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

**CAUSE NO. POCL 8 OF 2014**

**IN THE MATTER OF AN APPLICATION FOR A VARIATION OF A RESTRAINT ORDER PURSUANT TO SECTION 46 OF THE PROCEEDS OF CRIME LAW (2014)**

**IN THE MATTER OF BRIAN DE WIT AND OTHERS**

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| **Appearances:** | Mr. Nicholas Dixey & Mr. Colm Flanagan Nelson & Company for Mr. Brian De Wit, the Applicant<br>Ms. Toyin Salako, Crown Counsel for the Director of Public Prosecution |
| **Before:** | Hon. Justice Richard Williams |
| **Heard:** | 27 May 2015 |
| **Draft Judgment circulated:** | 8 June 2015 |
| **Date of Judgment:** | 8 June 2015 |

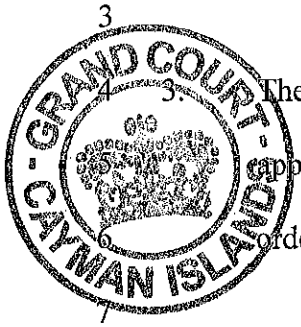

**JUDGMENT**

**Procedural Background**

1. This matter came before me in Chambers.

2. I have before me a Summons filed by Mr. Brian De Wit ("the Applicant") on 21 May 2015 seeking a limited variation order extended by Mettyear J. (actg.) on 28 April 2015. The Applicant seeks to have the prohibition in respect of the RBC

Dominion Securities Global Limited account xxxxx308 ("the Account") contained in paragraph 1.1 c) viii. of the said order lifted.




3. The Crown on behalf of the Financial Crimes Unit ("FCU") opposes the application to vary the restraint order and seeks a three-month renewal of the said order.

4. These proceedings have been ongoing for roughly six and a half months, having commenced by the initial ex parte application for a restraint order made pursuant to section 45 of the Proceeds of Crime Law (2008) ("the Law") which came before Quin J. on 17 October 2014. Quin J. granted a restraint order in relation to a number of named individuals including the Applicant. Quin J.'s order contained details of a number of accounts, but did not detail the Account which is the subject matter of this variation application. This order was given an expiry date of 14 January 2015. Under the terms of the order the Office of the Director of Public Prosecutions ("the DPP") undertook to serve each Defendant with a copy of the order and supporting affidavit as soon as possible or within seven days. That order was not served on the Applicant by the Office of the DPP.

5. At that hearing of the application Quin J. considered the affidavit of DC Keith Taylor sworn on 17 October 2014. The said affidavit exhibited the unsealed Indictment number CR14-00476 sealed in the United States District Court Eastern

District of New York by the United States Attorney on or around September 2014. In the indictment there is an allegation against the Applicant of conspiracy to commit securities fraud and money laundering conspiracy. Importantly, Crown Counsel has rightly conceded during the hearing that the content of the affidavit is primarily a reproduction of the content of the Indictment. She stated that: "*I concede that Mr De Wit's name is on the ex parte order based on the US Indictment only. .... It is the US Indictment, without that there would be no investigation.*"

6. On 10 November 2014 Benjamin C.J., sitting in the Supreme Court of Belize discharged a restraint order which had been made by him on 24 September 2014. The proceedings had been initiated by an application for a freezing order made by the Belize Financial Investigation Unit following a request for assistance from the United States Department of Justice under the Mutual Legal Assistance and Cooperation Act in Belize. The proceedings in Belize had been grounded on the same US indictment that has grounded the investigation and the application for a restraint order currently before me. The Defendants in the Belize proceedings are also Defendants in the proceedings before me.

7. The Learned Chief Justice's reasons for discharging the restraint order are set out in his detailed written judgment ("the Belize Judgment"). Crown Counsel informed the Court that she first became aware of the Belize Judgment and

decision when she received the affidavit of the Applicant sworn on 20 May 2015. Crown Counsel rightly conceded that if she had been aware of the Belize Judgment that it would have been provided by her to Quin J. "*as that is the Crown's obligation.*" Crown Counsel also confirmed that DC Taylor had been aware of the Belize Judgment from the time of the December application and he should have brought it to her attention.

8. On 3 December 2014 Quin J. heard an application by Crown Counsel to vary the existing restraint order by permitting substituted service to three of the other Defendants, not including the Applicant. Those orders were made.

9. On 15 December 2014 the Applicant emailed RBC Cayman ("the Bank") informing them that he and his wife had decided to relocate to Canada to be closer to their family and therefore, for tax reasons, they would again become resident in Canada. He asked the Bank representative whether he would then need to close his account in order to repatriate his offshore assets and asked for advice about the process. There were further emails exchanged and on 16 December 2014 the Applicant provided the Bank with wire instructions for his bank in Canada and for the funds from the liquidated portfolio to be sent there.

