IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE NO. G45 OF 2016

BETWEEN:

APPLEBY (CAYMAN) LIMITED

Plaintiff

AND

KAZUKO TAKADA

Defendant

Appearance:	**Mr. Jeremy Walton of Appleby for the Plaintiff**
Before:	**Hon. Justice Richard Williams**
Heard:	**15 June 2016**
Draft Judgment Circulated:	**16 June 2016**
Judgment Delivered:	**20 June 2016**

HEADNOTE

Ex parte on notice application to serve out of the jurisdiction – Ex parte on notice application for freezing order.

TRANSCRIPT OF EX TEMPORE JUDGMENT

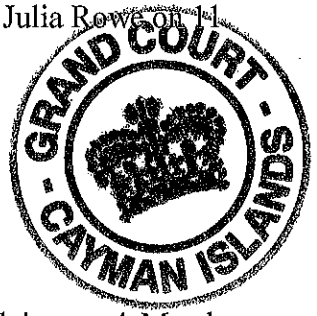
Introduction

1. Having regard to the need for there to be reasons for my decision to be given promptly, I feel it appropriate to deliver an Ex Tempore Judgment. A perfected transcript of this Judgment will be provided to the parties.

The Applications

2. The matter firstly comes before me on the Plaintiff's ex parte application for leave to serve Mrs. Kazuko Takada, the Defendant, out of the jurisdiction. The application is brought by a Summons filed on 20 May 2016 and is supported by an affidavit sworn by Kathryn Julia Rowe on 19 May 2016.

3. The matter secondly comes before me on the Plaintiff's ex parte on notice application for a freezing order. The application is brought by a Summons filed on 10 June 2016 and is supported by an affidavit sworn by Kathryn Julia Rowe on 11 June 2016.



Background

4. The Plaintiff issued its Writ of Summons and Statement of Claim on 4 March 2016.

5. The Plaintiff law firm's claim is that, by the written retainer ("the Retainer") dated 7 August 2013, it was engaged by the Defendant to provide legal advice and representation to her in relation to her divorce proceedings in Cause No. Fam 25 of 2012. The terms for payment by the Defendant to the Plaintiff for legal services rendered and disbursements were set out in the Retainer and attached Terms of Engagement. The Terms of Engagement confirm that the governing law of the engagement is the law of the Cayman Islands. I remind myself of the general guidance given by Mr. Justice Underhill at paragraph 83 in ***Manches LLP v***

Kenneth William Green (trading as Green Denman & Co.) [2008] EWHC 917 (QB) where he stated:

> *"I have considered carefully whether I ought to treat the terms of the letter as a definitive statement of the terms of the retainer in this regard. It might at first sight seem attractive to do so. The point of a retainer (or client care) letter is that both parties should have an authoritative statement of the basis on which the solicitor is acting; and once such a letter (drafted, be it noted, by the solicitor) is signed there is a lot to be said for its being conclusive unless and until replaced by an equivalently formal document. But Mr. Prestwich did not in fact put the case that high, and on reflection I think he was right not to do so. In the case of other written contracts, their terms can be varied, or a waiver or estoppel can arise, as a result of oral agreement or of conduct, and I can see no principled reason why a solicitor's retainer should be different."*

6. It is claimed that services were rendered and that no payments have been made by the Defendant in relation to 12 invoices issued between 23 April 2015 and 1 March 2016. These invoices were subject to an express term in the Retainer, namely that payment was required to be made within 14 days, with interest of 10% per annum to be applied to any outstanding balance not paid within the agreed time. The Plaintiff claims that, as of the date of the Writ, the Defendant was indebted to the Plaintiff for fees and disbursements totaling US$333,725.03. The figure of $400,000 raised in the freezing order application is reached having regard to ongoing interest and costs.

7. By letter dated 15 January 2016 the Plaintiff terminated the engagement with the Defendant. By email dated 8 March 2016 Stenning and Associates informed the Plaintiff that it had been instructed to take over the conduct of the divorce proceedings. A Notice of Change of Attorney was filed on 3 February 2016.

8. A Notice of Hearing was issued on 11 February 2016 which indicated that the final ancillary relief hearing was listed for a 7 day hearing commencing on 11 July 2016. I note that a pre-trial review hearing is still to be set. I have been informed by Listing that following observations made at a recent hearing by Mangatal J., the Learned Judge expressed concern about the viability of that hearing taking place. There is a possibility that the hearing will have to be vacated.

