

BETWEEN:

EDITH M. PORTER-SHIRLEY, EXECUTRIX
OF THE ESTATE OF PEGGY LUSTIG KELLY, DECEASED

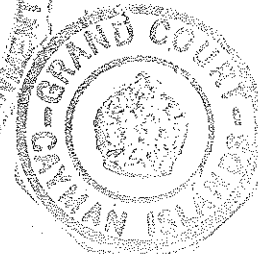
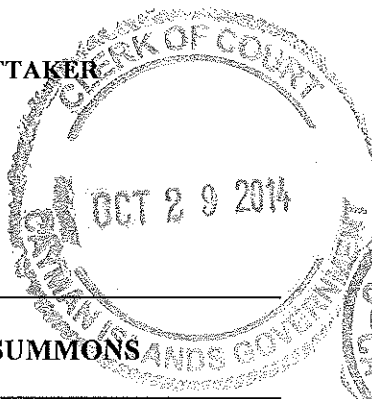
PLAINTIFF

AND

1. RAYMOND WHITTAKER

2. BRIANY LTD

DEFENDANTS



WRIT OF SUMMONS

TO: RAYMOND WHITTAKER
C/o FCM Ltd.
UNIT # 2-105, Governor's Square
West Bay Road / Lime Tree Bay Road,
PO Box 1982
Grand Cayman KY1-1104

BRIANY LTD
C/o FCM Ltd.
UNIT # 2-105, Governor's Square
West Bay Road / Lime Tree Bay Road,
PO Box 1982
Grand Cayman KY1-1104

THIS WRIT OF SUMMONS has been issued against you by the above named Plaintiff, of Nashville, Tennessee, U.S.A. in respect of the claims set out on the next page.

Within 14 days after service of this Writ on you, (or where this Writ is served on you out of the jurisdiction pursuant to an Order of the Court, within 28 days) counting the day of service, you must either satisfy the claim or return to the Courts Office, P.O. Box 495, George Town, Grand Cayman, KY1-1106, Cayman Islands the accompanying Acknowledgement of Service stating therein whether you intend to contest these proceedings.

If you fail to satisfy the claim or to return the Acknowledgement within the time stated, or if you return the Acknowledgement without stating therein any intention to contest the proceedings, the Plaintiffs may proceed with the action and judgment may be entered against you forthwith without further notice.

Issued this 29th day of October 2014.

NOTE this Writ may not be served later than 4 calendar months (or, if leave is required to effect service out of the jurisdiction, 6 months) beginning with the date of original issuance unless renewed by order of the Court

IMPORTANT

Directions for the Acknowledgement of service are given with the accompanying form.

BETWEEN:

**EDITH M. PORTER-SHIRLEY, EXECUTRIX
OF THE ESTATE OF PEGGY LUSTIG KELLY, DECEASED**

PLAINTIFF

AND

1. **RAYMOND WHITTAKER**
2. **BRIANY LTD**

DEFENDANTS

STATEMENT OF CLAIM

The Parties:

1. The Plaintiff, resides in Nashville, Tennessee and is the daughter and executrix of the estate of her late mother, Peggy Lustig Kelly ("the deceased") who died on 21 October 2006. Probate of the last will of the deceased dated 28 April 1998 was granted to the Plaintiff by the Seventh Circuit Court of Davidson County, Tennessee on 8 November 2006 and resealed by the Grand Court of the Cayman Islands on 17 December 2008. The deceased was and is survived by her three children, the Plaintiff and her two brothers, Philip H. Lustig III and John Bruce Lustig.
2. The 2nd Defendant, Briany Ltd ("Briany"), was incorporated in the Cayman Islands on 25 March 1991 and registered as an ordinary company on 28 March 1991, and has its registered office at the offices of FCM Ltd ("FCM") located at Governor's Square, Grand Cayman. At its incorporation and at all times since (until the 1st Defendant's wrongful acts and deceits set out below) 100 shares had been issued, 50 to the deceased and 50 to the 1st Defendant ("Whittaker") who is a banker by background and training. Thereafter until her death the deceased was the legal owner of 50 shares in Briany and by succession, after her death the Plaintiff as executrix was the legal owner.
3. Whittaker resides in Grand Cayman and is owner and managing director of FCM, a company formation, management and corporate administration services company. According to Whittaker's biographical sketch on FCM's website, he has an extensive background and experience in banking and finance including being for 16 years managing director of TransOcean Bank & Trust Ltd, has a BA degree, is a member of the Society of Trusts and Estate Practitioners ("STEP"), a Notary Public and a member of the Cayman Islands Directors Association and the

