IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 183 OF 2020 (ASCJ)

BETWEEN:

CARLOS MAGNO, NERY E MEDEIROS SOCIEDADE DE ADVOGADOS

(AS JUDICIAL ADMINISTRATOR OF THE INSOLVENT ESTATES OF SAM INDUSTRIAS SA, BOULDER PARTICIPAÇÕES LTDA & MR DANIEL BIRMANN)

PLAINTIFF

AND

BT GLOBAL INVESTMENTS

DEFENDANT

REPRESENTATIONS:SS NICHOLAS CRAIG QC FOR THE PLAINTIFF INSTRUCTED BY PAUL KENNEDY AND NIENKE LILLINGTON OF CAMPBELLS

CHARLES SAMEK QC FOR THE DEFENDANT INSTRUCTED BY NICHOLAS DUNNE, ANDREW GIBSON AND DAISY BOULTER OF WALKERS

BEFORE:

THE HON CHIEF JUSTICE ANTHONY SMELLIE

HEARD:

20 AND 21 SEPTEMBER 2021

JUDGMENT DELIVERED: 27 OCTOBER 2021

Headnote

Cause began by way of originating summons - failure to meet requirements for particulars of pleading pursuant to GCR Order 7.r.3- claim governed by both Cayman and Brazilian law - conflict of laws –reliance on Brazilian judgment- applicable law - whether " default rule" applies - whether striking out is appropriate remedy where claim is arguable even if unparticularised – directions for cause to proceed as if begun by writ.

JUDGMENT

1. By originating summons instituting this cause on 14 August 2020 **("OS" or "Cause"),** the Plaintiff Carlos Magno **("CM")** in his capacity as Judicial Administrator of the Bankruptcy Estates of Sam Industrias SA, Boulder Participacoes Ltda and Daniel Birmann, seeks to recover assets now held in the name of the Defendant **("BTG"),** on the basis that those assets belong to the said Bankruptcy Estates.

2. By way of its amended summons dated 15 June 2021 (the **"Amended Summons"),** BTG seeks four alternative forms of relief from the Court relating to the OS. These are, as set out in the Amended Summons, that:

   2.1. The O.S. be struck out pursuant to Grand Court Rules **("GCR")** Order 18, rule 19(1)(a), (b), (c) and/or (d) and/or pursuant to the inherent jurisdiction of the Court **("Strike Out");** or

   2.2. the Cause be stayed pending the final determination by the Brazilian Courts (after exhausting all appeals) as to whether CM has *locus standi* to seek the relief sought in the OS **("Stay");** or

   2.3. the Cause proceed by way of writ pursuant to OCR 0.28 r.8(1); and consequential directions be given but including an order that notice of the proceedings be served on Miriam Birmann pursuant to OCR 0 .15, r.13A on the grounds that although she is not a party to the Cause, she will or may be affected by any judgment given therein **("Writ Action");** or

   2.4. pursuant to OCR 0.3 r.5, that the date upon which BTG is required to file and serve its affidavit in response pursuant to OCR 0. 28 r. lA (4) be extended to 28 days after the date of this Order (made hereunder); the date upon which CM is required to file further affidavit evidence in reply (if any) be extended to 14 days thereafter;

and that the Cause be listed for a directions hearing on the first mutually convenient date on or after 28 days thereafter with a time estimate of half a day **("Extending Time").**

3. At the outset of the hearing, I proposed that I should take the arguments on Stay as the first order of business. This was because it raises the fundamental question of CM's *locus standi* to bring this action, having regard to BTG's argument that he lacks authority from the Brazilian Court to do so.

4. This particular question of standing or lack of authority arises because CM, having been originally appointed in 2017 (replacing an entity called **"Braslight"),** was subsequently purportedly replaced as trustee in bankruptcy by a judge (Judge Rucker) whose order was itself subsequently overruled by an appellate court in Brazil. The matter did not end there however, because yet another judge (Judge Mesquita) by order on 12 February 2021, again purported to replace CM with another appointee. That order also was appealed and on 4 March 2021, the State Court of Appeals in Brazil granted an injunction to stay the effects of Judge Mesquita's ruling pending the determination of CM's appeal against it.

5. In response to my proposed order of proceeding, Mr Samek QC on behalf of BTG, conceded that the aforesaid injunction did indeed have the effect of staying Judge Mesquita's ruling such that, unless and until CM's replacement is ultimately confirmed, he remains the duly appointed trustee in bankruptcy and Judicial Administrator ("JA") On that basis, it was agreed that the determination of the Stay issue (ground 2) of the Amended Summons, should be deferred pending the final determination of the appeal in Brazil and, as a matter of better case management, I proceeded to hear the arguments first on ground 1, Strike Out.

6. This is therefore the judgment on Strike Out.

7. To set the stage for the analysis of the arguments on Strike Out, it is necessary to set out CM's claim as stated in the OS:

"By this Summons, which is issued on the application of the Plaintiff, Carlos Magno, Nery e Medeiros Sociedade de Advogados (as Judicial Administrator of the Insolvent Estates of SAM Industrias SA, Boulder Participacoes Ltda & Mr Daniel Birmann (collectively, the "Birmann Estate")) the Plaintiff applies for the following orders:

1. *A declaration that the Birmann Estate, represented by the Plaintiff, is the lawful owner and/or has an equitable propriety interest in the following shares or interests in the/allowing entities:*
   - *1.1 CBC Ammo LLC (formerly Brookmont Trading Corporation and Brookmont Trading LLC)*
   - *1.2 South America Logistics LLC;*
   - *1.3 Anaconda Group LLC;*
   - *1.4 Charquin LLC;*
   - *1.5 Rayvera LLC;*
   - *1.6 Rogerdale International LLC;*
   - *1.7 BR Realty LLC; and*
   - ***1.8** CBC Europe SARL; (together the **"Birmann Assets").***
2. *A declaration that the Defendant holds such property [(ie: the Birmann Assets)] and/or its traceable proceeds on trust for the Plaintiff, as Judicial Administrator of the Birmann Estate, which trust is governed by Cayman Islands law.*
3. *An order that the Defendant do execute such documents and deeds as shall be required to vest legal ownership of the Birmann Assets, and/or equitable compensation and all other necessary accounts and enquiries.*
4. *An account of profits, including but not limited to any and all dividends or distributions paid to the Defendant in respect of the Birmann Assets, and/or equitable compensation and all other necessary accounts and enquiries.*
5. *Costs.*
6. *Such further or other relief as the Court thinks appropriate, including as to any of these or any related proceedings.*

Dated the 14//, day of August 2020. "[emphasis added at 2. above].