9. On 7 April 2016, McMillan J. made a substituted service order in favour of Stenning and Associates to serve a Summons containing its application to come off the record as Mrs. Takada's attorneys. From a review of the divorce court file, it does not appear that an order has been made granting leave for Stenning and Associates to come off the record and no intention to act in person has been filed by Mrs. Takada. Despite that, produced by the Plaintiff is an email dated 12 May 2016 from Stenning and Associates to them and to Mrs. Takada in which they state that their firm is no longer on the record for her as her attorneys.

10. Having regard to the duty to give full and frank disclosure, I have also been informed by the Plaintiff that it is aware that the Defendant may have raised certain matters at this hearing if in attendance. These include issues surrounding a Fee Agreement made by the parties in February 2014. The Plaintiff contends that the Agreement came to an end as it was repudiated by the Defendant's US attorney and that repudiation was accepted by the Plaintiff. That is arguable and an issue for determination at trial. The second matter which the Plaintiff informed the Court about was the Defendant's complaints about the invoices issued from June 2014 onwards, which she may claim should be set-off against the amounts claimed in the Writ. That again is an arguable issue for determination at trial. I have regard to both disclosed areas of dispute when considering the applications before me today.

Application - Service out of the Jurisdiction

11. Having regard to GCR O.11, r.4(1) the Plaintiff has, as required, filed an affidavit in which Ms. Rowe discloses where the Defendant can be found. The Defendant's residential address in Manhattan, New York, United States is set out at paragraph 23 of Ms. Rowe's affidavit sworn in support of the application.

12. The first question for me at this stage is whether the action is within Grand Court Rules ("GCR") O. 11, r.1(1)(d). That rule provides that service of a writ out of the jurisdiction is permissible with leave of the Court if in the action begun by the writ:

> *"The claim is brought to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or obtain other relief in respect of the breach of a contract, being (in either case) a contract which –*
>
> *(i)...*
>
> *(ii)...*
>
> *(iii) is by its terms, or by implication, governed by the law of the Islands; or*
>
> *(iv) contains a term to the effect that the Court shall have jurisdiction to hear and determine any action in respect of the contract.*

13. It is up to the Plaintiff to demonstrate that its cause of action falls within the rule, and to do that the standard which it must meet is that of a good arguable case that the matter is within the rule: ***Seaconsar Far East Bank Ltd. v Bank Markazi Jomhouri Islami Iran*** [1993] 4 All ER 456 (HL).

14. The assumption of jurisdiction over a foreign person is not something which the Court undertakes lightly. There is no presumption in favour of the applicant, and indeed the rule provides to the contrary:

> *"No such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order."* (GCR O.4, r.3)

15. This provision is in similar terms to the English RSC Ord.11, r.4(2) and it is directed:

"...not to the existence of the cause of action but to the question whether the plaintiff has sufficiently established that the case falls within one of the heads of jurisdiction specified in r.1" (***Seaconsar*** (supra) at p.462E).

16. The proper approach is set out by Lord Goff in ***Seaconsar*** (supra), at p. 467 G-H:

"....A judge faced with a question of leave to serve proceedings out of the jurisdiction under Ord. 11 will in practice have to consider both (1) whether jurisdiction has been sufficiently established, on the criterion of good arguable case laid down in Korner's case, under one of the paragraphs of r.1(1), and (2) whether there is a serious issue to be tried, so as to enable him to exercise his discretion to grant leave, before he goes on to consider the exercise of that discretion, with particular reference to the issue of forum conveniens."

17. The question whether the Plaintiff crosses the first hurdle is not, therefore, one of discretion. A discretion only arises once he has shown a good arguable case that the matter is within the rule.

18. I have carefully considered the content of the Retainer and in particular noted the paragraphs headed "*Applicable Laws*" and "*Submission to Jurisdiction*" found on page 11 of the Terms of Engagement.

19. I am satisfied that the Defendant engaged Appleby legal practice of the Cayman Islands in regard to the Grand Court divorce proceedings and that they agreed that the Cayman Islands Courts would have exclusive jurisdiction over disputes

arising out of the performance of the Engagement. Accordingly, I find that the GCR O. 11, r.1(1)(d)(iii) and (iv) gateways have been met. For completeness sake, I am also satisfied in a dispute about fees owed to a Cayman Islands law firm following an engagement agreement between parties for representation in proceedings before the Grand Court that the Cayman Islands is the convenient and appropriate forum to deal with the issues concerning the contract.

