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-118(VM)**

SUPPLEMENTAL AFFIDAVIT OF ROD S. ATTRIDE-STIRLING

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I, **ROD S. ATTRIDE-STIRLING** of Hamilton, Bermuda, MAKE OATH and SAY as follows:

1. I am the same Rod S. Attride-Stirling who swore an affidavit in this matter on December 22, 2009 ("first affidavit").

2. I make this further affidavit in response to the affidavits of Mark Diel dated March, 22 2010 ("Diel Affidavit") and, to the extent it purports to deal with Bermudian law, the affidavit of Robert Miles Q.C. dated March 19, 2010 ("Miles Affidavit").

I. General Comments regarding the Diel and Miles Affidavits

3. In paragraph 2 of his Affidavit, Mr. Miles states that he is:

> *"[A]ble to provide expert evidence about the law of the British Virgin Islands and Bermuda because the legal system of each of Bermuda and the BVI is based on the principles of English common law, and the Courts of each treat the decisions of the English courts as persuasive, particularly in specialist areas of law such as company law, where the body of law is limited".*

4. I do not question Mr. Miles' professional competence as a company law barrister in England and Wales. Nonetheless, I do respectfully point out that his qualifications to give advice and/or express an expert opinion on questions of Bermuda law appear to be limited to the sole occasion on which Mr. Miles was given special permission to appear as counsel in a case in Bermuda. To my knowledge, Mr. Miles is not a member of the Bermuda Bar and has, as far as I am aware, only appeared in one case before the Bermuda courts, *IPOC International Growth Fund Limited v OAO "CT-Mobile" et al* [2007] Bda LR 43, on the basis of a special admission. Notably, the issues in that case had no relation to the issues in the Complaint here.

5. It has been my experience that, while English lawyers often purport to give opinions on Bermudian law, such opinions are generally premised on the assumption (explicit or implicit) that U.K. and Bermudian law are identical. This is an incorrect and misleading assumption, particularly in relation to the law of director and officer liability in Bermuda, which is markedly different to that in the U.K.

6. For example, the U.K. has broadened directors' liabilities in recent decades by legislation, including through the introduction of liability for "wrongful trading." The Bermudian legislature has explicitly chosen to take a different path. In Bermuda, the concept of *fraudulent trading* exists, but it requires a higher burden of proof than is required to demonstrate *wrongful trading* in the U.K. Another example in which U.K. and Bermuda differ significantly is that Bermudian law permits companies to offer a wider degree of indemnities than the U.K. for the actions or inactions of directors which fall short of fraud or dishonesty.

II. Breach of Fiduciary Duty

6. In my first affidavit, I was asked whether the Fairfield Greenwich Defendants would owe fiduciary duties to the shareholders of the Funds under Bermudian law. I answered this question in the negative and that remains my opinion. It is my view that the Complaint simply does not allege facts necessary to give rise to a breach of fiduciary duty under Bermudian law.

7. The factual situation alleged here is not a factual situation which could give rise in Bermudian law to a fiduciary duty by directors of the Fund (still less by directors of the management company of the Fund) to the shareholders of the Fund. For such directors never undertook to anyone but the companies of which they were directors any fiduciary duties and then only in regard to the management of assets legally and beneficially owned by the Fund as distinct from the shareholders. That the existing shareholders of "feeder" funds to Mr Madoff do not have a beneficial or legal interest in the assets of the Fund was accepted by Kawaley J and the Court of Appeal in *Kingate Global Fund Limited v. Knightsbridge (USD) Fund Limited*[1] [TAB 1].

8. In paragraph 26 of his affidavit, Mr. Diel disagrees with my opinion and suggests that the Plaintiffs' claim for breach of fiduciary duty is not *"unarguable"*, *"bound to fail"* or *"obviously unsustainable"*.[2] I disagree. While Mr. Diel is correct that the existence of a

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[1] Civil Appeal 2009 No. 17.

[2] Mr. Diel disagrees with my interpretation of *Arklow* and *West Building Society*.[2] My discussion of those decisions was merely to illustrate general propositions of Bermudian law regarding the existence of a fiduciary relationship. In *Arklow*, the Privy Council applied Millett LJ's observation in *Bristol and West Building Society v Mathew* that "*a fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence*". Thus, as I explained in paragraph 16 of my affidavit, the mere fact that one is either (i) trusted by the other party to a business transaction, or (ii) has superior knowledge or (iii) the right or ability to control some action or asset is, without

fiduciary relationship is *"fact-specific"* and *"dependent upon a detailed assessment of individual facts and circumstances"*,[3] it is unclear what *"difficult issues of fact"*[4] could arise here.