8. The basis of BTG's Strike Out argument is that the OS, in its terms as set out above, does not comply with the rules of pleading, most especially GCR Order 7 rule 3(I); in that it fails to disclose a cause of action and is therefore an embarrassing pleading, as it is impossible for the Defendant to determine with clarity what cause or causes of action CM relies upon.

9. GCR Ord.7 r. 3(1) must therefore be considered and provides as follows:

> *"Every originating summons* ***must*** *include a statement of the questions on which the plaintiff seeks the determination or direction of the Court or, as the case may be, a concise statement of the relief or remedy claimed in the proceedings begun by the originating summons* ***with sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims that relief or remedy"*** [emphases added].

10. BTG's criticism is that while the OS claims the relief which it describes (viz: declaratory, mandatory injunctive and an account), it fails to state, in particulars as required by Ord 7 r. 3(1), why CM is entitled to that relief.

11. While simply from a reading of the O.S. itself this will appear to be fair criticism, an analysis of whether it justifies striking out requires an understanding of the circumstances of the case.

Background to the case

12. The case arises in the context of long-running litigation, principally in Brazil but also in the United States and elsewhere, relating to SAM Industrias SA's bankruptcy and its extension to the assetsof Mr Birmann himself.

13. Mr Birmann is a Brazilian businessman engaged in the munitions industry. He gained control of SAM Industrias SA ("SAM") in 1992. In October 1997, he incorporated Boulder Participacoes Ltda ("Boulder") as an investment holding company, to hold the shares in SAM and a number of other entities.

14. On 27 February 2008, the Brazilian Bankruptcy Court granted applications by two creditors (Fundac;ao de Seguridade Social Braslight (the aforementioned Braslight) and Senso Corretora de Cambio e Valores Mobiliarios S.A.) to declare SAM bankrupt and to *"extend the bankruptcy effects"* to Mr Birmann and to Boulder (the **"Bankruptcy Order").**

15. The Bankrnptcy Order was unsuccessfully appealed and so it appears, as CM asserts, is therefore to be regarded as a final and conclusive order as against Mr Birmann, SAM and Boulder. The effect of the extension of the bankruptcy to Mr Binnann is apparently such that (and is not disputed in these proceedings), under Brazilian law, Mr Birmann and Boulder are rendered liable for SAM's obligations to its creditors and Mr Binn ann's and Boulder's assets may be used to satisfy SAM's debts to the extent that these cannot be repaid from SAM's assets.

16. The extension of SAM's bankruptcy to Mr Birmann was granted on the basis of allegations of fraud made by the creditors, to the effect that Mr Birmann and Boulder had fraudulently transferred most of SAM's assets (to the value of some BRL 243 million or USO 93 million) out of SAM to themselves and had done so to defeat their claims. For the present purposes of Strike Out, it is relevant that CM asserts however, that the allegation of fraud is not relied upon. That it is not necessary to do so, as he relies instead upon the effects of the Bankruptcy Order itself.

17. It is also uncontroversial however, that CM's role as the JA includes consolidating the general list of creditors and collecting the assets of the bankrupt's estate, so that they can be appraised and realised for the purpose of satisfying the debts owed to the creditors.

18. On 3 June 2009, following the determination of various appeals, as mentioned above, the Bankruptcy Order was made final. Also as mentioned above, on 5 May 2008, Braslight had been appointed to act as the JA of the bankruptcy estate of SAM.

19. On 24 July 2017, CM was appointed to replace Braslight as JA, but as also outlined above, there have been disputes in relation to the validity of CM's appointment on which a determinative appellate judgment is pending.

20. On I 8 July 20 I9, Kawaley J. granted CM recognition in this jurisdiction and *Norwich Pharmacal*[1] relief, on an application made on his behalf by Harneys. Whilst the order granting recognition is silent as to the basis upon which it was made, on the basis of preceding correspondence from the learned judge ,[2] it appears likely to have been made pursuant to section 240 of the Companies Act (2018 Revision) and/or at common law. This enabled CM as the *"foreign representative"* not only to obtain disclosure but also to act in this jurisdiction generally on behalf of the bankruptcy estates of SAM, Boulder and Mr Birmann.

21. However, against the background of developments in Brazil, it is important to note for present purposes, as Mr Samek QC for BTG emphasises relying upon the expert evidence of Brazilian lawyer Laura Mendes Bumachar, that:

    a. No bankruptcy order has been made against the Defendant BTG;

    b. The Brazilian Court has not made any order purporting to extend the bankruptcy effects of SAM's bankruptcy to BTG;

[1] *Norwich Pharmacol Co. v Customs and Excise Commissioners* [1974) 2 ALL ER 943

[2] By email per his Personal Assistant Bridget Myers dated 16 May 2019.

c. BTO has never been a party to any proceedings in Brazil (or elsewhere) relating to the bankruptcy of SAM or to the Bankruptcy Order, and has had no opportunity to be heard in any such proceedings; and

d. Neither the Brazilian Court (nor any US Court where other proceedings are on foot) has delivered any judgment or made any order that the assets of BTO belong to Mr Birmann, SAM or Boulder. Nor, says Mr Samek QC, (without I might add, demurrer from Mr Craig QC for CM) has the Brazilian Court been asked to make any such order.

The arguments for Strike Out

22. The arguments for the Defendant BTO are not complicated. They ask the question how does CM lay claim to assets held in the name of BTO on the basis that they are Birmann Assets, as he seeks to do by way of the relief sought by the OS?

23. In the OS, CM has been required by OCR Ord. 7 r. 3, as shown above, to set out not only " *a concise statement of the relief or remedy claimed"* but also *"sufficient particulars to identify the cause or causes of action"* in respect of which the relief or remedy is claimed. However, in fact as also shown above, the OS, while citing the reliefs claimed, provides no particulars at all.

