Neutral Citation Number: **[2022] EWHC 2446 (Comm)**

Case No: **CL-2022-000404**

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: **18 August 2022**

Before :

His Honour Judge Pelling KC

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Between :

(1) Stratton Mortgage Funding 2019-1 PLC; **(2) Clavis Securities PLC;** **(3) Keycards Holdings Inc;** **and (4) Kessa Holdings Ltd**	**Claimant**
- and -	
(1) Stratton Hawksmoor 2022-1 PLC; **(2) Aline Sternberg;** **(3) CSC Directors (No. 1) Limited;** **(4) CSC Directors (No. 2) Limited;** **(5) Paivi Helena Whitaker;** **(6) Intertrust Directors 1 Limited; and** **(7) Intertrust Directors 2 Limited**	**Defendant**

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Adam Al-Attar (instructed by **Bryan Cave Leighton Paisner (BCLP)**) for the **Counsel**

Hearing dates: **18th August 2022**

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RULING

His Honour Judge Pelling QC **Thursday, 18 August 2022**
(**10:40** am)

Ruling by **His Honour Judge Pelling QC**

1. This was to be the hearing of an application by the applicants for an order either striking out proceedings commenced in the name of the claimants or, alternatively, granting summary judgment in relation to them.

2. The procedural timing in relation to these applications and what I now have to determine is important. The defendants issued their applications on 10 August 2022. The claimants then issued what they characterise as an interlocutory application dated 15 August seeking an order from me that I recuse myself from determining the applications issued by the defendants on 10 August last.

3. The recusal application was one which the applicants sought to have determined on paper. That was referred to me as a question to be determined and I directed that the recusal application be heard at the same time and before the substantive application for a strikeout and/or summary judgment order.

4. That resulted in a letter of 17 August 2022 from Keycards Holdings Incorporated, the third claimant in these proceedings. The letter was a lengthy one, running as it does to three pages. It appears to make two points. Firstly, it is said that the claimants have rightly applied for the recusal application to be dealt with on paper and I was wrong to direct on 16 August 2022 that it be listed for either a hearing or directions on 18 August 2021. The second I should do so without hearing from the defendants and applicants in relation to that application.

5. Why it should be wrong to direct an oral hearing is not entirely clear from the letter, although at paragraph 6 it is asserted by the signatory of the letter, Mr Artemiou, that:

> "In the circumstances the claimants see no basis to derogate from their original request for the determination on the papers and as such they will not be making a physical appearance at the hearing. The court is respectfully invited to account for the written submission filed in respect of the recusal application and if, as the deputy judge seemingly and superficially appears to be alluding to, it does not ally with the just, proportionate and obvious decision and one that would promote the principle of justice being seen to be done and it being necessary in the circumstances to give directions at the hearing for the proper disposal of refusal application."

The specific reason why I directed that the recusal application should be listed to be determined or for directions at today's hearing was simply because that was the first reasonable opportunity that the defendants could be heard in relation to the application having regard to the timing I set out at the start of this judgment. In relation to the implicit suggestion that I should not give permission for the defendants to make submissions in relation to the recusal application, I reject that submission. As Mr Justice Miles set out in the judgment he delivered when facing a similar application to this, the interests of justice and the particular circumstances of this case require that the respondents in should be entitled to make submissions as to whether the recusal application should be allowed or not.

6. The other issue which surfaces from the letter and which is relied upon in the submissions in support of the recusal application is a suggestion that there was no sufficient urgency to justify the listing of either the defendants' application or for that matter, as I follow it, the recusal application as vacation business. This is addressed in paragraph 8 of Mr Artemiou's letter which is in these terms:

> "The court should also note that any alleged 'urgency', reinforced with some deliberately vague assertion of some sort of 'irredeemable harm' being peddled by the defendants is wholly misguided and not pleaded well enough to merit any real consideration, weight or to justify any derogation from the just and proper disposal of the claim, not least when (1) in light of the strikeout application and its evidence therein we have as a matter of caution conscionability and in order to fully respect the court's processes not issue or repeat any threat to issue an administration application on 15 August in the companies court and will not do so or consider doing so if it still remains possible until at least after the claim has been properly disposed of with finality ...and (2): The purported transaction … insofar as it even exists, as to which no evidence has been submitted by the defendants, by their own admission can purportedly complete in November 2022 with any prejudice, if any, being readily quantifiable in damages."

