

Collas Crill Caribbean Brief

Key offshore updates in one place

Welcome to the Collas Crill Caribbean Brief – a concise round-up of significant recent decisions and legal developments affecting offshore and cross-border litigation.

Key contacts

**Justina Stewart**

Partner

+1 345 914 9622

justina.stewart@collascrill.com**Rocco Cecere**

Partner

+1 345 914 9630

rocco.cecere@collascrill.com**Matthew Dors**

Partner

+1 345 914 9631

matthew.dors@collascrill.com**Zachary Hoskin**

Partner

+1 345 914 9663

zachary.hoskin@collascrill.com**Michael Adkins**

Partner

+44 (0) 1481 734 231

michael.adkins@collascrill.com**David O'Hanlon**

Partner

+44 (0) 1481 734259

david.ohanlon@collascrill.com

Contributing authors

**Annalisa Shibli**

Counsel

+1 345 914 9656

annalisa.shibli@collascrill.com**Joshua Hamlet**

Senior Associate

+1 284 852 6348

joshua.hamlet@collascrill.com**April Bradey**

Associate

+1 345 914 9634

april.bradey@collascrill.com

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Grand Court (Cayman Islands)

Case	<i>Donghai Investment Holding Ltd v Crystal Fount Investments Ltd</i> [2025] CIGC (FSD) 97
Court	Grand Court (Cayman Islands)
Subject	Service out of jurisdiction, forum non conveniens, presumption parties have already considered forum issues if relevant contract contains jurisdiction clause
Judges	Asif J

Summary: When considering an application to serve out of the jurisdiction, if a contractual agreement exists with respect to jurisdiction, the court will not re-weigh factors which were foreseeable in assessing whether the Cayman Islands is the most appropriate jurisdiction, absent exceptional, unforeseen circumstances.

Further details: The Plaintiff sought leave to serve a writ out of the jurisdiction on the Defendant, in the British Virgin Islands. In determining whether to grant leave to serve out of the jurisdiction the Court must consider whether: (i) there is a serious issue to be tried on the merits of the case; (ii) there is a good arguable case that the claim falls within one of the gateways in Order 11 of the Grand Court Rules; and (iii) the Cayman Islands is the most appropriate forum to hear the case.

Limbs (i) and (ii) were satisfied. As to (iii), Asif J adopted the principles stated by Gloster J in *Antec International Ltd v Biosafety USA Inc* [2006] EWHC 47 (Comm), as applied by Doyle J in *Seahawk China Dynamic Fund v Gold Dragon Worldwide Asset Management Ltd* (unreported, 2 February 2024). Thus Asif J reaffirmed the position that, if parties have agreed either an exclusive or non-exclusive jurisdiction clause, they are taken to have considered all relevant factors of convenience at the time of contracting. Accordingly, there must be overwhelming or very strong reasons to depart from the contractual choice, and convenience factors that were foreseeable at the time the contract was made (such as location of witnesses or documents) do not suffice.

Finding no exceptional or unforeseen circumstances pointing to another jurisdiction, and noting the strong connecting factor of a Cayman choice of law clause, Asif J held that the Cayman Islands was the appropriate forum.

Case	<i>IGCF General Partner Ltd and The Infrastructure and Growth Capital Fund L.P. v White Crystals Ltd</i> [2025] CIGC (FSD) 98
Court	Grand Court (Cayman Islands)
Subject	Appropriate dispute resolution mechanism if both governing law/jurisdiction clause and arbitration agreement, exempted limited partnership, whether claim by limited partner against general partner for breach of duty is derivative claim, whether limited partner can maintain claim against general partner in liquidation, whether approach to staying court proceedings in favour of arbitration differs if partnership is in voluntary liquidation
Judge	Asif J

Summary: The decision concerns whether a dispute between investors in a Cayman Islands exempted limited partnership should proceed by arbitration in London under LCIA Rules or before the Cayman Courts. Asif J found that the Cayman proceedings should be stayed in favour of the arbitration, and refused the general partner's (GP's) application for an injunction to restrain the limited partner (LP). In so finding, the Judge applied established principles concerning the interaction between governing law/jurisdiction clauses and arbitration agreements, found that claims of a limited partner against the general partner are not derivative claims, and further that the fund being in voluntary liquidation did not displace the arbitration agreement. This judgment serves to confirm the pro-arbitration stance of the Cayman Courts.

