

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 HOLDEN AT GEORGE TOWN

Cause No: 0173/2011

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5 BETWEEN:

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CATHARINE MARGARET GILLIES-
SMITH

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PLAINTIFF/APPLICANT

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11 AND:

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GEORGE BRUCE SMITH

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DEFENDANT

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17 Appearances:

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Ms. Rachael Reynolds and Mr. William
Jones of Ogier on behalf of the Plaintiff

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20 Before:

The Hon. Mr. Justice Charles Quin

21 Heard:

10th May 2011

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JUDGMENT

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1. The Plaintiff makes an application for *ex parte* relief to freeze assets, in the Cayman Islands, in the Defendant's own name or whether solely or jointly owned, up to the value of CAD\$3.5 million, and seeks a prohibition to include property, a house, purchased in the name of the Defendant in the Cayman Islands, Savannah, Block 27C Parcel 555, at Leeward Drive, Grand Cayman ("*the Cayman Property*") and monies in accounts with Cayman National Bank in his name.
2. In support of her application the Plaintiff has filed an affidavit of William Jones dated the 10th May 2011 which itself exhibits the affidavit of the Plaintiff sworn on



1 the 5th May 2011 before the Superior Court of Justice – Family – in Ontario with
2 Court File Number 11-7632 (“the Ontario Court”).

3 *History of the Ontario Proceedings*

4 3. The Plaintiff and the Defendant began living together in 2002 and they were
5 married on the 24th September 2005.

6 4. On or around November 2008 the Defendant won the Super 7 Lottery with his
7 mother for CAD\$15million. They divided the funds between them leaving the
8 Defendant with CAD\$7.5million.

9 5. Prior to the lottery win the Plaintiff and her husband worked together in the
10 Defendant’s father’s construction company. The Defendant did the carpentry and
11 the Plaintiff did the finishing and painting. After winning the lottery they both
12 stopped working at the company.

13 6. The Plaintiff avers that after winning the lottery the Defendant purchased three
14 properties and a large quantity of diamonds for re-sale. The Plaintiff further avers
15 that approximately one year ago the Defendant visited the Cayman Islands and
16 purchased a property and opened at least two bank accounts.

17 7. After winning the lottery the Defendant and the Plaintiff purchased a home at 253
18 Lakeshore Road North, in Meaford Ontario, Canada, (“*the matrimonial home*”) in
19 joint names. This home is valued at approximately CAD\$630,000.00

20 8. The Plaintiff’s affidavit in the Canadian proceedings sets out all the other assets that
21 the husband has acquired.

1 9. The Plaintiff avers that, about one year ago, the Defendant asked her to sign papers
2 to place a CAD\$500,000.00 mortgage on the matrimonial home. She protested that
3 they did not need the extra cash flow and he insisted that it was better to “*have the*
4 *money working for us, rather than to leave it in the house.*” Accordingly, the
5 Plaintiff agreed to place a mortgage on the house, because she thought that the
6 money was for their mutual benefit.

7 10. The Plaintiff avers that, about a year ago, the Defendant travelled to the Cayman
8 Islands. She has exhibited correspondence which demonstrates that the Defendant
9 was setting up a new Cayman Islands company for the purpose of entering the
10 business of wholesale trade in precious stones.

11 11. The Plaintiff avers that on or around January 2011 she and her husband visited the
12 Cayman Islands to look for real estate and the Defendant purchased the Cayman
13 Property. The Plaintiff further avers that the Defendant paid cash for this property
14 and put the Cayman property in his name alone.

15 12. In addition, the Plaintiff avers that the Defendant opened two bank accounts with
16 Cayman National Bank and provided documentary support for her evidence.

17 13. The Plaintiff’s evidence is that on Friday the 29th April 2011 the Defendant told the
18 Plaintiff that he wanted a divorce and left for the Cayman Islands on the 1st May
19 2011. Although he said he would be returning on the 7th May 2011, he has not
20 called nor has he contacted the Plaintiff since the 1st May 2011.

