*
- (ii) *there is a good arguable case that the claim falls within at least one of the classes of case as to which permission to serve out may be given; and*
- (iii) *in all the circumstances, Guernsey is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service out of the jurisdiction.”*

11. I will refer to the first two limbs of the test as the “Merits Test” and the “Jurisdictional Gateway Test” respectively. The third limb I will refer to as the “Appropriate Forum Test” and to the second part thereof as the “Court’s Discretion”.

The Merits Test – the pleaded facts

12. The Company is a Guernsey registered company, licensed by the Guernsey Financial Services Commission as a closed ended investment fund. It was established to provide investors with exposure to senior secured loans and CLO notes on both a direct and indirect basis, through the use of investments of the type described in its investment policy and as set out in the Company's offering memorandum ("OM") dated 10 August 2015. The OM defines a CLO as a *"special purpose vehicle which issues notes backed by a pool of collateral consisting primarily of loans"*. CLO notes are defined as *"notes representing tranches of debt issued by a CLO"*.
13. Portfolio management services were provided to the Company by ACIS Capital Management LP ("Acis LP") and a portfolio services agreement was executed on behalf of that entity by its general partner, ACIS Capital Management G P, LLC, and signed on behalf of that entity by Mr Terry. The Cause referred to those two entities collectively as "ACIS" and I will adopt the same.
14. The Portfolio Services Agreement ("PSA") in force at the material time (from 10 August 2015 to 22 December 2016) required ACIS to discuss investment objectives with the Company, present information to its directors with respect to potential investments and make available such personnel and resources as necessary in connection with those services (inter alia). The OM recorded that ACIS would provide personnel and other support and assistance to the Company and named Mr Terry as the sole member of the investment committee who will *"be made available by ACIS to the Company pursuant to the Portfolio Services Agreement"* albeit that other personnel might be made available from time to time.
15. Mr Terry was a limited partner of Acis Capital Management L.P. and an employee of Highland Capital Management L.P ("Highland CM"). In performing services to the Company, including his involvement in the establishment of the Company, it is alleged that Mr Terry came into possession of confidential information concerning the Company during the period to, on or about, 9 June 2016 when his employment with Highland CM was terminated. He ceased to be a limited partner of Acis Capital Management L.P. and his roles with ACIS also terminated at that time. He provided no services to the Company after that date.
16. On or about 7 September 2016, Highland CM issued proceedings in the Dallas District Court against Mr Terry for breach of his employment agreement, breach of fiduciary duty/self-dealing, violation of the Texas Uniform Trade Secrets Act and sought declaratory relief that his employment had been terminated for cause. On Mr Terry's application, the proceedings were stayed and the parties were compelled to arbitrate. The Final Award dated 20 October 2017 awarded monetary compensation to Mr Terry against Acis in the sum of \$7,949,749.15.
17. In or about November 2017 an affiliate of Highland CM began negotiations with Mizuho Securities USA LLC to enter into a 2.25 year "Reset" of each of 4 CLOs in which the Company held investments. Within each CLO there are different levels of note-holder and the subordinated notes held by the Company are the last to be paid pursuant to the funds flow "waterfall". The "Reset Transactions" (as I will refer to them) would have resulted in a re-financing of each of the CLOs. This would have avoided the Company suffering from a reduction in the weighted average coupon of the collateral pool and would have led to substantially greater cash flows being available to the Company as a holder of the sub-notes because of the reduced amounts that would have been payable to the senior note-holders. The first of the Reset Transactions was scheduled to complete on 1 February 2018 by which date the only remaining condition precedent was for a portfolio management agreement to be transferred from ACIS.

18. It is alleged that Mr Terry sought to prevent the Reset Transactions from going ahead in order to put pressure on Mr Dondero and others to pay to Mr Terry the Final Award due to him. He first of all sought a temporary restraint order in the Dallas State Court and subsequently lodged an involuntary bankruptcy petition against ACIS in the United States Bankruptcy Court in Dallas by allegedly using confidential information concerning the Company that came into his knowledge when he was providing services to it. The Company seeks to recover loss and damage in the annual sum of US\$13,729,084. It is also alleged that by assisting ACIS's trustee in bankruptcy he was to receive a fee of US\$700,000 (amended in the amended cause from US\$500,000) and the Company claims recovery of that sum and any other benefits received by him by virtue of his alleged breaches of fiduciary duties ("the Restitutionary Claim").

