



Civil Appeal No. 62 of 2023

**IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS
ORIGINAL CIVIL JURISDICTION
BEFORE THE HON. CHIEF JUSTICE NARINDER HARGUN
CASE NUMBER 2021: No. 257**

Dame Lois Browne Evans Building
Hamilton, Bermuda HM 12

Date: 18/07/2025

Before:

**THE HON. DAME ELIZABETH GLOSTER
THE HON. GEOFFREY BELL
THE HON. CHRISTOPHER CLARKE**

Between:

- (1) FRANK MAJORS
- (2) MAXINE MAJORS
- (3) MODIFIED MDMW 2010 FAMILY TRUST
- (4) MAJORS FAMILY LLC

Appellants

-and-

KPMG TAX LIMITED

Respondent

Appearances: Mr John Jarvis KC and Mr Nicholas Howard and Ms Izabella Arnold
of Walkers (Bermuda) Limited for the Appellants/Defendants

Mr David Scorey KC, Mr Mark Chudleigh and Mr Erik Penz of
Kennedys Chudleigh for the Respondent/Plaintiff

Date of Hearing: 8 November 2024

Date of Judgment: 18 July 2025

JUDGMENT

GLOSTER JA

Introduction

1. This is an appeal by the Defendants in the action against the order of Hargun CJ (“the Chief Justice”), dated 20 October 2023 (“the October 2023 Order”), which reflects the judgments handed down by the Chief Justice on 20 October 2023 (the “ASI Judgment”) and 22 November 2023 (“the Costs Judgment”). By the October 2023 Order the Chief Justice granted permanent anti-suit relief against the Defendants restraining them from pursuing or otherwise continuing proceedings brought by them in the Chancery Court for the State of Tennessee, in the United States of America, Case No. 21 – 0641 – III (“the Tennessee Proceedings”) or otherwise preventing the Plaintiff from enforcing an arbitration agreement to which it alleged that the Defendants were subject.
2. The Defendants in the action, and the appellants on the appeal, are Frank Majors, his wife, Maxine Majors, Modified MDMW 2010 Family Trust, and Majors Family LLC (collectively “the Appellants”). I shall refer to them individually as “Mr Majors” “Mrs Majors”, “the Trust” and “the LLC” respectively.
3. The dispute arises from the disposal by Mr Majors, Mrs Majors and the Trust’s predecessor, of their interests in Nephila Holdings Limited (“Nephila”), the holding company of a substantial reinsurance asset management business which was sold to Markel Corporation (“Markel”) in 2018. Mr Majors was a co-founder and director of Nephila and its wholly owned subsidiary, Nephila Capital Ltd, both Bermuda companies.
4. Mr Majors is a resident of Tennessee in the United States and is the sole managing member of the LLC, a Delaware limited liability company. Mrs Majors is also a resident of Tennessee. She is the settlor of the Trust and a member of the LLC. The Trust is described in the Complaint in the Tennessee Proceedings as a Delaware *inter vivos* trust. The Trust is itself a member of the LLC.
5. The Plaintiff in the action, and the Respondent to the appeal, is KPMG Tax Limited (“KPMG” or “the Respondent”). It is a multinational accounting organisation which provides independent professional services including audit, tax and advisory services.

6. KPMG advised that, for reasons of tax efficiency, a US LLC should be established and the ownership interests in Nephila of Mr Majors, Mrs Majors and the Trust's predecessor, the MDMW Discretionary Settlement ("the Jersey Trust"), should be transferred to the LLC prior to the sale to Markel in exchange for Mr and Mrs Majors and the Jersey Trust acquiring ownership interests in the LLC, with Mr Majors as the managing member. KPMG took responsibility for implementing this strategy, arranging for the LLC to be incorporated and thereafter providing tax-related services to the LLC, including handling its tax filings.
7. The Appellants allege that KPMG negligently failed to consider US state taxes, resulting in the LLC incurring a substantial (over US\$10 million) liability to Tennessee franchise and excise tax that could easily have been avoided by making a routine filing, known as an "obligated member entity election" or "OMEE".
8. In July 2021, the Appellants commenced the Tennessee Proceedings seeking compensation for the alleged losses caused by the KPMG's alleged negligence in preparing the tax filings.
9. The Tennessee Proceedings have been in abeyance since 3 September 2021, when KPMG obtained an *ex parte* interim anti-suit injunction from the Supreme Court of Bermuda (Subair Williams J) against all the Appellants on the basis that the Tennessee Proceedings were alleged to be:
 - (1) brought in breach of an arbitration agreement ("the Arbitration Agreement") contained in the KPMG's standard terms and conditions for advisory work and tax services ("the Terms and Conditions"), and/or
 - (2) vexatious and oppressive.
10. The Terms and Conditions were included as terms of a letter of engagement signed by Mr Majors on 31 January 2018 ("the 1st Majors LoE"); a letter of engagement signed by the Trust on 13 January 2018 ("the Trust LoE"); and a letter of engagement dated 7 February 2019 ("the 2nd Majors LoE").
11. The Terms and Conditions contain the following relevant clauses:
 - (1) Clause 13 provides that the Engagement Letters and the Terms and Conditions are governed by and construed in accordance with the laws of Bermuda.
 - (2) Clause 14 of the Terms and Conditions provides:

"14. Alternative Dispute Resolution. Any dispute or claim arising out of or relating to the Engagement Letter between the parties, the services provided there-under, or any other services provided by or on behalf of KPMG or any of its subcontractors or agents to Client or at its request (including any dispute or claim involving any person or entity for whose benefit the services in question are or were provided) shall be resolved in accordance with the

dispute resolution procedures set forth below which constitute the sole methodologies for the resolution of such disputes. By operation of this provision the parties agree to forego litigation over such dispute in any court of competent jurisdiction. Mediation, if selected, may take place at a place to be designated by the parties. Arbitration shall take place in Bermuda.

...

The following procedures are the sole methodologies to be used to resolve any controversy of claim ("dispute"). If any of these provisions are determined to be invalid or unenforceable, the remaining provisions shall remain in effect and binding on the parties to the fullest extent permitted by law.

Mediation

Any party may request mediation of a dispute by providing a written Request for Mediation to the other party or parties... The parties agree to discuss the differences in good faith and to attempt, with facilitation by the mediator, to reach a consensual resolution of the dispute. The mediation shall be treated as a settlement discussion and shall be confidential...

Arbitration

Arbitration shall be used to settle the following disputes: (1) any dispute not resolved by mediation 90 days after the issuance by one of the parties of a written Request for Mediation (or, if the parties have agreed to enter or extend the mediation, for such longer period as the parties may agree) or (two) any dispute in which a party declares, no more than 30 days after receipt of a written Request for Mediation, mediation to be inappropriate to resolve the dispute and initiates a Request for Arbitration. Once commenced, the arbitration will be conducted either (1) in accordance with the procedure in this Engagement Letter and the relevant Bermuda laws as in effect on the date of this Engagement Letter, or (2) in accordance with other rules and procedures as the parties may designate by mutual agreement. The provisions of this document will control. The arbitration will be conducted before a panel of three arbitrators to be selected as provided in the UNCITRAL Rules provided, that in the case of a dispute involving a claim for less than \$100,000, a sole arbitrator shall be agreed by the parties and, in the event that there is no such agreement after 30 days of the Request for Arbitration, the sole arbitrator shall be appointed by the Appointments Committee of the Chartered Institute of Arbitrators Bermuda Branch. Any issue concerning the extent to which any dispute is subject to arbitration, or concerning the applicability, interpretation, or enforceability of these procedures, including any contention that all or part of these procedures are invalid or unenforceable, shall be governed by the Bermuda International Conciliation and Arbitration Act 1993 and resolved by

the arbitrators. No potential arbitrator shall be appointed unless he or she has agreed in writing to abide and be bound by these procedures.