9. At paragraph 17 of his affidavit, Mr. Diel states that *"there is nothing in principle to prevent the creation of a fiduciary relation between a director and investor. It all depends on the particular facts and circumstances"*. Mr. Diel is careful not to say, however, that the particular facts and circumstances alleged here could give rise to a fiduciary relationship. That is because no such fiduciary relationship exists here.

10. In paragraph 16 of his affidavit, Mr. Diel states that the Court of Appeal decision in *Walsh and Taal v Horizon Bank International Ltd* (*"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"*.

11. This proposition, however, is based on the peculiar facts of *HBI* which do not apply here. In *HBI*, the court found that *the company*, HBI bank, assumed a fiduciary duty toward certain investors, when the bank and the investors expressly entered into an agreement to manage the investors' assets.[5] The issue in *HBI* was not whether a director owed a fiduciary duty to the shareholder of a company, but rather whether the company itself

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more, insufficient to warrant a finding of a fiduciary relationship. In my opinion, the facts of those cases are materially different from the present case.

[3] Diel Affidavit, para 17.

[4] Diel Affidavit, para 26.

[5] [2009] CA Bda 6 Civ at 16-20.

(HBI) assumed a duty where the company's employee signed the agreement on its behalf.[6]

12. In contrast, the allegations in the Complaint do not involve any agreement between any Fairfield Greenwich Defendant and any Plaintiff. Indeed, the Plaintiffs' claims are premised on their allegation that they purchased shares in the Fund directly.

13. At paragraphs 19-20 of his affidavit, Mr. Diel cites section 97(1), Bermuda Companies Act 1981 ("CA 1981") in support of his contention that every director and officer of a company has an open-ended general duty of care that amounts to a fiduciary duty to an unspecified class of persons. I disagree. I should clarify that our Companies Act 1981 was based on the U.K. Companies Act 1948. Section 97(1) expressed the then existing common law of the nature of the fiduciary duty and duty of care that the directors owe to the Company in discharging their functions as a directors.

14. Under Bermudian law, directors do not owe a statutory duty of care to either creditors or individual shareholders. On the contrary, the statutory duty expressly requires the director to act at all times in the best interests of the company (as distinct from the company's creditors or shareholders) in exercising his powers and discharging his duties to the company. Section 97(1) simply expresses the nature and content of the duty owed by the director to the company of which he is a director.

15. On this basis, I question the relevance of the passage quoted from the Supreme Court of Canada decision of *Peoples Department Stores*[7] since that case involved an open-ended

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[6] *Id* at 18-20. Moreover, Mr. Diel himself concedes at paragraph 31 of his affidavit that *"there does not appear to be any claim that the Funds or the Investment Managers were acting as agents [actual or de facto] for the Plaintiffs in entering into the IMAs so as to make them parties to the contracts"*.

[7] See Diel Affidavit, para 19.

duty of care towards a number of beneficiaries, including creditors. I believe that a Bermudian Court would attach no weight to the *Peoples* decision for the purpose cited by Mr. Diel. To the extent that Mr. Diel appears to suggest that the Canadian authority "*may arguably*"[8] support the suggestion that a statutory duty of care may be extended to include shareholders, it is my opinion that a Bermudian Court would not follow it, for reasons given in paragraph 13 of my original affidavit. In any event, in my experience, Bermudian Courts tend not to look first to Canadian authorities for guidance, save but in exceptional circumstances which do not apply here.[9]

16. Mr. Diel's error is compounded by his concession in paragraph 21 of his affidavit that the "settled categories" of fiduciaries *"do not include investment or financial advisers or managers".*[10]

17. At paragraph 36 of his affidavit, Mr. Miles agrees with me that as a general rule, directors and officers of a Bermuda company owe a duty only to the company they serve. Mr. Miles also states that under certain "special circumstances", directors may owe duties to shareholders under U.K. law. Mr. Miles offers two cases to illustrate such "special

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[8] See Diel Affidavit, para 20.

[9] See *Kessler v. Hill* [2005] Bda LR 57 [TAB 2], at paras 20 – 21. Further, the *Peoples* case originates in Quebec, where the duty of care is set out in Article 1457 of the Civil Code of Quebec ("CCQ") which is very broad in nature. Bermuda has no equivalent of the CCQ. In Canada the statutory obligations under CBA s. 122(1)(b) of a director's duty of care are informed by the breadth of the duty of care under CCQ Article 1457. *Peoples* at para 56-57.