The Merits Test – the Company's case

19. An essential element of the Company's case rests on the submission that ACIS provided personnel rather than services to the Company, specifically that Mr Terry was named as the only personnel provided, that the Company reposed trust and confidence in him and thus that he owed fiduciary duties to the Company which are governed by Guernsey law. The Company had two non-executive directors, Heather Bestwick and William Scott, but no employees. Mr Terry provided a broad range of management functions and gave advice on which the directors were reliant including in relation to the Company's investment and valuation policies although the PSA expressly provided (at Clause 6) that the ultimate responsibility rested with the board of directors of the Company who were free to accept and to reject any advice rendered by ACIS "*for any reason or for no reason*".
20. On behalf of the Company, Advocate Bell submitted that Mr Terry could not distance himself from the affairs of the Company on the ground that he was not a member, director, officer or employee of it; he owed fiduciary duties to the Company because of the extent of his involvement in the establishment and operations of the Company. He emphasised that the question whether an individual owes fiduciary duties to a company is fact-sensitive and does not depend on the individual having a particular role. He submitted that English decisions in relation to matters of company law are persuasive on the basis that the concept of a limited company was imported into this island from English law (per Southwell, LB, in Flightlease Holdings (Guernsey) Limited v Flightlease (Ireland) Limited [2009-10] GLR 38 at para 91) and he cited a number of English decisions to show how fiduciary duties can arise.
21. In Instant Access Properties Limited v Rosser & Others [2018] EWHC BCC 751, Morgan J reviewed a series of cases involving shadow directors (at paragraphs 259-263) and held that rather than ask whether a person is a shadow director, the crucial question is whether the person assumed the duties of a director such that he owed fiduciary duties and, if so, what duties. At paragraph 263, he said "*it is usually helpful to ask whether the individual has expressly or impliedly (from the circumstances) undertaken or assumed a position of trust and confidence or whether there is a legitimate expectation that he will not use his position in a way adverse to the interests of the other*".
22. In Brent BC v Davies [2018] EWHC 2214 (Ch), (at paragraphs 327-334) Zacaroli J reviewed the circumstances which may give rise to fiduciary duties outside of the established categories of fiduciary relationship. After referring to the general principles set out by Morgan J in Instant Access, he said that "*Fiduciary duties may co-exist with other legal relationships, for example contracts. Where they do, the scope and nature of the fiduciary duties will be moulded to fit the terms of the contract*". Whilst the relationship of employer and employee

is not a fiduciary one, the receipt by the employee of confidential information may place him in the position of a fiduciary.

23. The essence of the Company's case is that as an employee of Highland CM who was nominated to provide services to the Company, Mr Terry was in receipt of confidential information concerning the Company and had an obligation not to use that information in a way adverse to the interests of the Company, which continued to apply after the relationship was terminated. The Company also asserts that Mr Terry was subject to the equitable doctrine of duty of confidence. The Company's claim is also made in tort and breach of confidence.
24. The pleadings allege that Mr Terry possessed confidential information concerning the Company and its investments which he acquired when performing services to the Company under the PSA. The duties included discussing investments with the directors of the Company, identifying and presenting information concerning potential investments, assisting with the investment portfolio, developing and maintaining the Company's valuation policy and advising on all aspects of investments. The details of the confidential information are particularised at paragraph 24 of the Cause:

a. The Defendant was aware of the Company's rights, as the holder of sub-Notes in excess of 67% of each of the 4 CLOs, to require a reset and optionally to redeem the 4 CLOs after expiration of the non-call period;

b. The Defendant acquired full details of the Company's investments in the 4 CLOs, the level of fees and expenses and the mechanics of their payment, the dates and priority of payments to noteholders and the indenture structures which govern the rights and remedies of the various categories of investors, issuer and portfolio manager including the order in which tranches were to be paid and the amounts that would flow to the Company;

c. The Defendant further knew the investment returns that the Company expected to make and the significance of the Company's rights to call for a reset or redemption if such returns were not being achieved;

d. The Defendant was also aware that such rights were a precondition for the Company agreeing to become an investor in Sub-Notes given the importance of Sub-Note holders having a mechanism to ensure that the economic structure of CLOs matches prevailing market conditions including rate levels;