1 14. The Plaintiff avers that the Defendant has moved assets out of Canada and into
2 Cayman whilst at the same time leaving her with the joint liability of the mortgage
3 on the matrimonial home.

4 15. On the 6th May 2011 the Honourable Mr. Justice R. M. Thompson (“Justice
5 Thompson”) granted the Plaintiff an Order freezing the assets of the Defendant. The
6 order of Justice Thompson restrains the Defendant from selling, removing,
7 dissipating, alienating, transferring, assigning or dealing with assets, wherever
8 situate, set out in Schedule A, which include two bank accounts in the Cayman
9 Islands and the Cayman Property.

10 16. The Plaintiff has produced a letter dated the 9th May 2011 from her Canadian
11 attorneys, Rogerson Law Corporation, and contends that under the Ontario Family
12 Law Act assets acquired during the marital relationship are considered matrimonial
13 property.

14 17. The Plaintiff’s Canadian attorneys are seeking an “equalization” of the “net family
15 property (NFP)” and have contended that the Ontario Court is likely to order
16 capitalized spousal support of 50:50, or possibly 60:40, in the Plaintiff’s favour.

17 18. The Plaintiff’s counsel contends, from instructions, and from what is set out in the
18 letter from Rogerson Law Corporation, dated the 9th May 2011, that the Defendant
19 has deliberately avoided service of Canadian process.

20 19. The Plaintiff has undertaken to issue and serve a Writ of Summons against the
21 Defendant for an injunction prohibiting the Defendant from dealing with the
22 property in the Cayman Islands and funds in the bank accounts until the final

1 determination of proceedings between the Plaintiff and the Defendant before the
2 Ontario Court.

3 *The Law*

4 20. Similar facts and circumstances to this case are found in the case of *Bass v. Bass*
5 [2001] CILR 317 when Sanderson J. held that the Plaintiff was not entitled to a
6 *Mareva* injunction merely to assist her in proceedings in Texas, since the Grand
7 Court had no power to grant such an injunction in the absence of a cause of action.
8 However the headnote adds in the first holding on page 317:

9 *“...if that power did exist, it was to be exercised only where the foreign court*
10 *could not grant an injunction in respect of assets here and they would remain*
11 *susceptible to dissipation.”*

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13 21. In this case Justice Thompson’s Order in the Ontario Court purports to apply to
14 “any assets of the Defendant wherever situate” and includes the Cayman property
15 and funds in the Cayman bank accounts in Schedule A attached to Justice
16 Thompson’s Order.

17 22. Ms. Reynolds, counsel for the Plaintiff, relies upon the recent decision of
18 Henderson J. in the case of *Deloitte and Touche v. Felderhof* Cause Number 845
19 1997, dated the 10th February 2010, where Henderson J. states that the decision of
20 Sanderson J. can no longer be regarded as good law.

21 23. Ms. Reynolds draws the Court’s attention to paragraph 21 of Henderson J’s
22 decision in *Deloitte and Touche v. Felderhof* where he states:

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“The Trustee says that its intention has always been to convert the Cayman action into one which is ancillary to and in aid of the actions in Canada. It says that the Mareva Injunction here is needed to render more efficacious the Canadian proceedings and any judgments he may obtain in Canada.”

24. Henderson J. referred to the House of Lords case of *Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd.* [1993] A.C. 334 case and added, also in paragraph 21:

“It has been clear that the Grand Court has jurisdiction to issue Mareva Injunctions in aid of foreign proceedings even though the parties have no intent to litigate the substance of their dispute in this jurisdiction.”

25. Ms. Reynolds draws the Court’s attention to Henderson J.’s dicta at paragraph 32 where he states:

“The first question must be whether the asserted cause of action is justiciable in this Court at all. The parties agree that is. The second question is whether the issuance of an injunction in this jurisdiction is likely to be of real assistance because there are assets here which may become available to satisfy a foreign judgment....Next I must consider whether there is a risk of dissipation if the injunction is not granted Moreover the balance of convenience is clearly tilted toward the side of the trustee.”