[10] The *Daly* case, which Mr. Diel cites at paragraph 21, is easily distinguished. In *Daly*, a stock broker advised Mr. Daly to not invest in the stock market but instead to lend money to the stock broker's firm itself (whilst failing to disclose that the brokerage was in perilous financial conditions). In contrast, I am unaware of any allegation in the Complaint that each or any of the Fairfield Greenwich Defendants "undertook" to advise each or any of the Plaintiffs or that the Plaintiffs "relied" on any advice given by them, as those terms are understood under Bermudian law.

circumstances", *Dawson International Plc v Coats Paton* (1988) 4 BCC 305 and *Coleman v Myers* [1977] 2 NZLR 297, but both cases arise in the corporate takeover context and neither case is applicable here.

18. In *Dawson International Plc v Coats Paton* (1988) 4 BCC 305, Lord Cullen considered whether directors were under a fiduciary duty to the shareholders to act in their best interests. The holding in *Dawson* is irrelevant because Lord Cullen specifically limited it to takeover situations:

> *"I think it is important to emphasise that what I am being asked to consider is the alleged fiduciary duty of directors to current shareholders as sellers of their shares. This must not be confused with their duty to consider the interests of shareholders in the discharge of their duty to the company".*[11]

19. In any event, the holding in *Dawson* would actually support the Fairfield Greenwich Defendants' position:

> *"It is well recognized that directors owe fiduciary duties to the company...In contrast I see no good reason why it should be supposed that directors are, in general, under a fiduciary duty to shareholders, and in particular current shareholders with respect to the disposal of their shares in the most advantageous way. The directors are not normally the agents of the current shareholders."*

20. The second case Mr. Miles uses to illustrate a "special circumstance" in which directors can owe duties to shareholders is *Coleman v Myers* [1977] 2 NZLR 297. In *Coleman v Myers*, a fiduciary relationship between directors and shareholders arose where, in a private company with the shareholding spread over a few associated family groups, the chairman was also the trustee of certain family trusts which owned shares for other family members. The directors had a high degree of inside knowledge and they

[11] Id at 313-314 (emphasis added).

fraudulently misinformed the other shareholders when the shares in the company were the subject of a takeover offer by a company owned by one of the directors. The court stressed that the existence of such a relationship depended entirely on the facts of that particular case. The circumstances here are entirely different, thus the holding in *Coleman v Myers* is inapplicable.

21. It therefore continues to be my opinion that the Plaintiffs' claim for breach of fiduciary duty as against the Fairfield Greenwich Defendants would be struck out by a Bermudian Court as failing to contain an arguable cause of action.

III. Duty Of Care In Tort

22. In my first affidavit, I stated that the Plaintiffs have failed to identify a recognizable duty of care under Bermudian law and that remains my opinion.

23. At paragraph 18 of his affidavit, Mr. Diel makes the bare assertion that the *"pleaded circumstances may well give rise to a duty of care"* under *Hedley Byrne* and *Hendersen v Merrett* principles. I disagree. In my opinion the particular facts and circumstances pleaded by the Plaintiffs could not give rise to a duty of care under Bermudian law and no such duty of care exists here. Indeed, Mr. Diel is careful not to say that such a duty exists.

24. In my opinion, in order to establish a duty of care in tort, the Plaintiffs would be required to allege that: (1) each of the Fairfield Greenwich Defendants made a representation and assumed personal responsibility towards each Plaintiff in respect of that representation, (2) each Plaintiff reasonably relied upon the statement that each Fairfield Greenwich Defendant made[12], and (3) a special relationship existed between each plaintiff and each

[12] See *Clerk & Lindsell on Torts* (19th Ed., 2006 at paragraph 8-84/87 [TAB 3]).

defendant. Moreover, as investment managers, the Fairfield Greenwich Defendants would *only* be held to have assumed responsibility for alleged statements and omissions if *"[they have] expressly authorised the plaintiff to rely on his work".*[13]

25. In the absence of such allegations, it is my view that the Complaint does not give rise to a duty of care. The bare allegation that the Fairfield Greenwich Defendants knew, or ought to have known, that their alleged misrepresentations or omissions would be relied upon by the Plaintiffs is not sufficient to establish a duty of care or to establish a cause of action for negligent misrepresentation with respect to investment managers of a Fund. Particulars of any misrepresentations must be contained in the pleading,[14] and specifically by whom and to whom each statement was made, and whether verbally or in writing – in the latter case identifying the document in which the statement is contained.[15]

26. Further, as the House of Lords recently held in *Stone & Rolls ltd v Moore Stephens Ltd* [2009] 1 AC 1391 [TAB 5], where a service provider (such as an accountant, or equally in my view, an investment management company or a director) provides services to a company pursuant to a contract, as a general rule that person will owe a duty of care to the company alone and not to any individual shareholder of the company as such, nor to any of the company's creditors.