24. Accordingly says Mr Samek QC, the OS fails to comply with the mandatory requirements of OCR Ord.7 r. 3 , as no cause of action, let alone a reasonable cause of action, is disclosed. Merely identifying the relief sought is not the same as identifying, let alone with sufficient particularity, the cause or causes of action said to give rise to an entitlement to such relief and despite the requirements of Ord.7 r. 3 (as set out in emphasis above), the OS does not identify any question on which CM seeks the Court's determination or direction.

25. This is , therefore, Mr Samek QC submits, a paradigm case for striking out under GCR Ord. 18 r.19 (1) which, in terms perhaps all too familiar, provides (for present purposes with emphasis upon subparagraphs (l)(a) and (b)) that:

> " *(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading3 or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-*
>
> *(a)* ***It discloses no reasonable cause of action or defence, as the case may be;*** *or*
> *(b) It is scandalous, frivolous or vexatious; or*
> *(c)* ***It may prejudice, embarrass or delay the fair trial of the action;*** *or*
> *(d) It is otherwise an abuse of the process of the court*
>
> *And may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.* "

26. Significantly also for present purposes, Ord. 18. r. 19 (2) provides that: *"No evidence shall be admissible on an application under subparagraph (J)(a)* ". And also of significance, Ord. 18 r. 19 (3) provides that : " *This rule shall, so far as applicable, apply to* ***an originating summons*** *and a petition as if the summons or petition, as the case may be, were a pleading."* [emphasis added].

27. And so, Ord. 18 r. 19 (3) explains that a strike out application can relate to the O.S. and the Ord. 18 r. 19(2) prohibition on the admission of evidence applies to both an applicant seeking to strike out under sub-rule (1)(a), as well as to a respondent to such an application. The reason for this prohibition is well known. It is that a perceived failure to disclose a reasonable cause of action in the pleadings is one of lack of particularity which can be rectified only by way of particularisation, not one which can be rectified by way of evidence. Accordingly, where the only ground on which a strike out application is made is sub-rule (1)(a) viz: that the pleading discloses no reasonable cause of action, no evidence is admitted. See ***Att-Gen of Duchy of Lancaster v L. & N. W. Ry.*** [1892] 3 Ch 278; and ***Republic of Peru v Peruvian Guano Co.*** (1887) 36 Ch 489 at 498. See also ***Murphy v Hacet*** 2020 (1) CILR 47 at [18] for a more recent application of this principle by this Court.

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[3] Which by GCR Ord. 18 r. 19 (3), includes an Originating Summons (see below).

28. Evidence is however, admissible in relation to an application to strike out under theother sub-rules of Ord. 18 r 19 (1) and to the extent that this factor is relevant to the outcome, it will be considered below.

29. In light of the prohibition on admission of evidence, such evidence as is provided by affidavit in support of CM's claim specifically by way of response to Strike Out will, therefore, not rectify a failure to meet the requirements ofOrd.18 r.19 (l)(a). This sub-rule, when applied in conjunction with Ord.7 rule (3), mandates that the pleadings speak, with sufficient particularity, for themselves.

30. This kind of failure of pleading I accept is not a mere technicality and the Defendant BTG's complaint is no mere "pleading point". As has been stated by this Court: *"It is well settled that a claimant must plead clearly all the facts necessary to give rise to its cause of action. Insiifficiency of pleading in regard to any important issue can result in the action being struck out":* ***Tasarruf Mewluati Sogorta Fonu v Wisteria Bay Limited et al*** [2007] CILR 3 IO (" ***Wisteria Bay").***

31. As to what is sufficiency of pleading for the identification of a cause of action, the timeless words of Lord Justice Diplock (as he then was) from ***Letang v Cooper*** [1964] EWCA Civ 5 , [1965] 1QB 232, resonate with clarity and simplicity:

> *"A cause of action is simply a factual situation the existence of which entitles one person to obtain from the Court a remedy against another..."*

32. The conclusion is therefore irresistible that the OS is impeachable m its failure to particularise the factual situation, the existence of which CM claims entitles him to the relief sought from this Court.

33. Despite that absence of particulars properly so called; Mr Craig QC on behalf of CM argues that the requirements of GCR Ord. 7 r. 3 are satisfied. I set out following his submissions in some detail because, while I am not persuaded on this point, they relate to and must be considered for Strike Out on the other grounds of Ord.18 r. 19 (1) as well.

34. For his argument Mr Craig QC relies on evidence filed in the form of affidavits from Marcelo Lucidi, CM's Brazilian lawyer and Marcello Carpenter, another Brazilian lawyer who acts for Braslight, in its capacity as creditor under the Bankruptcy Order and as supporter of CM's actions in this jurisdiction.

35. Competing expert evidence on Brazilian law was also filed by way of affidavits from other Brazilian lawyers relating to the issue of CM's *locus standi* and authority to act in this jurisdiction (Andre Dinis Angelo and Laura Mendes Bumachar on behalf of BTG and Professor Flavio Yarshell on the other side, on behalf of CM). However, by a case management directions ruling of 22 April 2021, I directed, for the reasons explained therein, that the expert evidence would not be admitted for the purposes of BTG's strike out/ stay applications. This was directed on the basis of well-known case authority (see for instance, ***Wenlock v Maloney*** (below)), that such applications should not involve detailed examination of competing evidence, *a fortiori,* competing expert evidence.

36. However, as to its purely factual significance, Mr Lucidi's evidence is relevant to the further grounds of Strike Out, and is based upon, among other matters, the disclosure obtained in this jurisdiction by way of Justice Kawaley's *Norwich Pharmacal* Order. Relying on that evidence, Mr Craig QC refers to the Bankruptcy Order and asserts that the evidence supports the conclusion that BTG holds Birmann Assets and the consequence of the extension of the Bankruptcy Order to Boulder and to Mr Binnann, is that their assets, together with those of SAM, are to be liquidated as part of the Insolvent Estates covered by the Bankruptcy Order and fall under the control of CM, in his capacity as the JA.