20. Having reviewed the contents of the affidavit and exhibits and having carried out the more limited exercise required at this time, I am satisfied that the facts, if proved, provide a sufficient basis for the alleged cause of action and that there is a serious issue to be tried.

21. I order that the Plaintiff has leave to serve the Writ and Statement of Claim and any further applications, pleadings or orders on the Defendant out of the jurisdiction. The service is to be served by way of personal service on the Defendant.

The Plaintiff's Submissions in relation to the Freezing Order

22. The Plaintiff, when submitting that there is a good arguable case in support of this application, relies upon the same submissions expounded in support of the service out of jurisdiction application. I do not intend to restate the submissions herein,

but have regard to them and the disclosure about the issues that may be raised by the Defendant.[1]

23. The Plaintiff contends that there is a risk of dissipation as the Defendant has resided in New York since 2012 and has expressed no interest in returning to the jurisdiction. It is submitted that the application is properly brought ex-parte on notice as the circumstances are urgent. It is submitted that the urgency arises from the Plaintiff's belief that the final ancillary relief hearing is scheduled to be heard in less than five weeks' time on 11 July 2016 and that, following the making of an order, there would be a risk that the assets would be removed from the jurisdiction. There is also concern that, due to recent significant disclosure of assets by her husband to Mrs. Takada, the parties may reach a swift agreement, the terms of which would be designed to evade payment of a significant legal fees liability. It is contended that the risk is heightened by the fact that the Defendant is aware of the Plaintiff's claim for significant unpaid fees and that she is on notice of this application for a freezing order.

24. The Plaintiff contends that there is concern as the Defendant has failed to instruct Cayman attorneys to deal with this claim and contends that the Defendant has also failed to give reasonable undertakings which would provide the appropriate protection thereby preventing the need for the making of the application before me.

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[1] See paragraph 10 above.

25. It appears that without prejudice correspondence moved between the Plaintiff and Stenning and Associates in an attempt to settle the issues which are now contained in the Writ. When no reply was received in relation to the last without prejudice correspondence of 18 March 2016, the Plaintiff became concerned when it saw that Stenning and Associates had applied to come off the record in the week of 11 April 2016. As a consequence, on the 11 May 2016, the Plaintiff wrote to the Defendant informing her that an application for leave to serve out the jurisdiction would be made unless her attorneys indicated that they would accept service on her behalf. In the same correspondence the Plaintiff stated its concerns about the dissipation of assets and sought confirmation that Stenning and Associates continued to act in the divorce proceedings. A draft undertaking designed to preserve assets was also provided to the Defendant.

26. On 18 May 2006 the Defendant's US attorney emailed the Plaintiff stating that the 11 May 2016 letter had been reviewed and the response would be forthcoming later on that day. No communication was received until 20 May 2016 indicating that the reply would be forthcoming no later than 9:00 A.M. on Monday, 23 May 2016.

27. On 23 May 2006 the US attorney sent draft mutual undertakings for agreement. The terms of this draft were different to the terms in the draft which had been prepared by the Plaintiff. The Plaintiff understandably felt that the amended undertakings did not afford proper protection as they limited the restricted assets

to two pieces of land jointly owned by the Defendant and her husband. It is submitted that the enforceability against joint owned land is problematic and that in the divorce proceedings there would be nothing to prevent the parties agreeing that the properties would be vested solely in the husband, resulting in the security disappearing. The fact that reference to all the other assets and to the proceeds from the divorce proceedings were removed from the draft amended undertaking that was suggested by the US attorney heightened concern that there would be dissipation of those assets. In the same letter the US attorney indicated that the Defendant was finalising a further offer to settle the issues and he hoped that this would be provided on the following day.

28. No offer of settlement was received on 26 May 2016, so the Plaintiff sent a further amended version of the draft mutual undertakings with an accompanying explanation. In the same correspondence the Plaintiff indicated that if no reply accepting the terms of the draft undertaking or offering a satisfactory settlement was received applications would be made as stated in the 11 May 2016 communication.