Cayman Islands Managers Association. Whittaker has served since 1988 as a director of Consolidated Water Co. Ltd ("Consolidated Water") because of his management, banking and financial experience according to Consolidated Water's annual filings.

4. The deceased was (until Whittaker's wrongful acts and deceits set out below), with Whittaker, a director of Briany in addition to being a 50% shareholder at law.

A Summary of the claims:

5. (a) The Plaintiff claims directly against Whittaker (the direct action) for declarations, damages for breach of contract, unjust enrichment and breach of trust; alternatively,
 - (b) The Plaintiff claims as a minority shareholder of Briany for and on behalf of Briany derivatively against Whittaker as director of Briany for an order that Whittaker replace all monies removed by him from Briany, which were received on a sale of Briany's 118 acres property described as North Side, Block 54A, Parcel 74, Grand Cayman ("the Property") on 2 December 2011 to the National Trust for the Cayman Islands ("the National Trust") and for a declaration that the Register of Members of Briany be rectified so as to show the deceased (and thereafter the Plaintiff as executrix) as holder of 50 shares in Briany.

Circumstances giving rise to the direct and the derivative actions:

6. By written agreement dated 26 April 1991 with Sugna South Ltd (in liquidation) Briany agreed to purchase and by a Transfer of Land dated 30 April 1991 acquired, the Property at a price of US\$90,000. Stamp duty of US\$9,956.30 was paid by Briany on the transfer. The entirety of such sums (amounting to about US\$100,000) was paid by the deceased out of her own monies. The deceased lived in the US and left Whittaker (whom she trusted) to administer Briany for the shareholders and in accordance with its Articles of Association. Further the deceased's late first husband, Philip H Lustig II, had set up a Cayman trust ("the Trust") which was at all material times managed by Whittaker as a trustee. The deceased and her first husband had treated Whittaker as a son and trusted him. By reason of the trust reposed in him by the Plaintiff, Whittaker owed fiduciary duties to her and after her death to her estate, over and above duties owed to Briany as a director.

The Written Statement

7. The deceased made an earlier will dated 5 October 1995 in which she stated inter alia as follows:-

"ARTICLE I. TANGIBLE PERSONAL PROPERTY

.....I may leave a written statement or list disposing of certain items of my tangible personal property. If I do, I direct that the terms of such disposition shall supersede any contrary provisions herein and shall be given the same legal effect pursuant to Florida law as if contained in my Will. If more than one such written statement or list is found by my Personal Representatives, then the latest one shall control. Such statement or list shall be determinative only if it is signed by me, is dated and describes the items and devisees therein with reasonable certainty.....

ARTICLE II. REAL PROPERTY

I give and devise to my three children, EDITH MARIE PORTER-SHIRLEY, PHILIP H. LUSTIG, III, and JOHN BRUCE LUSTIG, as special Trustees, the condominium or any other principal residence that I own at the time of my death, to be held by them for the uses and purposes which I have specified and made known in a separate written statement dated April 29, 1995.....

8. Associated with the said will, signed by the deceased and dated 29 April 1995 was a written statement which dealt with various assets and in particular with her shares in Briany in the following terms:

"These are my wishes at the time of my death, or should I be unable to communicate with you. . . .