37. Mr Craig QC continued as follows from his written submissions :

> *"It is common ground between the parties that, as a matter of Brazilian law, the effect of the Bankruptcy Order* is *that:*
>
> *the bankrupt person loses the right to manage or dispose of his assets, and any disposal of assets contrary to this principle would result in such disposals being null and void .*

Further, under Brazilian Bankruptcy Law, a bankrupt is under a positive duty to identify all of his property to the appointed Judicial Administrator".

38. His submissions then turn to the evidence relied upon as showing that the assets held by the Defendant BTG are assets of the Bankruptcy Estates:

> *"On 18 July 2019 the Plaintiff obtained the Norwich Pharmacal Order from this Court (per Kawaley J.), ordering Trident Trust Company (Cayman) Limited* ***(Trident)*** *to provide the Plaintiff with documents that it held in relation to the Defendant.*
>
> *From the documents which were provided to the Plaintiff, among other things, it is apparent that:*
>
> a. *by a Declaration of Trust dated 4 October 2007, i.e. after Braslight had petitioned for bankruptcy, Mr Birmann established 'The Fiduciaire de la Famille M & M Benasayag Star Trust' (the M&M Trust) with Deutsche Bank as trustee.*
>
> b. *the following day (5 October 2007), Mr Birmann transferred 100% of the shares in the Defendant BTG to the M&M Trust and M&M became the sole shareholder in the Defendant.*
>
> c. *on 8 January 2010, Trident was appointed by Mr Birmann himself to be the Trustee of the M&M Trust in the place of Deutsche Bank.*
>
> d. *despite the prohibition of the Bankruptcy Order on his doing so, Mr Birmann transferred significant assets to the M&M Trust and the Defendant, following the making of the Bankruptcy Order. In particular, the following assets were transferred (these are hereinafter collectively referred to as the "Misappropriated Assets")[(note: there is the identification with those named above in the* OS *as Birmann Assets)].*

39. Mr Craig QC also cited a disclosed email dated 20 September 2011, from a representative of Trident which reads as follows:

> *"Daniel Birmann contributed almost all of the assets presently in the trust, is the only beneficiary and currently acts as the sole appointed Enforcer and therefore is to be treated as the true economic sett/or and ultimate beneficiary of the entire trust (which is irrevocable). As you know, [the Defendant} is the sole shareholder of the*

underlying companies, and Trident as Trustee of the Trust is the sole shareholder of [the Defendant}."

40. His submissions then continue: *" Further , relying again on Mr Lucidi* 's *evidence, that pursuant to a Deed of Direction, Discharge and Release dated 31 March 2015, Mr Birmann* 's *sister, Miriam Birmann (Ms Birmann), directed Trident to appoint the entirety of the trust (i.e. the shares in the Defendant) to her. Ms Birmann did not provide any consideration for the transfer of the shares from M&M Trust; nevertheless, the shares were transferred and the trust was dissolved. However, Trident remained as sole director of the Defendant, and it is clear from subsequent communications that Trident consulted with Mr Birmann, only, and takes its instructions from him (not Ms Birmann). In June 2016, while serving as a director to the Defendant, Trident obtained a schedule of the dividends paid by CBC Ammo in the period from 2011 to 2016 which shows that the total dividends and distributions in that period totaled US$ 121,951, 777. Around the same time Mr Birmann instructed Trident to appoint his US attorney as director of the Defendant in its stead".*

And finally: *"that all of the assets identified above (and any other assets of Mr Birmann) should be at the disposal of the Judicial Administrator [CMJ for the benefit of creditors in the Bankruptcies as part of the Insolvent Estates for the following reasons.*

The Brazilian bankruptcy court has frozen assets in Brazil owned by BR Realty LLC and Rayvera LLC (subject to a final decision) on the grounds that Mr Birmann is the owner of each of them. Further, in a recent judgment (6 July 2021) (the Appellate Decision) the Civil Appeals Court in Brazil determined, following an application made by Mr Bernardo Birmann, Mr Birmann's *son, and CBC Global Ammunition LLC who claim to be the owners of the shares in Companhia de Cartuchos (CBC), inter alia, that:*

(i) CM, the Plaintiff, was entitled to take steps to enforce against the shares in CBC and did not first need to apply to pierce the corporate veil: "The motion to pierce the corporate veil is not to be confi1sed with the court decision declaring the bankrupt's

ownership of shares in a company that the bankrupt controls remotely, from abroad, from a wide series of offshore entities. While the first presupposes commingling of assets and possible abuse of legal personality, the second dispenses with the idea of fraud and is based exclusively on the identification of the beneficial controlling shareholder of the collected shares. "(see para. 4 of the Appellate Decision).

(ii) *the Plaintiff did not first need to take action to declare the transfers by Mr Birmann to his son and CBC Global Ammunition LLC null and void: "No need for avoidance action if we are not talking about the validity or effectiveness of legal transactions entered into by and between the bankrupt and third parties, but the use of a corporate structure, by the bankrupt himself, in order to conceal his assets to the detriment of creditors" (see para. 5 of the Appellate Decision).*

(iii) *by its investigative action overseas, the Plaintiff had found the evidence to prove that Mr Birmann held the shares in CBC at the time of his bankruptcy as well as his total contempt to the bankruptcy process: "After deepening the investigation abroad, the Judicial Administrator was able to enter in the docket the "evidentiary reinforcement of the structure" that was missing, from which it was confirmed that the bankrupt held, at the time of the bankruptcy, the controlling interest in CBC, in addition to having demonstrated an absolute contempt for this bankruptcy, since, despite being legally prohibited, he continued (and continues) to use and freely dispose of his assets to the detriment of creditors. "(see para. 7 of the Appellate Decision)."*

