UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ANWAR, et al., **Plaintiffs** **v.** **FAIRFIELD GREENWICH LIMITED, et al** **Defendants** **This Document Relates to: All Actions**	0118 **Master file No. 09-cv-[redacted] (VM)**

AFFIDAVIT OF MARK A C DIEL

I, **MARK A C DIEL** of Marshall Diel & Myers, "Sofia House", 48 Church Street, Hamilton HM 12, Bermuda hereby **MAKE OATH AND SAY** as follows:

1. I am a partner in the Bermuda firm of Marshall Diel & Myers and the head of the litigation department of the firm. I have an LL.B from the University of Buckingham in the United Kingdom (1984) and was called to the Bar of England and Wales in 1984. I was called to the Bermuda Bar in 1985. A copy of my curriculum vitae is appended hereto at **TAB 1**.

2. Marshall Diel & Myers' practice is similar to that of Attride-Stirling & Woloniecki. Since my call to the Bermuda Bar in 1985, I have myself specialized in commercial litigation, including insolvency and insurance and reinsurance litigation and, like Mr. Attride-Stirling, I have advised on numerous occasions on the issue of officers' and directors' duties under Bermuda law.

3. I have been asked to provide an affidavit on matters of Bermuda law in connection with claims brought by the investors in the Fairfield Greenwich Funds in the United States District Court for the Southern District of New York. I have in particular been asked:

- To review and comment on the Affidavit of Mr. Rod Attride-Stirling in this matter dated 22 December, 2009, including relevant issues of law that his instructions did not allow him to address.
- To review and comment on the Affidavit of Robert Miles, Q.C. dated 19 March, 2010 as it pertains to Bermuda law.
- To address other issues that are relevant to the salient issues in this case.

4. I have reviewed the following documents for the purpose of this affidavit:

(a) The Second Consolidated Amended Complaint in *Anwar, et al v Fairfield Greenwich Limited, et al*, Master file No 09-CV-118 (VM) (the "SCAC")

(b) The Private Placement Memoranda ("PPMs") of Fairfield Sentry Limited ("Sentry") and Fairfield Sigma Limited ("Sigma") (together, the "Funds"), including the Sentry PPM, dated 1 July 2003; the Sentry PPM, dated 1 October 2004, the Sentry PPM, dated 14 August 2006; the Sigma PPM dated 2 February 2006, and the Sigma PPM, dated 1 December 2008

(c) The Investment Management Agreements (the "IMAs") between Fairfield Greenwich (Bermuda) Ltd ("FGBL") and Sigma, dated 1 October 2004 and between FGBL and Sentry, dated 1 October 2004

(d) The memoranda of law in support of the Fairfield Greenwich Defendants', Citco Fund Services (Bermuda) Limited and Ian Pilgrm's, and PricewaterhouseCoopers Accountants N.V.'s, PricewaterhouseCoopers LLP's, and PricewaterhouseCoopers International Limited 's motions to dismiss the Second Consolidated Amended Complaint in this action.

(e) The affidavit of Robert Miles, Q.C. dated 19 March, 2010 addressing issues of U.K. and Bermuda Law.

5. In giving an expert opinion on Bermuda law, I am required to express my independent views of the state of the law irrespective of the positions of the parties, and I have done so.

(A) **General – Bermuda Law**

6. Mr. Attride-Stirling's description of the sources of Bermuda law is generally correct, but I do not adopt the various formulations of the test used by him in his Affidavit, such as "regarded as binding", "not hierarchically binding", "very persuasive" or "persuasive but not binding", as they are contradictory. In my opinion the principle is best expressed by DaCosta JA in the *Crockwell* case **[TAB 2]**, a case to which Mr. Attride-Stirling refers:

> "Whatever may be the position in strict theory the reality of the situation is summed up by Lord Diplock in these words:
>
> > "Since the House of Lords as such is not a constituent part of the judicial system of Hong Kong it may be that in juristic theory it would be more correct to say that the authority of its decision on any question of law, even the interpretation of recent common legislation, can be persuasive only: but looked at realistically its decisions on such a question will have the same practical effect as if they were strictly binding, and a court in Hong Kong would be well advised to treat them as being so." (*de Lasala v de Lasala* (1980) AC 554, 558).
>
> In short, whatever may be the orthodox theory of the doctrine of precedents, any decision of the House of Lords will be treated with the greatest respect having regard to the reputation and distinction of that august body as the highest legal tribunal of the United Kingdom, and will as a general rule be followed by a court in Bermuda. Should the rare occasion arise where it is thought that local conditions dictate a path different from that charted by the House of Lords, then the local court must be at liberty to adopt such a course leaving it to the Judicial Committee to decide as ultimate arbiter whether such a course was justified.
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> In matters of commerce uniformity-is of course highly desirable and this court in *J.E.L. Lightbourne & Co Ltd v Test Freres* (1980-80) LRC (Comm) 463 readily followed the decision of the House of

Lords in the *Advocaat* case (1980) RPC 31 as being "the most authoritative pronouncement on the law of passing off in England." The President of the Court took the view that there was no reason why the common Law on this subject as applied in these islands should be different."