10. On 22 December 2014, following a request from the Bank made on the same day, the Applicant provided the Bank by email with details of his residential address in

Canada. On 30 December 2014 the Bank notified the Applicant that they had received a *"restraining order"* against his investment account and that this meant the funds could not be wired out. This email notification was the first time that the Applicant became aware of the existence of the restraint order. In fact a letter dated 29 December 2014 from Detective Inspector Lavine at the FCU to the Regional Head of Compliance at the Bank requested information pursuant to section 3(2)(b)(iii) of the Confidential Relationship (Preservation) Law (2009 Revision). Part of this request was for email correspondence for all accounts held in the name of the Applicant to date. If these had been provided they would have included the above email which contained details of the Applicant's Canadian address. Crown Counsel was unable to clarify what disclosure had been received from the Bank as a result of the request, but it does appear that they should have been able to obtain the Applicant's address to serve him properly pursuant to the undertaking given when the order was made. I note that DC James Buckley stated in his affidavit sworn on 7 January 2015 that the Applicant was believed to be resident in Canada, thus raising the likelihood that he had obtained details of his address from the Bank.

11. A copy of the restraint order was provided to the Applicant by the Bank on 6 January 2015.

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12. I am satisfied that, when instructing the Bank to liquidate his portfolio in December 2014, the Applicant was unaware of the existence of the restraint order. I am satisfied that he was seeking to have the liquidated funds transferred to Canada and not to Panama. Crown Counsel rightly conceded during the hearing that DC Buckley had been wrong to state at paragraph 12 b) of his affidavit sworn on 7 January 2015 that the Applicant had attempted to liquidate the assets by transferring them to a bank account in Panama City, Panama. It was rightly conceded that this part of the affidavit may have created an incorrect impression in Quin J.'s mind that the Applicant intended to dissipate the funds to Panama, rather than him having to transfer them to Canada because he was now a resident there. It also appears that DC Buckley was wrong to indicate that the Applicant had been given notice of the 'inter partes' renewal hearing to be held on 7 January 2015. For completeness sake, I note that the order of 17 October 2014 did not detail the relevant account at the Bank and therefore, arguably, that account was not subject to restraint until the later Order which was made on 13 January 2015.

13. On 13 January 2015 Quin J. renewed the restraint order, this time specifically restraining the Applicant's relevant account with the Bank. The preamble to the order records that the Learned Judge had read the affidavit of DC James Buckley sworn on 7 January 2015.[1] The Order was given an expiry date of 14 April 2015

[1] See concession made by Crown Counsel in relation to paragraph 12 b) of the affidavit mentioned in paragraph 10 above.

and included the same undertaking about service on the Defendants. That order was renewed by Quin J. on 10 April 2015 with an expiry date of 28 April 2015.

14. On 2 March 2015 the Applicant's attorneys contacted the DPP seeking disclosure of affidavit evidence, transcripts or notes of the various hearings as well as copies of legal submissions and case or statute law produced at the various hearings.

15. On 28 April 2015 an application for further renewal came before Mettyear J. (actg). The Order was renewed with an expiry date of 28 May 2015. Although not mentioned in the face of the Order, the Learned Judge would have had a copy of the affidavit of DC Taylor sworn on 28 April 2015 before him. That affidavit referred back to the US Indictment. Paragraphs 17 to 41 contained details of the Cayman Islands investigation, although only paragraphs 35 to 41 relate to the Applicant. Crown Counsel did not seek to make any detailed submissions in relation to those paragraphs of the affidavit when conceding that the Crown's application was primarily based on the information extracted from the US Indictment and replicated in the various affidavits.

16. Although the order was due to expire on 28 May 2015, and the parties appeared to be aware that it may be a contested renewal hearing, no date had been fixed for that return date. It is not good practice for parties to fail to fix a date for the renewal application promptly after the order has been made if they are aware that

it is likely to be contested at the next hearing. It is not good practice for the parties to expect the Court to be able to accommodate a contested renewal hearing on the day that the existing order expires. In this matter Listing was asked to fix a contested hearing of the application to vary the order on two days' notice. Although the order provided that only two days' notice is required, especially in a case like this where the Applicant has known about the terms of the orders for months, it is not good practice to expect the Court to be able to accommodate a contested hearing on two days' notice. In this case the hearing was accommodated, and one of the reasons why this was is because the Court had little option as the order was due to expire on the following day. Parties should not give the Court a fait accompli when it comes to listing matters and they will now be expected to fix a date for a renewal hearing which they know will likely be contested well in advance of the expiry date of the restraint order. Orders should be served promptly and in compliance with the terms of the order in relation to service and parties should thereafter endeavour to determine well before the expiry date of the order whether the hearing is going to be a contested one or not.

17. I have considered the written and oral submissions made by Counsel. I have considered the various affidavits including all of those already considered at the previous hearings. I have reviewed the affidavit of the Applicant sworn on 20 May 2015, and the affidavit of DC Taylor sworn on 26 May 2015.