27. In any event, the scope of any duty in tort would be determined by the scope of the contractual duties owed to the Fund, which limitations are addressed in my first affidavit.

28. Lord Morris stated the general principle concerning directors' duties of care in *Hedley Byrne & Co. Ltd v Heller & Partners Ltd* [1964] A.C. 465. Under *Hedley Byrne*, a duty

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[13] *Benjamin v. KPMG Bermuda* [2007] Bda L.R. 22 [TAB 4].
[14] See Order 18/12/27, 1999 White Book [TAB 6].
[15] *Id.*

of care arises where someone possessing *"a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill..."*[16]

29. The *Hedley Byrne* principle was examined in *Williams v Natural Life Health Foods Ltd* [1998] 1 W.L.R. 830 [TAB 7], where the House of Lords concluded that a director or employee of a limited company could be personally liable for a negligent misstatement made on behalf of the company only in the most extraordinary of circumstances. There would have to be: (1) an assumption of personal liability by the director to the plaintiff, and also (2) reasonable reliance by the plaintiff on the assumption of personal responsibility, so as to create (3) a special relationship between plaintiff and defendant.[17] Even on the facts in *Natural Life*, where the company's misrepresentations were made by the effective sole owner/operator of the company, the owner/operator was not personally liable.

30. The *Hedley Byrne* principle was also applied in *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145, where it was established that a further prerequisite for imposing liability for economic loss was that *"reliance upon [the assumption of responsibility] by the other party will be necessary to establish a cause of action (because otherwise the negligence will have no causative effect)"*. *Id* at 180.

31. Under Bermudian law, there is no presumption of reliance. It must be specifically pleaded. Moreover, as stated by Kawaley J in *Benjamin v. KPMG Bermuda*[18] [TAB 4], Bermuda law *"has never simply required bare reliance, but rather actual reliance*

[16] [1964] A.C. 465, 502-503.
[17] [1998] 1 W.L.R. 830, at 835.
[18] [2007] Bda L.R. 22, 7.

without an opportunity to receive independent advice." Further, the House of Lords noted that *"[t]he test is not simply reliance in fact. The test is whether the plaintiff could reasonably rely on an assumption of personal responsibility by the individual who performed the services on behalf of the company".*[19]

32. The test for "*assumption of responsibility*" is an objective one:

> *"[t]he touchstone of liability is not the state of mind of the defendant. An objective test means that the primary focus must be on things said or done by the defendant or on his behalf in dealings with the plaintiff" and whether it was conveyed, whether directly or indirectly, that the director assumed personal responsibility for the risk involved".*[20]

33. Thus, in order to maintain its claim that the Fairfield Greenwich Defendants were negligent and owed and breached a duty of care to the Plaintiffs in tort, the Plaintiffs must establish that each individual Fairfield Greenwich Defendant assumed a personal responsibility to each of the Plaintiffs having regard to things alleged to be said or done by each of the Fairfield Greenwich Defendants. Each Fairfield Greenwich Defendant will be held to have assumed responsibility if, and only if, *"[he has] expressly authorised the plaintiff to rely on his work".*[21]

34. In this case, there is no allegation that each Fairfield Greenwich Defendant expressly assumed a personal responsibility to each Plaintiff, as it is unclear precisely what statements were allegedly made by which Fairfield Greenwich Defendants or to whom each statement was made, and there is no indication that each Fairfield Greenwich Defendant *"expressly authorized each Plaintiff to rely on these representations".*

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[19] [1998] 1 W.L.R. 830, 837.
[20] *Id* at 835.
[21] *Benjamin v. KPMG Bermuda* [2007] Bda L.R. 22, 9.

35. There is likewise no sufficiently pleaded allegation of *"actual reliance without an opportunity to receive independent advice"*[22] by each Plaintiff, nor allegations establishing that each Plaintiff *"could reasonably rely on an assumption of personal responsibility by the individual who performed the services on behalf of the company"*.[23] In the absence of such allegations, it is my view that the Complaint does not give rise to a cause of action in tort, and any claim on this ground is, in my opinion, bound to fail.