29. On 30 May 2016 the US attorney indicated to the Plaintiff that due to a public holiday in the US he had been unable to take instructions from his client to enable him to reply. The Plaintiff indicates that alarmingly no further communication has thereafter been received from the Defendant concerning acceptance of the undertaking or submitting an offer which the US attorney had said was being

finalised. The Plaintiff is understandably concerned that this is an indicator that there is a risk of dissipation of the assets.

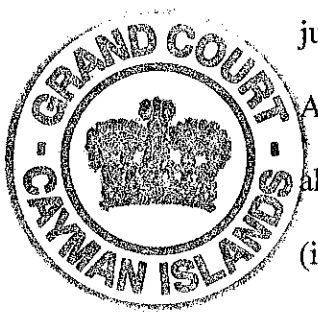
30. It is with this background that the application is made on an urgent ex-parte on notice basis. As already mentioned, the Plaintiff has indicated that advance notice of the application was given to the Defendant by providing her with a copy of the Summons, draft order, affidavit and exhibits and skeleton argument. These documents have been provided over the past few days, culminating with the skeleton argument on 13 June 2016. Neither the Court nor the Plaintiff has received any communication from the Defendant or her US attorney following the provision to her of the pleadings in relation to the two applications. This in itself is a factor to be considered when reviewing the risk of dissipation.

31. The Plaintiff contends that the Defendant may well soon receive money and property and assets in the divorce proceedings. The jointly owned assets are set out at paragraph 27 of Ms. Rowe's affidavit as well as in the draft order presented to the Court. The Plaintiff contends that those assets would either be divided pursuant to an order made by the Court following the ancillary relief hearing or be in a negotiated settlement. The Plaintiff indicates that the negotiated settlement may not be recorded in a draft consent order for the approval of the Court. However, if that is the position then the parties would not be able to apply to the Court to certify the dissolution of marriage as the Court would require there to be a submission of a consent order with the appropriate consent order information

form duly completed. However, the Plaintiff is right to highlight that the parties can make arrangements to distribute the assets out of the jurisdiction prior to any consent order being approved.

The Law

32. The jurisdiction to grant freezing order relief is derived from s.11 of the Grand Court Law (2015 Revision). Pursuant to that section the Grand Court has the same jurisdiction as exercised in the High Court in England under the Senior Courts Act 1981, which, in turn, provides at s.37 that such an order can be granted (i) in all cases in which it appears to the Court to be just and convenient to do so and (ii) on such terms and conditions as the Court thinks just.



33. Lawton L.J. gave the following helpful guidance concerning affidavit evidence required for such applications in ***Third Chandris Shipping Corporation v Unimarine S.A.*** [1979] 1 Q.B. 645 at p671G to 672D:-

> *"They (judges) should not expect to be given proof of previous defaults or specific incidents of commercial malpractice. Further they should remember that affidavits asserting belief in, or the fear of, likely default have no probative value unless the sources and grounds thereof are set out: see R.S.C., Ord. 41, r.5 (2). In my judgment an affidavit in support of a Mareva injunction should give enough particulars for the plaintiff's case to enable a court to assess its strength and should set out what inquiries have been made about the defendant's business and what information has been revealed, including that relating to its size, origins, business domicile, the location of its known assets and the circumstances in*

which the dispute has arisen. These facts should enable a commercial judge to infer whether there is likely to be any real risk of default."

The affidavit in support of the application which is before me, albeit not in a commercial case, is helpful and the content of the same addresses the required factors.

34. It is often forgotten that the general rule is that one "*cannot get an injunction to restrain a man who is alleged to be a debtor from parting with his property."*[2] The freezing injunction/order sought before me is a draconian measure; it should not be regarded as an order the making of which is the norm. The freezing order should be regarded as an exception to the above general rule, a judicial creation,[3] which must not be granted without careful consideration. As already mentioned, I have a general power to grant such an order in any situation where it is '*just and convenient*.' When exercising my discretion I remind myself that an order may impose considerable pressure upon a Defendant and must not be used simply to impose such pressure. The injunction should only be granted where the Plaintiff has a reasonably clear ('good arguable') case for an ascertainable sum and that there is a real risk that assets currently available will not be available when judgment is obtained or that enforcement will be made more difficult. It is not necessary for the Plaintiff to show that the Defendant was actually acting with the

[2] ***James L.J. in Robinson v Pickering*** (1890) 45 Ch D 660 at 661 (see also Cotton L.J. in Lister v Stubbs (1890) 45 Ch D 1).
[3] ***Mareva Compania Naviera SA v International Bulkcarriers SA*** [1975] 2 Lloyds Rep 509.

intention of depriving the Plaintiff of the fruits of any possible judgment, but only that her behaviour, unless restrained, will have that affect.