The seat of the arbitration is Bermuda and the venue shall be Bermuda save that the panel may choose to hold hearings at any place for the convenience of the parties and/or the panel.” (Emphasis added.)

12. The Appellants accept that this is a valid and binding arbitration agreement as between Mr Majors and KPMG.
13. In circumstances where the Appellants contend that the relevant losses were all suffered by the LLC (and on that hypothesis that the LLC is, accordingly, the proper plaintiff in the Tennessee proceedings), Mr Majors, Mrs Majors and the Trust for pragmatic reasons took the decision: (i) voluntarily to discontinue their claims in the Tennessee proceedings, leaving the LLC as the sole plaintiff; and (ii) in the Bermuda proceedings, offered undertakings in lieu of an injunction.
14. Accordingly:
 - (1) On 6 September 2022 Mr Majors, Mrs Majors and the Trust filed a Notice of Voluntary Non-suit in the Tennessee Proceedings, thereby withdrawing from those proceedings. On 12 September 2022 the Tennessee Court made an Order of Voluntary Nonsuit confirming the withdrawal.
 - (2) On 11 October 2022, the LLC issued a Summons seeking an order discharging the interim injunction (“the Discharge Application”).
 - (3) For their part, Mr Majors, Mrs Majors and the Trust did not seek to discharge the interim injunction, but, prior to the hearing before the Chief Justice, wrote to the Court in letters dated respectively 6 January 2023 and 10 January 2023, undertaking to the Supreme Court of Bermuda and to the Plaintiff in the following terms:

“not to prosecute, pursue or otherwise continue or take any step against the Plaintiff in respect of any dispute that falls within the scope of the Plaintiff’s Standard Terms and Conditions for Advisory and Tax, save for dismissing, withdrawing and/or otherwise discontinuing the proceedings commenced in Tennessee.”

The undertakings given to the Court and to the Plaintiff added that it was the understanding of Mr Majors, Mrs Majors and the Family Trustee that they

“will not be in breach of this undertaking merely by reason of the Fourth Defendant [LLC] continuing with this claim in Tennessee, should the Fourth Defendant succeed on its application to the Court to discharge the Interim Injunction granted by the Court on 3 September 2021.”

15. On 26 September 2023, the Chief Justice heard the Discharge Application, as well as KPMG's claim for final injunctive relief against all four Defendants.
16. By the ASI Judgment, the Chief Justice dismissed the Discharge Application and granted the final injunctions sought by KPMG. He held, principally in favour of KPMG:
 - (1) that, in respect of the period prior to the 2nd Majors LoE dated 7 February 2019, any advice provided by KPMG to, and in respect of, the LLC was subject to the Terms and Conditions (including the Arbitration Agreement), as made clear by the terms of the 1st Majors LoE; and that in seeking such advice on behalf the LLC, Mr Majors was to be treated as the LLC's agent; see paragraph 39 of the ASI Judgment;
 - (2) that Mr Majors signed the 2nd Majors LoE not only on his own behalf but also as an agent and/or on behalf of the LLC; he referred to the fact that this LoE expressly notes that the services to be provided include: "*Preparation of the 2018 Form 1065, U.S. Return of Partnership Income for the **Majors Family LLC***" (emphasis added); see paragraph 38 of the ASI Judgment;
 - (3) that accordingly the Court was satisfied "*to a high degree of probability that there is an arbitration agreement which governs the dispute between the LLC and KPMG*"; see paragraph 42 of the ASI Judgment;
 - (4) that, in the alternative, the LLC was subject to the terms of the arbitration agreement on a quasi-contractual basis since the LLC could not assert rights in respect of advice given by KPMG, without at the same time being subject to the burden of the agreed contractual dispute resolution process contained in the Engagement Letters; see paragraph 47 of the ASI Judgment;
 - (5) that, in the further alternative, in all the circumstances, it was unconscionable, vexatious and/or oppressive for the LLC to continue the Tennessee Proceedings; see paragraph 56 of the ASI Judgment;
 - (6) that in relation to the provision of professional services by KPMG to Mrs Majors, Mr Majors was acting as her agent; and it was clear that the services rendered to Mrs Majors by KPMG were rendered on the basis of the Terms and Conditions which included an arbitration clause in the event of a dispute in relation to those services; it was also reasonably clear that the allegedly negligent advice of KPMG was provided to *inter alios* Mr and Mrs Majors; see paragraph 33 of the ASI Judgment;¹
 - (7) that, however, he was minded to discharge the injunction against Mr Majors, Mrs Majors and the Trust on the basis of their undertakings but would hear further argument on the point; see paragraph 57 of the ASI Judgment.
17. On 8 November 2023, there was a further hearing before the Chief Justice to address consequential matters arising from the ASI Judgment.

¹ The Chief Justice does not appear to have addressed the position of the Trust in the ASI Judgment but it is to be assumed that he concluded that it was bound by the Trust LoE because he took the view that it was the successor in interest to the Jersey Trust, which signed the Trust LoE.

18. On 22 November 2023, the Chief Justice handed down the Costs Judgment in which, *inter alia*, he concluded that the undertakings proffered by Mr Majors, Mrs Majors and the Trust were not sufficient, and that the injunction against them should therefore stand unless they agreed to provide revised undertakings, which in the event they declined to do. He awarded KPMG its costs of the proceedings against all the Appellants, to be taxed on the indemnity basis if not agreed, save that there was to be no order as to costs as regards:
- (1) the LLC in relation to the hearing on 22 November 2022; and
 - (2) Mr Majors, Mrs Majors and the Trust in respect of the period subsequent to 13 January 2023.
19. The appeal before us was concerned principally with the position of the LLC. In summary, the LLC's position is that it never had any retainer with KPMG, it never agreed to the Terms and Conditions, and accordingly there is no basis for treating the LLC as if it were a signatory to the arbitration agreement contained in those terms. The Defendants contend that the injunction was therefore wrongly granted against the LLC, and that the Chief Justice's decision² dated 20 October 2023 is "*fundamentally flawed and ought to be reversed by this Court.*"³
20. So far as the other Appellants are concerned, their position in the appeal before us was as follows:
- (1) Mr Majors, who did sign the KPMG's engagement letters and agreed to the Terms and Conditions, accepts that he is bound by the Arbitration Agreement.
 - (2) Mrs Majors and the Trust contend they did not agree to the KPMG Terms and are therefore not bound by the Arbitration Agreement.
 - (3) However, Mr Majors, Mrs Majors and the Trust challenge the Chief Justice's conclusion that the undertakings proffered by Mr Majors, Mrs Majors and the Trust were not sufficient. They do so for two reasons. First, they contend that the Chief Justice should have accepted their undertakings and accordingly made a different costs order in relation to the proceedings before him. Second, they contend if, and to the extent that, the final injunction granted by the Chief Justice applies to Mr Majors, Mrs Majors and the Trust, they nonetheless should not be prevented in their capacities as shareholders/officers of the LLC from permitting or allowing the LLC to continue with its claim in Tennessee, on the assumption that its present appeal succeeds.