36. I also note that the existence of limitation clauses and "non-reliance" clauses for the benefit of the Fairfield Greenwich Defendants is highly relevant to the determination of the existence, nature and scope of any duty of care that might be owed to the Plaintiffs. Under Bermudian law, the Plaintiffs would be held to their contractual bargain where, as here, the they expressly agreed that:

> *"The shares offered hereby (the "Shares") will be issued only on the basis of the information in this Private Placement Memorandum and any attachments hereto (the "Memorandum"). No other information about Fairfield Sentry Limited (the "Fund") has been authorized. Any investment in the Fund on the basis of information that is not contained, or which is inconsistent with, the information herein shall be solely at your risk. The delivery of this Memorandum does not imply that any information herein is correct at any time after the date hereof...*
>
> *You should not construe this Memorandum as legal or investment advice. You should consult your own attorneys, accountants and other advisers regarding this investment..."*[24]

37. Similarly, at page 41 of the PPM, the Plaintiffs agreed that if they are *"in doubt about investing in the Fund [they] should consult an authorized person specializing in advising on such investments"*.

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[22] [2007] Bda L.R. 22, 7.
[23] [1998] 1 W.L.R. 830, 837.
[24] July 1, 2003 Sentry PPM at iii; October 1, 2004 Sentry PPM at iii; August 14, 2006 Sentry PPM at iii; December 1, 2008 Sigma PPM at iii (emphasis added).

38. Taken together, these contractual provisions provide a clear basis to establish that no duty of care could arise regarding (1) any "advice" allegedly given (2) any information allegedly given beyond or at odds with the statements in the PPM.

39. This is supported by a recent line of legal authority.[25] For example, in *Titan Wheels Limited v. the Royal Bank of Scotland Plc*, David Steel J held that:

> *"...where, as here, the parties have purported to allocate by contract their respective roles and the risks involved in their relationship, this will in the normal run preclude any wider obligation arising from the common law duty of care".*[26]

40. David Steel J further concluded that the contractual terms, taken as a whole, were:

> *"only consistent with the conclusion that Titan and the Bank [were] agreeing to conduct their dealings on the basis that the Bank was not acting as an advisor nor undertaking any duty of care, regardless of what recommendations, suggestions or advice were tendered".*

41. David Steel J also drew an important distinction in *Titan* between an "adviser" and a "salesman", noting that, among other factors, the fact that there was no written or oral request for advice by the client meant that the bank did not owe a duty of care to act as adviser and moreover, did not owe a duty of care in relation to "advice", recommendations or suggestions which were given by bank employees.

IV. Fraud

42. At paragraph 47 of his affidavit, Mr. Miles states that *"sections D to J of the Complaint set out in some detail the factual case which is made against the Fairfield Defendants and in particular the false representations and the red flags which were said to have been*

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[25] See *Peekay v Australia and New Zealand Banking Group* [2006] 2 Lloyd's Rep 511, *JP Morgan Chase Bank v Springwell Navigation Corp* [2008] EWHC 1186 (Comm) and *IFE Fund v Goldman Sachs Int.* [2007] EWCA Civ 811 and *Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd.* [2008] 2 Lloyd's Rep 581.

[26] [2010] EWHC 211 [TAB 13].

ignored". Mr. Miles appears to suggest that the Complaint sufficiently pleads fraud with the requisite degree of particularity as required under Bermudian law. I disagree.

43. As a matter of Bermudian law, to establish fraud, pleadings must be fully particularised such that the details of the fraud as well as the particulars of the defendant's state of mind are alleged. See RSC Order 18, Rule 12. Conduct alleged to be fraudulent must be distinctly alleged and distinctly proved and may not be simply inferred from the facts. See *Davy v Garrett* (1878) 7 Ch. D. 473 at 489. See also *The Bermuda Fire & Marine Insurance Company Limited v BF&M Limited*, Civil Jurisdiction 1995 No. 393 at 6 where Ground CJ, considering the distinction between primary and conclusory facts as drawn by Da Costa JA in *Intercontinental Natural Resources Limited v Dill & Ors* (CA July 1982) held as follows:

> *"In approaching this pleading I have kept at the forefront of my mind Da Costa JA's lucid analysis in the Intercontinental case...of the distinction between primary and conclusory facts, and the inadequacy of a pleading founded upon the latter alone. In particular I have borne in mind that conclusory facts are not presumed to be true on an application to strike out a pleading on the basis that it discloses no reasonable cause of action, while primary facts are. That does not, of course, mean that conclusory facts may not be pleaded. It simply means that if they are they should be supported by primary facts, and it is the task of the judge on a strike-out application to assess any conclusory facts in the light of the primary facts which are pleaded to see if the primary facts are capable of supporting the conclusions drawn".*

44. Thus, to sustain a common law action for fraud, the following facts must be pleaded, particularised and proved:

(i) a representation of fact made by words or conduct (mere silence is not enough);

(ii) the representation was made with knowledge that it was false, *i.e.* wilfully false, made in the absence of any genuine belief that it is true, or made recklessly (without caring whether the representation was true or false);[27]

(iii) the representation was made with the intention that it would be acted upon by the claimant (or a class of persons including the claimant) in the manner which resulted in damage to him;

(iv) the claimant acted on the false statements; and

(v) the claimant's damages were caused by his reliance on the fraudulent misrepresentations.[28]

45. Further, the pleading must specify the nature and extent of each alleged misrepresentation[29], by whom and to whom each one was made, whether verbally or in writing – and if in writing, it must identify the document in which the statement is contained and who prepared the document.[30]

46. In my opinion, these requirements have not been satisfied by the Plaintiffs and have not been pleaded in the Complaint. Specifically, the Plaintiffs have failed to specify (by reference to each individual Fairfield Greenwich Defendant):

(a) Which, if any, of the Fairfield Greenwich Defendants actually knew, and/or how or why they knew, or were reckless in not knowing, that the allegedly false statements were false at the time they were made;

(b) that each alleged misrepresentation was intended to be relied upon, particularly in circumstances where Plaintiffs agreed to rely only on the offering documents to which the Fairfield Greenwich Defendants are not a party; and

(c) that each alleged misrepresentation caused the claimed loss.

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[27] See *Derry v. Peek* [1889] 14 App. Cas. 337.
[28] See *Bradford Third Equitable Benefit Building Society v. Borders* [1941] 2 All ER. 205 at 211 [TAB 8], per Viscount Maugham.
[29] See Order 18/12/27, 1999 White Book [TAB 6].
[30] *Id.*

47. Thus, Plaintiffs have failed to plead primary facts to maintain a valid cause of action for fraud under Bermudian law. It is therefore my opinion that a Bermudian Court would not interpret the allegations against the Fairfield Greenwich Defendants as amounting to fraud or dishonesty. The Plaintiffs' failure to plead fraud with sufficient particularity renders that claim "embarrassing" and "vexatious" as a matter of Bermudian law and I believe would be struck out.

V. Third Party Beneficiary Breach of Contract

48. In my first affidavit, I was asked whether Bermudian law recognised a cause of action for third party beneficiary breach of contract. As I stated at paragraphs 23-24 of my first affidavit, Bermuda law does not recognize third party rights to a contract, and that remains my opinion.

49. In paragraph 27 of his affidavit, Mr. Diel makes an argument for the broad interpretation of Bermudian law so as to allow the recognition of circumstances in which a third party is able to acquire rights under a contract. However, Mr. Diel cites no Bermudian, English, or any other authority to support such a broad interpretation.

50. Moreover, the extract that Mr. Diel cites in paragraph 27 of his affidavit has no application here. Mr. Diel's example involves a promise by A to B that A will confer a benefit on C and that B intends to hold the benefit of A's promise on trust for C. In contrast, the IMA is a contract between A (the Managers) and B (the Fund), which contains no promise that the Managers will confer a benefit on C (the Plaintiffs). There is therefore nothing that could be held on trust by B, the Fund, for C, the Plaintiffs. Nor are any facts pleaded from which it could be inferred that the Fund intended to hold the benefit of any promise on trust for the Plaintiffs.

VI. Mutual Mistake

51. In my first affidavit I was asked whether Count 11 of the Complaint would give rise to a cause of action for mutual mistake under Bermudian law. I answered in the negative and that remains my opinion.

52. At paragraph 28 of his affidavit, Mr. Diel accepts that I am correct in my analysis that *"as far as Bermuda law is concerned the claim is not properly particularized"*. Therefore, it follows that the claim for mutual mistake, as far as Bermudian law is concerned, would be struck out, since a factual situation giving rise to a legal remedy in Bermuda has not been pleaded.