41. By reliance on that account of the findings of the Brazilian Appellate Court, as well as upon the foregoing disclosure obtained from Trident Trust which is said to show that the entities identified above as Misappropriated Assets were, on the directions of Mr Birmann,

transferred to the Defendant BTG post-bankruptcy4, Mr Craig QC submits that it is plain that the Birmann Estate, represented by CM, is the lawful owner and/or has an equitable interest in the shares of the companies comprised within the Misappropriated Assets as pleaded in the OS. It is also plain he submits, that CM's cause of action against BTG is an equitable tracing claim that the Defendant holds those assets on constructive or resulting trust for CM, as those concepts are known to Cayman law and that CM is entitled to a declaration to that effect as pleaded in the OS. He further submits that CM does not need to plead how the constructive trust came into being, that that would simply be evidence of the factual situation to be proven at trial. The factual assertion in the OS that CM is the lawful owner is the only factual assertion required, anything further would be a matter for evidence. He submits also that the Form of Originating Summons itself prescribed by the GCR is what is relied upon by CM and calls for only *"relief claimed"*, it has no space for separate particulars. Moreover, it is plain says Mr Craig, that Mr Lucidi's affidavit stands by way of particulars of pleading, citing ***In Re Caines, Knapman v*** **Servain** [1978] WLR 540 and ***Corbiere Properties Ltd v Taylor*** (1972) 23 P&C.R. 289. And finally, but without citing authority in support, that had the Defendant seen the need for further and better particulars, it should have requested them and would have been obliged to do so before asking the Court to strike out.

Discussion on Strike Out

42. These are not persuasive responses to a criticism of failure to plead a proper cause of action in keeping with Ord. 7 r. 3. and as required by Ord. 18 r. 19(1)(a) and (c). Reliance on the evidence which would be adduced at trial but which has been put in at this stage after the application to strike out and by way of response to it, is, in keeping with Ord. 18 r. 19 (2), impermissible for this purpose.

43. Neither of the cases cited above provides CM with an answer to these shortcomings. ***In Re Caines*** is authority for two propositions, only one of which arises here for consideration;

[4] The evidence shows that the M&M Trust was established with Mr Birmann himself appointed as enforcer at a time when the bankruptcy petition had already been filed but the order not yet made. However, the transfers to BTG in question are said to have been made after the date of the Bankruptcy Order.

which is that the prohibition in Ord. 18 r. 19 (2) against adducing evidence on a strike out application itself, does not apply as proposed here, to affidavit evidence already put in to support an originating summons, such evidence being usually intended and allowed to serve instead of pleadings. This was held even while having regard to the space limitations of an originating summons Form itself. ***In Re Caines*** has been applied for this proposition for which it stands by this Court before, in the context of an application to strike out under Ord. 18 r. 19 (1). See ***A v. B. Bank Limited and D***. 1997 CILR 43, at 48-50. See also commentary on ***In Re Caines*** to similar effect at **Notes to Rules of the Supreme Court 1999 Edition,** at 18/19/5.

44. In this case, the first affidavit of Mr Lucidi was filed along with the O.S and so before the summons to strike out was filed. However, the report of Prof Yarshell relied upon in response to Strike Out, was filed specifically for that purpose and after the application was lodged by way of the strike out summons. While Mr Lucidi's first affidavit by itself may come within the ***In Re Caines*** principle, taken by itself it does not meet the criticism of lack of particularization. This is because as shown below, it purports to rely, confusingly, at once upon both Cayman and Brazilian law as grounding CM's claim. And while Prof Yarshell's report may be considered, as it will be further below, in the context of strike out on the further grounds of Ord. 18 r. 19(1), it is irrelevant here where the application to strike out is based primarily upon Ord 18 r 19(1)(a); that is, for failure to disclose a reasonable cause of action in the O.S. and in which context, even on the basis of ***In Re Caines***, evidence filed after the application to strike out and in response to it, is inadmissible.

45. ***Corbiere Properties*** is relied upon by Mr Craig for the proposition that once the plaintiffs put in their originating summons a statement of the relief or remedy sought, there was no failure to comply with Ord. 7 r. 3 resulting from the lack of sufficient particulars. But that, in my view, is a misunderstanding of the case which turned upon a jurisdictional point; viz: whether an amendment to an originating summons could be allowed to add a pleading for foreclosure on a property so as to make the case justiciable in the High Court although the claim as originally pleaded, was one for recovery of possession only and so, by virtue of section 37(1) of the Administration of Justice Act 1970, justiciable exclusively in County

Court. As the proceedings as originally pleaded had been started in the High Court instead of the County Court, they were deemed a nullity and so incapable of amendment, albeit the lack of particulars itself was not found to be the nullifying factor. Thus, the views expressed per Whitford J. in passing at p 292 - that a lack of particulars in the originating summons did not amount to a nullifying breach of Ord. 7 r. 3, - were merely obiter. His decision turned instead upon the meaning and effect of section 37(1).

46. But even if the affidavit evidence filed in response to the strike out application could properly be relied upon as particulars of pleading, it would remain very significant for present purposes, that CM relies essentially, upon the following paragraphs 6, 52 and 54 from Mr Lucidi's first affidavit:

> "'6.The Plaintiff brings these proceedings to assert proprietary and personal rights under Cayman law in respect of assets which were wrongfully transferred to the Defendant by Daniel Birmann in an attempt to put them out of reach of his creditors" ... (then follows a description of the Misappropriated Assets, (or Birmann Assets so called in the OS)[emphasis added]...
>
> 52..Article 166 of the Brazilian Civil Code provides that any legal act that is performed in spite of a legal prohibition shall be considered automatically null, without producing any effects. Further, Art. 103 of Brazilian Law 11, 101/2005 provides that "[s]ince the adjudication of the bankruptcy, the debtor loses the right to manage his assets and to dispose of them".
>
> 54. To summarise, all subsequent transfers or donations of assets which formed part of the estate of Daniel Birmann upon the adjudication of the bankruptcy are considered null and void under Brazilian law and the assets are considered to remain part of the property of the bankrupt estate despite any purported transfer. The Plaintiff is entitled to collect all of the assets of the bankrupt estate to the benefit of the proven creditors of the estate. This is the case no matter where the assets are located."