I own a company in Cayman which is called "Briany Company Ltd". Raymond [Whittaker] and I own equal shares in the company and we comprise its Board of directors and are its Officers on the Board. The holdings of "Briany" are 119 acres of land on the North Side Road. I paid \$90,000.00 plus fees for another \$10,000.00, for a total of \$100,000.00. (one hundred thousand dollars) There is some cash in the Company, and we are trying to sell the land. When the property is sold I am [here the page ended and it continued with some disconnection on the following page . . .] the years plus the original \$100,000.00 the profits from the sale are to be divided in half between Raymond and me. All the records for this Company are in the left hand file drawer.

I have no written contract with Ray Whittaker. I pay an annual fee to him out of the Trust and he is now receiving about \$14,000.00 a year to manage the Trust and my personal affairs."

9. In the circumstances the deceased and Whittaker agreed that on a sale of the Property by Briany, the loan of US\$100,000 would be paid to the deceased and the balance of the proceeds of sale and any profits shared equally between them, it being implied that the necessary resolutions of Briany to enable this to be done would be passed.
10. On numerous occasions prior to her mental incapacity referred to below the deceased reiterated to the Plaintiff and to the Plaintiff's brothers, that she had paid for the purchase of the Property held by Briany, that it was a speculative venture with Whittaker, and that upon sale of the Property the proceeds net of the purchase price would be split between the Plaintiff and Whittaker equally.
11. From and after its incorporation until the matters referred to hereafter, the Annual Returns of Briany showed (as was the case) that the deceased and Whittaker were directors and equal shareholders of Briany. According to paragraphs 75 and 84 of the Articles of Association of Briany, the business was to be carried out at meetings of directors with majority voting.
12. On 12 May 2002 the deceased had executed a durable power of attorney in the Plaintiff's favour, appointing her as attorney in respect of her financial affairs.
13. In early 2002 the deceased gave the Plaintiff a file relating to Briany comprising Briany's original corporate documentation including its Certificate of Incorporation, Memorandum and Articles of

Association, Register of Members, and Register of Officers, together with a copy of the written agreement dated 26 April 1991 and the original Transfer of Land dated 30 April 1991 referred to in paragraph 6 above by which Briany acquired the Property. In providing the file as aforesaid to the Plaintiff, the clear implication and expression to the Plaintiff was that she (the deceased) funded the purchase of the Property and owned a 50% share in that company, and wished the Plaintiff to have proof of that interest.

14. The deceased underwent quadruple by-pass surgery in November 2002 during the course of which she suffered brain damage, including impairment of her judgment and short term memory loss. She was unable to manage her affairs. The subject of the deceased's deteriorating mental condition and her mental incapacity was well known to and discussed with Whittaker at all relevant times by the Plaintiff and her brothers and Whittaker was fully familiar with her medical status throughout. Her affairs thereafter were conducted mainly by the Plaintiff with assistance from her two brothers all of whom had numerous meetings and discussions ("the meetings and discussions") with Whittaker as set out hereafter.

The meetings and discussions.