² ROA/10/068-071

³ Appellants' Skeleton Argument, p.2, [6]

Additional factual background

21. The relevant evidence was not substantially in dispute. Much of it was contained in the Appellants' own evidence as to the relationship between them and KPMG, and the services supplied by KPMG to the Appellants. That evidence was contained in an affidavit of Mr Majors, an affidavit of Mr Daniel O'Brien, a financial and estate planning advisor to the Majors family and an expert report from Mr L Webb Campbell II, an attorney in Tennessee opining on matters of Tennessee law and the nature of the claim in the Tennessee Proceedings. In addition, Mr Michael Morrison, the then Chief Executive Officer of KPMG Bermuda, provided an affidavit which had initially been relied upon by KPMG to obtain the interim injunction.
22. Until 2018, Mr Majors, Mrs Majors and the Jersey Trust,, a Jersey-based trust settled by Mrs Majors, which was the predecessor of the Trust, held an aggregate interest of 29.1% in Nephila Partners LP, a Bermuda limited partnership, which in turn held a majority (56%) interest in Nephila. The Jersey Trust was settled by Mrs Majors in 2010 to hold a portfolio of investment securities, including any interest in Nephila. The assets of the Jersey Trust were re-domesticated from Jersey to Delaware and are now held by the Trust.
23. In 2018, as already stated, Mr Majors, Mrs Majors and the Jersey Trust agreed to sell their interests to Markel Corporation, the US-based global (re) insurance business, as part of Markel Corporation's acquisition of the entire issued share capital of Nephila.
24. The subsequent retainer of KPMG, and the services which it provided, are summarised in the ASI Judgment which I can do no better than to quote, so far as relevant:

"10. By letter dated 31 January 2018 Mr Majors engaged KPMG to provide tax advisory services and to prepare certain income tax returns and other revenue related filings for himself and others (the "Majors First LoE"). The Majors LoE stated that "if you are in agreement with the terms of this engagement letter (and the attached Standard Terms and Conditions), please sign the enclosed copy of this letter to confirm our agreement." Mr Majors signed this letter on 7 March 2018 confirming his agreement. Mr Majors is a party to a further letter of engagement dated 7 February 2019 (the "Majors Second LoE").

11. By letter dated 30 January 2018 the trustee of the Jersey Trust engaged KPMG to provide tax compliance and tax advisory services (the "Trust LoE"). The Trust LoE stated that "if you are in agreement with the terms of this engagement letter (and the attached Standard Terms and Conditions), please sign the enclosed copy of this letter to confirm our agreement." The trustee of the Jersey Trust signed this letter on 21 February 2018 confirming the agreement on behalf of the Jersey Trust.

12. In anticipation of the potential sale of Nephila to Markel, in or about August 2018 KPMG proposed that, for tax purposes, the interest of the Majors family in Nephila should be transferred to a Delaware limited liability company in exchange for Mr and Mrs Majors and the Jersey Trust acquiring ownership interest in the company, with Mr Majors as the managing member. This led to the formation of the LLC⁴. Accordingly, it is not in dispute that the LLC was the result of, and in furtherance of, the tax advice provided by KPMG to Mr and Mrs Majors and the Jersey Trust.

13. Although the First Majors LoE was addressed to and executed by Mr Majors, Mr William McCallum has advised⁵ that it was contemplated that the engagement would include work to be carried out by KPMG on behalf of Mrs Majors and others. Thus, the First Majors LoE references tax returns to be completed for Bedford Avenue LLC, a Tennessee company in which Mrs Majors was a member, and the charitable Devine-Majors Foundation. In the event, KPMG assisted in the completion of tax returns for both Mr Majors and Mrs Majors as well as for the Jersey Trust and provided all three with tax planning advice, advice which led to the creation of the LLC.

14. KPMG performed services on behalf of Mrs Majors. By emails of 2 February and 5 March 2018 KPMG tax manager, Ashley Godek, and Melissa Singler of Nephila Advisers stated that both Mr and Mrs Majors would need to sign the KPMG Tax Ltd Annual Consent to Disclose Tax Return Information and, in an email of 5 March 2018, Ms Godek requested they, “let us know if Frank or Maxine have any questions”. On 8 March 2018, Ms Singler replied to KPMG by email enclosing, among other documents, the Annual Consent to Disclose Tax Return Information signed on 7 March 2018 by Mr Majors in his capacity as the taxpayer and by Mrs Majors in her capacity as the taxpayer’s spouse. A similar KPMG Tax Ltd Annual Consent to Disclose Tax Return Information form was signed by Mr and Mrs Majors on 18 February 2019 in connection with the subsequent tax year returns.

15. Mr Morrison states that in performing its instructions arising out of the First Majors LoE and the Trust LoE, KPMG rendered various services to Mr and Mrs Majors and the Jersey Trust, including:

- (1) preparation of 2017 US Individual Income Tax Return and supporting schedules, which was a joint return from Mr and Mrs Majors;
- (2) preparation of 2017 Tennessee Individual Income Tax Return and supporting schedules, likewise a joint return for Mr and Mrs Majors;

⁴ On 18 August 2018.

⁵ This statement by the Chief Justice is based on paragraph 15 of Mr Morrison’s affidavit which states that he, Mr Morrison, was “advised by William McCallum Head of Tax of KPMG, and believed” etc.

- (3) preparation of 2017 Form FinCEN 114, Report of Foreign Bank and Financial Accounts, a form for Mrs Majors;*
- (4) preparation of 2017 Annual Return to Report Transactions with Foreign Trust and Receipt of Certain Foreign Gifts for Mrs Majors;*
- (5) calculation of estimated US income tax payments for Mr and Mrs Majors;*
- (6) preparation of 2017 Form 990 – PF, Return of Private Foundation, a US return, and Form NY CHAR500, New York State Annual Filing for Charitable Organisations, for the Devine-Majors Foundation, Mr Majors’ private foundation;*
- (7) preparation of 2017 Form 170, Tennessee Franchise, Excise Tax Return for Bedford Avenue LLC of which Mr Majors was a member; and*
- (8) tax advisory services arising out of the acquisition by Markel of Nephila, including in respect of the formation of the LLC to facilitate such transaction.*

16. In respect of the above services related to Mrs Majors, she signed all necessary returns and revenue documents for filings with the revenue authorities, including furnishing KPMG with an authorisation dated 14 October 2018 for KPMG to file electronically her 2017 FinCEN 114, i.e., Report of Foreign Bank and Financial Accounts, referred to at 15(3) above. KPMG’s invoice dated 7 November 2018 confirms that KPMG’s charges included charges for the preparation of tax returns and calculations for “Frank and Maxine” and for the reporting of foreign accounts on behalf of Mrs Majors.

17. For the services KPMG performed in relation to the LLC, KPMG’s invoice dated 7 November 2018 addressed to Mr Majors included fees of \$4500 for “Review, analysis, and discussion regarding potential tax planning in advance of the Markel acquisition of Nephila Holdings Ltd, including coordination of LLC formation and other transactional issues”. For the tax year following the formation of the LLC, the Majors Second LoE dated 7 February 2019 included reference to anticipated work by KPMG in preparing tax returns on behalf of the LLC as the product of tax advice provided regarding the sale of Nephila.”

25. It was common ground that the LLC was not expressed to be a party to either of the 1st Majors LoE or the Trust LoE as at 30 or 31 January 2018, because it had not been incorporated by then. Nor was the LLC expressed to be a party to the 2nd Majors LoE. However, as stated in paragraph 12 of the ASI Judgment, it was not in dispute before us that the LLC was the result of, and in furtherance of, the tax advice provided by KPMG to Mr and Mrs Majors and the Jersey Trust. Likewise, the Appellants accepted before us that, following the establishment of the LLC and the sale of Nephila, KPMG continued to provide tax advice and services to Mr and Mrs Majors – and also to the LLC: see Mr Majors’ affidavit at [12]; and Mr O’Brien’s affidavit at [23]. (I refer to the LoEs collectively as “the Engagement Letters”.)