e. The Defendant was aware that the equity investors in the Company included a third-party charitable trust funded by contributions from Highland Capital Management, LP and principals of Highland Capital Management, LP and that such charitable trust enjoyed a close and strong relationship with Acis (including the trust investing in Acis investments and Acis acting as investment manager for the trust);

f. The Defendant was further aware from the confidential portfolio management agreement pertaining to CLO3 that the Company, as equity holder, did not have the discretion to force a reset simply by terminating ACM LP as portfolio manager, and from the CLO3 indenture that ACM LP would have to consent to such reset (which consent could not be provided with a bankruptcy pending);

g. Finally, the Defendant was aware (i) that Highland CM and its affiliates were involved in the management of the Company; (ii) the Company owned a controlling equity interest in CLO3 and the rest of the 4 CLOs; (iii) that the Highland affiliated charitable trust referred to in paragraph 24.e. above was a primary

investor in the Company; and (iv) by virtue of such ownership would be regarded as the precipitating party of any reset.”

The Merits Test – The Submissions

25. Mr Sevilla, the counsel to Highland CM gave further details in paragraph 23 of his first Affidavit which expanded on those particulars, to which Mr Terry replied in his first Affidavit at paragraphs 59 to 70. There are two principal themes to his response, firstly that some of what was stated was inaccurate and secondly that some of the allegedly confidential information was lawfully available either because it was in the public domain or because it had been disclosed to him during or subsequent to other litigation in the Dallas Courts. A third element in his reply is that he did not have up-to-date knowledge of the Company at the time of the bankruptcy proceedings as he had had no involvement with it after the termination of his employment.
26. An example of the inaccuracies was a quote by Mr Terry from the Acis CLO 2014-3 Limited Indenture to show that the Company did not have the “*right to require a reset*” because the terms of any refinancing had to be acceptable to Acis LP (whose prior consent was needed if Acis LP would be adversely affected) and to a majority of the holders of the Subordinated Notes (i.e. the Company). If there was no agreement, they had no cause of action for any failure to re-finance. There were two reasons why the contents of the Indenture were not confidential: the document could be obtained through a Google search; and it had been discussed in open court in the US bankruptcy proceedings. The fact that the Company owned the subordinated notes of the CLOs had been disclosed by Highland CM on its website and in statements to the media. Ownership information had also been provided to Mr Terry through the post-judgment discovery process of the Dallas District Court. Mr Terry gave further examples of inaccuracies in paragraphs 59 to 70 of his first Affidavit.
27. Mr Sevilla responded in his second Affidavit. He repeated the allegations that Mr Terry misused confidential information in bringing the bankruptcy petition but he acknowledged that some of the information, such as the Acis-3 Supplemental Indenture was publicly available at that time and that CLO Holdco Ltd was listed as an investor in the Company. At paragraph 64 of the Affidavit he listed a number of documents such as the Acis LP limited partnership agreement, the indentures for each of the CLOs, the Portfolio Management Agreements for each of them, the sub-advisory agreement between Highland CM and Acis and the shared services agreement between those two companies, all of which he said were confidential at the time of the bankruptcy petition filing. Insofar as documents had changed after the departure of Mr Terry, he said the alterations were limited. He also acknowledged that much of the information did become public but said that was after the bankruptcy petition had been filed.
28. In his second Affidavit, Mr Terry replied briefly with a further denial that he had used confidential information when filing the bankruptcy petition and made an additional allegation that any relevant information claimed by Mr Sevilla to be confidential was in fact the property of Acis LP.
29. It is not disputed that one effect of the bankruptcy was to prevent the Reset Transactions from taking place.
30. To summarise, the principal issues in relation to the Merits Test are whether Mr Terry owed fiduciary duties that went beyond any contractual duty of confidentiality that he might have owed in respect of confidential information that he possessed and could recall at the time of the presentation of the bankruptcy petition; the question of who was the true owner of that

confidential information; and whether it was truly confidential in that the same information could not have been obtained either from public sources or from information disclosed to him during the course of other proceedings and in post-judgment disclosure.