47. Mr Samek QC complains, properly in my view, that the statement in paragraph 6 of Mr Lucidi's first affidavit of reliance on Cayman law as grounding CM's claims is raised for the first time in argument now and is markedly different from the basis of the case as explained by Mr Lucidi himself in paragraphs 52 and 54 (above) and by Prof Yarshell, CM's expert on Brazilian law, as that explanation comes from Prof Yarshell's report (at H.31- 33) relying upon the Bankruptcy Order and the Brazilian Appellate Court Decision

excerpted above :

> *"31. In the current case, after Mr Birmann was made subject to the Bankruptcy Order, I understand that he removed assets from his personal estate and donated them to a legal entity (trust) of the Birmann family, to the benefit of the Defendant, BT Global. His actions and these transfers are automatically considered ineffective and null under Brazilian Bankruptcy Law.*
>
> *32. ...*
>
> *33. The effect of the prohibition on the transfer of assets by a bankrupt means that any purported transfers are a nullity and are void. Because the debtor loses right to manage assets, he loses the capacity to dispose of them. Therefore, any such transfer is considered null when [...} the law expressly declares it null, or prohibits its performance without establishing a sanction.* "

48. Thus, as between Mr Lucidi's evidence in paragraph 6 on the one hand and that in his paragraphs 52 and 54 and Prof Yarshell's Report on the other, there are starkly different approaches taken for CM's claims- the first based upon proprietary and personal claims at Cayman law (supported only by Mr Lucidi's bald assertion to that effect as quoted above from paragraph 6 of his first affidavit), the other upon operation of the Bankruptcy Order and Appellate Decision under Brazilian law, as explained by reliance on Prof Yarshell as the independent expert on Brazilian law. The former approach would appear to proceed upon equitable tracing for the establishment of a constructive or resulting trust; the latter on the basis of the nullification of transactions resulting (seen through the lens of the common law) in the allegedly Misappropriated Assets never having left the Bankruptcy Estates in the first place.

49. Even if this difference of approach as between Mr Lucidi's affidavit and Prof Yarshell's report can be rationalized, no such rationalization is apparent from the OS as it presently stands. Indeed, as mentioned already, there is nothing in the OS to suggest that Mr Birmann, as the transgressor discussed in both the Lucidi affidavit and Prof Yarshell's report (above), has anything at all to do with the assets held by the Defendant. Nor is there pleaded in the OS, any issue which requires determination as a matter of Brazilian law so as to explain reliance upon the Bankruptcy Order or Appellate Decision. None the less, the relief sought by the OS would include a declaration that the Defendant BTG holds the Birmann Assets for CM upon a trust governed by Cayman law. And so, in CM's

case as it presently stands, conflict of laws issues – as between Cayman and Brazilian law - clearly arise.

50. It is trite law and agreed to be uncontroversial in this case, that foreign law, when relied upon to support a cause of action, is a matter of fact to be supported by evidence and therefore must be pleaded as such. It is also settled that in appropriate circumstances, in the absence of satisfactory pleading of foreign law the Court, by way of the so-called "default rule", will apply English (Cayman) law. See **Rule 25(1) and (2), Dicey, Morris & Collins on Conflict of Laws, 15th Ed:**

> *"(]) In any case to which foreign law applies, that law must be pleaded and proved as a fact to the satisfaction of the judge by expert evidence or sometimes by certain other means.*
>
> *(2) In the absence of satisfactory evidence of foreign law, the court will apply English law to such a case.* "

51. However, in this case, contrary to Mr Craig's submissions, given the state of the pleadings and the evidence, it would not be acceptable for CM to assume that in the absence of pleading of foreign law, by default the Court will proceed on the basis that the foreign law is the same as Cayman law and that, as he also submits *"it is for the defendant to say what issues it says are governed by foreign law".* This would be unacceptable because, on the present state of the pleadings and evidence, reliance is confusingly placed by CM, as shown above, upon both Cayman and Brazilian law.

52. The real mischief is readily apparent. Assuming for the purposes of argument that CM, consistently with Prof Yarshell's report, founds his claim on the fact that the transfer of assets to BTG was void as a matter of Brazilian law, then, on the face of it, it is that law which determines whether BTG holds the transferred assets on constructive or resulting trust or upon some other basis for CM, not Cayman law. And assuming further, that the claim is proceeding under Brazilian law as Prof Yarshell proposes, then the question arises, namely: how is it that CM is entitled to a constructive (or query resulting) trust under Cayman law, as both the OS and Mr Lucidi assert?

53. Moreover, the further fundamental and obvious question arises; viz: whether Brazilian law

recognizes the trust concept at all.

54. The pleadings in this case may not sensibly proceed on the basis that these are questions which can be answered simply on the basis of the application of the default rule. Unlike the situation facing the English Court of Appeal in ***Brownlie v FS Cairo (Nile Plaza) LLC*** (2020] EWCA Civ 996 upon which Mr Craig relies - and where it was clear that the plaintiff would plead Egyptian law as the *lex situs* of her claims in tort as being in effect, the same as English law - here CM's equivocation about the applicable law is confusing and untenable. As Underhill VP explained in ***Brownlie*** (about the default rule as set out in ***Dicey*** (above)) at (171]: *"First, the rule does not take effect by disapplying what would otherwise be the applicable foreign law. On the contrary, it is a rule of evidence, intended to address the situation where foreign law does apply (or at least may do so) but there is no evidence about its content. Conceptually, the Court is applying the foreign law but using the default rule to establish its effect. That seems to me to be recognized in the formulation of rule 25(2) itself, but it is in any event established as a matter of authority"* (citing ***OPO v MLA*** [2014) EWCA Civ 1277, [2014) EMLR 67).

55. The compelling point here to my mind, is that on the state of the pleadings (such as it is presented in the OS) and the conflicting evidence of Mr Lucidi and Prof Bushell, it is being suggested at once that both Cayman and Brazilian law could or should be determinative of the claim but without any particularization as to how this could be so.

56. Nor will it suffice therefore, for CM to argue as does Mr Craig on his behalf, (citing ***Brownlie*** at [177)) that " *...where the claimant's position is that their claim is governed by English Law, even if they appreciate that the defendant will argue otherwise, in such a case they will simply plead their case without reference to foreign Law, and the burden will be on the defendant to plead that foreign Law applies and the relevant content of that Law.*"

57. In this case, given the uninformative paucity of the pleadings and the internal equivocation in the evidence (and as between the evidence and the OS), the Defendant BTG is perfectly entitled to be agnostic as to the applicable law of CM's claim. CM is therefore not entitled to compel BTG to take a position in that regard. CM must explain with sufficient

particularity the applicable law relied upon to allow BTG to respond.