**The Law**

18. The purpose of restraint orders under the Law is to preserve any realisable property which may be available to satisfy any confiscation order which may be made subsequently. It is an interlocutory remedy. The Crown does not have to prove the case to the criminal or even the civil standard when applying for a restraint order. In ***Compton v CPS*** [2002] EWCA Civ. 1720, the Court of Appeal held that the test is the same as on an application for a civil freezing order, namely that a good arguable case been established that the defendant has benefited from criminal conduct and that he has an interest in the assets in relation to which the application is made. Although this was a case dealing with an application under the Drug Trafficking Act 1994 the approach advocated is equally applicable to restraint orders under the Proceeds of Crime Law.

19. Section 44 of the Law lays down a number of preconditions, one of which must be satisfied before a restraint order may be made. Section 44(1) of the Law provides that:

> *"The court may grant a restraint order in accordance with section 45 if any one of the following conditions is satisfied –*
> *(a) a criminal investigation has been started in the Islands with regard to an offence and there is reasonable cause to believe that the alleged offender has benefited from his criminal conduct;*
> ……"

20. Section 69(4) of the Law provides that a person benefits from an offence if he obtains property as a result of or in connection with his conduct. Pursuant to section 69(7) where he benefits from the conduct his benefit is the value of the property so obtained. These sections would cover a professional person who launders money on behalf of the client and he benefits to the extent of the value of the property he obtains no matter how short period of time he retains it. Section 69(5) provides that a person who obtains a pecuniary advantage as a result of or in connection with the conduct is to be treated as if he had obtained as a result, or in connection with the conduct, a sum of money equal to the value of the pecuniary advantage.



21. Although termed as being an application to vary the order, it is in reality an application by the Applicant to discharge the part of the order which relates to him. The application is brought on three grounds which are highlighted in the Applicant's skeleton argument. Firstly, there was/is no evidence to justify the granting/maintaining of the order. Secondly, that there was material nondisclosure and procedural flaws. Finally, there has been undue delay in charging the Applicant with any offences.

22. It is conceded by the Applicant that the Financial Crimes Unit has started criminal investigations with regard to a relevant offence. However, the Applicant contends that the Crown does not have and has not established a reasonable cause

for believing that he has benefited from any alleged criminal conduct. Section 69 of the Law defines *"criminal conduct"* as being conduct which is either an offence in the Islands or conduct which would constitute such an offence if it occurred in the Islands. It is rightly submitted that in order to obtain the initial order and any subsequent renewals the Court has to be satisfied by the Crown that this reasonable cause exists.

23. Regrettably, unlike in England and Wales, there are no rules setting out the procedures for applying for restraint orders under the Law. The time may well have come for such Rules to be drafted to enable there to be consistency and guidance in such proceedings.[2] In the absence of any Rules, I have to determine the type of evidence that should be placed before the Court. It is accepted by the parties that an application should be supported by affidavit evidence or a witness statement. Although not binding, I feel that Part 59.1 of the Criminal Procedure Rules[3] in England and Wales provide useful guidance as to what detail should be found in an affidavit or witness statement. The Rules provide that such written evidence should contain (i) the grounds for the application, (ii) to the best of the witness's ability, full details of the realisable property in respect of which the restraint order is sought and specify the person holding that property; and (iii) the proposed terms of the order.

[2] For example it could deal with issues raised in paragraph 16 above.
[3] Re-stated on 6 October 2014.

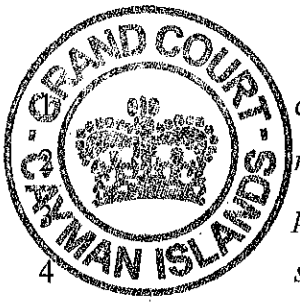
24. In the aforementioned proceedings before the Belize Supreme Court, Benjamin C.J. appeared to be dealing with applications to extend and discharge a "freezing order" made pursuant to the Money-Laundering and Terrorism (Prevention) Act 2008 ("MLTPA") and the inherent jurisdiction of the Court. The MLTPA was passed to make improved provision for the investigation of offences such as money-laundering and enables an application to be made for a restraining order. Under that piece of legislation the Supreme Court may make the order if it is satisfied that the defendant is being investigated for a serious crime and there is reasonable cause to believe that the property is tainted property in relation to an offence or that the defendant derived benefit directly or indirectly from the commission of the offence. There must also be reasonable grounds for believing that a forfeiture order or a pecuniary penalty order may be more likely to be made in relation to the property. Interestingly, Section 39(2) MLTPA mandates that an application for a restraining order must be accompanied by an affidavit containing specific information. This includes, but is not limited to (i) details of the crime for which a person is being investigated and the grounds for believing that he has committed the offence; (ii) a description of the property in respect of which the order is sought; (iii) the name and address of the person who is believed to be in possession of the property; (iv) the grounds for the belief that the property is tainted property in relation to the offence or that the accused derived a benefit directly or indirectly from the commission of the offence; and (v) the grounds for the belief that a forfeiture order or a pecuniary penalty order may be or is likely to