The Jurisdictional Gateway Test – the Parties’ Contentions

31. In relation to the Restitutionary Claim, the Company relied upon the law of the place of incorporation as grounding jurisdiction for the claim. In other words, the alleged fiduciary duties owed by Mr Terry to the Company are governed by Guernsey law (see Base Metal Trading v Shamurin [2004] EWCA Civ 1316) and hence the Royal Court of Guernsey has jurisdiction. In relation to the claims in tort and for breach of confidence, the Company relied upon the jurisdiction where the detriment or loss was suffered or, if no such location could be identified, it was the place of incorporation. At the hearing of the *ex parte* application for leave to serve out, Advocate Bell, on the instructions of Mr Sevilla, relied upon the fact that that the Company’s bank accounts were in Guernsey. He later corrected that statement to say that the Company has no accounts in this island.
32. Mr Terry’s response was that the authorities relied upon by the Company do not support its contentions. Firstly, in respect of the alleged fiduciary duties, the decision in Base Metal Trading v Shamurin concerned duties owed by a director of the company who was inextricably bound up with the company and must therefore be governed by the place of incorporation of the company. It is therefore distinguishable from the case pleaded against Mr Terry.
33. In respect of the jurisdiction where the ultimate economic detriment was felt, Mr Terry submitted that any alleged loss must be governed by New York law. The Subordinated Notes for the CLOs provide that: *“The Indenture and the Notes shall be construed in accordance with, and the Indenture and the Notes and any matters arising out of or relating in any way whatsoever to the Indenture and the Notes (whether in contract, tort or otherwise), shall be governed by the law of the State of New York”*. Furthermore, the decision in Eurasia Sports Limited v Aguard [2018] EWCA Civ 1742 provides that: *“The place where the loss occurs is not determinative. When damage has occurred that makes the tort complete, the correct approach is to look back over the series of events constituting it and ask where in substance the cause of action arose”* and *“the fact that a corporation’s loss is felt where its books are made up does not mean that this is the place where the damage occurred”*.

Appropriate Forum Test

34. The Company relies upon the principles set out in Spiliada Maritime Corporation v Cansulex Limited [1987] AC 460. Guernsey is the most appropriate and natural forum: the Company is registered in Guernsey; Mr Terry chose to involve himself with a Guernsey company; the Cause includes claims governed by Guernsey law; and any practical and logistical difficulties arising from witnesses and documents being located elsewhere in the world can all be overcome.
35. In reply, Mr Terry relied upon: the residence of the principal relevant witnesses being in Dallas, Texas; the jurisdiction clauses in a number of the documents being elsewhere, mainly New York and, in respect of Mr Terry’s employment agreement, Texas; the fact that the proceedings arise out of bankruptcy proceedings that were litigated in Dallas and the arbitration proceedings successfully brought by Mr Terry alleging wrongful termination of his employment having been concluded in Dallas.

Discussion

36. The Company is at the apex of the type of structure which is common in the collective investments fund industry. It was formed as a closed-ended investment fund, incorporated in Guernsey to take advantage of the legislative and regulatory environment in this Island, as well as the proximity to London capital markets because the original intention was that it be listed on the London Stock Exchange. Counsel said Guernsey was also attractive for accountancy and tax purposes. It had two Channel Island resident non-executive directors but had no employees so all services and operations were delegated to specialist service providers. Its administrator was State Street (Guernsey) Limited whilst State Street Custodial Services (Ireland) Limited was the custodian and principal banker. The auditors were PriceWaterhouseCoopers CI LLP in Guernsey.
37. Inevitably for a fund with a niche portfolio of investments, a specialist investment advisor was required and that was where Mr Terry came in. He was employed by Highland CM, a limited partnership whose only two partners were James Dondero and Mark Okada, both of whom are resident in Dallas where the partnership had its principal place of business. It acted as investment advisor to structured product vehicles such as CLOs. Mr Terry was employed from 2005 until June 2016 and was Head of Trading and Structured Products. He claims that he had limited signatory authorisation and that the ultimate decision-making authority rested with Mr Dondero.
38. Acis Capital Management LP was a limited partnership, incorporated under the laws of Delaware; Mr Terry had a 25% share, Mr Dondero 60% and Mr Okada 15%. Mr Terry said he was responsible for the day-to-day activities while Mr Dondero made higher-level decisions. The limited partnership provided portfolio services to the Company under the terms of the PSA and was the portfolio manager for the CLOs under Portfolio Management Agreements (“PMAs”) through which it generated fees and revenue. The PSA was governed by Texas law and the PMAs by New York law. There was also a shared services agreement whereby Acis Capital Management LP’s portfolio management responsibilities were shared with Highland CM.
39. Clause 1 of the PSA included an obligation on Acis Capital Management LP to “*make available to the Company such personnel and resources as are necessary in connection with the foregoing services*”. The Offering Memorandum specified that the Company had no employees, the directors were non-executive and it was Acis LP that provided the necessary personnel. Mr Terry was the only named person who was made available although he said he was not the only person who provided services to the Company to which the Company replied that most of the others were answerable to him.
40. Thus, the complicated organisation that supported the operations of the Company was established through a network of contractual documentation governed by the laws of a number of jurisdictions, mainly in the USA. Advocate McGuffin maintained that the role of Mr Terry, the services he performed and the obligations he undertook all need to be viewed in the context of the contractual structure. Advocate Bell, on the other hand, sought to impose fiduciary duties on top of the contractual obligations and emphasised that there was nothing in the contracts to exclude the existence of fiduciary duties nor to exclude liability for breach of such duties.
41. Looking at the Merits Test, is there an arguable case for recognising the existence of fiduciary duties alongside and/or in addition to the contractual that is more than merely fanciful? In my view, it is not sufficient to say simply that the Company reposed trust and confidence in Mr Terry. Where services are to be performed under the terms of an agreement, it is inevitable