7. The Bermuda legislature has the power to enact statutes which have the effect of overriding the common law as it exists in the United Kingdom. United Kingdom statutes do not apply in Bermuda unless they are expressly applied. The first principle is expressed in the introductory words of section 15 of the Supreme Court Act 1905, to which Mr. Attride-Stirling refers, and both are consistent with the constitutional position, an authoritative expression of which is as follows (emphasis supplied):

> "The common law of England and the statute law existing at the date of the formation of the colony applied to colonies acquired by settlement, but **statutes subsequently enacted do not apply unless they are expressly applied.** This principle of introduction or reception is, however, subject to this restriction, that so much only of the law of England was carried with them by the colonists as was applicable to their situation and the condition of an infant colony.
>
> The law of England introduced on settlement is open to local development, for on the one hand, statute law thus introduced will not override or prevail against the enactments of the local legislature unless contained in an Act of Parliament which is made applicable to the colony by the express words or necessary intendment of any Act of Parliament, and on the other hand, **the common law thus introduced** not only **is subject to local legislation** but also develops by the practice of the courts; such development will not always be uniform with the development of the common law in England, unless it is provided that the common law in force is to be that in force in England for the time being rather than as at a specified date." (See *Halsbury's Laws of England*, Volume 13 (2009) 5th Edition, Title "Commonwealth", paragraph 869) **[TAB 3].**

8. As discussed herein, Bermuda has enacted statutes relevant to this case that have the effect of overriding the common law as it exists in the United Kingdom. For example, the Bermuda Companies Act 1981 principally governs the rights, duties and obligations of corporate officers and directors of Bermuda Companies; whilst the Supply of Services (Implied Terms) Act 2003 imposes a statutory implied term of reasonable care and skill in contracts for the supply of a service. Conversely, Bermuda has not enacted certain legislation enacted in the United Kingdom, such as legislation concerning the rights of third party beneficiaries of contracts, which would have been relevant to this case.

(B) **Breach of Fiduciary Duty (Count 8)**

9. Mr Attride-Stirling's analysis in this section appears to be in three parts:

(i) In paragraph 13 he addresses the question of whether directors of companies owe fiduciary duties to individual shareholders of the company.

(ii) In paragraphs 14 to 17 he addresses the creation of fiduciary duties more generally, and asserts that on the general test, the allegations of the SCAC that certain of the Fairfield Greenwich Defendants owed a fiduciary duty to the shareholders of Sentry and Sigma fail it.

(iii) In paragraphs 18 to 20 he looks at the issue of concurrent duties fiduciary, contractual and tortious. As to the latter, the question of concurrent duties in the form in which it arose in the cases cited by Mr. Attride-Stirling does not appear to be of much relevance. The issue in this case, it seems to me, does not concern the question of concurrent duties flowing directly between, for example, parties to an investment advisory contract, but whether the parties to that contract may owe duties to a third party of one sort or another independent of the contract.

10. I would note that Mr. Attride-Stirling (correctly) in paragraph 12 of his affidavit characterizes Count 8 of the SCAC as alleging the existence of both "a fiduciary duty and a duty of care on behalf of the Defendants" (emphasis supplied) (see, e.g., SCAC paragraph 404). Yet his affidavit does not address the potential liabilities arising from a duty of care. I agree for the most part with Mr. Attride-Stirling's synopsis of the law as it relates to a director's duty qua director of a company to its shareholders, however, as Mr. Miles QC points out, he takes a broad brush approach and does not address the exceptions to this general rule. Further, in my opinion, the authority of *Arklow* does not support the propositions which he sets out in the final two sentences of paragraph 16 of his affidavit, the second of which is, as he asserts, that *Arklow* "explains" that "One does not become a fiduciary merely because one is trusted by the other party to

a business transaction, or by superior knowledge, or by having the right or ability to control some action or asset."