Further details: The limited partnership deed provided: **Clause 11.6 (Governing Law)** – *"This Deed and the rights and obligations of the parties hereto shall be governed by and construed in accordance with the laws of the Cayman Islands and the parties submit to the non-exclusive jurisdiction of the courts in the Cayman Islands"*, and; **Clause 11.8 (Arbitration)** – *"Disputes shall be submitted to a panel of three arbitrators ... The arbitration proceedings shall be held in London, England ... Such arbitration proceedings shall follow the rules of the [LCIA]"*.

The LP argued that the claims advanced in the arbitration were derivative claims, and so fell within clause 11.6, not clause 11.8. This argument did not succeed:

- **Interaction between governing law/jurisdiction clause and arbitration agreement** – First, the non-exclusive jurisdiction provision in clause 11.6 did not detract from the wide scope of 11.8. Jurisdiction clauses, particularly if non-exclusive, are interpreted so as not to impede or otherwise prejudice a mandatory arbitration agreement: *Ace Capital Ltd v CMS Energy Corp* [2008] EWHC 1843 (Comm); *Surrey CC v Suez Recycling and Recovery Surrey Ltd* [2021] EWHC (TCC).
- **Claims not derivative** – In any event, under s.33(3) of the *Exempted Limited Partnership Act*, a derivative claim may only be brought where the general partner fails to sue a third party, not where the general partner itself is alleged to have committed the wrong. The LP's claims were therefore direct claims against the GP for breach of duty, which vested directly in the limited partner. (However, if the claim was correctly characterised as a derivative claim, then the court's approval would have been required to pursue the same. Such approval had not been sought, which would have been a reason to refuse the stay).

A limited partner is not prevented from maintaining a claim once a liquidator of the GP has been appointed – In so finding, Asif J highlighted that if the limited partner were to be required to surrender their claim against a general partner to the general partner's liquidator, that would result in the legally and practically infeasible situation of the general partner, by its liquidator, suing itself.

Relevance of the fund being in voluntary liquidation – Applying s.4 of the FAAEA and the guidance from *FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corp* [2023] UKPC 33 concerning whether to stay proceedings in favour of arbitration, the Judge found that the current proceedings should be stayed. The fact that the fund was in voluntary liquidation did not lead to a different result. A neutral bystander, if asked at the time they entered into the LP Deed whether disputes similar to those advanced by the LP and GP were intended to be covered by clause 11.8 if the Fund was being voluntarily wound up at the expiry of its term, or should be addressed by the court under s.129 of the Companies Act, would have responded that they agreed to arbitration. Further, s.129 is permissive not mandatory, such that the ability of the court to determine a question in the voluntary winding up does not exclude the continuing availability to the parties of recourse to the arbitration agreement.

Case	<i>Hungerstation Holding Ltd and Hungerstation LLC v Ninja Holding</i> [2025] CIGC (FSD) 99
Court	Grand Court (Cayman Islands)
Subject	Application to stay proceedings on the ground of forum non conveniens
Judge	Doyle J

Summary: The decision highlights the need to obtain reasoned expert evidence in support of applications to stay proceedings on forum non conveniens grounds.

The Plaintiffs existed under the laws of the DIFC and KSA respectively, while the Defendant was Cayman incorporated. The Plaintiffs alleged breaches of duties by a former manager and unlawful means conspiracy, unlawful interference with the Plaintiffs' business and dishonest assistance in breaches of fiduciary duty by the Defendant. The Defendant applied to stay the Cayman proceedings on forum non conveniens grounds in favour of the KSA or DIFC. Applying the *Spiliada* test, the Defendant's stay application was dismissed.