be made under this part in respect of the property. This is the type of evidence on affidavit Benjamin C.J. found to be required in the matter before him where the Defendants were still under investigation and not charged. Although, unlike in Belize, in this jurisdiction there is no statutory requirement for an affidavit in support of an application for restraint order to contain this detail, I again feel that it provides helpful guidance as to the type of information that should be contained in a supporting affidavit. I accept that in this jurisdiction there need not necessarily be as rigid an approach as taken by Benjamin C.J. where the information required by statute in Belize is lacking from the affidavit[4]. That said, it is the type of detail one might expect the Crown to set out in a supporting affidavit when seeking to satisfy the Court that one of the necessary preconditions for making restraint order have been met. The preconditions are not dissimilar to those required in Belize.

25. The Applicant relies upon the dicta of ***Hopper LJ in the case of Windsor and Others v R*** 2011 EWCA Crim 143 when he states at paragraph 53:

> *"Before charge – and all the more so before arrest – there will be many uncertainties. The law does not require certainty at this stage but uncertainty is not in itself a reason for making a restraint order as some of the Respondent's submissions might suggest. The court must sharply focus on the statutory test: is the judge satisfied that there is a reasonable cause to believe that the alleged offender has benefited from his criminal conduct? It is that test which the*

[4] See paragraph 34 of the Belize judgment.




*court must apply and it requires a detailed examination of the material put before it. The presence of uncertainties does not prevent there being reasonable cause to believe, but the judge must still be satisfied that there is reasonable cause to believe."*

26. In ***Windsor*** the evidence before the Judge had been set out in a statement which repeated what the Belgian authorities suspected as a result of investigations in Belgium. At paragraph 87 in ***Windsor*** Hopper L.J. stated that it was vital for judges to be given the material on which they can reach a conclusion themselves that there is reasonable cause. In that case he said the Court could not find it just because it was informed that the investigation in England had confirmed the suspicions of the Belgian authorities. Hopper L.J. expressed a concern when hearing that these unsupported assertions of typical statements may be ordinarily accepted by the Courts. I accept that Hopper J.'s approach is the correct one and his concern raised in response to a submission that unsupported assertions could be considered as that was the practice.

27. It is submitted by the Applicant that there has not been sufficient evidence placed before this Court to allow it to form a view as to whether there was reasonable cause to believe that the Applicant has benefited from criminal conduct. It is submitted that simply reproducing and relying upon large sections of the Indictment in the affidavits, a feature of the pleadings which is conceded by Crown Counsel, is not sufficient and should be regarded as background

information rather than evidence. It is submitted that the Indictment is no more than a pleading containing allegations and assertions made by the Authorities in the United States and does not constitute evidence or material upon which a court can find there to be reasonable cause. The Applicant highlights that there is no witness statement or affidavit from any officer involved in the investigation in the United States giving the information in the US Indictment an evidential footing. He reminds the Court that these proceedings are not related to any request for mutual legal assistance. It is clear that the investigations in the proceedings before me being conducted by the FCU are for offences against the laws of the Cayman Islands.

28. There is no requirement set out in the Law requiring the Applicant for a restraint order to establish as a condition precedent to obtaining an order that there exists a risk of dissipation of assets. However, in the Court of Appeal decision of ***Re AJ and DJ*** (CA, 9 December 1992) Glidewell J. when upholding the decision of Laws J (as he was then) stated at 23C that:

> *"It follows in my judgment that Laws J was entirely correct to conclude he had a discretion whether or not to make or discharge a restraint or charging order and to consider that such an order should only be made if there is a reasonable apprehension that, without it, realisable property may be dissipated. I agree with the judge that, to quote him, "if there is not such risk, or the risk is merely fanciful, the order ought not to be made, since ex*

*hypothesis it would not be necessary for the achievement of its only proper purpose.""*

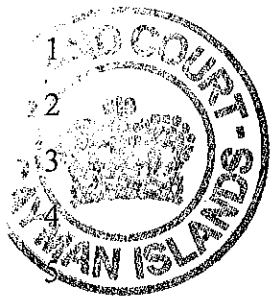

In that case the Court of Appeal discharged the order as it found that there was no evidence to establish a real risk of dissipation as there had been a delay in excess of two years between the defendants being charged and the application for restraint order being made during which time no attempt to dissipate had taken place.