that the employer will repose trust and confidence in the service provider and its employees to provide those services. If it did not, it would not have employed the service provider.

42. It is acknowledged that fiduciary duties can exist and be imposed on the parties to what would otherwise be a purely commercial relationship. Snell's Equity at paragraph 7-005 cites agency as a clear example. It also says that fiduciary expectation may be appropriate in respect of part only of the duties of the arrangement between the parties. The categories of fiduciary relationship are not settled; it is a flexible concept where the duties will be imposed if the circumstances justify their imposition. In other words, it is fact-specific. Where fiduciary duties are imposed, the fiduciary is expected to subordinate his interests and act solely in the interests of the principal. The expectation is assessed objectively and so fiduciary duties may be imposed even where the fiduciary subjectively believes he does not owe such duties.
43. In his submissions, Advocate Bell placed heavy reliance on the analysis by Morgan J in Instant Access of the circumstances where an individual may be considered to be a shadow director or a *de facto* director and the duties thereby imposed on the individual. He cited Lord Hope's judgment in Revenue and Customs Comms v Holland [2010] 1 WLR 2793, with which the majority of the Supreme Court agreed, in which his Lordship drew the following propositions from decided cases:

“(1) if it is unclear whether the acts of the person in question are referable to an assumed capacity or to some other capacity such as shareholder or consultant the person in question must be entitled to the benefit of the doubt;

(2) it is difficult to postulate one decisive test;

(3) in considering whether a person “assumes to act as a director” what is important is not what he called himself but what he did;

(4) circumstances vary widely from case to case, the issue is one of fact and all relevant factors must be taken into account”.

44. Advocate Bell also relied upon a passage in the judgment of Lord Collins in the same Supreme Court case where, after reviewing earlier cases, Lord Collins commented:

“(1) it was now impossible to maintain the distinction between a de facto director and a shadow director;

(2) the court had a very difficult problem of identifying what functions were in essence the sole responsibility of a director or board of directors;

(3) the most relevant tests for identifying what functions were the responsibility of a director were:

a. whether the individual was the sole person directing the affairs of the company (or acting with others equally lacking in valid appointment);

b. if there were true directors, whether the individual was acting on an equal footing with them in directing the affairs of the company;

c. whether there was a holding out by the company of the individual as a director and whether the individual used that title;

d. whether the individual was part of “the corporate governing structure” of the company, which phrase refers to the system by which companies are directed and controlled.”

45. At paragraph 259 of his judgment, Morgan J said that in the absence of a statutory definition of a shadow director:

“when the ultimate question is whether an individual owes fiduciary duties to a company, it will not be essential and it may not even be helpful to ask whether that individual is a shadow director of the company. In other words, instead of asking three questions, first, whether an individual is a shadow director, secondly, what fiduciary duties does a typical shadow director owe to a company and, thirdly, does the individual owe the same duties as a typical shadow director, it may be preferable to ask instead whether in all the circumstances of the case the individual owed fiduciary duties, and if so, what duties, to a company.”