The urgency issue was the subject of evidence which was filed in support of the strikeout and summary judgment application. The evidence is contained in the first statement of Ms Aline Sternberg who is the second defendant in the proceedings. She sets out at paragraph 14 and following the basis on which this application is said to be urgent. I set out that evidence in full. It is in these terms:

> “14. On 28 July 2022, Clavis and Stratton issued notification ... to the market respectively confirming:

(a) Clavis intends to exercise its right to redeem a number of notes in respect of each of the Clavis Series ... in August 2022; and.
(b) in respect of notes issued by Stratton, by reference to the Prospectus dated 10 June 2019, the Option Holder of specific notes intends to exercise the Call Option in relation to a number of notes ...

15. The effect of these steps will be that the Clavis Notes and the Stratton Notes are redeemed. Following the redemption of the Clavis Notes and the Stratton Notes the underlying mortgages will be restructured into a new residential mortgage backed securitisation and Stratton Hawksmoor will issue new notes to the market (the 'Transaction').

16. As noted in paragraph 14, the Transaction has already been announced to the market and the notes to be issued by Stratton Hawksmoor have been pre-placed with new investors on the basis that the Transaction closes in late August 2022 ... The investors in Stratton Hawksmoor have priced the Transaction on this basis and are only bound to accept notes issued on that date.

17. The August completion date cannot be moved as this date coincides with the date on which an optional redemption can be exercised in Stratton Mortgages (and another deal to be included in Stratton Hawksmoor having the same call option date). Both call option have already been announced to the market and irrevocable call option notices served on Stratton Mortgages as well as the other issuer. Although the call option date for Clavis is later (in September 2022), the investors in Stratton Hawksmoor will, upon completion of the Transaction in August 2022, pre-fund the Clavis call and the exercise of the option to purchase the Clavis assets. In the event the Transaction cannot close on the date set in late August 2022, the earliest possible closing date would be late November 2022. This is because the call options must be exercised on quarterly interest payment dates. This delay would result in a step-up in the interest rate payable to the existing Stratton Mortgages investors.

18. I am concerned that these Proceedings have the potential to cause concern to investors and disrupt the Transaction such that it will be unable to complete on the date already set in late August 2022. If that were the case, I am concerned that this has the potential to cause losses to the investors of Stratton Hawksmoor and to the efficiency of the market more broadly.

19. I note that the Claim Form (at paragraphs 2(iii) and 3(iii)) seeks some form of order to restrain or limit the Defendants' (including the CSC Defendants) ability to rely upon any indemnification or to use funds of Stratton and Clavis to discharge liabilities incurred in relation to these Proceedings. Once the Notes are issued in late August 2022, it is proposed that a corporate services agreement between, amongst others, Stratton Hawksmoor and CSC Capital Markets UK Limited... will be entered into. At that time and as is standard, the SH Directors will be entitled to be compensated for all costs, expenses and liabilities associated with their role as directors of Stratton Hawksmoor, by and out of the assets of Stratton Hawksmoor. It is not proposed that the SH Directors will be indemnified by or utilise funds of Clavis and Stratton."

In summary, there will be widespread implications for third parties if the transaction as defined is disrupted as it potentially will be if the defendants are entitled, as they maintain, to have the claim in these proceedings struck out and it is not struck out before the transaction completes in August 2022.

7. The suggestion that damages in some way will provide a remedy in respect of all of this is misconceived for two distinct reasons. The first is that losses will be suffered by third parties if the transaction is disrupted in the way that is feared; and secondly, and in any event, there is no evidence available to suggest that any damages claim that might result could be made good by the third and fourth claimants or those who stand behind them.

8. In those circumstances, as it seemed to me, a suggestion that there is a lack of urgency in relation to the strikeout application is misconceived and that I was fully entitled to come to the conclusion that I came to, namely that this application should be treated as vacation business and listed accordingly.