29. Although I accept that the matter before me is not one involving allegations of drug trafficking unlike in ***Re AJ*** where the Court was dealing with the Drug Trafficking Act 1994, I note that Glidewell J. went on to state that:

> *"I accept that in many perhaps a substantial majority of cases where offences involving a gain exceeding £10,000 are concerned, the circumstances of the alleged offences themselves will lead to a reasonable apprehension that, without a restraint or charging order, realisable assets are likely to be dissipated. In drug trafficking offences, this is likely to be so in almost every case. Thus the onus on the prosecution will often not be difficult to satisfy."*

30. A similar approach has been taken for offences of dishonesty. In ***Jennings v CPS*** [2005] 4 All ER 391 Longmore L.J. stated:

> *"In a case where dishonesty is charged, there will usually be reason to fear that assets will be dissipated. I do not therefore*



*consider it necessary for the prosecutor to state in terms that he fears assets will be dissipated merely because he or she thinks there is a good arguable case of dishonesty. As my Lord has said, the risk of dissipation will generally speak for itself. Nevertheless prosecutors must be alive to the possibility that there may be no risk in fact. If no asset dissipation has occurred over a long period, particularly after a defendant has been charged, the prosecutor should explain why asset dissipation is now feared at the date of application for the order when it was not feared before."*

31. With this in mind, I also feel that any affidavit in support of an application for a restraint order should include detail about asset dissipation. In this case, I do not base my decision on the issue of dissipation.

32. In the Belize judgment, Benjamin C.J. noted that it was a statement saying that, as a result of the money-laundering investigation intelligence, the respondents were directly or indirectly associated with multiple accounts connected to various entities and the schedule of the accounts held by the respondents was exhibited. No material was furnished to support the suggestion made by the intelligence. The Chief Justice felt that the Court was unable to determine on its own whether the conclusion was cogent. He made specific mention to the affidavit of Mr. Wit, where, like in his affidavit filed before me, greater detail about the source of funds was set out. In the affidavit sworn by the Applicant on 20 May 2015 he sets out details about the Account and the source of funds in it, and exhibits a copy of the

Account statement and a record of portfolio transactions. He said that the Account is funded by payments made by Legacy Global Markets S.A ("Legacy") and that that none of those funds are proceeds of crime or tainted by the proceeds of any crime. As in the Belize proceedings, he contends that his evidence has not been effectively answered or rebutted by the Crown. He also highlighted that the balance of the account was US$384,659.44 and that in their affidavits it was only claimed by the Crown that funds in the sum of US$278,875.42 had been received from Legacy. He therefore submitted that the Crown had failed to disclose to the Court at the earlier hearings that there were substantial funds in the account which were unrelated to the FCU's investigation.

33. In DC Taylor's first affidavit the detail about background information, about the companies and the individual defendants, the relevant regulatory principles and definitions, the US undercover operation and the corrupt US clients were lifted straight from the US Indictment. From that background information it is contended that Legacy was an offshore broker-dealer and investment management company primarily based in Panama with an office in Belize. Also from that background information the Applicant was stated to be a Canadian citizen who was President of Legacy working at its Panama City Office. In the affidavit DC Taylor stated that an investigation into money-laundering had been commenced in the Cayman Islands and that there was reasonable cause to believe that the Applicant and other named offenders had benefited from their criminal conduct.

He said that the application was made ex parte because there was a real risk that they would attempt to dissipate, transfer or hide the relevant property. He went on to say that his knowledge of the facts in the affidavit was derived from his investigation of the matter and from information and documents obtained. He mentioned that the defendants had been indicted with conspiracy to commit securities fraud, conspiracy to defraud the United States and money-laundering conspiracy. Importantly, at paragraph 5 of the affidavit he said that it was the attached US Indictment which formed the basis of this investigation.

34. Under the heading 'Cayman Islands Investigation' at paragraph 12 in his affidavit, DC Taylor noted that it had been identified that the Defendants had transferred and deposited within the Cayman Islands substantial assets, which are believed to be the proceeds from the criminality. He noted that the investigation had identified that funds were being held by Pinnacle Financial Group (Cayman) Ltd ("Pinnacle"). At no place in the affidavit does he associate or link the Applicant with Pinnacle. DC Taylor also noted that the funds were being held by Titan International Securities INC and Unicorn International Securities LLC ("Titan and Unicorn"). He stated that his investigations had discovered that Titan, Unicorn and Legacy hold accounts at the Caledonian Group Services Ltd and accounts are currently held in the names of Titan and Legacy with the current balance of US$240,095.95. He concluded that there were "*reasonable grounds to believe that the defendants who have control of these companies had used them as*

*a device and facade to receive and conceal the proceeds of crime."* He stated that *"their association, behaviour and admissions have identified that the companies are being used as a vehicle to launder the proceeds of crime."*

35. In relation to the risk of dissipation of the assets DC Taylor highlights that the offences are serious offences, that the Defendants could face a substantial term of imprisonment and substantial confiscation order if convicted and therefore they may attempt to dissipate assets. He highlighted that a number of the Defendants were still at large and would have the ability to dissipate the assets if they wished. He also added that the Defendants held substantial funds in the accounts already identified within the jurisdiction and that the funds were readily accessible to the individuals if they wished to transfer them immediately. He did not give any reliable evidence of attempts made by the Defendants to dissipate the assets.