46. Morgan J continued, at para 263:

“...a question such as the present is fact-sensitive but it is usually helpful to ask whether the individual has expressly or impliedly (from the circumstances) undertaken or assumed a position of trust and confidence or whether there is a legitimate expectation that he will not use his position in a way adverse to the interests of the other.”

47. Advocate Bell focussed on the latter question and submitted that by establishing and operating the Company structure Mr Terry had assumed a position of trust and confidence and its directors had reposed trust and confidence in him with the consequence that he owed fiduciary duties to the Company.

48. It is unsurprising that Advocate Bell passed over Lord Collins’ tests as to whether Mr Terry was a shadow director of the Company. Any suggestion that Mr Terry was the sole person directing the affairs of the Company or acting on an equal footing with the directors or holding himself out as a director or even part of the corporate governance structure would have conflicted with the terms of the Offering Memorandum and the PSA which made it clear that ultimate decision making responsibility rested with the two directors.

49. Instead, the case (particularly the Restitutionary Claim) relies upon showing that the directors reposed trust and confidence in Mr Terry. The people who were best placed to testify as to the manner and extent to which they relied upon Mr Terry were the two directors (Mr Scott and Ms Bestwick) but they gave little factual detail in their Affidavits. Their short Affidavits sworn in response to the Application to set aside the leave to serve out contain some legal commentary even though neither of them claims to have local legal qualifications. William Scott and Heather Bestwick were both at pains to stress that the board has ultimate control and authority and both said that did not preclude others having fiduciary duties. Mr Scott said:

“Although ultimate control and authority rests with the board of the Company, it does not mean that those to whom functions are delegated, including in relation to the Company’s investments, do not have authority and autonomy to act on behalf of the company and in no way precludes such individuals also owing fiduciary duties where relationships of trust and confidence exist, and where such individuals are legitimately expected not to use their positions in a way which would be adverse to the Company. This is especially so in relation to specialist matters, such as the Company’s CLO investments where individuals such as Mr Terry bring sophistication and expertise which the board of the Company relies upon and trusts.”

50. Heather Bestwick’s Affidavit was very similar:

“To develop this further, although ultimate control and authority rests with the board of the Company, it does not mean that those to whom functions are delegated, including in relation to the Company’s investments, do not have authority and autonomy to act on behalf of the Company and in no way precludes such individuals also owing fiduciary duties when carrying out those delegated functions in circumstances where relationships of trust and confidence exist and such individuals may properly be expected not to act in a way which is adverse to the interests of the Company. The degree of trust and confidence is particularly acute, for example, in relation to complex investments such as CLO instruments which are highly technical and sophisticated.”

51. The area in which the two directors emphasised having reposed trust and confidence in Mr Terry was in respect of the investment advice given in relation to CLOs. Neither of them suggest that Mr Terry was a shadow or *de facto* director in that he “assumed to act as director” to quote the third of Lord Hope’s tests and because their evidence also failed to meet the Lord Collins’ tests, Advocate Bell turned to the judgment of Millett LJ in Bristol and West Building Society v Mothew [1998] Ch 1 adopted by Kitchin LJ in Farrar v Miller [2018] EWCA Civ 172 and followed by Morgan J in Instant Access: “one joint venturer has undertaken to act for and on behalf of another in a particular matter or circumstances which have given rise to a relationship of trust and confidence” to which Kitchin LJ added: “It may also be helpful to ask whether one joint venturer is in a relationship with the other which has given rise to a legitimate expectation, which equity will recognise, that he will not use his position in such a way which is adverse to the interests of the other”.
52. Advocate Bell said he relied on the decision in Mothew although he did not cite the full judgment. The facts of the case are very different from the present but it is helpful to quote further from the judgment in Mothew (with my emphasis added):

“Although the remedy which equity makes available for breach of the equitable duty of skill and care is equitable compensation rather than damages, this is merely the product of history and in this context is in my opinion a distinction without a difference. Equitable compensation for breach of the duty of skill and care resembles common law damages in that it is awarded by way of compensation to the plaintiff for his loss. There is no reason in principle why the common law rules of causation, remoteness of damage and measure of damages should not be applied by analogy in such a case. It should not be confused with equitable compensation for breach of fiduciary duty, which may be awarded in lieu of rescission or specific restitution.