9. I should add, for the avoidance of doubt, since some reliance is placed upon the fact that I indicated that I would make myself available to hear the application, even though theoretically I was on holiday, it is not because of any desire on my part to hear this application above and beyond the usual duties which rest on judges' shoulders to hear applications, but because there is a direction in place from the former judge in charge of the Commercial Court, allotting these cases to me until further notice in the interests of efficient disposal of court business. It is for that reason that I indicated I was prepared to hear this application, even though theoretically on holiday.

10. Turning now to the application for me to recuse myself, the relevant principles are well-established and were summarised by Mr Justice Miles at paragraph 138 and following of his judgment in BMF Assets No 1 Limited and others v. Sanne Group plc and others [2022] EWHC 140 (Ch) where he held:

> "The legal principles were summarised in Bubbles & Wine Ltd v Lusha [2018] EWHC Civ 468 at [17]-[19] and I shall not repeat the whole passage. The ultimate question is whether the fair-minded observer and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. The fairminded and informed observer is not unduly sensitive and suspicious but neither is he or she complacent. The facts and context are critical to any recusal application. The fair minded and informed observer is not to be confused with the person raising the complaint of apparent bias and the test ensures that there is this measure of detachment.

> I also note the observation of Floyd LJ in Zuma's Choice Pet Products Ltd v Azumi [2017] EWCA Civ 2133 at [29] that the mere fact that a judge has decided applications in the past adversely to a litigant is not generally a reason for that judge to recuse himself at further hearings. If that were the case the same judge could not make two successive interim decisions in a case without risking accusations of bias. It would make it impossible for there to be a designated judge assigned to complex cases with multiple interim applications. The fair minded and informed observer does not assume that because a judge has taken an adverse view of a previous application or applications, that he or she will have pre-judged, or will not fairly deal with, all future applications.
> Ms Cooke also referred me to Miley v Friends Life Ltd [2017] EWHC 1583 (QB) at [27] where Turner J cited Baker v Quantum Clothing Group [2009] EWCA Civ 566 for the proposition that recusal applications should be made promptly and may be dismissed if there is inordinate and inexcusable delay in raising the point; such applications go to the heart of the administration of justice and must be raised as soon as reasonably practicable."

As Mr Justice Miles observed in paragraph 142 of his judgment in the same case:

> "Applications of this kind should be made as soon as possible as they affect the administration of justice. This case is apt example. The 19 January 2021 hearing had been in the court's diary for some months. It concerned an important application concerning six sets of proceedings. Making the recusal application two days before the hearing would, had it succeeded, have disrupted the hearing. It would have been very difficult to find a replacement judge in time. The same is true of the imminent trial of the committal proceedings which have been in the court's diary for some months. In my judgment the delay in making the application is inordinate and it is entirely unexplained. This is in my judgment sufficient basis for disposing of the application."

11. Although the facts of this case are different from those that were being considered by Mr Justice Miles, the chronology that I set out at the start of this judgment speaks for itself. The application, that is the substantive application by the defendants, was issued on 10 August and an attempt was made by the defendant applicants to achieve expedition of the hearing of that application, amongst other things by applying for a foreshortened period of time for the service of the application. I rejected that application when it was put before me, and directed that there should be a listing meeting in order to achieve the listing of the application in proper order. That was what was done and today's hearing (on 18 August 2022) was the result.

12. The application for me to recuse myself, was issued on 15 August, that is to say three days before the present application was due to be heard, and if the application to recuse succeeds, then the effect will be that the substantive application cannot be heard thereby defeating the purpose of directing an expedited hearing of the strike out and summary judgment applications. In those circumstances, as it

seems to me, this case comes very close to being functionally similar to the problem identified by Mr Justice Miles in paragraph 142 of his judgment. However, I leave that point to one side for now, since there are other more substantial points which need to be addressed.

13. The recusal application itself is supported by the first statement of Mr Andreou Artemiou, which is dated 15 August 2022. In paragraph 10 of that statement he says this:

> "Given that witness statements of fact should not be used as vehicles for submissions I do not intend to set out the submissions for the claimants' application in any detail whatsoever in this witness statement. The position will be adumbrated in the claimants' written submissions, which are intended to be filed concurrently when the court is requested to turn to the claimants' application on the papers ..."