Further details: Under the *Spiliada* test, first it is necessary to show that the foreign forum is "available", meaning it has jurisdiction (personal and subject matter). Next, the court must consider whether it is the most appropriate, by reference to connecting factors. Even if more appropriate, the Cayman court can retain jurisdiction if the plaintiff shows by cogent evidence that there is a real risk that it will not be able to obtain substantial justice. The Defendant, being incorporated under the laws of the Cayman Islands, was served as of right and had the burden of showing the *Spiliada* test was satisfied.

It is worth bearing in mind certain dicta highlighted by Doyle J: "An expert must explain the basis of his or her evidence when it is not a personal observation or sensation; mere assertion or "bare ipse dixit" carries little weight ... If anything, the suggestion that an unsubstantiated ipse dixit carries little weight is understated; in our view such evidence is worthless ..." and "what carries weight is the reasoning, not the conclusion": *Kennedy v Coria (Services) LLP* [2016] 1 WLR 597; [2016] UKSC 6.

The Defendant sought to rely on the DIFC being an alternative available forum due to a shareholders agreement and arbitration clause referring to arbitration under DIFC/LCIA Rules in Dubai at the DIFC. However, the Defendant was not a party to the arbitration agreement and had not adduced expert evidence on DIFC law and DIFC and Dubai arbitration, law and procedure. Accordingly, the Defendant failed to discharge its burden under the *Spiliada* test. Further, the argument was raised late and it would not be fair to permit the Defendant to take the DIFC point.

Both parties adduced expert evidence on whether KSA was an available alternative jurisdiction. The Court found the Defendant's expert evidence to be unsupported by authority and, in parts, textually inaccurate, and preferred the Plaintiffs' expert evidence, which was supported by detailed reasoning and properly translated materials.

The Plaintiffs' expert demonstrated that KSA was not an available jurisdiction because: (i) the Defendant had no residence in KSA; (ii) the claims did not involve any obligation that originated or was enforceable in KSA; and (iii) there were no contractual provisions pointing to enforcement in KSA. The Defendant relied on *Al-Aggad v Al-Aggad* [2024] 4 WLR 35, arguing that where there is a conflict in expert evidence that the court cannot resolve, principles of comity require the court to assume that the foreign forum is capable of delivering justice. The Court rejected that argument, holding that the Defendant had conflated the availability of a forum with access to justice, and had failed to prove that KSA was, in fact, an available alternative forum.

Case	<i>Re China Gem Fund IX LP (in official liquidation)</i> [2025] CIGC (FSD) 100
Court	Grand Court (Cayman Islands)
Subject	<i>Cross-border insolvency, letter of request, whether to use standard form for letter of request in use in Hong Kong or to limit recognition sought</i>
Judge	Asif J

Summary: This decision provides helpful guidance on the appropriate scope of powers to be sought in a recognition of liquidators by the High Court of Hong Kong. The powers sought should be no wider than those genuinely required.

Further details: The liquidators of China Gem applied to the Grand Court for a letter of request to be sent to the High Court of Hong Kong for their recognition by the court and for the High Court to grant them judicial assistance. The liquidators had identified a securities account in China Gem's managed by Taiping, a Hong Kong based company. The account held shares in a Hong Kong Stock Exchange listed company. The liquidators asked Taiping to transfer the shares so they could realise their value for the benefit of creditors. However, Taiping required formal recognition of the liquidators' authority by the Hong Kong court before effecting the transfer. To obtain that recognition, the liquidators applied to the Grand Court of the Cayman Islands for a letter of request to be sent to the High Court of Hong Kong.

The principal issue before the Cayman court was the scope of that request. The liquidators' Hong Kong counsel recommended using the standard Hong Kong form, which includes wide-ranging powers that the liquidators in this instance, did not require.

Asif J, concerned that requesting excessive powers would "*trespass upon comity*", informally sought the views of Harris J of the Hong Kong Companies Court. Harris J confirmed that while the standard form is generally preferred for efficiency, the request should be tailored to what is actually required in each case.