11. *Arklow* was a suit brought by an entrepreneur against an investment bank he had consulted with, but had not retained, to assist in the financing of land for a land acquisition. The Court noted that there was no relationship created between the parties "beyond one created by and limited to the giving and receipt of confidential information." The defendant did not undertake any obligation, either expressly or impliedly, to act on behalf of the plaintiff. The only issue in the case was whether the investment bank owed a duty to safeguard confidential information provided to it.

12. *Arklow* and the UK Court of Appeal decision in *Bristol and West Building Society v. Mothew* [1998] Ch. 1 (to which Mr. Attride-Stirling refers and which was approved in *Arklow*) were recently considered in the Bermuda Supreme Court and Court of Appeal decisions in *Walsh and Taal v Horizon Bank International Ltd* [2008] Bda LR 16 and *Horizon Bank International v A Walsh et al [2009] CA (Bda) 6 Civ (March 2009)* ("HBI"). Notwithstanding Mr. Attride-Stirling's characterization of the meaning and effect of *Arklow*, the Bermuda Court of Appeal were able to find that a fiduciary duty had arisen under the facts and circumstances of the case, applying the decisions in *Arklow* and *Bristol and West Building Society*. Given what those facts and circumstances were, it is difficult to see how the Court could have done this if Mr. Attride-Stirling's assessment of the *Arklow* case is accurate.

13. In *HBI* **[TAB 4]**, a Bermuda Bank, the Bermuda Commercial Bank ("BCB"), held a large sum for the account of an Antiguan Bank, "HBI", which was being wound up in Bermuda and St Vincent and the Grenadines. HBI's entitlement to the moneys was being challenged by two men, Walsh and Taal (referred to by the Court of Appeal as "the Investors"), who alleged that about US$14 million of the sums held by BCB for the account of HBI represented the proceeds of a large number of Microsoft shares worth in excess of US$20 million which they had entrusted to HBI and others for the specific purposes of an Offshore Investment Programme in about September 1997. They alleged, amongst other things, that from about November 1998 HBI and others had used the shares for their own purposes, acting dishonestly and in breach of fiduciary duties they owed to the Investors. Applying *Arklow* and *Mothew*, the first instance Judge held that HBI owed the Investors fiduciary duties on the basis (amongst other things), that:

> "in agreeing to establish an offshore structure which entailed [the Investors] placing assets into companies which HBI would control on their behalf (i.e. by providing its own manager, Coombes, to be the manager of Boomer), HBI in my judgment became a fiduciary of [the Investors] to the extent that it was trusted to ensure that Boomer would be managed consistently with the interests of [the Investors]" (at paragraph 56 of the judgment); and "HBI entered into a fiduciary relationship with [the Investors] and Boomer because it agreed to manage their assets, which were to be kept separate from HBI and Extant's assets, subject to certain broad guidelines through a structure over assets of which [the Investors] had relinquished operational control..." (at paragraph 59 of the judgment)

14. In other words, the first instance Judge held that a fiduciary relationship had come into being on the basis (amongst other things) that the Investors had entrusted their assets to HBI, by relinquishing operational control over them to HBI.

15. The Court of Appeal entirely agreed with the reasoning of the first instance Judge, referring, in paragraph 35, to those paragraphs of the first instance judgment mentioned above. Then, having applied *Arklow* and *Mothew* in paragraph 33, the Court held, in paragraph 40, that the Judge's holding that HBI owed a fiduciary duty to the Investors was "undoubtedly correct".

16. Accordingly, in my opinion, the recent decision of the Bermuda Court of Appeal in *HBI* is good authority for the proposition that there are circumstances in which a fiduciary relationship can arise by reason that one person entrusts the management of his assets to another and for that purpose relinquishes operational control over them. The SCAC alleges that the investors entrusted funds to the Fairfield Greenwich Defendants for purposes of investment. This is an allegation of primary fact which, in my opinion, is capable of bringing the case within the parameters of that proposition.

17. In light of the Bermuda Court of Appeal's judgment in the *HBI* case, that, there does not seem to be anything in *Arklow* which supports Mr. Attride-Stirling's opinion as set out in paragraph 16 of his affidavit. What is required, according to *Arklow* (at page 598 of the WLR Report) is "a

situation where one person is in a relationship with another which gives rise to a legitimate expectation, which equity will recognise, that the fiduciary will not utilise his or her position in such a way which is adverse to the interests of the principal." Further, as the Privy Council continues on the same page: "The existence and the extent of the duty will be governed by the particular circumstances. It is therefore essential at the outset to turn to the circumstances ..." In short, the existence and scope of a fiduciary relationship are fact-specific and very much dependent upon a detailed assessment of individual facts and circumstances, as has been held in many other cases. There is nothing in principle to prevent the creation of a fiduciary relationship between a director and an investor. It all depends on the particular facts and circumstances.