36. In his affidavit sworn on 7 January 2015, DC Buckley stated that the general background to the investigation and basis for the order was as outlined in paragraph 6 to 15 of Mr. Taylor's affidavit (paragraphs 6 to paragraph 12 being of the repetition of the content of the US Indictment). Under the heading Cayman Islands investigation DC Buckley noted that the Applicant held funds in the Account and that it had been used to receive funds from Legacy totalling US$278,875.42. As already highlighted herein, he wrongly contended that the Applicant had attempted to liquidate those assets and transfer them to Panama

City, thereby giving an improper impression about the risk of dissipation to the Court. Without giving any specifics, he mentioned that further material was still being recovered which required analysis and that it should identify the flow of funds into the jurisdiction believed to be the proceeds of crime from the criminal conduct mentioned in DC Taylor's first affidavit. A 90 day extension was sought to allow sufficient time to continue the investigation and secure the assets whilst enquiries were being conducted. He also submitted that that timeframe would allow a full investigation of all other accounts held by the Defendants in any further accounts to be identified. DC Buckley's unsworn affidavit contained in the bundle, which appears to be dated 10 April 2015, did not contain any helpful additional evidence or materials.

37. In his affidavit sworn on 28 April 2015, DC Taylor refers back to and repeats a great deal of the content found in the earlier affidavits. There is some additional information provided in relation to Pinnacle. Between paragraphs 35 and 39 some information is provided about Legacy and the Applicant, but it does not provide any particularly incisive insight. The affidavit sworn by DC Taylor on 26 May 2015 also refers to and repeats a great deal of the content in the earlier affidavits. In that affidavit DC Taylor does mention that additional information has been obtained from RBC, namely about three transfer of funds into the account, one on 9 May 2009 for US$172,393.50, one on 13 July 2011 $17,353.56 and one on 14 March 2011 for US$89,143.36

38. Although the Belize judgment is no way binding upon me, it is helpful when considering the evidential value of the Crown's affidavits which the Crown concedes primarily rely upon and regurgitate the content of the US Indictment. The reasoning in the judgment is helpful, despite the fact that we do not have any Rules or statutory provisions setting out the detail required to be in an affidavit. As I stated above, the requirements set out in the English Rules and the provisions in Belize, simply reflect the type of detail that one would expect to see in an affidavit filed by the Crown when seeking to ground an arguable case based on the statutory preconditions.


39. Benjamin C.J. found that the regurgitation of the details in the US Indictment without any supporting material fell "woefully" short of the requirements. He stated at paragraph 58 of the ruling that "*no documentation was exhibited to enlighten the court as to the scheme referred to. Indeed, some of the allegations against the respondent appeared to mirror allegations of fact made in the US District Court indictment, which carried little weight in this application save for information purposes*".

40. Benjamin C.J. found that the paucity of independent detail meant that the transactions outlined in the affidavits are equivocal where proof of the risk of dissipation of the funds is concerned. He found that the Belize FIU concluded on "*shaky premises*" that the respondents had benefited directly or indirectly in the

form of the proceeds residing in the accounts. Benjamin J. found that there was no material to support the suggestion that the respondents were directly or indirectly associated with multiple accounts connected to various entities. He went on to say that being associated one with the other does not mean that criminality can be inferred.

41. Although a number of affidavits have been filed by the Crown in the proceedings before me, they primarily rely upon the content of the indictment. I find myself in a situation similar to that of Benjamin C.J. It is important to note that this was conceded by Crown Counsel during the hearing. As already noted by me in the hearing, DC Taylor's first affidavit is mostly taken up with the regurgitation of the content of the US Indictment. I am willing to accept that this may have been appropriate at the very early stage of the investigation at the time of the initial application, because the content of the US Indictment, whatever its evidential value might now be, would have understandably caused the Crown to decide to commence a criminal investigation and to consider at the same time whether to apply to the Court to restrain relevant assets. However, as the months have passed, the Crown should not have expected to continue to primarily rely upon the content of the US Indictment for renewals of the restraint order.

42. As highlighted above, each affidavit refers back to the content of the US Indictment and simply adds minimal detail with no supporting material about the

ongoing investigation. The affidavits should have contained more detail of the findings of the investigation supported with material to provide this Court with cogent evidence to enable it to perform its own review as to whether there is a reasonable cause. There is no cogent evidence before the Court in support of the statements in the affidavits that there are reasonable grounds to believe that the Applicant's "*association, behaviour and admissions*" which "*identify the companies as being used as a vehicle to launder the proceeds of crime*" or that the Applicant has benefited from criminal conduct. The disclosed material and evidence presented to the Court arising out of the six month investigation adds little to the content of the US Indictment. I find myself in a similar position to the one Benjamin J found himself in, namely that the Court is unable to determine on its own whether the conclusion of the Crown is cogent. An affidavit could have been obtained from the investigators in the United States outlining the factual information and sufficient material to show that there was an arguable case for the necessary precondition being met. Even if such an affidavit could not be obtained, a member of the FCU could have given evidence of discussions he had with the investigators in the United States and exhibited any relevant material. There is provision at sections 49 and 50 of the Law as to the admission of hearsay evidence in restraint proceedings. At no time during the hearing, or it appears since the initial application, has the Court received any submissions from the Crown in relation to hearsay evidence and how the Court should approach such evidence.