58. It is also trite that the pleadings must identify and address the issues of conflict of laws arising - see ***Dicey*** (op cit) ***Rules 172 and 168.*** And so, very apposite to the conundrum presented by CM's case here, is the following dictum of Chancellor Sir Andrew Morritt from ***Global Multimedia International Ltd v Ara Media Services and another*** [2007) 1 ALL ER (Comm) 1160 at [38), dealing with a dispute over the proper law of a contract:

> *"As foreign Law is in most cases a question of fact to be proved by evidence, in the absence of such evidence the court has no option but to apply English Law. But if the facts alleged demonstrate that, for example, the proper Law of the contract is not the Law of England, then as the Law of England includes the principles of private international law, those principles may demonstrate that some other system of Law is applicable to the claim, and if the relevant principles of that system are not sufficiently proved the claim may fail for that reason. "*

Accordingly, as long as there is purported reliance upon Brazilian law, the relevant principles must be sufficiently pleaded and proved and the default rule cannot be applied instead so as to regard Cayman law as governing the issues in dispute.

59. Finally, on the question of sufficiency of pleading under Ord 7 r. 3, I deal with a further submission from Mr Craig, which as I understand it, goes less to the strike out arguments under sub-rule 19(I)(a) and more to those other grounds under sub-rules 19(1)(b) and (d).

60. His argument here is that there is a final and conclusive judgment of the Brazilian court which extended the SAM bankruptcy to Boulder and Mr Birmann on the basis that they had transferred assets out of SAM to themselves and injuncting the dissipation of any assets held by them, especially by Mr Birmann. And therefore, that the post- bankruptcy transfers of Birmann Assets to BTG must be in breach of the Brazilian judgment and *ipso facto,* a basis for CM' s claims for the relief pleaded in the OS for recovery of those assets against BTG. It follows he submits, that even if Ord 7 r. 3 is not strictly satisfied, CM clearly has an arguable case involving serious issues to be tried, not one fit for striking out as being *"frivolous or vexatious"* within the meaning of Ord. 18 r. 19 (1)(b) and if so, his claim should not be struck out under Ord 18. r. 19 (l)(a) for failing to comply with Ord. 7 r. 3 either. He cites ***Burgess v Stratford Hotel*** [1990] and ***National Stadium Corp v NH***

International Ltd [2015] 1 WLR 1435, in both of which it is emphasized that the power to strike out should be confined to clear and obvious cases and should not be utilized where any extensive enquiry into the facts is likely to be necessary. He also cites the well-known authority of ***Wenlock v Maloney*** [1965) 1 W.L.R. 1238 which deprecates the use of affidavit evidence, even for the purposes of assessing strike out under the further sub-rules of Ord 18 r. 19(1), where that would involve a *"(usurpation) of the functions of the trial judge"* per Sellers LJ (at 1242G) or, as per Danckwerts LJ (at 1244 B-C) *"the summary jurisdiction of the court under Ord. 18 r. 19 was not intended to be exercised by a minute examination of the documents and the facts of the case; and to do so was itself an abuse of the inherent power of the court".*

61. However, in this case where CM must rely upon the Bankruptcy Order as a judgment of a foreign court, reliance upon the foregoing dicta, however authoritative, as a complete answer to the criticisms about lack of pleadings, would, in my view, subvert the principles for which the cases stand. For while a detailed enquiry into competing evidence in the context of a clearly non-frivolous claim may be inappropriate for the purposes of Strike Out, that can be no answer to such fundamental questions of pleading as discussed above, as to what is the applicable law of the claim? Or what is the meaning and effect of a judgment, especially a foreign judgment, upon a non-party to the proceedings from which the judgment emanates? The lack of particularly of pleadings in the OS means that in this case, such fundamental issues are not addressed in a way that allows for BTG as defendant, to respond.

62. The well-known principle from ***Hollington v Hewthorne & Co. Ltd*** [1943] 1 K.B. 587, is especially illustrative in this latter regard (at 596-7):

> *"A judgment obtained by A against B ought not to be evidence against* C, *for, in the words of the Chief Justice in the Duchess of Kingston's case (1776) 2 Sm LC 13th Ed 644, 'it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses or to appeal from a judgment he might think erroneous: and therefore ... the judgment of the court upon facts found, although evidence against the parties, and all claiming under them, are not, in general, to be used to the prejudice of strangers'. This is true, not only of convictions, but also a/judgments in civil actions.* If *given between the same parties they are conclusive, but not against someone who was not a party.* "

63. This long-standing principle was reaffirmed very recently by the English Court of Appeal in ***Ward v Savill*** [2021] EWCA Civ 1378 in which the Court reaffirmed the need to prove, as against a stranger, all the elements constituting a claim notwithstanding a declaration in earlier proceedings tantamount to *res judicata* as between the parties to that action, as to the existence of a constructive trust following rescission of a contract; and in which (at [81]) the court also rejected any distinction between factual findings made in the earlier judgment and the legal consequences of those findings: confirming that neither is binding on a stranger (applying on this latter point, the Privy Council judgment in *Calyon v Michaidis* [2009]UK PC 34).

64. These are principles which will be applicable where the judgment in question is not a judgment *in rem* (which is binding as to title as against the whole world - *Pattini v Ali* [2007] 2 AC 85) but one *in personam,* such as the Bankruptcy judgment extending the SAM bankruptcy to Mr Birmann. Thus , it is equally well settled that the preclusive effect of a judgment *in personam* is limited according to the doctrines of privity and mutuality; i.e. the parties or privies to the earlier proceedings must be the same as those to the subsequent proceedings and must have been mutually bound by the outcome in the earlier proceedings. See ***Gray v Lewis, Parker v Lewis*** [1872-73] 8 Ch App Cases 1035, 1059-60. This principle will be equally applicable where the earlier proceedings are foreign proceedings, notwithstanding that on the basis also of well-established authority, it may be arguable that the foreign judgment operates as a *res judicata* as between the parties to it. See ***House of Spring Gardens Ltd v Waite*** [1990] 2 All E. R. 990.