18. Further still, and in any event, the pleaded circumstances may well give rise to a duty of care as described by Mr. Miles in his affidavit and as illustrated in the leading authority of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. **[TAB 5]**.

19. There is, in addition, under section 97 (1) of the Bermuda Companies Act 1981, a general duty lying upon every officer of a company, which of course includes directors, "in exercising his powers and discharging his duties", to "(a) act honestly and in good faith with a view to the best interests of the company; and (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances." (Relevant sections of the Bermuda Companies Act of

1981 are appended hereto as **TAB 6]**. The Bermuda provisions mirror the identical provisions of section 122 of the Canadian Business Corporations Act. As the Supreme Court of Canada has commented in relation to those provisions (in *Peoples Department Stores Inc (trustee of) v. Wise (Peoples)* (2004) 244 Dominion L. Rep 4th 564, 586, paragraph 57) **[TAB 7]**:

> ". . . the statement of the duty of care in s 122 (1) (b) of the CBCA does not specifically refer to an identifiable party as the beneficiary of the duty. Instead, it provides that "every director and officer of a corporation in exercising his powers and discharging his duties shall . . . exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. Thus, the identity of the beneficiary of the duty of care is much more open-ended and it appears obvious that it must include creditors."

20. The point is that the statutory duty is potentially a duty to a broad class of persons which, in my opinion, may arguably include the plaintiffs in this case.

21. *Snell's Equity*, 31st Edition (with Supplement up to date to September 1, 2009) I believe provides a very measured analysis. After discussing the "settled categories" (in which the editors do not include investment or financial advisers or managers), the editors then go on to address what they call the "ad hoc" categories, namely those relationships which, depending on the circumstances and how close they are to the general test, may be found to be fiduciary. The following appears at the end of paragraph 7-10 (emphasis supplied):

> "Accountants who had incompetently reported to their client that the proposed price for a takeover target was fair and reasonable were not guiding or influencing their client's decision and so did not owe fiduciary duties to the client. **But financial advisers can occupy a fiduciary position vis-à-vis their clients:** *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371 at 377 **[TAB 8]**; *Aequitas v AEFC* [2001] NSWSC 14, (2001) 19 ACLC 1.006 at [307]." **[TAB 9]**

In *Daly*, Australia's highest court, the High Court of Australia (a court including Gibbs, later a Privy Councillor) was faced with a client who had been advised by a firm of stockbrokers that he should give the firm a loan at a high rate of interest and therefore a high rate of return for him, rather than make investments in the market, which, the firm advised, was not the best place to put his money at the time. The firm failed to disclose its precarious financial position, and the client suffered loss when the firm later became insolvent. Gibbs CJ said **[TAB 10]**:

> "5. The argument for the appellant was that Patrick Partners owed a fiduciary duty to Dr Daly and were in breach of that duty in borrowing money from him without disclosing the firm's unsatisfactory financial situation. The failure to account for money received in a fiduciary capacity was, so it was submitted, a defalcation. Further, it was said, a constructive trust arose immediately the money was received, so that the money was received for or on behalf of Dr Daly, or as trustee, within the meaning of the sections.
>
> 6. It was right to say that Patrick Partners owed a fiduciary duty to Dr Daly and acted in breach of that duty. The firm, which held itself out as an adviser on matters of investment, undertook to advise Dr Daly, and Dr Daly relied on the advice which the firm gave him. In those circumstances the firm had a duty to disclose to Dr Daly the information in its possession which would have revealed that the transaction was likely to be a most disadvantageous one from his

> point of view. Normally, the relation between a stockbroker and his client will be one of a fiduciary nature and such as to place on the broker an obligation to make to the client a full and accurate disclosure of the broker's own interest in the transaction: *In re Franklyn*; *Franklyn v. Franklyn* (1913) 30 TLR 187; *Armstrong v. Jackson* (1917) 2 KB 822; *Thornley v. Tilley* [1925] HCA 13; (1925) 36 CLR 1, at p 12; *Glennie v. McDougall & Cowans Holdings Ltd.* (1935) 2 DLR 561; *Burke v. Cory* (1959) 19 DLR (2d) 252; *Culling v. Sansai Securities Ltd.* (1974) 45 DLR (3d) 456. The duty arises when, and because, a relationship of confidence exists between the parties: see *Tate v. Williamson* (1866) LR 2 ChApp 55, at pp 61, 66 and see also *McKenzie v. McDonald* (1927) VLR 134, at pp 144-145; *Hospital Products Ltd. v. U.S. Surgical Corporation* [1984] HCA 64; (1984) 58 ALJR 587, at pp 596-598, 628; [1984] HCA 64; 55 ALR 417, at pp 431-436, 488-489."