Relying on this guidance, Asif J issued a narrowly framed letter of request, limited to seeking recognition sufficient to allow the liquidators to take ownership of the shares, without extending to broader investigative or management powers. He further advised that future Cayman applications for recognition in Hong Kong should be confined to the specific relief genuinely needed, rather than defaulting to the standard, wide-ranging form.

Eastern Caribbean Supreme Court, Territory of the Virgin Islands, Court of Appeal

Case	<i>Sancus Financial Holding Limited, Carson Wen and Julia Yuet Shan Fung v Chad Christopher Holm</i> BVIHCMMAP2023/0025
Court	Eastern Caribbean Court of Appeal
Subject	Interim payment order under CPR Rule 17; ' <i>reasonable proportion</i> ' in interim payments; inability to pay interim payments
Judge	Hon. Mde. Ellis, Hon. Mde. Alexander, Hon. Mr. Ramdhani

Summary: Mr Holm (**Holm**) brought proceedings against the appellants for damages for breach of contract for his investment in the Bank of Asia Project (**Project**). The claim was bifurcated with Holm succeeding on liability.

With liability settled, Holm successfully applied under Rule 17.5 of the Civil Procedure Rules (Revised Edition) 2023 (CPR) for an interim payment of damages of an amount considered the "irreducible minimum". The grounds of appeal included that the learned judge wrongly determined the "reasonable proportion" of the overall damages likely to be awarded to the respondent at the quantum trial, and erred in concluding that any interim payment should be made, in disregarding the need for Holm to show that he had already suffered loss as a matter of causation, and in failing to take into account the appellants' evidence that they could not afford to pay damages in the amount sought. The appeal was dismissed.

Further details: Rule 17 confers a broad discretionary jurisdiction to grant interim remedies at any stage including following judgment but prior to the final assessment of quantum. The underlying rationale for interim payment orders is that, where a claimant has established a clear entitlement to a monetary award, the court may properly intervene to prevent injustice due to the delay in the quantification of damages. Therefore, a successful party is not kept out of funds to which they are clearly entitled pending the final resolution of quantum. Accordingly, under Rule 17.6(1), the court exercises its discretion on a cautious and conservative basis to avoid overpayment while ensuring that a party is not unjustly kept out of their monies. Where the court can safely conclude that a party will recover at least a certain sum, and it is likely to recover more, then that '*irreducible minimum*' may form the basis of an interim payment.

The normal measure of damages for breach of contract at common law is compensatory. The general rule is that damages are assessed as at the date of the breach. However, that rule is not inflexible. If the application would produce injustice, the court may adopt another date more consistent with the compensatory principle.

Damages for breach of contract includes actual loss and lost gain, and "gain" does not import any requirement that a claimant must prove an actual sale or realised profit. The deprivation of a contractual entitlement to shares is itself a compensable loss. Therefore, the argument that the absence of a realised gain precludes loss failed.

A claimant is not required to establish financial necessity, nor is the court bound to consider potential prejudice to a defendant, as a precondition to granting an order for interim payment. The rule is broad, the only express limitations being contained in Rule 17.6(2) (none of which applied here).

At first instance, the judge found that a breach-date valuation would have been unjust, and on the expert evidence (including the appellants' own) determined a conservative minimum value for the respondent's interest (a safe "irreducible minimum"). Taking into account that nearly seven years has passed since the breach, during which the respondent had received no damages or reimbursement of extensive legal costs, the grant of an interim award was justified. It could not be said that the decision under appeal was "plainly wrong".

Case	<i>Caldicott Worldwide Ltd v Siong Beng Seng, Ching Hui Huat and Springfield Investments & Nominees Pte Ltd</i> BVIHCMAP2023/0009
Court	Eastern Caribbean Court of Appeal
Subject	Application for conditional leave; interplay between arbitration clauses and statutory unfair prejudice remedies
Judge	Hon. Mde. Ellis, Hon. Mde. Byer, Hon. Mr. Theodore

Summary: In granting conditional leave to appeal to the Privy Council, the Court of Appeal held that the question raised – whether an arbitration clause between a company and a shareholder can be used to stay the factual basis of a shareholder-versus-shareholder unfair prejudice petition – has wide-ranging implications for s. 1841 of the BVI Business Companies Act (**BCA**) and under similar legislation in other jurisdictions. It affects the integrity of statutory remedies for thousands of companies, possibly rendering such remedies illusory.