26. In addition, the Appellants emphasised the key points of Mr Campbell's expert evidence of Tennessee law, which explained the nature of the LLC's claim in the Tennessee Proceedings as follows:
- (1) The LLC's claim is not derived from or based on the contracts documented by Engagement Letters with Mr Majors and the Jersey Trust, nor is it based on the pre-transaction structuring advice that KPMG provided to Mr Majors and the Jersey Trust pursuant to those contracts.
 - (2) Instead, the LLC's claim is a freestanding tort claim based on KPMG having assumed a duty of care to the LLC in its own right by providing it with post-formation tax advice and services as described above. That claim is based on the principles of Tennessee law which govern the circumstances in which a professional assumes a duty of care to a third party with whom it is not in contractual privity (effectively the Tennessee equivalent of the principles of English law explained in *Caparo Industries plc v Dickman* [1990] 2 AC 605).
27. The LLC alleges that, in or around November 2020, it became aware that it had an unpaid Tennessee franchise and excise tax filing obligation, meaning that the LLC was liable for Tennessee state taxes for 2018, 2019 and 2020. The Appellants assert that a declaration should have been made in 2018; alternatively, the liability could have been reduced if a declaration had been made belatedly in 2019 or 2020 during which time KPMG continued to provide tax advice to, inter alios, the LLC. As such, it alleges that there were continuing and/or further breaches and/or negligence in those periods.

Grounds of appeal

28. The Appellants advance five grounds of appeal to support their contention that the Chief Justice erred in dismissing the LLC's application to set aside the interim injunction previously granted by the Supreme Court, and in making that interim injunction final against all of the Appellants. They also submit that the Chief Justice erred in relation to costs. In summary the five grounds upon which the Appellants rely are as follows.
- (1) *Ground 1: The Agency Point*
Under this head the Appellants argue that the Chief Justice was wrong to conclude that Mr Majors acted as agent for the LLC and in that capacity bound the LLC to the Engagement Letters and the Terms and Conditions, including the Arbitration Agreement.
 - (2) *Ground 2: The Quasi-Contractual Point*
Under this head the Appellants argue that the Chief Justice was wrong to conclude in the alternative that, in the absence of Mr Majors in his capacity as agent, binding the LLC to the terms of the Engagement Letters, nonetheless the LLC was bound on a quasi-contractual basis. (It was common ground that this point did not arise in circumstances where this Court rejected the appeal under Ground 1.)

(3) *Ground 3: The Unconscionable, Vexatious and/or Oppressive Point*

Under this head the Appellants argue that the Chief Justice was wrong to conclude, in the further alternative, that it would be unconscionable, vexatious and/or oppressive to permit the LLC to pursue the Tennessee Proceedings despite the Arbitration Agreement in the KPMG Engagement Letters. (Again, it was common ground that this point was relevant only if the Court of Appeal accepted both Grounds 1 and 2 of the Appellants' appeal.)

(4) *Ground 4: The Position of Mr Majors, Mrs Majors and the Trust*

Under this ground, the Appellants contend that, in the event that the LLC succeeds on all grounds of its appeal, then the form of order vis-à-vis Mr Majors, Mrs Majors and the Trust wrongly prevents them *qua* members of the LLC from permitting it to proceed with its Complaint in the Tennessee Proceedings. (Again, it was common ground that this point was relevant only if the Court of Appeal accepted Grounds 1, 2 and 3 of the Appellants' appeal. However, KPMG accepted that, if all of Grounds 1-3 are accepted by the Court, with the result that the ASI Order was discharged vis-à-vis the LLC, the terms of the ASI Order would need to be varied to allow the other Appellants, *qua* LLC members, to permit the LLC to pursue the Tennessee Proceedings.)

(5) *Ground 5: Costs*

Ground 5 concerns costs. The Appellants contend that if they succeed on Grounds 1 – 4 above, then it follows that the Chief Justice's order as to costs must be discharged. In addition, the Appellants contend that, even if some or all of Grounds 1 – 4 above fail, this Court should vary the Chief Justice's order to provide that: Mr Majors, Mrs Majors and the Trust are liable for KPMG's costs only up to 2 December 2022; and thereafter, KPMG should pay the former's costs on the indemnity basis. The reason for this is that Mr Majors, Mrs Majors and the Trust made clear from at least 10 October 2023 that they were prepared to provide undertakings that fully protected KPMG's position. They then proceeded to propose draft forms of undertaking on 22 November and 2 December 2022, before then providing signed undertakings on 13 January 2023. Although the Chief Justice wrongly thought otherwise, the undertakings proffered by Mr Majors, Mrs Majors and the Trust were more than adequate to protect KPMG's position, and in those circumstances there was no good reason whatever for KPMG to proceed further against them. This ought to be reflected in the order as to costs.

Ground 1: The Agency Point

The Appellants' submissions on the agency point

29. The Appellants submitted that, in concluding that Mr Majors acted as the LLC's agent and bound it to KPMG's Terms and Conditions, the Chief Justice made a whole series of errors, ignoring or overlooking submissions made to him on behalf of the LLC that were (and are) fatal to KPMG's contention that the LLC is bound by KPMG's Terms

through the agency of Mr Majors. Accordingly, the Chief Justice's decision should be reversed accordingly.

30. In his oral submissions to this Court, Mr John Jarvis KC, on behalf of the Appellants, emphasised that it was up to KPMG to show that Mr Majors had indeed acted as agent to bind the LLC to the Terms and Conditions. He emphasised that, contrary to the Chief Justice's comment in paragraph 41 of the ASI Judgment, it was not a question as to whether there was a lack of commerciality in the submission that KPMG was providing its services other than under the terms of the Engagement Letters, but rather whether, on the evidence, viewed objectively, the LLC and KPMG agreed that KPMG would provide services on those terms. He then went on to develop the arguments contained in the Appellants' written skeleton argument by a helpful examination of the relevant documents. His arguments in relation to the agency point may be summarised as follows.
31. The Appellants' *first* argument in respect of Ground No.1 is that the 2nd Majors LoE was addressed to Mr Majors alone and in a personal capacity and did not purport to extend to any third-parties: see the Appellants' written skeleton argument at paragraphs 36 – 37. Mr Jarvis submitted in summary as follows:
 - (1) First, the 2nd Majors LoE was KPMG's document and was drafted by it. If KPMG had wanted to make the 2nd Majors LoE binding on parties other than Mr Majors (like the LLC) to whom it would be providing services, then KPMG could easily have achieved this by expressly requiring Mr Majors to sign both in his personal capacity, and also for and on behalf of the LLC. But KPMG did not do so, and it is clear on the face of the 2nd Majors LoE that it was not intended to bind anybody other than Mr Majors.
 - (2) The 2nd Majors LoE was addressed to Mr Majors in his personal capacity (only). It was not addressed to the LLC, or to Mr Majors in his capacity as the managing member of the LLC.
 - (3) Further, Mr Majors signed the 2nd Majors LoE in his own name (only). There is nothing whatsoever in the 2nd Majors LoE to indicate that he was doing so on behalf of (and as agent for) the LLC or any other third party.
 - (4) On the contrary, paragraph 1(a) KPMG's Terms and Conditions made quite clear that the only parties to the engagement were the "*Client*" (defined as "*the addressee of the Proposal or Engagement Letter to which these Standard Terms and Conditions are attached or incorporated*", i.e. Mr Majors) and KPMG. This left no room for reading the 2nd Majors LoE or KPMG's terms as extending to, and binding, third parties like the LLC.
 - (5) In short, KPMG had an opportunity to bind the LLC to the Terms and Conditions but chose not to take it, electing instead for its relationship with the LLC (to whom it was providing services) to remain on an entirely extra-contractual footing. This exposed KPMG to an obvious risk of being sued in Tennessee (or another forum not of its choosing). KPMG cannot now complain

that this risk has materialised, having chosen not to require the LLC to agree to KPMG's Terms and the Arbitration Agreement therein.