22. Paragraph 20 of the Attride-Stirling affidavit may be correct as far as it goes., I do not understand the relevance of the cited passage in the context of this case. However, a close reading of the *Henderson* decision and in particular the cited passage indicates that if tortious duties are to be excluded or restricted, they must "be so inconsistent" with the particular applicable contract that the parties must be "taken to have agreed" that this should be the case. The strictness of this principle is illustrated by the facts of and the result in *Henderson*, where contracts had conferred "absolute discretion" on defendant managing agents in the running of the affairs of the respective syndicates, and where despite this apparently unrestrained language, Lord Goff and the House of Lords had no difficulty in holding that tortious liability was not excluded.

23. Mr. Attride-Stirling's comments in paragraph 21 are unremarkable as far as they go, but their relevance is questionable. The SCAC does not allege that fiduciary duties were derivative or transitive. Rather defendants are asserted to have directly entered into fiduciary relationships with the investors. Moreover, Mr. Attride-Stirling was not instructed to address the salient issue of duty arising under a common law duty of care, despite the fact that (as he recognises in paragraph 12 of his affidavit) the Plaintiffs' claims include duty of care claims.

24. For the reasons stated above, I disagree with Mr. Attride-Stirling's conclusion in paragraph 22 of his affidavit. In order as a matter of Bermuda law for a claim to be struck out it must be "unarguable", "plain and obvious", "obviously unsustainable", "clear beyond doubt". These are phrases that have been used by the Courts over the years to describe the very high test to be met before a Court will strike out a claim. Statements of the test include:

- "the jurisdiction to strike out will only be exercised in plain and obvious cases, where the claim is essentially unarguable or bound to fail" (*Roberts v Commissioner of Police and Minister of Public Safety & Housing* [2008] Bda LR 27);

- "It is now well settled that a pleading should be struck out only where the pleaded case is 'obviously unsustainable', ' unarguable', 'hopeless', 'one which cannot succeed', or other language to this

effect. Before me both parties accepted the 'plain and obvious' test, which comes from the judgment of Lord Pearson in *Drummond-Jackson v British Medical Association*, [1970] 1 WLR 688 at 696...'the order for striking out should only be made if it becomes plain and obvious that the claim ... cannot succeed' (*Yearwood v Thomas Miles & Co Ltd. 2000 Civil Jur. No. 213* [2001] Bda LR 30) **[Tab 11]**.

25. In the result-

- A pleading will not be struck out where it raises an arguable, difficult or important point of law (see *A-G of Duchy of Lancaster v London and North Western Rly Co* [1892] 3 Ch. 274, applied in various Bermuda cases, including *Bermuda Commercial Bank Ltd v Estate Representatives of Bickley (Deceased) 1991 Civil Jur. No. 78* [1991] Bda LR 89 **[TAB 12]**.

- The "summary jurisdiction of the court is not intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and

not a proper exercise of that power." (see *Wenlock v Moloney* [1965] 2 All ER 871, at page 874 **[TAB 13]**, per Danckwerts LJ, applied several times in Bermuda, including by the Bermuda Court of Appeal in *Chiang and Pacific Challenge Holdings Ltd v Kistefos Investment AS* [2002] Bda LR 50 **[TAB 14]** and *Inova Health System Foundation v First Virginia Reinsurance Limited 1998 Civil Appeal No. 1* [1998] Bda LR 2 **[TAB 15]**.

26. In my opinion, as a matter of Bermuda law, the Plaintiffs' claim for breach of fiduciary duty and breach of a duty of care against the FGG defendants do not fit any of the descriptions given above, nor would a Bermuda court permit a strike out to become a trial of difficult issues of fact or law.