Therefore, the ultimate determination of this appeal could have far-reaching implications for the practical ability of minority shareholders to obtain relief under s.1841 of the BCA and analogous legislation elsewhere.

The procedural context to this matter, while relevant to the ultimate appeal, is complex and not covered here.

Eastern Caribbean Supreme Court, Territory of the Virgin Islands, High Court

Case	<i>Access Bank Plc (as successor in title and assignee of Diamond Bank plc) v Dr Ambrosie Bryant Chukwueloka Orjiako and ors</i> BVIHCCOM2023/0282
Court	Eastern Caribbean Supreme Court, Territory of the Virgin Islands, High Court
Subject	Summary judgment; beneficial interest in shares; sham transaction; setting aside a conveyance of property
Judge	Mithani J

Summary: This robust decision illustrates that even in cases alleging fraud and dishonesty, it may be possible to obtain summary judgment on the merits. In particular, it demonstrates that a respondent can not simply rely on bare denials and nebulous contentions about evidence potentially emerging before trial.

Further details: The High Court in England entered judgment against Dr Orjiako, based on sums he owed pursuant to a personal guarantee. Then Claimant then obtained an order of the BVI Court, giving effect to the English judgment.

Dr Orjiako was the beneficial owner and controller of valuable shares held in one or more BVI companies (Shares). The Claimant alleged that, following threats of legal proceedings against Dr Orjiako, he transferred the Shares to his wife (Share Transfers) but:

1. only the legal title in the Shares was transferred. The Shares remained beneficially owned by Dr Orjiako. While this was a purported gift made by Dr Orjiako to his wife, the principles underlying sham transactions were equally applicable;
2. alternatively, the Share Transfers were made on the part of Dr Orjiako to defraud his creditors, contrary to the provisions of the Conveyancing and Law of Property Act 1961 (CLPA). This replicates the now-repealed England and Wales provision of s.172 of the Law of Property Act 1925 (which was in turn replaced in England and Wales by s.423 of the Insolvency Act 1986).

The Claimant sought summary judgment under r.15.2 of the ECSC Civil Procedure Rules (Revised Edition) 2023 (ECSC CPR).

The authorities say that there is no bar to granting a summary judgment application in a fraud claim on the merits, but considerable caution is required. Indeed, the Judge accepted, as bare statements of law, the propositions that claims grounded upon allegations of reprehensible conduct, including fraud or dishonesty, are ill-suited for determination by summary judgment as they are usually fact-sensitive, relying on complex facts and involving significant questions of law and fact for determination. However, the Judge found that the written evidence adduced in these proceedings did not support those propositions:

- Mr Orjiako's evidence was largely bare denials. It did not address the allegations made by the Claimant.
- There was no basis for the Defendants to claim that their case at trial may have been improved by disclosure or in any other way.
- The only meaningful disclosure that could assist the Orjiakos at trial would be the disclosure of documents in their own possession or control. If the Orjiakos had any documents in their possession or control that supported the position they maintained in the claim, they would, or should, have disclosed these as part of their written evidence in opposition to the application. They plainly either did not have those documents, or if they did, those documents did not support but almost certainly undermined their case.
- Dr Orjiako provided different accounts relating to the Share Transfers and sought to "bury his case in a morass of irrelevant information and documents going back many years, hoping that neither the Claimant nor the Court would be able to get to the bottom of his case at the stage of the hearing of the Application. He believed that because of the overwhelming and confusing nature of that information and documentation ... it would inevitably mean that he would get unconditional leave to defend the Claim". However, the inconsistencies in his case would not be satisfactorily explained by an oral explanation given by them at trial.