VII. Bars to the Plaintiffs' Claims

53. In my first affidavit I was asked whether the exculpatory provisions of the IMAs bar all of the Plaintiffs' claims against the Fairfield Greenwich Defendants not arising from wilful misconduct, gross negligence, bad faith or reckless disregard. I answered in the affirmative and that remains my opinion.

54. Mr. Miles appears to accept at paragraph 40 of his affidavit that the exculpatory provisions in the IMAs would bar claims against the Fairfield Greenwich Defendants for breach of the IMAs or other breaches of concurrent duties as well as any claims made by other parties for breach of the IMAs.

55. However, at paragraph 30 of his affidavit Mr. Diel contends that the Plaintiffs are not bound by the exculpatory clauses because they are not parties to the IMA. I do not agree. As I have explained in paragraphs 18-20 of my first affidavit, the scope of any parallel obligation/liability owed in tort, in relation to services which are also being provided pursuant to a contract, cannot be greater than that expressly or impliedly provided for in

the contract. Therefore, Plaintiffs cannot seek to impose a wider duty in tort which exceeds the scope of the obligations/liabilities imposed by the IMA (which are expressly limited by the exculpatory clauses). To use Mr. Diel's own example: where there is a contract between A and B, containing an exclusion clause for the benefit of B, and C (a third party) alleges injury and seeks to impose liability on B, C cannot impose a wider duty/ liability in tort than is provided for under the contract between A and B. This is supported by the House of Lords decision in *Junior Books v Veitch,* where a builder was suing a sub-contractor with whom he had no privity of contract:

> *"On the facts I have just stated, I see nothing whatsoever to restrict the duty of care arising from the proximity of which I have spoken. During the argument it was asked what the position would be in a case where there was a relevant exclusion clause in the main contract. My Lords, that question does not arise for decision in the instant appeal, but in principle I would venture the view that such a clause according to the manner in which it was worded might in some circumstances limit the duty of care just as in the Hedley Byrne case the plaintiffs were ultimately defeated by the defendants' disclaimer of responsibility".*[31]

56. At paragraph 32 of his affidavit, Mr. Diel cites sections 3 and 6 of the Bermuda Supply of Services (Implied Terms) Act 2003 ("SoSA") and suggests that "*contractual liability for negligent misstatement along Hedley Byrne lines cannot be contractually excluded.*" SoSA is irrelevant in the present circumstances and is of no consequence to my opinion that the Plaintiffs' claims are barred.

57. In enacting SoSA, Parliament intended that certain terms shall be implied into contracts for service (*i.e.* care and skill, time for performance and consideration) where these terms are not expressly provided for in the contract. Essentially, SoSA *"puts into statutory form*

[31] [1983] 1 AC 520 [TAB 9], at p 546, See also *Pacific Associates v Baxter* [1990] 1 Q.B., 993, 1022, 1033 and 1038 and *Henderson v Merrett* See also the discussion of Mance J *in Red Sea Tankers v Papachristides* [1997] 2 Lloyd's Rep. 547 at 593.

basic obligations owed by those who provide services. The [Act] enunciates principles that have been developed at common law. However, the Consumer Affairs Board has recommended that the obligations should be enshrined in statute".[32] In my opinion, SoSA does no more than re-state the common law as it was prior to the enactment of this Act.

58. Moreover, Mr. Diel's emphasis on section 6 of SoSA is misconceived. Section 6 provides that *"the terms implied by this Act in a contract for the supply of a service shall have effect notwithstanding any agreement or course of dealing between the parties".* This merely reinforces the point that SoSA will imply the terms in a contract for the supply of a service notwithstanding any other pre-existing agreement or course of dealing between the parties. It could be said that it might render ineffective a contractual term which stated that the only contractual service paid for was to be supplied "without responsibility", that is, without undertaking any obligation or duty to exercise skill and care at all. However, that is not the same thing as a statutory prohibition preventing contractual limitations of liability for breach of the duty to exercise skill and care. Such contractual limitations have always been possible at common law.[33]

59. Section 6 of SoSA does not preclude the ability of the parties to a contract to limit liability for a breach of its terms, whether express or implied. If Parliament had intended that consequence, it would have expressly so provided. There is nothing inconsistent

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[32] See Explanatory Memorandum: The Supply of Services (Implied Terms) Bill 2003 [TAB 10].
[33] The distinction between clauses which exclude any duty arising and clauses which limit or exclude liability for breach of the duty is made clear in the U.K. in the Supply of Goods and Services Act 1982 and the U.K. Unfair Contract Terms Act 1977 s.13 (1) and ss. 2 and 5-7 [TAB 11], where clauses having the former effect are subject to regulation as if they were terms which excluded or restricted liability.

between the implication of a term that a reasonable degree of skill and care will be exercised and an agreement limiting liability to a grossly negligent breach of that term. Indeed, in such a case liability for gross negligence would be predicated on the existence of the duty to take care implied by the statute or the common law: see the observation of Mance J. in *Red Sea Tankers v Papachristides* [1997] 2 Lloyd's Rep 547 at 586 col. 2-587 col. 1 when discussing (and allowing) a clause excluding liability unless for gross negligence.