(C) **Third Party Beneficiary Breach of Contract**

27. Whilst I agree there is no Bermuda statute equivalent to the UK Contract (Rights of Third Parties) Act 1999, I do not agree that the common law (in the broadest sense as including the principles of equity) does not recognise any circumstances in which a third party who is the beneficiary of a contract is able to acquire rights under the contract:

"Equity developed an exception to the doctrine of privity by making use of the concept of a trust of chose in action. It accordingly held that where A made a promise to B for the benefit of C, the promise could be enforced against A if B constituted himself trustee of A's promise for C. This exception to the doctrine of privity was approved by the House of Lords in Walford's case where C (a broker) negotiated a charterparty in which the shipowner (A) promised the charterer (B) to pay a commission to C, who could accordingly enforce the promise against A." (see *Chitty on Contracts*, 30th Ed. (2008), Vol I, paragraph 19-078) **[TAB 16]**

(D) **Mutual Mistake**

28. Again Mr. Attride-Stirling may be correct that as far as Bermuda law is concerned the claim is not properly particularized but that is a matter for the US Court and its procedure.

(E) **Bars to Plaintiffs' Claims**

29. In paragraph 28 of his Affidavit, Mr. Attride-Stirling makes a rather generalized statement that claims against the Fairfield Greenwich Defendants are completely barred as a matter of Bermuda law by virtue of the fact that there is no privity of contract between the plaintiffs and the FG Defendants and no duty of care. This statement is too broad because it ignores potential *Hedley Byrne* liability discussed earlier in my affidavit and in Mr. Miles' expert affidavit at paragraphs 48 to 50. The SCAC does in my opinion raise arguable claims against the FFG defendants for negligent misrepresentation under the principles in *Hedley Byrne*. As stated earlier Mr. Attride-Stirling only deals with the issue of fiduciary duties while not considering the common law duty of care. In any event, as I have already stated, and as Mr. Miles QC has also said, it is incorrect to say that no duty of care of any kind would arise in the pleaded circumstances.

30. It also needs to be remembered that the fact that the Plaintiffs are not privy to the IMA's has another consequence. It is that it cannot simply be assumed, as it seems Mr. Attride-Stirling has, that they bear the burden of

the exclusion clauses contained in those contracts. I believe the law to be as stated in *Halsbury's Laws of England*, Volume 9 (1) (Reissue), Title "Contract" at paragraph 818 **[TAB 17]**:

> *"On the other hand, there may be a contract between A and B, containing an exclusion clause for the benefit of B behind which B seeks to shelter in an action against him for injuring C, a third party, while B was performing his contract with A. The rule here is that A and B cannot simply, by contract between themselves, impose the burden of the exclusion clause upon C. Where, however, on the proper interpretation of the facts A or B is acting as agent for C to make C a party to the contract, C may be bound by the exclusion clause if, on its proper construction, it is sufficiently wide. Similarly, the facts may support an implied contract between B and C containing the same exclusion clause as that between A and B, in which case C will be similarly bound."*

31. In light of the fact that there does not appear to be any claim that the Funds or the Investment Managers were acting as agents for the Plaintiffs in entering into the IMA's so as to make them parties to the contracts; or that there is any implied contract between either party to the contracts and the Plaintiffs, in my opinion, there is nothing on the pleadings which permits the assertion that the Plaintiffs claims can be barred by the exclusion clauses.

32. In paragraph 29 of his affidavit, Mr. Attride-Stirling again asserts that the Fairfield Greenwich Defendants have no duty of care to the Plaintiffs, which, as I have said, ignores potential *Hedley Byrne* liability. He then goes on to say that even if there is liability, it would be subject to the exculpatory provisions contained in paragraph 10 of the IMA. This fails to address sections 3 and 6 of the Bermuda Supply of Services (Implied

Terms) Act 2003 **[TAB 18]** under which there is an implied statutory duty of care which applies *notwithstanding any contractual provision, course of dealing or usage to the contrary*. The exclusion clauses therefore cannot affect contractual liability under this Act for breach of the implied statutory term requiring reasonable care which, in the case of a breach consisting in the making of negligent misstatements, would parallel *Hedley Byrne* liability. The upshot is that by virtue of the Act, in my opinion contractual liability for negligent misstatement along *Hedley Byrne* lines cannot be contractually excluded.

33. Those sections provide in relevant part:

> "3. **Implied term about care and skill**
>
> In a contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill.
>
> 6. **Contracting out**
>
> The terms implied by this Act in a contract for the supply of a service shall have effect *notwithstanding any agreement, course of dealing between the parties or usage.*" (emphasis added).