*This leaves those duties which are special to fiduciaries and which attract those remedies which are peculiar to the equitable jurisdiction and are primarily restitutionary or restorative rather than compensatory. A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. **The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary.** This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr. Finn pointed out in his classic work *Fiduciary**

Obligations (1977 ed. p. 2), he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary.”

53. Applying that to the present case, it is necessary to ask not only whether the directors of the Company reposed trust and confidence in Mr Terry for his knowledge and understanding of the sophisticated and complex nature of CLOs but also to ask whether he owed an obligation of loyalty to the Company. If not, he was merely providing a service to the Company under the terms of the contractual agreements that governed the relationship.
54. Mr Sevilla, in his Affidavits, which contain a mixture of evidence and legal opinion, gave more of an explanation. In his first Affidavit, he said:

“14. “On the contrary, clause 10 [of the PSA] recognised that the Portfolio Services Provider and those responsible for providing its functions (including Mr Terry) were subject to fiduciary duties by virtue of the inclusion of language specifically providing that similar services could be provided to other entities without acting in conflict with the interests of the Company.”

I interject to say that, in my view, that does not assist the Company. I interpret it to mean that the Company was not entitled to the single-minded loyalty of the Portfolio Services Provider or of Mr Terry and the other personnel who provided its services.

55. Mr Sevilla continued:

“15. In light of the matter set out above, and as will be explained further in the legal submissions to be filed on behalf of the Company in connection with its application for permission to serve Mr Terry in Texas, it is at the very least arguable (and is in fact clear) that:

15.1 Mr Terry owed fiduciary duties to the Company because of the functions that he was to perform as the person made available to perform portfolio management services under the Portfolio Services Agreement and/or as a result of the trust and confidence reposed in him by the Company in connection with the performance of functions under the Portfolio Services Agreement.

15.2 Such duties included a duty not to profit or otherwise utilise confidential information acquired by him as a fiduciary both while engaged to fulfil the roles described above on behalf of the Company and at any time thereafter (including subsequent to the termination of his functions under the Employment Agreement and the Portfolio Services Agreement).

16. In this regard the Company also relies upon Mr Terry’s own positive case in the arbitration proceedings to which reference is made at paragraphs 18-23 below, that as a portfolio manager he owed fiduciary duties to those to whom he was providing portfolio management services (see page 6 of the Final Award at page 801 of JPS1).”

56. Mr Sevilla expanded upon his evidence in his second Affidavit in the section headed “Mr Terry’s assumption of fiduciary duties to Highland Funding”. In paragraph 18 he summarised Mr Terry’s services to the Company:

“Mr Terry was the person primarily responsible for many of Highland Funding’s operations, including Highland Funding’s: (i) creation; (ii) initial investment with the

charitable trust as the “seed investor”; (iii) recruitment of potential new investors; (iv) financing facilities; (v) corporate structure; and (vi) daily financial operations.”

In paragraph 22, Mr Sevilla explained that,

“in carrying out the functions described above he [Mr Terry] clearly undertook the sorts of functions that an officer of Highland Funding would have performed and acted on behalf of Highland Funding in circumstances giving rise to a relationship of trust and confidence, and in which he could legitimately be expected to not use his position in a way which would be adverse to Highland Funding.”