32. The Appellants' *second* argument in respect of the agency point is that Mr Majors cannot have been an agent for the LLC when signing the 1st Majors LoE in March 2018 because the LLC did not exist until August 2018: see Appellants' skeleton argument at paragraphs 38 – 40. In relation to this point, Mr Jarvis submitted in summary as follows:

- (1) The position was even clearer in relation to the 1st Majors LoE. Given that the LLC was not even in existence at the time that Mr Majors signed it, he cannot have done so as the LLC's agent.
- (2) The Chief Justice's conclusion that Mr Majors somehow bound the LLC to the 1st Majors LoE at some point after it was executed was unsustainable; see paragraph 39 of the ASI Judgment. The terms of the 1st Majors LoE did not "*make clear*" (as the judge suggested) that services to the LLC (which was not even in existence at the time of the 1st Majors LoE) would be provided on the basis of KPMG's Terms and Conditions. And while it may well be the case that Mr Majors acted as the LLC's agent in seeking KPMG's advice/services for the LLC, it did not follow that Mr Majors was thereby using his authority as agent to bind the LLC to the 1st Majors LoE and/or KPMG's Terms and Conditions, which is something that Mr Majors was never asked by KPMG to (and did not) do.

33. The Appellants' *third* argument in respect of the agency point (see their skeleton argument at paragraphs 41 – 42) is that KPMG's Terms and Conditions preclude the provision of advice to third-parties and/or reliance upon such advice by them. This, it is said, prohibits the LLC being brought within the ambit of the KPMG Engagement Letters. In relation to this point, Mr Jarvis submitted in summary as follows:

- (1) Far from being "commercially unreal", the possibility of KPMG providing advice and services to third parties (like the LLC) with whom it was not in contractual privity was in fact expressly contemplated and provided for in KPMG's Terms. In particular:
 - (a) Paragraph 4(c) of KPMG's Terms provides:

"Client acknowledges and agrees that ... any advice, recommendations, information, Deliverables or other work product ("Advice") provided by KPMG in connection with the services under the Engagement Letter is intended for Client's sole benefit and KPMG does not authorize any other party other than Client to benefit from or rely upon such Advice, or make any claims against KPMG relating thereto. Any such benefit or reliance by another party shall be at such party's sole risk. Client agrees that if such Advice, is made available to any third party ... the provisions of Paragraph 8(b) shall apply unless Client has a written notice substantially in the form of Appendix

A hereto ... acknowledged in writing by such third party and returned to Client ...".

(b) Paragraph 8(b) provides:

"Subject to Paragraph 4(c), Client agrees to indemnify, defend and hold harmless the KPMG Parties from and against any and all Liabilities incurred or suffered by or asserted against any of the KPMG Parties in connection with a third party claim arising from KPMG's Advice ...".

- (2) KPMG's Terms therefore contemplated that KPMG's "Advice" (as defined) might be provided to third parties like the LLC. The chosen means of addressing this was to require Mr Majors as KPMG's Client: (i) to obtain a signed notice from the third party which sought to negative any duty of care arising in tort owed by KPMG to the third party; and (ii) to the extent that this was not done, to indemnify KPMG in respect of any claims by the third party. KPMG's Terms did not attempt to make the third party privy to the contracts documented by the various engagement letters, or to the Terms or the arbitration clause within them.
34. The Appellants' *fourth* argument in respect of the agency point (see their skeleton argument at paragraph 43), was that, at the *ex parte* stage, KPMG did not even argue that Mr Majors acted as the LLC's agent. Mr Jarvis submitted that, on the contrary, KPMG accepted that the LLC was not a party to any arbitration agreement, and accordingly that an injunction against it could only be sought on quasi-contractual grounds or on grounds of vexation and oppression. Accordingly, until its last-minute change of position, KPMG itself proceeded on the basis that its relationship with the LLC was entirely extra-contractual. That, submitted the Appellants, was impossible to reconcile with the Chief Justice's conclusion that such an arrangement was "*commercially unreal*".
35. The Appellants' *fifth* argument in respect of the agency point (see their skeleton argument at paragraph 44) was that all of the points made in paragraphs 36 – 43 of the Appellants' skeleton argument in this court, were raised in the LLC's written and oral submissions. However, they appear to have been completely ignored by the Chief Justice. None of them had been addressed or even referred to in the ASI Judgment, save for a brief reference in paragraph 27 to KPMG's position at the *ex parte* stage. Accordingly, the Chief Justice failed to have any regard whatsoever to a series of relevant indicia that, both individually and cumulatively, were fatal to his conclusion that Mr Majors agreed to KPMG's Terms on the LLC's behalf as its agent (and that the contrary view was "*commercially unreal*"). The Chief Justice's assessment was flawed as a result and should be set aside.
36. The Appellants' *sixth* argument in respect of the agency point (see their skeleton argument at paragraphs 46-47) was that the Chief Justice was wrongly influenced by KPMG's submission that Mrs Majors had conceded that Mr Majors acted *qua* agent by

providing undertakings and ‘*nonsuiting*’ the Tennessee Proceedings and that the same must therefore be true for the LLC. Mr Jarvis submitted that this was a further error. Mrs Majors made clear, both in correspondence and in submissions to the Chief Justice, that she had offered undertakings purely for pragmatic reasons (not being the proper plaintiff or otherwise a necessary party in Tennessee), and without any concession that she was bound by the Arbitration Agreement. That being the case, Mrs Majors’ decision to offer undertakings was wholly irrelevant. It should not have been taken into account in determining whether Mr Majors had bound the LLC to KPMG’s Terms as its agent.

KPMG’s submissions on the agency point

37. It is KPMG’s case that Mr Majors had actual or ostensible authority to act as agent for and/or on behalf of the LLC: (a) to obtain advice for the LLC subsequent to its incorporation, such advice to be provided pursuant to the 1st Majors LoE; and/or (b) to enter into the 2nd Majors LoE.
38. KPMG contends that the Chief Justice was correct to conclude that the LLC was indeed a party to the Arbitration Agreement in KPMG’s Terms and Conditions by virtue of the 1st Majors LoE and the 2nd Majors LoE. In support of this contention, Mr David Scorey KC submitted, as preliminary points:
 - (1) *First*, it should not be controversial that the LLC can be bound by KPMG’s Terms and Conditions, including the Arbitration Agreement, if agreed by someone acting as agent for and/or on behalf of the LLC (and, indeed, either of Mrs Majors and/or the Trust), either by accepting those Terms and Conditions at the outset, or by commissioning services and/or advice pursuant to those Terms and Conditions.
 - (2) *Secondly*, it was pellucidly clear from the documents that KPMG provided advice *about* the LLC not only to Mr and Mrs Majors and the Trust, but also *to the LLC* following its formation on 21 August 2018:
 - (a) Mr Majors volunteers the fact that KPMG provided tax advice and services to the LLC following its formation until 2020: see paragraph 12 of Mr Majors’ affidavit. KPMG was alleged to be the only firm that advised the LLC on its tax liabilities: see paragraph 13 of Mr Majors’ affidavit.
 - (b) Consistent with KPMG’s prior relationship with the Appellants, it was anticipated by them that KPMG would continue to advise the LLC: see paragraph 22 of Mr O’Brien’s affidavit. This is in fact what happened, as confirmed by paragraph 23 of Mr O’Brien’s affidavit
 - (3) *Thirdly*, that advice to the LLC was not provided gratuitously, nor in a legal vacuum. It was provided at the express instruction of Mr Majors *qua* interface between the Appellants and KPMG. That relationship arose under the 1st Majors

LoE for the 2018 period and the 2nd Majors LoE thereafter – both of which were expressly subject to KPMG’s Terms and Conditions:

- (a) The allegedly negligent advice of KPMG which is the subject of the Tennessee Proceedings was provided to Mr Majors and Mrs Majors: see, e.g., paragraphs 6, 7 and 9 of Mr O’Brien’s affidavit and KPMG’s invoice 87713 of 7 November 2018.
 - (b) However, Mrs Majors did not personally sign the Majors LoE, nor KPMG’s Terms and Conditions. That did not matter: KPMG was engaged by Mr Majors pursuant to the 1st Majors LoEs to provide (and did provide) advice to him and his wife – all subject to KPMG’s Terms and Conditions: see paragraph 13 of the ASI Judgment.
 - (c) As the interface between KPMG and the Appellants, the obvious conclusion is that Mr Majors was therefore acting as agent for and/or on behalf of Mrs Majors.
 - (d) The same follows in respect of the 2nd Majors LoE which expressly contemplated filing the tax return for the LLC. It was self-evident that Mr Majors signed the 2nd Majors LoE not only on his own behalf but also as agent for and/or on behalf of the LLC. He certainly had authority to do so *qua* managing member of the LLC: see paragraph 1 of Mr Majors’ affidavit.
 - (e) Likewise, in respect of the period prior to the 2nd Majors LoE, any advice provided by KPMG to and in respect of the LLC was subject to the Terms and Conditions (including the Arbitration Agreement), as made expressly clear by the terms of the 1st Majors LoE. Thus, in seeking and/or commissioning such advice, Mr Majors is to be treated as the LLC’s agent.
- (4) For those reasons, KPMG contends that the Chief Justice was correct to conclude that the LLC is *prima facie* a party to KPMG’s Terms and Conditions, including the Arbitration Agreement *via* the agency of Mr Majors.

39. Mr Scorey also made further detailed written and oral submissions. It is not necessary to summarise these here as they are reflected in my discussion and determination in subsequent paragraphs of this judgment.

Discussion and Determination of Ground 1 - The Agency Point

40. The principles which govern the grant of anti-suit injunctions as set out in paragraphs 20 – 26 of the ASI Judgment were largely common ground. For present purposes I need do no more than repeat the relevant principles set out by the Chief Justice in relation to the grant of anti-suit relief in the context of an arbitration agreement as recently summarised by Cockerill J. in *Times Trading Corporation v National Bank of Fujairah (Dubai Branch)* [2020] EWHC 1078 (Comm) at paragraph [38]:

i) *The Court has the power to grant an interim injunction "in all cases in which it appears to the court to be just and convenient to do so": section 37 (1) of the Senior Courts Act 1981 ("SCA 1981"). "Any such order may be made either unconditionally or on such terms and conditions as the court thinks just": section 37(2).*

ii) *The touchstone is what the ends of justice require: Emmott v Michael Wilson & Partners Ltd [2018] 1 Lloyd's Rep 299 at [36] per Sir Terence Etherton MR.*

iii) *The Court has jurisdiction under section 37(1) of the Senior Courts Act 1981 to restrain foreign proceedings when brought or threatened to be brought in breach of a binding agreement to refer disputes to arbitration: Ust-Kamenogorsk Hydropower Plant JSC v AES Kamenogorsk Hydropower Plant LLP [2013] 1 WLR 1889 (SC).*

iv) *The jurisdiction to grant an anti-suit injunction must be exercised with caution: Société Nationale Industrielle Aérospatiale v Lee Kui Jak [1987] UKPC 12, [1987] AC 871, 892E per Lord Goff.*

v) *As to the meaning of "caution" in this context, it has been described thus in The "Angelic Grace" [1995] 1 Lloyd's Rep 87 at 92:1 per Leggatt LJ: "The exercise of caution does not involve that the Court refrains from taking the action sought, but merely that it does not do so except with circumspection."*

vi) *The Claimant must therefore demonstrate such a negative right not to be sued. **The standard of proof is "a high degree of probability that there is an arbitration agreement which governs the dispute in question": Emmott at [39].** The test of high degree of probability is one of long standing and boasts an impeccable pedigree going back to Colman J in Bankers Trust Co v PT Mayora Indah (unreported) 20 January 1999 and American International Specialty Lines Insurance Co v Abbott Laboratories [2003] 1 Lloyd's Rep 267 and has been recently affirmed on the high authority of Christopher Clarke LJ in Ecobank v Tanoh [2016] 1 WLR 2231 at 2250.*

vii) *The Court will ordinarily exercise its discretion to restrain the pursuit of proceedings brought in breach of an arbitration clause unless the Defendant can show strong reasons to refuse the relief: The Angelic Grace [1995] 1 Lloyd's Rep 87; The Jay Bola [1997] 2 Lloyd's Rep 279 (CA) at page 286 per Hobhouse LJ.*

viii) *The Defendant bears the burden of proving that there are strong reasons to refuse the relief: Donohue v Armco Inc [2002] 1 All ER 749 at [24]-[25] per Lord Bingham.*

[My emphasis.]

41. Accordingly, the critical issue which the Court has to decide under this head is whether there is indeed "*a high degree of probability*" that there was an arbitration agreement concluded as between KPMG on the one hand, and, through the agency of Mr Majors, the LLC on the other which governs the dispute in question.
42. In my judgment that requires the Court to analyse on a holistic basis not only the Letters of Engagement but also the other evidence relating to the commercial arrangements between the parties and the advice and services which were actually provided by KPMG to the LLC. That requires, as Mr Jarvis correctly submitted, an objective analysis of the facts to ascertain whether KPMG and the LLC were indeed in a contractual relationship.
43. It was common ground that the LLC was not in existence when Mr Majors signed the 1st Majors LoE in March 2018 because the LLC was not established until August 2018. However, that is clearly not the end of the matter.
44. The advice provided pursuant to the 1st Majors LoE related to the sale of Nephila which gave rise to the creation of the LLC, which was intended to be a tax-efficient corporate vehicle for the Majors' family interests. The fact that the creation of the LLC was not expressly stipulated for in the 1st Majors LoE, or even contemplated at the time of its signing, is in my view not relevant. The 1st Majors LoE expressly states as follows:

'This engagement letter also covers tax advisory matters that may arise during 2018 and 2019 for which you seek our advice and consultation, both written and oral, and that are not the subject of a separate engagement letter.'

If matters exceed the scope of this engagement letter, we will issue a separate engagement letter or clarifying addendum to confirm the scope and related terms. When, in the course of providing general tax consulting services, it is determined that the service would exceed the scope of this letter, preliminary engagement planning activities undertaken prior to the issuance of a separate engagement letter all the discreet tax consulting project are intended to be covered by this engagement letter.'

45. It is apparent from the documents in the appeal record that KPMG *in fact provided advice* about the LLC, not only to Mr and Mrs Majors and the Trust, but also *to the LLC* following its formation on 21 August 2018. Thus:
 - (1) Mr Majors states that KPMG provided tax advice and services to the LLC following its formation until 2020; see paragraph 12 of his affidavit: and that KPMG was the only firm that advised the LLC on its tax liabilities: see paragraph 13, *ibid*;

- (2) consistent with KPMG's prior relationship with the Appellants, it was anticipated by them that KPMG would continue to advise the LLC: see paragraph 22 of Mr O'Brien's affidavit. Mr O'Brien confirmed that this was what in fact happened: see paragraph 23, *ibid*;
- (3) KPMG's invoice dated 7 November 2018 addressed to Mr Majors included fees of \$4500 for "*Review, analysis, and discussion regarding potential tax planning in advance of the Markel acquisition of Nephila Holdings Ltd, including coordination of LLC formation and other transactional issues*".

46. So far as subsequent advice given to the LLC was concerned, it was clear from the face of the 2nd Majors LoE (by which time the LLC was already in existence) that the 2nd Majors LoE expressly included the tax return of the LLC in the list of '*Tax Compliance Services*' to be provided: thus the relevant text read:

*"We will perform the following services as required:.....
Preparation of the 2018 Form 1065, US Return of Partnership Income for the Majors Family LLC"*.