60. At paragraph 40 of his Affidavit, Mr. Diel also takes issue with my opinion that Fairfield Risk Services ("FRS") and its respective directors and officers could avail themselves of the exculpatory provisions in the IMAs between FGBL and the Funds. As set out in paragraph 29 of my first affidavit, the protection provided under paragraph 10(b) of the IMAs extends to the "Investment Manager, its directors, officers and employees, *agents* and counsel..." Thus, to the extent that FRS acted as agent of the Investment Manager, the exculpatory provisions would apply.

61. As I stated in my first affidavit, pursuant to the exculpation clause in the IMAs, liability, if any, would be limited to claims arising from wilful misconduct, gross negligence, bad faith or reckless disregard. In my opinion, the Complaint does not contain allegations amounting to wilful misconduct, gross negligence, bad faith or reckless disregard as these concepts are interpreted under Bermudian law.

Wilful Misconduct

62. At paragraph 38 of his affidavit, Mr. Diel (referring to paragraphs 32 and 33 of my first affidavit) suggests that the passage I cited from the *Focus v Hardy* decision *"was*

reversed on appeal" and *"therefore cannot be regarded as an authoritative statement of the standards for willful negligence or willful default."*[34]

63. I respectfully but emphatically disagree. The quoted passage merely restates the widely accepted test for wilful misconduct as laid out by Romer J in *In Re City Equitable Fire Insurance Co,* a case which has been cited with approval by the Bermudian Court of Appeal.[35] The reversal of *Focus v Hardy* (on other grounds) did not affect the validity or applicability of the *City Equitable* test, a test which was originally established in England in 1925 and which Bermuda has firmly adopted.

64. The court of appeal also referred to its decision in *Intercontinental v. Dill* (1981 Civil Appeal No. 14) which itself also approved the decision in *Re City Equitable* and in particular the test for wilful neglect (see p. 30 of the decision of the President of the Court of Appeal in *Intercontinental*).

65. I maintain that Plaintiffs have failed to satisfy the test for wilful misconduct. At paragraph 42 of his Affidavit, Mr. Diel refers the Court to paragraphs 225, 227 and 231 of the Complaint, implying (without stating how) that these paragraphs meet the test for pleading wilful misconduct. I respectfully disagree with this contention. In my opinion the Complaint (and in particular paragraphs 225, 227 and 231, as cited by Mr. Diel) would not give rise to a cause of action for wilful misconduct and would be struck out by a Bermudian court.

66. At paragraph 47 of his affidavit, Mr. Miles appears to suggest that *"sections D to J of the Complaint set out in some detail the factual case which is made against the Fairfield*

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[34] I note that it was the *Focus* appeal decision which was at Tab 13 of my first affidavit.
[35] See *Intercontinental v Dill* (1981 Civil Appeal No. 14) at 30 [TAB 12].

Defendants and in particular the false representations and the red flags which were said to have been ignored." As discussed in paragraphs 42-47 above, in my opinion the Plaintiffs' fraud claims are not sufficiently particularised. Likewise the facts pleaded in paragraphs 225, 227 and 231 are insufficient to establish wilful misconduct.

Gross Negligence/Reckless Disregard/Bad Faith

67. In my first affidavit I stated that the allegations in the Complaint would not establish gross negligence, reckless disregard or bad faith under Bermudian law. That remains my opinion.

68. Neither Mr. Miles nor Mr. Diel appear to address these aspects of my first affidavit.

SWORN TO by the said)
Rod S. Attride-Stirling)
At Hamilton, Bermuda)
On the 21st day of May 2010)

Rod S. Attride-Stirling

Before me:

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COMMISSIONER OF OATHS / ~~NOTARY PUBLIC~~

Christopher J. Brough
Commissioner for Oaths
Canon's Court
22 Victoria Street
P.O. Box HM 1179
Hamilton HM EX
Bermuda
Date: 21 May 2010