

**IN THE GRAND COURT OF THE CAYMAN ISLANDS**

**Cause No.: POCL 12 of 2019  
( CJICL 3 of 2018 )**

**IN THE MATTER OF AN APPLICATION BY THE DIRECTOR OF PUBLIC PROSECUTIONS FOR A RESTRAINT ORDER PURSUANT TO SECTION 24 OF THE CRIMINAL JUSTICE (INTERNATIONAL COOPERATION) LAW (2015 REVISION) SCHEDULE 5 OF THE PROCEEDS OF CRIME LAW (2019 REVISION)**

**AND IN THE MATTER OF GUENTHER KLAR**

**AND IN THE MATTER OF THE ORDERS OF THE COURT DATED 20 SEPTEMBER 2019**

**IN CHAMBERS**

**Appearances:** Mr. Nick Dixey and Mr. Colm Flanagan of Nelsons for Mr. Guenther Klar  
Ms. Toyin Salako for the Director of Public Prosecutions

**Before:** The Honourable Mr. Justice Robin McMillan  
**Heard and Decided:** 25 September 2020

**Reasons for Judgment Delivered:** 1 October 2020

**HEADNOTE**

*Restraint Order – Undertaking of Director of Public Prosecutions to effect service as soon as practicable – Consequences of breaching undertaking.*

## REASONS FOR JUDGMENT

### Introduction

1. On 25 September 2020 the Court heard a Summons Application on behalf of Guenthar Klar (“the Applicant”) for an Order discharging certain Restraint Orders made on 20 September 2019 by Mrs. Justice Carter (Actg). The Application was granted, and the Restraint Orders were discharged.
2. The Restraint Orders were made pursuant to a request made on behalf of the Authorities in Belgium in relation to allegations of forgery and fraud, together with associated tax offences.
3. In respect of mutual legal assistance, where the request for assistance has been made by Belgium, the Criminal Justice (International co-operation) Law (2015 Revision) (the “CJ (IC L)”) provides the statutory and procedural framework to give that assistance. Section 3 of the CJ (IC) L provides that, amongst other things, assistance may be given for the purpose of immobilizing criminally obtained assets and assisting in proceedings relating to forfeiture and restitution.
4. The jurisdiction to make a restraint order by way of assistance to a foreign country pursuant to the Proceeds of Crime Law (2015 Revision) (“POCL”) is conferred by section 187, which provides that Schedule 5 of the POCL applies to:



*"...any proceedings which have been, or are to be, instituted and which may result in external confiscation orders made in foreign countries".*

5. One Order granted on 20 September 2019 related to assets held and/ or accounts currently or formally held with Global Fiduciary Bank Limited. The other Order related to accounts currently or formerly held with Caledonian Bank Limited and now held by Joint Official Liquidators of that entity.
6. In each instance the Order states at paragraph 5 that the Office of the Director of Public Prosecutions gives to the Court the undertakings set out in Schedule 1 to this Order.

7. Schedule 1 of each Order then states as follows:



*"Schedule 1*

*As soon as practicable the Director of Public Prosecutions will arrange to have served on the Defendant a copy of this Order.*

*Anyone notified, as being affected by this Order will be given a copy of it by the Director of Public Prosecutions."*

8. It is critical therefore to bear in mind both that an undertaking has been given and that in furtherance of the undertaking as soon as practicable the Director of Public Prosecutions will arrange to have served on the Defendant, i.e., the Applicant, a copy of the Order.

9. Clearly such a mandatory course was in the contemplation of the Director of Public Prosecution in seeking these Restraint Orders in the first place. Without the undertaking, these Orders would not have been granted.
10. In other words, service is not an option but is a strict requirement. Moreover, in the event that it did not prove possible to effect service either within a practicable timeframe or at all then the Director of Public Prosecutions mindful of the undertaking which has been given must inform the Court of that state of affairs. Thereupon it would be open to the Court to consider and determine such appropriate options as the Court might choose to exercise.
11. All of this takes properly into account the fundamental needs to ensure that everyone has the right to a fair and public hearing in the determination of his or her legal rights and obligations by an independent and impartial court within a reasonable time as section 7 of the Cayman Islands Constitution stipulates.
12. Consequently, if there is a failure to serve the relevant Order as soon as practicable then in keeping with the undertaking that important fact must be brought to the attention of the Court both conscientiously and expeditiously.
13. In *In the matter of Brian De Wit & others* (unreported 8 June 2015 POCL 8 of 2014) Mr. Justice Williams at paragraph 45 makes the illuminating observation that a restraint order is “*a draconian order as it seriously interferes with the Applicant’s rights to deal with his property.*”



14. This Court fully concurs with that observation.
15. In the present case before the Court, no formal service was effected on the Applicant following the making of the Restraint Orders on 20 September 2019, nor was the Court apprised of that fact. Indeed when this Application was heard on 25 September 2020 no evidence was adduced to confirm that it had not been practicable to serve on the Applicant copies of the Orders.
16. It appears that notwithstanding the seeking of the Restraint Orders the Director of Public Prosecutions was unaware at the time of where the Applicant was actually located.
17. The Applicant states at paragraph 85 of his Affidavit dated 4 August 2020 that in breach of the undertaking an order had never been formally served upon him.
18. It seems that the Applicant may have heard about one of the Restraint Orders from contacting the Liquidators of Caledonian Bank Limited. Thereafter his London Solicitors on enquiry received a confirmation of the position in the form of a letter from the Director of Public Prosecutions.
19. The literal accuracy of the details is not of any significant concern because both in principle and in practice service was not effected in the manner originally undertaken in any event.



20. Although a number of additional matters were raised by the Applicant and are comprehensively set out in the Written Submissions of his attorneys dated 16 September 2020, it is unnecessary for immediate purposes to consider and determine them as well.
21. The procedural defect of which the Applicant complains is ultimately determinative of this Application.
22. When a Restraint Order has been granted, it is important to recognise that it is granted on an *ex parte* basis only and that in due course a fair and timely *inter partes* hearing should follow if so requested. The interests of justice must prevail over mere expediency.

Robin McMillan

**THE HONOURABLE MR. JUSTICE ROBIN MCMILLAN**

**JUDGE OF THE GRAND COURT**