34. Plainly, the IMA's are contracts for the supply of a service. Equally plainly, the Bermuda Defendants were acting in the course of a business. Accordingly, in each of the contracts there is a statutory implied term that the Defendants would carry out the promised service with reasonable care and skill; and that implied term is effective notwithstanding any contrary agreement, such as the exclusion clauses in question here. Thus, despite the provisions of those clauses, the effect of the statutory implied term is that the Defendants had an obligation to act with reasonable care and skill. Accordingly, there is no need to demonstrate wilful misfeasance, wilful misconduct, bad faith, gross negligence or reckless disregard. All that needs to demonstrated, and pleaded, as a matter of Bermuda law, is a lack of reasonable care and skill.

35. Mr. Attride-Stirling's reliance on the first instance *Focus Insurance Company* is, I believe, somewhat misplaced. The case concerns the application of sections 97 and 98 of the Bermuda Companies Act which imposes a broad duty of care on directors, but permits companies to indemnify officers and directors in inter alia a direct or derivative action by the shareholders. Limitations in the bye-laws of the company do not impinge on the liability of officers and directors to third parties or impede shareholders from bringing direct claims against the officers and directors.

36. *Focus* was an action brought in 1991 by a Bermuda insurance company in liquidation against its former directors. The statement of claim was amended twice. The first director (D1) ran the company and embezzled

funds. The amended statement of claim alleged that the other two directors (D2 and D3), who were not involved in the financial management of the company, were liable for willful negligence and default in failing to detect and put an end to the embezzlement by D1. The Former Chief Justice of the Bermuda Supreme Court denied an application by the defendant directors to strike out the claims pursuant to sections 97 and 98 of the Bermuda Companies Act and the bye-laws of the company which provided that directors of the company could only be held liable for "willful negligence, willful default, fraud and dishonesty." The Court held that the amended statement of claim, if proved, would show willful disregard of their duties by the directors and would be evidence that they acted in a negligent manner.

37. On appeal **[TAB 19]**, the Bermuda Court of Appeal reversed the lower court decision on the grounds that "a director is not the watchdog of another director. A duty of care could only arise if one director had reason to suspect that his fellow director was acting dishonestly." In the absence of any warning that D1 was dishonest, the other directors had no duty to investigate their fellow director. Rather than adopt the lower court's formulation of the standard for "willful negligence" and "willful default", the Court of Appeals merely observed that these terms "indicate conduct which is not, and so falls short of fraud or dishonesty.... "and imply conduct which is more serious in nature than mere negligence and mere default." The appellate court dismissed the amended statement of claim

because it failed to plead that the other directors were on notice of D1's improper conduct or were reckless as to whether or not he had behaved improperly.

38. In paragraphs 32 and 33 of his affidavit, Mr. Attride-Stirling relies on the former Chief Justice's decision in *Focus v. Hardy* which was reversed on appeal. The passages cited, therefore, cannot be regarded as an authoritative statement of the standards for willful negligence or willful default.

39. One of the reasons why the Court of Appeal struck out the action against two of three directors was that the Court's finding that either knowledge or recklessness was required and neither was or could be asserted by the liquidators in that case. The situation in the *Focus* case appears to be significantly different from the present action where such "elements" are specifically asserted in the pleadings. The Fairfield Greenwich Defendants are alleged to have known that Madoff was operating a Ponzi scheme or to have been reckless in not knowing that he was doing so. Unlike D2 and D3 in *Focus v. Hardy*, the SCAC alleges that the Fairfield Greenwich Defendants ignored blatant warning signs that should have led them to investigate Madoff and to expose the fraud.

40. Mr. Attride-Stirling cites no authority for his statement in paragraph 30 that Fairfield Risk Services ("FRS") and its respective directors and officers could avail themselves of the exculpatory provisions in the IMA

agreements between FGBL and the Funds. FRS was not a party to the IMAs and Mr. Attride-Stirling makes no reference to any other agreement.

41. Any allegation that the Fairfield Greenwich Defendants or the Citco Defendants were "agents" of FGBL would raises issues of fact that should not be resolved on a strike out motion.

42. As to paragraph 34 of Mr. Attride-Stirling's affidavit, there appear to be pleaded allegations that meet the test set out by Mr. Attride-Stirling, see by way of example only paragraphs 225, 227 and 231 of the SCAC. This point is made by Mr. Miles QC in his affidavit at paragraph 38 and for completeness I agree with all his comments in so far as it relates to the Bermuda defendants, Mr. Attride-Stirling's affidavit and Bermuda law.