14. The relevant submissions are entitled "*Written submissions of the claimants in respect of their application dated 15 August 222 for the recusal of HHJ Pelling QC sitting as a Deputy High Court Judge of the Queen Bench's Division and/or the adjournment of the hearing presently listed for 18 August 2002*." The issue concerning urgency is addressed at paragraph 10. It is addressed in the written submissions and I have addressed those already earlier in this judgment and I say no more about them. If and to the extent it is suggested that by giving the directions I have for the hearing of the substantive application I have done so without any proper basis for so doing, then, with respect, I reject that for the reasons I have identified. This is a case where the applicants have demonstrated to the requisite standard the degree of urgency which justifies this case being heard in vacation and no other prejudice can be said to have been suffered by the respondents to it since full notice was given of the applications as I directed and the hearing itself was directed to be fixed at a fixture meeting in the ordinary course.

15. The substance of the grounds relied upon in support of the recusal application are set out in paragraph 19 of the skeleton. It is right that I should address each of those, albeit relatively briefly, because this together constitutes the heart of the application. In looking at each of the points relied upon I do so applying the test identified by Mr Justice Miles quoted above.

16. The first ground relied upon, set out in paragraph 19(a) of the written submissions, is as follows:

> "Firstly, at the very outset when he first became aware of Mr Hussain and what he consistently terms his 'modus operandi", the Deputy Judge egregiously erred and took unprecedented, extreme and unbalanced steps that no other judge acting reasonably would

> have done so in the circumstances, when he granted permanent and final injunctions against Mr Hussain, as an actual or potential shareholder in Hurricane Energy plc, to prevent him from 'taking any steps to appoint or remove (or cause or encourage anyone else to appoint or remove) anyone as its director'. This was an incredible and extraordinary injunction (which was impermissible and ought to never have been made) which was discriminatory solely against Mr Hussain (including any parties associated with him) and no one else, and, with finality, fundamentally and fatally abrogated, infringed and violated his Article [6] rights without proper legal basis, when, as a known activist investor, they deprive him, at a minimum, of his absolute right to make any future investments (without prejudice, to any existing investments he had at the time of the making of the injunction) in the securities issued by the company by unnecessarily unconscionably and unjustifiably restraining or restricting him from carrying out or intending to carry out steps or actions which any other actual or potential investor ... in the securities issued by the company freely able to do ..."

Placing to one side the rather prolix way in which this particular objection is expressed, it appears to be suggested that apparent bias is to be inferred on my part from the orders that I made in Hurricane Energy Plc and others v Richard Paul Chaffe and others [2021] EWHC 2258 (Comm). The issue which is being addressed by Mr Artemiou in paragraph 19(a) of his submissions is that which I addressed in paragraphs 18 and 19 of that judgment. It is necessary I set those paragraphs out

> "18. The more difficult question concerns what appears in paragraph 13 of the draft order, which as it is presently formulated seeks to preclude Mr Hussain, FVS and Saret from issuing or continuing any proceedings of any nature in any jurisdiction against any of the Hurricane companies or any of the directors, officers, legal advisers of subsidiaries of the Hurricane companies including without limitation any solicitor in the firm of Dentons and counsel. This proposed order is entirely unqualified, is global in its scope and controls the future actions of Mr Hussain, FVS and Saret for all time.
>
> 19. There are a number of difficulties with this paragraph in the way it is presently formulated. First, it purports to preclude each of the three identified defendants from issuing proceedings in the future. This in my judgment gives rise to quite serious potential article 6 points although that might be regarded by some as an academic point in the circumstances of this case. Nonetheless, article 6 rights exist for the benefit of Mr Hussain as they exist for the benefit of everybody else. The mechanisms which are available to control proceedings brought in a civil court in England are broadly speaking the jurisdiction which enables the Attorney-General to apply for an order declaring someone to be a vexatious litigant, which is contained in primary legislation and the more limited civil restraint order mechanisms contained in the Civil Procedure Rules, which have been carefully formulated by the Civil Procedure Rules Committee in order to be compliant with article 6. In my judgment it would be wrong in principle to make an order that purported to control the commencement of future litigation other than by recourse to those mechanisms. There is already in existence a general civil restraint order against Mr Hussain which is designed to control conduct of this sort. It was submitted on behalf of the applicants that I could properly make the order sought since any proceedings could safely be assumed to be proceedings which would be maliciously prosecuted and therefore tortious, and therefore proceeding which would entitle the court to grant injunctive relief. The difficulty about that

> is it's impossible to say in the future that there would be no circumstances in which proceedings could be commenced which could be anything other than vexatious and malicious therefore I prefer to proceed in the way I've identified."