57. I note first that he compares Mr Terry’s role with that of an officer of the Company rather than with a director. He does not suggest that Mr Terry was acting on an equal footing with the directors nor that he was the sole person directing the affairs of the Company. The mere fact that he was performing functions that could have been performed by an officer of the Company does not by itself establish that Mr Terry owed fiduciary duties to it.
58. Mr Terry was not an officer of the Company but an employee of another company and a limited partner of a limited partnership contracted to provide services. That is also insufficient by itself to show that he owed fiduciary duties to the Company. There are numerous instances where an employee of a company provides services on behalf of their employer to a third party and thereby acquires confidential information about the third party but that does not necessarily place the employee in the position of owing fiduciary duties to the third party.
59. Mr Sevilla said in his Affidavits that Mr Terry had acknowledged in the arbitration proceedings that he had a fiduciary duty to the Company and its investors. He quoted from the final arbitration award: *“Terry was opposed to Dondero’s plan and saw a need to vigorously oppose the plan. Terry was the portfolio manager of these Highland CLOs and was convinced it would be a breach of his fiduciary duty to allow the Pamco-Cayman and Vahalla notes to be extended as they were past or near maturity.”* Advocate McGuffin’s response was that the Indenture and the Notes and all matters arising out of or relating in any way to them were governed by New York law. Mr Terry’s comment was made in separate arbitration proceedings to which the Company was not a party and does not establish that Mr Terry had acknowledged any fiduciary duty owed to the Company under Guernsey law. The arbitration was in respect of alleged breaches of Mr Terry’s employment agreement with Highland CM including allegations of breach of fiduciary duty to his employer. That claim was decided in favour of Mr Terry. In my judgment, it would be very tenuous to allow the present claim to proceed in Guernsey simply on the basis of such a remark made in the course of those proceedings. Indeed, if it were material to the Company’s Cause or if the Company were claiming any form of estoppel, it would have pleaded the admission in the Cause but it has not done so.
60. Advocate Bell contended that the question of whether fiduciary duties may be owed is fact-sensitive and therefore the case should proceed to trial here in Guernsey for those facts and the legal issue to be decided. I am not persuaded that is appropriate, even though Mr Terry provided a wide range of advice and services to the Company. It is not enough for the directors to assert that they reposed trust and confidence in him when they have given little or no evidence to support the assertion.
61. In the amended Cause and in the supplementary evidence filed by the Company in support (which in many respects goes beyond the pleaded case) I have not managed to find a strong

arguable case that would persuade me that Mr Terry owed fiduciary obligations to the Company beyond the contractual duties undertaken.

62. There remains the case pleaded in tort and for breach of confidence. In relation to those aspects, the prevailing factors point away from Guernsey as an appropriate jurisdiction. The actions complained about were not committed here and the key witnesses are all in Dallas. Any proceedings will be closely linked to the bankruptcy proceedings that were held in Texas. The important question of whether any of the relevant information used by Mr Terry in the bankruptcy petition was confidential when disclosed by him or whether it was all in the public domain, or had been disclosed during post-judgment discovery is better decided in Texas than here. The argument over quantum can also be heard in that jurisdiction where the witnesses who are best able to provide the evidence are based.
63. One factor that would have pointed strongly towards Guernsey as the appropriate forum would have been that any fiduciary duties arising in relation to the operation of a Guernsey company are governed by Guernsey law and should best be heard in a local court. However, it would be inappropriate to allow the case to proceed here solely on that ground when the facts do not support such a case. To order otherwise would be to encourage others to bring spurious claims based on alleged fiduciary duties in order to have them heard here when they prefer not to have to go to another court elsewhere.
64. Any discretion available to me under the Court's Discretion is to be exercised in favour of declining jurisdiction given the lack of candid disclosure by the Company and its deponents which was another factor argued by Advocate McGuffin.

Conclusion

65. Advocate Bell acknowledged that his strongest argument in support rested on the Restitutionary Claim and he sought to persuade me that there was a good arguable case that Mr Terry owed fiduciary duties to the Company that went beyond any contractual obligations. Such claims would best be heard before the Courts of Guernsey as they are unquestionably governed by Guernsey law. Hence he had to demonstrate a good arguable case that the Company reposed trust and confidence in Mr Terry in circumstances giving rise to fiduciary duties. It is in this island that the corporate structure of a collective investment fund and the necessary delegation of functions to specialist providers would best be understood.
66. In my judgment, the Company's submissions failed partly because the two directors of the Company were keen to stress that they had ultimate responsibility, thereby denying any suggestion that Mr Terry was a shadow or *de facto* director. The main evidence relied upon was that of Mr Sevilla, counsel to Highland CMP who had a detailed knowledge of the legal framework but less detailed knowledge of the day-to-day operations as evidenced by him misleading Advocate Bell as to the location of the Company's bank accounts. His evidence was not sufficient to persuade me that trust and confidence was reposed in Mr Terry beyond that which would be expected of individuals and corporates performing in a proper way their contractual obligations towards each other.
67. There is no doubt that Mr Terry owed a duty of confidence but the question of whether the information used by him in the bankruptcy proceedings was not legitimately available to him is a question that will best be decided in the jurisdiction where the information and the key witnesses are located. That is also where the Courts would be best placed to understand the relationship between this action and the arbitration award and those bankruptcy proceedings.

68. I therefore grant Mr Terry's application to set aside the leave to serve out of the jurisdiction.