Thus, Mr Majors expressly engaged KPMG to prepare the LLC's tax return for its first year of existence, viz., the period when it is alleged that the appropriate election should have been made to the Tennessee authorities.

47. As correctly stated by the Chief Justice at paragraph 45 of the ASI Judgment, this is not a case where A (Mr Majors) contracted with B (KPMG) to confer a benefit upon C (the LLC) in circumstances where C was a passive recipient of that benefit. Instead, there was active engagement by KPMG with the LLC – as one would expect, given the nature of the tax advice provided. Indeed, as is clear from the invoices, the services in respect of, and to, the LLC, were provided pursuant to, and charged under, the KPMG Engagement Letters.
48. The Appellants place great reliance on the fact that the 2nd Majors LoE was signed by Mr Majors and not expressly signed by him on behalf of the LLC; and, likewise, that the LoE defined the 'Client' as Mr Majors rather than the LLC. But that submission belies the reality of what was happening. As the managing member of the LLC, Mr Majors had actual authority on behalf of the LLC to engage KPMG to advise the LLC and deal with its tax affairs. Indeed, the Appellants did not suggest to the contrary. It is thus unreal to suggest that Mr Majors was instructing KPMG to prepare confidential tax returns of the LLC solely in Mr Majors' private capacity unconnected to the LLC or otherwise than as the LLC's managing member, i.e., for and/or on behalf of the LLC. The fact that Mr Majors is referred to as the "*Client*" cannot undermine the reality that the preparation of the tax returns and the advice given to the LLC, was for the LLC's (as well as for its members') benefit and could not have been undertaken without the authorisation and cooperation of the LLC. In those circumstances, I accept KPMG's submission that it is unreal to suggest that Mr Majors was acting solely in a personal

capacity - the reality is that he was also acting on behalf of the LLC. As such, ‘Client’ can only sensibly be understood as meaning Mr Majors, both personally and in his capacity as agent for the other principals (including the LLC) on whose behalf he engaged KPMG.

49. Similarly, the Appellants’ theory that KPMG provided services to the LLC, but ‘*on an entirely extra-contractual footing*’ (see Appellants’ skeleton argument at paragraph 37) is also commercially unreal and was rightly rejected by the Learned Chief Justice as such: see paragraph 41 of the ASI Judgment.
50. As summarised above, Mr Jarvis submitted that KPMG’s Terms and Conditions precluded the provision of advice to third parties and/or reliance upon such advice by them. That, he submitted, prohibited the LLC being brought within the ambit of the Engagement Letters. In particular Mr Jarvis relied upon clause 4(c) of the Terms and Conditions: which provides:

“4(c) Client acknowledges and agrees that notwithstanding Paragraph 4(a), any advice, recommendations, information, Deliverables or other work product (“Advice”) provided by KPMG in connection with the services under the Engagement Letter is intended for Client’s sole benefit and KPMG does not authorize any other party other than Client to benefit from or rely upon such Advice, or make any claims against KPMG relating thereto. Any such benefit or reliance by another party shall be at such party’s sole risk. Client agrees that if such Advice, is made available to any third party other than as expressly permitted by the Engagement Letter, the provisions of Paragraph 8(b) shall apply unless Client has a written notice substantially in the form of Appendix A hereto (the “Notice”), acknowledged in writing by such third party and returned to Client. Upon request, Client shall provide KPMG with a copy of the Notice acknowledged by such third party. Notwithstanding the foregoing, in the event of a disclosure made by Client that is required by law, that is made to a regulatory authority having justification over Client or that is made pursuant to Paragraph 18(a) below, no acknowledgement of the Notice shall be required to avoid application of paragraph 8(b). For the avoidance of doubt, no Notice or acknowledgment shall be required to avoid application of Paragraph 8(b) with respect to disclosures expressly authorized by the Engagement Letter.....”

51. It is also relevant in this context to set out the provisions of clause 8(b) of the terms and Conditions. This provides:

“8(b) Subject to Paragraph 4(c), Client agrees to indemnify, defend and hold harmless the KPMG Parties from and against any and all Liabilities incurred or suffered by or asserted against any of the KPMG Parties in connection with a third party claim arising from KPMG’s Advice. The foregoing indemnification obligation shall apply regardless of whether the third party claim alleges a

breach of contract, violation of statute or tort (including, without limitation, negligence) by the KPMG Parties.”

52. I do not accept Mr Jarvis’ submission in relation to the Terms and Conditions for the following reasons:

- (1) Clause 14 of the Terms and Conditions (the Alternative Dispute Resolution clause) clearly envisages that KPMG’s services may be provided not only to, and for the benefit of, the Client but also at its request to and for the *benefit* of other persons. As already quoted above, clause 14 provides:
“Any dispute or claim arising out of or relating to the Engagement Letter between the parties, the services provided there-under, or any other services provided by or on behalf of KPMG or any of its subcontractors or agents to Client or at its request (including any dispute or claim involving any person or entity for whose benefit the services in question are or were provided) shall be resolved in accordance with the dispute resolution procedures set forth below which constitute the sole methodologies for the resolution of such dispute. In respect of such services provided to other persons at the request of the Client, any dispute is said to be governed by the Arbitration Agreement.
- (2) In contrast, the provision in clause 4(b) envisages that it will be the Client who will be making available the advice or other work product to the third party; and that the third party will sign a Notice in the form of Appendix A acknowledging that:
“The advice recommendations, information, deliverables and other work product (“KPMG Advice”) being made available to you in connection with this notice were prepared for the sole benefit of [Name of Client], based on the specific facts and circumstances of [Name of client], and its use is limited to the scope of KPMG Tax Limited’s (“KPMG”) engagement for [Name of Client]. It has been made available to you for informational purposes only. You acknowledge and agree that KPMG does not authorize any party other than [Name of Client] to benefit from or rely upon it, or make any claims against KPMG relating thereto, and any such reliance by you or anyone else shall be at your or their own risk. Accordingly, KPMG accepts no responsibility or liability in respect of such KPMG Advice and you shall have no right to make it available to anyone else without including a copy of this notice and, unless disclosure is required by law or to fulfill [sic] a professional obligation required under applicable professional standards, obtaining a signed acknowledgement of this notice from the party to whom disclosure is made and you providing a copy thereof to [Name of Client]. You acknowledge and agree that you will be responsible for any damage suffered by KPMG as a result of your failure to comply with the terms of this notice.”
- (3) But such third parties are clearly different from a person of the type envisaged in clause 14 for whom KPMG has indeed agreed to provide services, at the request of the Client, and for the *benefit* of such persons. That was the case here

where all parties knew that the advice/services were being sought for the benefit *inter alios* of the LLC and that KPMG had agreed to provide such advice/services to the LLC for the LLC to use for its own purposes and benefit. It is obvious that KPMG could only have prepared the LLC's tax returns with information provided by the LLC. It was equally obvious that the LLC would use that advice, i.e., by filing it with the authorities. There was obviously no question raised about any requirement on the part of the LLC to sign a Notice of Acknowledgment in the form of Appendix A. The notion that the advice/services which KPMG provided to the LLC were not for the latter's benefit or were not advice/services upon which it was entitled to rely, is again wholly contrary to the commercial reality of the arrangements described in the evidence, which showed KPMG as regarding the LLC as within the scope of the '*Client*' to whom services were provided.