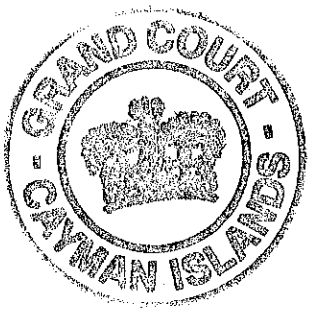
35. I have to be satisfied that the Plaintiff has 'a good arguable case.' In the matter before me, as already found when considering the application to serve out of the jurisdiction, it does appear that the Plaintiff has a good arguable case. When I reach this conclusion I have regard to the Plaintiff's disclosure of the areas of dispute that may be raised by the Defendant. I accept when I state this that the Court may only be able to make an informed determination about this at the final hearing after having heard the cross-examination of the parties and their witnesses.

36. There ordinarily has to be some evidence of the existence of assets in the jurisdiction. The existence of bank accounts and of the other assets in the matter before me is sufficient. Although detail of those assets may have come to the attention of the Plaintiff's attorney in communications with the Defendant, there is no breach of confidence or breach of privilege in an attorney reminding his client of matters communicated to him by her client in these proceedings. This guidance was given by Mr. Justice Tugendhat at paragraph 74 in ***Mary Elizabeth Hakendorf v Vivian Countess of Rosenborg*** [2004] EWHC 2821 (QB).

37. There must be some evidence to satisfy the Court that, as Kerr L.J. stated in ***Ninemia Maritime Corp v Trave Schiffarhtsgesellschaft mbH & Co*** [1984] 1

All ER 398, CA at 419h,[4] there is a "*real risk that a judgment or award in favour of the Plaintiff would remain unsatisfied.*" It is not sufficient simply to show that the debtor is a foreign resident, although of course that may be a material part of the picture. Lawton L.J. to the same effect said at p.671:

> *"The mere fact that a defendant having assets within the jurisdiction of the Commercial Court is a foreigner or a foreign corporation cannot, in my judgment, by itself justify the granting of a Mareva injunction. There must be facts from which the Commercial Court, like a prudent, sensible commercial man, can properly infer a danger of default if assets are removed from the jurisdiction. For commercial men, when assessing risks, there is no commercial equivalent of the Criminal Records Office or Ruff's Guide to the Turf..... What they have to do is find out all they can do about the party with whom they are dealing, including origins, business domicile, length of time in business, assets and the like..... In my judgment the Commercial Court should approve applications for Mareva injunctions in the same way."*



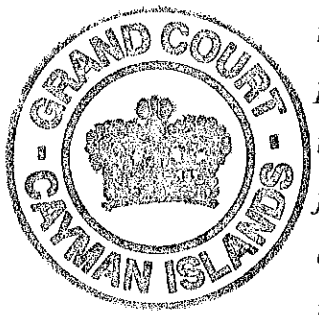
I am, of course, aware that I am not dealing with a commercial case, but the above general guidance given by Lawton L.J. is still helpful.

38. The fact that Mrs. Takada resides out of the jurisdiction, and may only visit this jurisdiction sporadically or not at all, is not, without more, evidence of an intended dissipation of assets within the jurisdiction. As Lord Kerr said in ***Ninemia*** at p.417 d-f:-

[4] Hereafter referred to as ***Ninemia***.

"Bare assertions that the defendant is likely to put any asset beyond the plaintiff's grasp and is unlikely to honour any judgment or award are clearly not enough by themselves. Sometimes more is required. Viewed from this point of view, the buyers' evidence in the present case can certainly be described as exiguous. In that respect it is very much a borderline case. However, the judge presumably took the view that in all the circumstances there was just enough to justify the limited injunction which he granted, leaving it to the sellers to apply to have it discharged, as happened, and knowing that no real harm would thereby befall them which could not be dealt with by an order as to costs. Accordingly, despite the judge's implied invitation to us to do so, we would not go so far as to say that, in the exercise of his discretion, he was wrong to make the order which he made. However, the exiguousness of the buyers; evidence on this aspect must naturally weigh strongly, as it did with the judge in this case, when the court comes or consider the whole of the evidence on the application inter partes to discharge the injunction."