43. Paragraph 36 of Mr. Attride-Stirling's affidavit states the allegations are "bound to fail (by which I take it to mean struck out) for want of particularity". Firstly as Mr. Miles points out this is a question of US procedural law. Thus this is not something I can opine upon. Secondly and in any event I do not believe this is correct. The Court will only strike out a claim if it is incapable of particularization. I attach the commentary to the United Kingdom 1979 "White Book" the Supreme Court Practice **[TAB 20]** from which our provisions *on*, *inter alia*, strike out are taken. Two useful extracts from it I set out below.

> "18/19/3 .....but a pleading will not be struck out under this rule "unless it is not only demurrable but something worse than demurrable," i.e. such that no

> legitimate amendment can save it from being demurrable, (per Chitty J in *Rep. of Peru v Peruvian Guano Co*, 36 Ch.D. 496; and see *Dadswell v Jacobs*, 34 Ch.D. 278; *Worthington v Belton*, 18 T.LR. 438).
>
> .....
>
> Where a Master ordered the striking out of certain paragraphs of a defence unless the defendant delivered certain further and better particulars not later than 4.0 p.m. on the twenty-first day following, it was held that the paragraphs were not automatically struck out if within the time specified the defendant delivered a document in good faith which could fairly be entitled particulars (*Reiss v Woolf*, [1952] 2 Q.B. 557, C.A.)."

44. In the *Focus* case on appeal, for example, the action was struck out against two of the directors as the liquidators had, after a number of attempts, particularized the claim as best as they were able and there was no chance that the pleading deficiencies could be cured by an amended statement of claim.

SWORN by the said **MARK A C DIEL**)
in the City of Hamilton in the Islands of)
Bermuda this 22 day of March)
2010)

Notary Public

Kim Raymond White, Notary Public
Commissioner for Oaths and Affirmations
for and in the Islands of Bermuda
Hamilton, Bermuda.
My Commission is unlimited as to time.
22 March 2010

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ANWAR, et al., **Plaintiffs** **v.** **FAIRFIELD GREENWICH LIMITED, et al** **Defendants** **This Document Relates to: All Actions**	**Master file No. 09-cv-0018 (VM)**

INDEX OF ATTACHMENTS

1. Curriculum Vitae of Mark A C Diel
2. *Lance Murray Crockwell v Theresa E Haley & Thomas F Haley* 1992 Civil Appeal No 23
3. *Paragraph 869 "Commonwealth"* Halsbury's Laws of England Volume 13 (2009) 5th Edition
4. *Horizon Bank International Ltd. v Allen Walsh, Hans Taal and Boomer Trading Co. Ltd.* 2008 Civil Appeal No 4, [2009] CA (Bda) 6 Civ
5. *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.* [1964] AC 465
6. *Section 97(1)* Bermuda Companies Act 1981
7. *Peoples Department Stores Inc. (Trustee of) v Wise* [2004] 3 S.C.R. 461, 2004 SCC 68

8. *Daly v Sydney Stock Exchange Ltd.* (1986) *160 CLR*

9. *Aequitas v AEFC* [2001] NSWSC 14

10. *Paragraphs 5 and 6, Daly v Sydney Stock Exchange Ltd.* (1986) 160 CLR

11. *Frederick Warrington Yearwood v Thomas Miles & Company* 2000 Civil Jurisdiction No 213, [2001] Bda LR 30

12. *Bermuda Commercial Bank Limited v The Estate Representatives of Walter Leonard Bickley, Deceased* 1991 Civil Jurisdiction No 78, [1991] Bda LR 89

13. *Wenlock v Moloney and Others* [1965] 2 All ER 871

14. *Lily Chiang and Pacific Challenge Holdings Limited v Kistefos Investment A.S.* 2001 Civil Appeals Nos 28 and 29, [2002] Bda LR 50

15. *Inova Health System Foundation, Inova Health Care Services and Inova Health System Services v First Virginia Reinsurance Limited* 1998 Civil Appeal No 1, [1998] Bda LR 2

16. *Paragraph 19-078* Chitty on Contracts, 30th Ed. (2008), Volume I

17. *Paragraph 818 "Contract"* Halsbury's Laws of England, Volume 9 (1) (Reissue)

18. *Bermuda Supply of Services (Implied Terms) Act 2003*

19. *Focus Insurance Company Limited v Mark Gregory Hardy, David Arthur Thirkill, Douglas Harvey Pullen, Cardeed Ltd., Starbook Investments Ltd., Villarosa Anstalt, Magnolia Trading SA, Bermuda Trust Company Ltd. (as Trustee of Forum Trust) and Judy Mary Hardy* 1992 Civil Appeal No 15

20. *Paragraph 18/19/3* Supreme Court Practice 1979 Volume 1 Part 1