- (4) Further, if the Appellants' argument that the LLC was a third party were correct, that would ultimately be self-defeating. If the LLC were truly a '*third-party*' then KPMG would owe it no duty of care because, pursuant to clause 4(c) of the Terms and Conditions, that was confined to the '*Client*'. Further, it would mean that the LLC's claim in the Tennessee Proceedings was a '*third-party claim*' in respect of which Mr Majors would have to indemnify KPMG fully pursuant to clause 8 (b) of the Terms and Conditions. That serves to reveal the lack of any commercial foundation to the Appellants' submissions.
 - (5) My conclusion is reinforced by the fact that the LLC (as its full name, Majors Family LLC, suggests) was clearly a vehicle constructed solely for the purpose of holding and disposing of Mr Majors', Mrs Majors' and the Jersey Trust's ownership interests in Nephila and receiving the proceeds of sale. The evidence does not suggest that (other than the Trust which replaced the Jersey Trust) it has any other members outside the Majors family.
53. Accordingly, I conclude that there is a high probability that the correct analysis of the arrangements as disclosed in the evidence is indeed that, from the later of the two dates when the LLC was established and KPMG agreed to provide advice/services to or for the benefit of the LLC, the LLC, through the agency of Mr Majors, was a party to a contract with KPMG as reflected in the 1st and 2nd Majors LoEs and that, accordingly, the LLC is subject to the terms of the Arbitration Agreement.
54. The Appellants' remaining arguments can be dealt with shortly as they add nothing to the substantive analysis but may rather be characterised as forensic points.
55. Mr Jarvis's fourth argument as summarised above was to the effect that, at the *ex parte* hearing when the interim injunction was initially obtained, KPMG did not rely upon any allegation of agency or contend that the LLC was a party to the Arbitration Agreement. Mr Jarvis submitted that, in circumstances where KPMG itself proceeded at the interim stage on the basis that its relationship with the LLC was entirely extra-

contractual, the Chief Justice's conclusion that such an arrangement was "*commercially unreal*" could not be supported.

56. I do not derive any assistance from this submission. At the *ex parte* hearing, KPMG did not have the evidence from the Appellants which set out in greater detail the advice and services which had been provided by KPMG. It was inevitable that arguments became more concentrated and focused leading up to the *inter partes* hearing, with the addition of leading counsel to KPMG's team, who no doubt may well have analysed the legal issues in a different way. The issue of permanent relief was addressed *de novo* at the return date (which was the hearing of the Summons which gave rise to the permanent anti-suit injunctions referred to in the ASI Judgment) and no suggestion of prejudice was raised by the Appellants to the effect that they had not had an appropriate opportunity to supplement their evidence at that hearing.
57. The Appellants' fifth argument (at paragraph 44 of their written submissions) was to the effect that the Chief Justice had "*completely ignored*" certain of their arguments as set out in paragraphs 36 – 43 of their arguments in this Court. The Appellants submitted that none of them was "*addressed or even referred to in the Judgment, save for a brief reference in [27] to KPMG's position at the ex parte stage.*" Thus, the Appellants further submitted that the Chief Justice failed to have any regard whatsoever to a series of relevant indicia that, both individually and cumulatively, were fatal to his conclusion that Mr Majors agreed to KPMG's Terms on the LLC's behalf as its agent (and that the contrary view was "*commercially unreal*"). So it was said that the "*Chief Justice's assessment was flawed as a result and should be set aside.*"
58. This specific line of argument was not actively pursued by Mr Jarvis in his oral submissions, although, as part of his overall argument, he obviously maintained that the Chief Justice's conclusion was wrong. In my view it is clear from the ASI Judgment that the Chief Justice did indeed adequately consider, and address, all the relevant arguments relating to these issues. In any event, whether or not the Chief Justice adequately did so, this Court has clearly considered all these points so far as relevant to our determination. Therefore, whether or not the Chief Justice adequately did so, is irrelevant to our conclusion.
59. Finally, by way of their sixth argument in their written submissions, the Appellants argued that the Chief Justice appeared to have been wrongly influenced by KPMG's submission that Mrs Majors had conceded that Mr Majors acted *qua agent* by providing undertakings and '*nonsuiting*' the Tennessee Proceedings, in coming to his conclusion that Mr Majors had bound the LLC to KPMG's Terms as its agent: see the Appellants' written skeleton argument at paragraphs 46 – 47.
60. It is correct that KPMG submitted in the hearing before the Chief Justice that, in the light of the evidence as to the services provided to Mrs Majors, and, in the absence of

any separate letter of engagement with KPMG, the inevitable conclusion was that Mr Majors acted *qua* agent on her behalf. It is also right that KPMG submitted that the withdrawal by Mrs Majors from the Tennessee Proceedings was a tacit admission of that fact.

61. Although it is not relevant for the purposes of this Court's decision, I agree with the Chief Justice's conclusion that, in all the circumstances, Mr Majors, as agent for his wife, had bound Mrs Majors to KPMG's Terms and Conditions. But I do not agree that the Chief Justice relied on that conclusion in reaching his decision that the LLC was similarly bound by KPMG's Terms and Conditions. But even if the Chief Justice did so, I have reached my decision in relation to the LLC separately and independently of any consideration of the position of Mrs Majors.
62. For the reasons given above, I conclude that the Appellants' appeal on Ground 1 should be dismissed. If so, it follows that the October 2023 Order should stand and that there is no need further to consider the alternative grounds of appeal put forward by the Appellants to support their arguments that anti-suit relief should not have been granted.
63. However, had it been necessary to do, I would have come to the same conclusion as the Chief Justice in relation to the granting of anti-suit relief on the alternative grounds that the LLC, although bringing its claim in the Tennessee Proceedings in tort, was nonetheless asserting rights in respect of the advice provided by KPMG under the Engagement Letters, and therefore was subject to the "*burden*" of the agreed contractual dispute resolution process contained in those letters; see paragraphs 43-50 of the ASI Judgment. I would also have accepted that the continuance of the proceeding was unconscionable, vexatious and oppressive. Permitting the LLC to proceed in Tennessee would frustrate the arbitration agreement between KPMG and the appellants other than the LCC and enable them to circumvent their concession that any claims of theirs should be arbitrated in Bermuda.

Ground 5 – Costs

64. The Appellants contend that, even if some or all of Grounds 1 – 4 fail, this Court should vary the Chief Justice's order to provide that: Mr Majors, Mrs Majors and the Trust are liable for KPMG's costs only up to 2 December 2022; and thereafter, KPMG should pay the former's costs on the indemnity basis. The Appellants contend that Mr Majors, Mrs Majors and the Trust made clear from at least 10 October 2023 that they were prepared to provide undertakings that fully protected KPMG's position; they then proceeded to propose draft forms of undertaking on 22 November and 2 December 2022, before then providing signed undertakings on 13 January 2023; the undertakings proffered by Mr Majors, Mrs Majors and the Trust were more than adequate to protect KPMG's position; and in those circumstances there was no good reason whatever for KPMG to proceed further against them. It will be recalled that those undertakings specifically stated the respective party's understanding that he, she or it would not be

in breach of the undertaking merely by reason of the LLC continuing with its claim in Tennessee, should the LLC succeed in its application to discharge the interim injunction.

65. I disagree. The Appellants' undertakings provided on 13 January 2023 (but dated 6 January 2023) were inadequate because they permitted Mr Majors, Mrs Majors and the Trust to direct the LLC, whether in their capacities as members of the LLC, or, in the case of Mr Majors, as managing member, to pursue the Tennessee Proceedings. That left the position open so far as those three Appellants were concerned, whichever way the Supreme Court decided the anti-suit injunction in relation to the LLC. For that reason, and for the reasons set out by the Chief Justice in paragraph [22] of his judgment, the (discretionary) decision which he reached should not be overturned.
66. Accordingly, I would dismiss this ground of appeal. I would also lift the stay imposed by the Chief Justice in paragraph 4 of his Order dated 20 October 2023.

Disposition

67. It follows that I would dismiss the Appeal in its entirety and award costs on the standard basis in favour of KPMG.

BELL JA

68. I agree.

CLARKE P

69. I also agree.