65. All of the foregoing underscores the seriousness of CM's failure to comply with GCR Ord. 7 r. 3 by not identifying in the OS the crucial elements of the claims relied upon. GTB is therefore able to complain that it simply does not and cannot, as matters stand, understand from the OS how the claim against it proceeds. It understands what relief is sought against it, but it does not understand the legal basis for the grant of such relief, nor under what system of law the question of whether such relief is to be granted is to be determined. This, in my view, is plainly justified criticism. As was also stated in Wisteria Bay at [19] referring to the passage already cited above herein above at [30]: *"The*

same principles [(ie. that before a party has to respond to serious allegations, it is incumbent on the party making the allegations to set out clearly and succinctly the major facts upon which it will rely)] must apply to a party who pleads foreign law as the basis for a claim and which goes to the root of the party's cause of action."

66. Dicta to similar effect can be found in ***Brownlie,*** per Underhill LJ at [174]: *"Secondly, the default rule does not apply in every case. In some cases where foreign law applies the court will not be prepared to proceed on the basis of English law, and the party whose case is governed by foreign law (typically the claimant) will accordingly be required to plead and prove its content. That point was first clearly identified by this Court in* ***Shaker v Al-Bedrawi*** *[2002) EWCA Civ 1452, [2003) Ch 350, and was repeated more recently in* ***Belhaj vStraw*** *[2014) EWCA Civ 1394, [2015) 2 WLR 1105 where the Court (Lord Dyson MR, Lloyd-Jones and Sharp LJJ) said at para. 158 (sic; this should be 157) of its judgment:*

> *"... the presumption of similarity [of English and foreign law] is not one in any event that applies inflexibly, regardless of the circumstances, and is subject to a number of exceptions..."*"

67. The circumstances presented here demand the enforcement of the principles of pleading without the presumption of similarity being relied upon in default. These are complex transnational proceedings involving claims in bankruptcy against assets located not only at the seat of bankruptcy but also in other jurisdictions, including it is said, the Cayman Islands. Enforcement will involve different systems of law and so the process will itself give rise to issues of conflict of laws. It would simply be untenable to attempt a resolution of the claims without proper and fully particularized pleadings on the issues to be resolved.

Remedy

68. What then is the appropriate order to make now? It is, I accept, that CM's claims are at least arguable and present serious issues to be tried. Strike out is a discretionary remedy and, as the cases show, is one to be *"reserved for clear cases (which are) in effect unarguable"*, to paraphrase Lord Neuberger's statement from ***National Stadium Corp.*** (above).

69. Having found myself in disagreement with Mr Craig QC about the need for proper pleadings, I see my way clear, instead of striking out, to accede to the relief argued for in the alternative by Mr Samek QC, based on para. 3 of BTG's summons. This is as set out above at [2.3], viz: that the Cause proceed as if commenced by writ in keeping with GCR Ord. 28 r. 8(1).

70. Mr Craig in his written submissions objects to this course as well, basing his objections on his understanding that BTG seeks this alternative recourse having regard to GCR Ord. 5 which requires that where a claim by a plaintiff alleges fraud, the proceedings must be begun by writ. This Mr Craig submits, would be a false premise because CM's case is not based upon allegations of fraud and seeks no such finding from this Court. Rather, that CM simply seeks (as Mr Craig still further explains the case at this juncture) to assert and trace an equitable proprietary interest in the assets held by BTG on the basis that they were assets owned and controlled by Mr Birmann (either directly or indirectly through offshore companies) at the time of his bankruptcy. And so, as I understand it, the issue will not be whether fraud was committed against SAM's creditors but the ownership of the assets under consideration.

71. While I can see that this could be a more direct approach to the pleading of the claim, it still has to be pleaded and particularized fully. That is what Ord 28. R. 8 (1) is designed to achieve in the case of a claim commenced by way of originating summons and this sub- rule is not limited in its terms to claims which allege fraud. It provides, in very wide terms, that:

> *"(1) Where, in the case of a cause or matter begun by originating summons, it appears to the Court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or apply for particulars thereof"* [emphasis added]

72. Given the confusing and conflicting state of the evidence as it stands in support of CM's case, it would not be appropriate to invoke the latter provisions of this sub-rule here simply to allow the affidavits to stand as pleadings. Rather, I am compelled to direct that CM files particulars explaining the basis of his claim and with sufficient clarity to allow BTG (and

any other party who might be allowed to intervene) to respond. It is, accordingly, so ordered and that BTG shall do so within 28 days of the date hereof. Any Defence from BTG to be filed within 21 days thereafter with any reply from CM to be filed within 7 days of the Defence. The particulars of claim, Defence and any reply are to stand as pleadings.

73. BTG also seeks directions, under this alternative head of its strike out summons, that CM serves notice of the proceedings upon Miriam Birmann, pursuant to Ord. 15 r. 13A on the grounds that although she is not a party to the proceeding, she will or may be affected by any judgment given therein. On this issue I am in agreement with Mr Craig. He argues that the basis of such a direction is unclear, that it is in any event, a matter for BTG as the Defendant to consider whether or not it wants to inform its sole named shareholder of the existence of the current proceedings. Although Ms Birmann appears from the evidence now to be the sole legal owner of all the shares of BTG, it is not normal to require another party in the proceedings to give notice of them to the shareholder(s) of a company involved in litigation. Assuming as one might, that BTG has informed Ms Birmann of the proceedings, it would be a matter for her to consider whether she wants to apply to intervene in the proceedings, per GCR Ord. 15 r.4.

74. As to the costs of this application, I can see no alternative but that they must follow the outcome and so I order that BTG shall have its costs, in any event, to be taxed if not agreed. However, if CM wishes to seek to persuade me otherwise, he will be at liberty to exchange written submissions with the other side within 7 days, with all submissions to be delivered to my chambers for consideration within 10 days of the date of this judgment.

GRAND COURT
FINANCIAL SERVICES DIVISION
CAYMAN ISLANDS

Hon Anthony Smellie
Chief Justice

27 October 2021