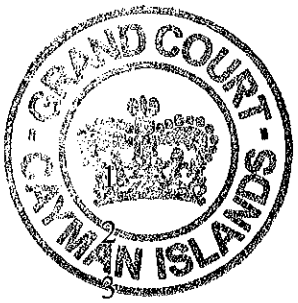
43. Before I move away from this area I wish to address the issue of delay, which over-links the issue about evidence. I do so because the greater the period of time since the making of the initial restraint order, the greater would be the expectation of the Court that there should be more evidence forthcoming independent of repeating the content of the US Indictment.

44. Section 46 (4) of the Law provides:

> "*Where the condition in section 44 which was satisfied was that an investigation was started or an application was to be made, the court shall discharge the order if within a reasonable time proceedings for the offence are not started or the application is not made, as the case may be.*"

45. A restraint order is a draconian order as it seriously interferes with the Applicant's rights to deal with his property. The purpose of Section 44(4) is to ensure that the investigating officers pursue any investigation diligently.

46. The suspicion is what leads to a restraint order in the first place, but it should not be a ground for extending it beyond a period that may be viewed as reasonable without charges being laid. In ***Ghani v Jones*** [1969] 3 All ER 1700 where Lord Denning said at 1705g in a case where passports and letters had been taken and held by the police for a month before action during a murder investigation and where that was held to be long enough that:




*"The police must not keep the article, nor prevent the removal, for any longer than is reasonably necessary to complete their investigations or preserve it for evidence,"*

47. The Authors of the of Proceeds of Crime - Law and Practice of Restraint, Confiscation, Condemnation and Forfeiture (Trevor Millington and Mark Williams) 2nd Edition rightly warn that: *"The prosecuting authority conducting the investigation cannot rest on its laurels once a restraint order is made and must conduct the investigation expeditiously."* The authors highlight that determining what is a reasonable time is an issue of fact having regard to the circumstances of each case.

48. The fact that the investigation is dealing with a serious allegation is not a reason for extending the time that may be reasonable for instituting criminal proceedings. If the investigation being conducted relates to a complex scheme with a vast quantity of documentation to examine and with overseas enquiries to be made, it is reasonable for an investigation to take much longer to complete than a more straightforward investigation into an offence where all the evidence can be found in this jurisdiction. Therefore, I accept that the nature and complexity of a particular case dictates the type of investigation that is required, the extent of detailed information that must be obtained, how and where that information can be obtained and inevitably the time it will reasonably take to carry out the investigatory process.

49. As time passes after the making of the initial restraint order, the Crown should ensure that it updates the Court about the progress of the investigation recognising that the Court should be monitoring whether it is appropriate for the restraint order to remain in force. The Crown should provide the Court with a valid reason as to why the investigation has not led to any charges being brought to date and sufficient information to assist the Court to determine whether the investigation is being conducted or progressed in a diligent fashion.

50. If there was affidavit evidence supported by material along the lines of the content of the US Indictment with additional evidence about what an investigation in the Cayman Islands was uncovering, this investigation may potentially be characterised as a complex one, with an overseas element and with a great deal of documentation to be analysed. In the first affidavit of DC Taylor he requested a 90 day initial order to allow further time to investigate and analyse all financial material obtained to date. He highlighted that the financial material recovered to date was substantial and required full analysis and that 90 days would allow sufficient time to further investigate the matter and secure the assets while the enquiries were conducted. He also stated that it would allow time to fully investigate all the other accounts held by the Defendants as well as any further accounts as yet not identified. DC Buckley in his affidavit sworn on 7 January 2015 also sought a further 90 day extension for precisely the same reasons given by DC Taylor. In DC Buckley's unsworn affidavit, which is dated 10 April 2015,

he sought a further extension for 14 days, again repeating the previously stated reasons. DC Taylor in his affidavit sworn on 28 April 2015 sought an extension for one month for the same reasons. DC Taylor in his affidavit dated 26 May 2015 now seeks a further three month extension, again for the same previously stated reasons. Although each time indicating that the extension should give sufficient time to complete the tasks set out under the heading further order of this Court in each of the affidavits, it appears that extensions are continually sought for the same general reasons.

51. There is not an open ended time frame for the bringing of any criminal charges. Section 46(4) is intended as a protection to any individual whose rights are being affected by the draconian restraint order, by making it mandatory for a Court to discharge the order once the Court finds that a reasonable period of time for the bringing of criminal proceedings has elapsed. I am conscious of this and also of the fact that once that reasonable period of time has passed and if as a consequence the restraint order is lifted, nothing prevents the Crown from continuing their investigation. The primary purpose of restraint orders is not to assist the investigation but to preserve assets.