26. It would appear from a review of the authorities that the birth of the increasing trend to grant freestanding *Mareva* injunctions absent a substantive cause of action is found in the dissenting Judgment of Lord Nicholls in *Mercedes Benz v. Leiduck* [1996] 1A.C. 284. This was an appeal from the Supreme Court of Hong Kong appellate jurisdiction to the Privy Council. At paragraph B on page 305 Lord Nicholls states:

1 “...his assets are in Hong Kong, so the Monaco court cannot reach him; he is
2 in Monaco, so the Hong Kong court cannot reach him. That cannot be right.
3 This is not acceptable today. A person operating internationally cannot so
4 easily defeat the judicial process. There is not a black hole into which a
5 defendant can escape out of sight and become unreachable.”

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7 27. In the case before me counsel for the Plaintiff has stated that her client is in a
8 similar position to the Plaintiff in the *Mercedes Benz* case. It would appear that she
9 is entitled to a significant award under the Ontario Family Law Act. Her husband
10 has assets in Cayman and there is no claim against him in the Cayman Islands other
11 than the claim for *Mareva* relief in support of the Ontario proceedings. Counsel
12 submits that like *Mercedes Benz* the Defendant is able to move his assets
13 internationally. He has accounts in more than one jurisdiction and it cannot be right
14 that he cannot be touched and wholly avoid the jurisdiction of the Ontario Court
15 Order. In summary, the Plaintiff contends that there will be an injustice if this Court
16 refuses to grant what has been referred to as a “status quo” injunction.

17 28. I now turn to paragraph E on page 308 of the *Mercedes Benz* case where Lord
18 Nicholls states:

19 “The court habitually grants injunctions in respect of certain types of conduct.
20 But that does not mean that the situations in which injunctions may be granted
21 are now set in stone for all time. The grant of *Mareva* injunctions itself gives
22 the lie to this. As circumstances in the world change, so must the situations in
23 which the courts may properly exercise their jurisdiction to grant injunctions.
24 The exercise of the jurisdiction must be principled, but the criterion is injustice.
25 Injustice is to be viewed and decided in the light of today’s conditions and
26 standards, not those of yesteryear.”

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28 29. Lord Nicholls directly addresses the question of what is a “cause of action” at page
29 310 paragraph G where he states:

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“They (practicing lawyers) do not always appreciate that the range of causes of action already extends very widely, into areas where identification of the underlying “right” may be elusive.”

Lord Nicholls goes on to explain:

*“For instance, a writ may properly be issued containing nothing materially more than a claim for an injunction to restrain a Defendant from continuing proceedings abroad on the ground that this would be unconscionable:- See **British Airways Board v. Laker Airways Ltd.** [1985] A.C. 58. In such a case, the underlying right, if sought to be identified, can only be defined along the lines that a party has a right not to be sued abroad when that would be unconscionable. This formulization exemplifies the circular nature of the discussion.”*

Lord Nicholls adds at paragraph H:

*“Second, originating process is not always concerned with the determination of an underlying dispute between the parties. For instance, a Plaintiff may bring an action for discovery against a person, in respect of whom he has otherwise no cause of action, in aid of other proceedings not yet commenced. (See **Norwich Pharmacal Co. v. Customs and Excise Commissioners** [1974] A.C. 133). In such a case the only relief sought is of an interim character in the sense that it is in aid of other proceedings.”*

30. Lord Nicholls addresses the point that an interlocutory injunction is not normally regarded as a cause of action at paragraph B on page 311 where he states:

“A right to obtain an interlocutory injunction in aid of the substantive relief sought in an action is not normally regarded as a cause of action. This is because ordinarily proceedings bring a substantive dispute before the court. Attention is therefore focused on the cause of action involved in the substantive dispute the court has been asked to resolve. The claim to interim protective relief is ancillary to the underlying cause of action, and in that respect it has no independent existence of its own.”