39. It is clear that to justify freezing order relief, there is no requirement for the Plaintiff to show that the Defendant intends to deal with her assets with the purpose of ensuring that any judgment will not be met. The test is an objective one of assessment of the risk that a judgment may not be satisfied. The Court of Appeal in Ontario in ***Chitel v Rothbart*** (1982) 39 O.R. (2d) 513 at 532-533, Canada after referring to the judgment of Lord Denning M.R. in ***Third Chandris Shipping Corporation*** gave the following helpful guidance as to what an applicant was required to do:-



"Turning finally to item (iv) of Lord Denning's guidelines – the risk of removal of these assets before judgment – once again the material must be persuasive to the court. The applicant must persuade the court by his material that the defendant is removing if there is a real risk that he is about to remove his assets from the jurisdiction to avoid the possibility of a judgment, or that the defendant is otherwise dissipating or disposing of his assets, in a manner clearly distinct from his usual or ordinary course of business or living, so as to render the possibility of future tracing of the assets remote, if not impossible in fact or in law."

40. The Plaintiff must adduce "*solid evidence*" to support his assertion that there is a real risk that any judgement will go unsatisfied.[5] Each case depends on its own facts but there are a number of factors that may be taken into consideration.

41. In this case, there is some lack of solid evidence of an actual threat to dissipate, but the Court will look at a debtor's way of dealing, and correspondence with her which may contain relevant material. I should build up a picture of the Defendant's course of conduct and way of dealing, and the Court will exercise its discretion from the picture derived from the whole of the evidence. This is particularly so in this case when I review the evidence contained in the communications between the Plaintiff and the Defendant and her former Cayman attorneys and the US attorney.

[5] ***Ninemia*** at pages 606-607.

42. Significant assets are the contents of bank accounts and I find that these may be dissipated with ease compared to other assets.

43. It is not every risk of a judgment being unsatisfied which can justify freezing order relief. In the matter before me it is clear that the Plaintiff believed that the assets would be removed following a divorce settlement or order of the Court. It is natural that they would be concerned about whether the debt owed to them would be satisfied if that settlement took place.

Conclusion on Application for Freezing Order

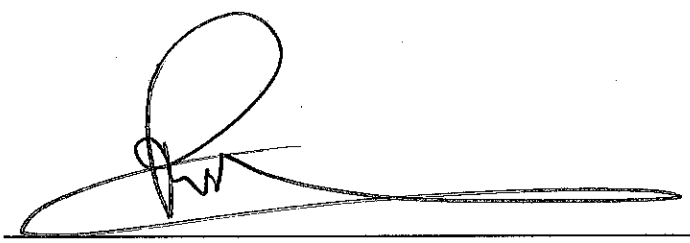
44. This is a case in which I have had to think carefully about whether or not the Plaintiff has established a real risk of dissipation. I am satisfied for the reasons outlined by the Plaintiff and analysed herein that there is. Of particular relevance, in light of the surrounding circumstances, is the failure of the Defendant to offer reasonable undertakings or to reply at all following her US attorney's indication that written comment upon the Plaintiff's last draft undertakings would be forthcoming, as would an offer to settle the claim.

45. Having reviewed the affidavit before me and the legal principles outlined above, I am satisfied it would be just and convenient to make the freezing order. After careful review of the submitted draft order I am also satisfied that the terms of the said order are appropriate. It is clear that the courts may make orders in relation to property in which a party has a joint or beneficial interest. In ***Hakendorf***, a freezing order was made on an application by a solicitor in relation to assets that

were the subject of divorce proceedings in a case involving disputed non-payment of fees. Accordingly I make that order.

46. Having regard to communications I have had with Listing concerning this matter and having regard to the fact that the Defendant resides out of the jurisdiction and that at this time she does not have a Cayman Islands attorney, I feel it would be inappropriate to set a return date that might be prejudicial to her as she may not have sufficient time to prepare for that hearing. The Defendant may apply on 7 days' notice to vary or discharge this order. If the parties agree that the order can be varied in a way that may prevent the need for a contested return date hearing then, if an appropriate consent order is placed before me, I may be in a position to consider that administratively.

47. Costs should be the normal order for these proceedings, namely costs reserved.



THE HON. MR. JUSTICE RICHARD WILLIAMS
JUDGE OF THE GRAND COURT