52. Despite this, this may have been one of those cases where a further reasonable period of time may have been afforded to the Crown, but the Crown would then have to give good reason for any further later renewal and not rely upon repeated

general reasons for extensions repeated in the affidavits. However, as I mentioned before, due to the passage of time since the initial order I would have expected with all of the extensions that have been given for the Crown to now be in a position to give substantial evidence in support of their application and not rely, as they concede that they do, on the content of the US Indictment.

53. I have to make a decision on the evidence in the affidavits before me and not speculate on what evidence could be placed before me when considering the application to extend the restraint order made by the Crown and the application to vary it made by the Applicant. Having considered the submissions very carefully, the evidence and material currently before the Court, which is conceded to be primarily the content of the US Indictment, over six months after the first restraint order was granted, is not sufficient to satisfy me that a good arguable case has been established by the Crown that there is reasonable cause to believe that the defendant has benefited from criminal conduct.

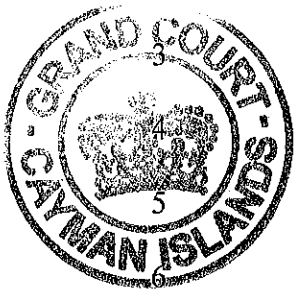
54. Having reached that conclusion, I do not feel it necessary to analyse in detail the submissions made by the Applicant on the issue of material non-disclosure. However, I make some general comments which may assist if future restraint order applications come before me. The Crown is required to give full and frank disclosure of all material facts. This includes disclosing any weaknesses in its case of which it is aware and any information that might be favourable to a

defendant. It is right that a serious failure by the Crown to comply with this duty may result in the order being discharged. That said the public interest in restraint and confiscation of the proceeds of crime mean that the Court should be careful before discharging a restraint order just because there has been a failure to give full and frank disclosure. [5]It is properly conceded by Crown Counsel that a copy of the Belize judgment should have been made available to her by the FCU and she in turn should have made that available to the judge at any of the renewal applications. Although some of the facts and the statutory requirements relied upon in the Belize judgement can be distinguished, the approach taken by Benjamin C.J. and the arguments and possible defences raised therein due to over reliance by the prosecutor in Belize on the US Indictment contained in that judgement should have been something that the Judge was able to at least be in a position to have considered before deciding whether to renew the restraint order. In future, it would be good practice that if a hearing takes place in the absence of a defendant, the Crown should ensure that a full note of it is taken and served on the defendant together with the order and supporting evidence.[6] The helpful guidance given by Smellie C.J. in Mareva proceedings in ***Ministry of National Defence, Republic of China v Wang and others*** (G276/13, unreported, 13 June 2014) should be followed when a restraint order is made in that hearing.



[5] See Lloyd L.J. Jennings v CPS [2005] 4 All ER 391.
[6] Interoute Telecommunications (UK) Ltd v Fashion Gossip Ltd (1999) TLR 762, Director of the (Admin) Assets Recovery Agency v Singh [2004] EWHC 2335.

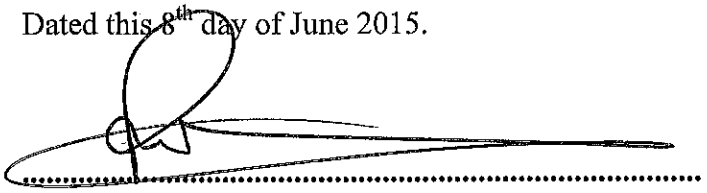
55. The restraining order has been extended on an unopposed basis until 4:00 p.m. on Monday, 8 June 2015. To their credit the parties agreed to the extension because I had to leave the jurisdiction on the morning after the hearing and they recognise that I would need some time to complete the judgment upon my return to the jurisdiction. Accordingly, I vary the restraining order by removing reference to Brian De Wit in paragraph 1 and discharging paragraph 1.1 viii.




56. Although this hearing was listed to determine the application by the Applicant to discharge the relevant part of the restraint order, the Crown asked the Court to extend the soon to expire restraint order for a further three months. I received only very limited submissions in relation to the renewal of the restraint order as it relates to the other Defendants. I did not receive submissions from the Crown about what orders should be made in relation to the balance of the restraint order if I acceded to limited variation/discharge application made by the Applicant. The other Defendants have not attended the hearing and have not applied for a discharge/variation. As a result of my observations in this judgment I have concerns, on the evidence currently before me, about extending the restraint order as it relates to the other Defendants for three months. I recognise that discharge applications are not frequently successfully made as a prosecutor on notice may remedy the defect by the time the hearing comes on. With this in mind, in the absence of any application by any of the other parties to discharge or vary, the

parts of the order which have not been varied or discharged will at this time only be extended until 4:00 p.m. on 6 July 2015.

Dated this 8th day of June 2015.



**The Honourable Mr. Justice Richard Williams**
**JUDGE OF THE GRAND COURT**