1 31. Lord Nicholls continues at paragraph C:

2 “That is the normal position. But where the substantive dispute is being tried by
3 a foreign court, the matter stands differently. It is difficult to see any reason in
4 principle why, in this type of case, where the defendant is within the territorial
5 jurisdiction of the court, the court should decline to give such interim relief as
6 might have been given had the court been determining the substantive dispute.
7 It would be odd if the court should adopt the attitude of drawing back and
8 declining to give any relief, whatever the circumstances, unless the court were
9 seized of the whole dispute. That would be a pointlessly negative attitude,
10 lacking a sensible basis. That is not the law. On the contrary, the Channel
11 Tunnel decision [1993] A.C. 334 has shown the way ahead. As appears from
12 the observations in that decision referred to above, a writ may be issued
13 claiming only interim relief ancillary to a final order being sought from some
14 other court or arbitral body. So be it. If the consequence is that in such a case,
15 where the court is seized only of a claim for interim relief, that claim must bear
16 the burden of being labeled a cause of action if intervention by the court is to
17 be justified, let that be so. The law continues to adapt and develop.”

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19 32. In *Deloitte and Touche v. Felderhof* Henderson J. has demonstrated that this Court
20 is prepared to allow the law in the Cayman Islands to continue to adapt and develop
21 in relation to *Mareva* injunctions in aid of foreign proceedings. Henderson J. stated
22 at paragraph 21 of his Judgment when referring to the *Channel Tunnel* case, that:

23 “It has been clear that the Grand Court has jurisdiction to issue *Mareva*
24 injunctions in aid of foreign proceedings, even though the parties have no
25 intent to litigate the substance of their dispute in this jurisdiction.”

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27 33. Henderson J. cited the Cayman Court of Appeal decision in *Telesystem*
28 *International* 2002 CILR (Note 22) when the Court stated (and I quote from
29 paragraph 21 of Henderson J.’s Judgment in *Deloitte and Touche v. Felderhof*):

30 “There was no dispute that in principle the Court has jurisdiction to grant a
31 *Mareva* injunction in aid of foreign proceedings notwithstanding that
32 proceedings for substantive relief in the Cayman Courts have been stayed in
33 favour of proceedings in Brazil. In *Channel Tunnel* Lord Mustill laid down
34 three conditions on which such relief may be granted: (a) the interim relief

1 *must be needed to render more efficacious the procedures and any decision*
2 *favourable to the Appellants that emerge therefrom; (b) the Court should*
3 *approach such an Order with utmost caution; and (c) the Court should be*
4 *prepared to act only when the balance of convenience plainly favours the grant*
5 *of relief”.*

6 The Cayman Court of Appeal referred to the Privy Council decision in *Walsh*
7 *and Ors v. Deloitte & Touche Inc.* and the Privy Council’s application of the
8 *Channel Tunnel* decision to Mareva injunction situations and Henderson J.
9 quoting from *Telesystem International* continued:

10 *“The Privy Council expressly applied the Channel Tunnel decision to the*
11 *Mareva injunction situation where it is intended that such an injunction should*
12 *be issued in aid of a foreign jurisdiction after the stay of proceedings in the*
13 *domestic Court. The Privy Council held that as the proceedings for a Mareva*
14 *injunction of a foreign Court are interlocutory, it is not necessary for the*
15 *applicant to show that he is likely to succeed in establishing such a cause of*
16 *action. For the purposes of the threshold requirement it is sufficient, if upon the*
17 *material before the Court, the appellant appears to have a good arguable*
18 *case.”*

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20 34. Ms. Reynolds, on behalf of the Plaintiff, has submitted she passes this test and has
21 demonstrated a good arguable case before the Ontario Superior Court. Ms.
22 Reynolds also argues that the interim relief is needed to render more efficacious the
23 Canadian procedures and that the balance of convenience plainly favours the
24 granting of relief of the Plaintiff’s *ex parte* application.