As is apparent, I rejected orders sought that would have interfered with Mr Hussain's Article 6 rights whilst at the same time making order designed to protect the applicants from legally misconceived attack. Tested against the objective test for apparent bias identified earlier in this judgment, I have no hesitation in concluding that the point made in paragraph 19(a) is profoundly mistaken and cannot, either of itself or in conjunction with the other points relied upon, support a finding of apparent bias.

17. The next point relied upon is set out in paragraph 19(b) of the submissions, which again I should set out in full, given that the applicant is not present. It is in these terms:

> "Secondly, and further to the above, based on the public records, the Deputy Judge in the myriad of diverse and disparate cases put before him, where whispers or mere hints were made that Mr Hussain was involved in or 'orchestrating' the matter or indeed (as in the present) is it said that the matter was 'issued by or at the direction of Mr Rizwan Hussain as part of a continued series of attacks and vexatious litigation', in every single one of the cases:
> "i. perniciously, accepted and granted all applications, requests, indulgences sought by the respondents, including making orders virtually identical to those presented in all the hearings with little to no real questions
> "ii. granted final third-party cost orders against Mr Hussain, without notice to him or hearing from him beforehand, and, in those instances, finding it entirely justifiable on his own accord to ride roughshod and untrammelled over the relevant provisions of the CPR, established procedure and, in instances, the law; and
> "iii. ordered that the evidence and (procrustean) submissions of the parties who succeeded be put before the office of the Attorney General in respect of an all-party barring order against Mr Hussain."

18. There are a number of points which flow from this paragraph. First, it appears to be suggested that I have formed a view as to the credibility of Mr Hussain and that that has motivated me to make the various orders that I have made in the cases that I have heard. This is wrong and mischaracterises both the basis of the applications I have determined and the orders I have made. I have been careful in each of the applications I have heard to ensure that any strikeout or summary judgment applications have been disposed of on the narrowest procedural grounds that are available to the applicant, not least for the purposes of ensuring that orders made do not go wider than is permissible or appropriate in the circumstances of the case. The issues that arise in each of these cases have in

the past at least been broadly similar. Rather than set out the substance of each of the judgments that I have previously given, anyone reading this judgment should refer to those previous judgments. In summary, however, the applications to strike out have proceeded on broadly two alternative bases. The first has been that as a matter of law, an attempt by an individual to appoint him or herself, or in the case of a company, itself, as the director of another company is, as a matter of law, absurd. That is a proposition that is not my own unalloyed legal analysis but flows from a number of previous decisions made in proceedings concerning Mr Hussain, including but not limited to the seminal judgment of Mr Justice Miles in which he addressed the suggestion that corporations or individuals could be self-appointed de facto directors of other companies, and condemned such a proposition in the terms I have just identified. There is at least one other judgment of His Honour Judge Matthews to similar effect. I have simply applied those principles in relation to each and every other case where similar allegations have been made. These are points which do not turn upon any credibility issues, but are simply questions of law that arise.

19. The other common theme in the cases that I have decided is that proceedings have been commenced in the name of very substantial companies by people who have no authority to act on behalf of those entities, whether as directors, officers or otherwise. It is a fundamental principle of English procedural law that proceedings commenced otherwise than with the actual authority of a company acting by its directors are proceedings which are bound to be struck out as an abuse of process. That principle is one that I followed in each of the cases where I have made striking-out orders.

20. There seems to be a suggestion that I made final third party cost orders against Mr Hussain that by definition shown that I am biased against him. So far as I recall the orders that have been made have been orders which have permitted parties to apply for such orders in the future; therefore he is mistaken, I think, in saying that I have made final third party orders against Mr Hussain, although the allegation is so generally phrased, and the number of cases now so great, I cannot be sure that that is certainly so. In any event, merely because I have made orders adverse to Mr Hussain in other case cannot of itself reasonably and objectively lead to the conclusion that I am apparently biased against him.