25 35. The Court of Appeal in Jersey in *Solvalub Limited v. Match Investments Limited*
26 [1996] JLR 361 adopted the conclusion and reasoning of Lord Nicholls in
27 *Mercedes Benz v. Leiduck* where the President of the Court, Le Quesne J.A., stated
28 at paragraph 25 on page 370:

1 *“In my judgment it is within the power of the Royal Court to grant a Mareva*
2 *injunction in aid of proceedings in a foreign court and to do that in proceedings*
3 *here in which no relief other than the grant of the Mareva injunction is sought.”*

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5 36. Indeed I note that the Jersey Court of Appeal was quick to acknowledge its
6 obligation under the principles of judicial and international comity when Le Quesne
7 J.A. stated at line 38 on page 369:

8 *“If the Royal Court were to adopt the position that it was not willing to lend its*
9 *aid to courts of other countries by temporarily freezing the assets of defendants*
10 *sued in those other countries, that in my judgment would amount to a serious*
11 *breach of the duty of comity which courts in different jurisdictions owe to each*
12 *other. Not only so, but the consequence of such an attitude would be that Jersey*
13 *would quickly become known as a safe haven for persons wishing to evade*
14 *liabilities imposed on them by the courts to which they are subject.”*

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16 37. One is reminded of the famous dicta of Lord Denning M.R., albeit in a letters
17 rogatory case, where he pronounced in *Rio Tinto Zinc Corporation v.*
18 *Westinghouse Electric Corporation* [1978] A.C. 547 at page 560:

19 *“It is the duty and the pleasure of the English Court to do all it can to assist the*
20 *foreign Court, just as the English Court would expect the foreign Court to help*
21 *it in like circumstances.”*

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23 38. The Plaintiff’s counsel has assisted the Court with a reference to an article entitled
24 *“Free-standing freezing orders: the Cayman view”* by Rupert Coe of Appleby
25 dated the 3rd March 2011 where he states that the Isle of Man took a similar
26 approach to the Court of Appeal of Jersey. Mr. Coe reports that the Manx
27 legislature enacted a statutory provision to supplement the Manx common law
28 which had already held that free-standing *Mareva* injunctions could be ordered by
29 enacting section 56B(1) of the High Court Act 1991 which reads:

1 determination of proceedings in Ontario between the Plaintiff and the Defendant
2 before the Superior Court of Justice in Ontario.

3 42. The Plaintiff has demonstrated that she has a significant claim for her entitlement to
4 a portion of the matrimonial assets which, based on the material before me, include
5 the Cayman Property and funds lodged by the Defendant in the Cayman bank. In
6 my view the Plaintiff has put forward a good arguable case and this Court should
7 assist the Ontario Court.

8 43. On the evidence before me there is a real risk of dissipation of the matrimonial
9 assets. Accordingly I find that if I do not grant the injunction sought it would cause
10 significant prejudice to the Plaintiff and thereby injustice.

11 44. On the other hand, on the evidence before me, the Defendant has other assets and
12 will therefore not be seriously prejudiced by this injunction. I hold on the evidence
13 before me that the balance of convenience is with the Plaintiff.

14 *Leave to Serve Out*

15 45. Ms. Reynolds has applied to this Court for leave to serve the Defendant out of the
16 jurisdiction under GCR O.11 r.1(1)(b). The Plaintiff submits that the *Mareva* being
17 sought on behalf of the Plaintiff is not interlocutory. The Plaintiff is seeking a final
18 injunction pending the determination of the Canadian proceedings. Again, counsel
19 for the Plaintiff prays in aid the *Mercedes Benz v. Leiduck* case where the Hong
20 Kong Court Rules were the same as the Grand Court Rules at the time of that
21 decision, and Lord Nicholls' dicta at page 312 where he states:


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“All that is required is that in the action an injunction is sought concerning acts or omissions of the Defendant within the territorial jurisdiction of the Court.”

46. Having heard the submissions of the Plaintiff’s counsel and having read the evidence contained in the Plaintiff’s affidavit I find that this is an appropriate case to give the Plaintiff leave to serve the Defendant out of the jurisdiction and I so order.

47. Accordingly I am prepared to grant the injunction in the terms sought in the *ex parte* Summons and I give the Defendant leave to vary or discharge the injunction on four days’ notice and order a return date for an *inter partes* hearing in 21 days.

Dated this the 12th May 2011



Honourable Mr. Justice Charles Quin
Judge of the Grand Court