21. So far as references to the office of the Attorney-General are concerned, that is again a procedural device which, so far as I recall it, was not devised by me, but was one which was developed by other judges, but in any event is an order I was entirely entitled to make in light of the very significant

judicial and therefore publicly funded resources that are being consumed by conduct that is without any legal foundation. The orders concerned simply direct that material be supplied to the attorney. The decision whether or not to bring vexatious litigant proceedings against anyone is a decision of the attorney and the attorney alone. My function is discharged by drawing the attention of the attorney to the problem that exists.

22. In the result therefore in relation to paragraph 19(b), I conclude that it would be wrong in principle to accede to a submission that the matters complained of demonstrate apparent bias, applying the test I identified, and it is on analysis a complaint in relation to the result of previous cases. In each and every previous case it was open of course to the disappointed litigant to apply for permission to appeal, either to me, which did not happen, or to the Court of Appeal.

23. The third point that is relied upon in paragraph 19 is at paragraph (c) in these terms:

> "Thirdly, and further to both of the above, it would seem that having been seemingly frustrated by the fact that the Attorney General did not take or indicated any wish to take any steps whatsoever, as so desired by the Deputy Judge, notwithstanding him sending virtually every order he made, purported to be linked to Mr Hussain, to her office and avowedly confirming in a public hearing that he was also making independent enquiries and pursuits himself, he recently, wholly contrary to principle, appears to have taken the clear and blunt step of descending into the arena of the hearings as effectively an advocate and granted, of his own motion, a without-notice ex parte GCRO (being the most extreme civil restraint order) against the, someone, or, indeed, everyone, called 'Rizwan Hussain', based on (it would seem) circumstantial evidence emanating entirely from someone who he refused to have cross examined in order to have his evidence tested when it was prima facie shown to be deceitful or highly likely to be a series of lies designed to mislead the court. This is of course putting aside the fact that the intended purpose of the fetter may be ineffectual or futile when valid service necessary to found in personam jurisdiction might not have occurred. Which is wholly consistent with some of the other earlier orders he made where, contrary to established process and the rules, he sought to import jurisdiction and assert sovereignty against a long and diverse list of individuals and entities, listed in tabular form."

Again, setting to one side the rather florid language in which this part of the case is framed, two points appear to emerge from this subparagraph, the first being an implicit complaint that by directing that papers be sent to the Attorney-General, I thereby displayed apparent bias. That is wrong for the reasons that I set out a moment ago. The second point which appears to emerge from this subparagraph is a complaint that I have granted a GCRO. To be clear, the GCRO that was granted against Mr Rizwan Hussain was not granted by me. Secondly, whilst it is true to say that I

have granted a general civil restraint order against one corporate entity in whose name various claims had been made and is used by Mr Hussain for the bringing of claims of the sort described in the earlier judgments, that was done only following a conclusion that the relevant claims should be struck out on the basis that it was misconceived for one or both of the reasons I identified earlier in this judgment.

24. Secondly, because I had certified the claim as totally without merit I was not merely permitted but obliged by the terms of the Civil Procedure Rules to consider whether to make a civil restraint order. I believe that a perusal of the judgments that I gave in concluding that a general civil restraint order should be made set out the principles that apply, making clear that there is a two-stage process, that is to say, one, where first I have to be satisfied that requisite level of persistency has been proved or applications have been brought, and then, secondly, whether, in the exercise of discretion, an order should be made.

25. I believe that I emphasised in the judgments that the case law in this area requires that a judge make the least intrusive order that will achieve the desired objective. I have applied that principle, making a GCRO only where that is necessary, and making one other extended civil restraint order where the lesser form in my judgment would achieve the desired purpose. The notion that simply because I have made such orders it therefore follows that I have displayed apparent bias, either to Mr Hussain or the various entities or individuals by or through whom he acts, is simply wrong. It is, on analysis, a complaint that I have made an order with which Mr Artemiou disagrees.

26. Taking a step back therefore and applying the test which I identified earlier in this judgment, I have considered not merely the grounds individually identified as being relied on in support of the application, but have considered whether collectively they could lead to the conclusion, applying the test identified earlier, that I am apparently biased against the claimants in these proceedings.

27. With great respect, I am unable to reach that conclusion applying that test, on the basis of the material that is relied upon, and in those circumstances this application is dismissed.