15. Until Whittaker's wrongful acts and deceptions as set out below, by his numerous statements and actions in the course of many meetings and discussions set out below, he accepted and consistently represented and admitted that (as was the case) the deceased and he had been, and that after her death the deceased's estate and he were, 50% owners of the shares in Briany.
 - (i) In June 2002, following damage resulting from Hurricane Michelle the Plaintiff flew to Cayman, met with Whittaker and stayed at his house, while they worked cleaning out a condo and garage owned by the Trust at Laguna del Mar on Seven Mile Beach. The subject of Briany came up in passing, in speaking generally of the deceased's interests. Whittaker made a dismissive reference to the Property being land locked and of little value. The discussion of Briany arose from the fact that it was owned, by the deceased jointly 50/50 with Whittaker as clearly accepted by the Plaintiff and Whittaker. At no time did Whittaker suggest otherwise or say anything inconsistent with that; the discussion recognized and acknowledged the deceased's 50% interest in Briany. At no stage did Whittaker say anything to suggest that the deceased did not own the said interest or that she had transferred it.
 - (ii) In the Fall of 2002 the Plaintiff returned to Grand Cayman to empty a container of furniture she had shipped in to re-furnish the Laguna del Mar condo and she worked closely with Whittaker for a couple of days to get the condo in order. There was mention of Briany and it was in the context of the deceased's 50% interest in it. At no stage did Whittaker say anything to suggest that the deceased did not own the said interest or that she had transferred it.
 - (iii) October 2006. The deceased died on 21 October 2006 in Nashville, Tennessee and Whittaker came to Nashville for the funeral service and stayed at the Hampton Inn in Nashville. After the service the Plaintiff and her brothers went back to the Hampton Inn to discuss among themselves and with Whittaker the deceased's will and the distribution of her estate. Her death was significant also in relation to the Trust under which the deceased had a life interest, since upon her death that Trust terminated and the assets were then payable to her three children, as beneficiaries. In the course of the discussions the Plaintiff raised the subject of Briany as being the deceased's sole asset of any

substance in Cayman and something that would have to be dealt with as part of the deceased's estate. Whittaker down-played it, saying it had little value, was not accessible by road and that "we" (i.e. he and the estate as shareholders in Briany) should just "hold on to it". Whittaker informed the Plaintiff and her brothers that it would be necessary to wait six months because he did not want to have questions raised with regard to deceased's late husband's estate and the administration of the Trust. He suggested that if the estate waited six months it was less likely to attract attention from the US tax authorities. At no stage did Whittaker say anything to suggest that the deceased's estate did not own a 50% share in Briany or that the deceased had transferred it.

- (iv) Over the winter of 2006/2007 or early spring 2007 the Plaintiff and her brother, Philip flew to Cayman and met with Whittaker at his house to go over the Trust assets and their distribution, and to deal with Briany which was the only substantial asset of the deceased's estate in Cayman. They again expressly mentioned Briany to Whittaker in the context of the estate's 50% interest. The position was the same according to Whittaker, i.e. that the Property had no great value, and there was no need to do anything with it at the time. At no stage did Whittaker say anything to suggest that the deceased did not own the said 50% interest or that she had transferred it.
- (v) In February 2008 Whittaker committed to meet the Plaintiff and her brothers at Nova Southeastern University, in Fort Lauderdale, Florida. They met on 27 February 2008 in a meeting room in Nova's library. The Plaintiff took with her the file the deceased had given her on Briany in 2002. Her email to her brothers and Whittaker of 24 February 2008 three days prior to the meeting stated:

*"Ray, do you have an agenda? I have asked Phil to put one together . . . it would be helpful to know Ray what you hope we can accomplish. I will be bringing w/ me all of the statements I have from mom's records as far back as 1989/1990 and the Briany papers. Hopefully this is helpful to all. So looking forward to seeing the three of you.
hugs, Bunny"*

At the meeting Whittaker immediately asked for the Briany file. The Plaintiff's brother John provided a copy to Whittaker. Whittaker gave the Plaintiff and her brothers the same story in relation to Briany, i.e. that the Property was not worth much and that "we" (i.e. the estate and Whittaker) should "hang on to it" instead of trying to sell it. There was no suggestion at that meeting by Whittaker that the deceased had not at her death had a 50% interest with him in Briany nor that the estate did not now have such 50% interest. At no stage did Whittaker say anything to suggest that the deceased did not own the said interest or that she had transferred it.

- (vi) In October/November 2009 on the Plaintiff's instructions, Truman Bodden & Company (now Higgs & Johnson), attempted to contact Whittaker with a view to facilitating the transfer of the deceased's 50% shareholding in Briany to the Plaintiff, as Executrix of the Estate under the grant of probate resealed by the Grand Court. On 21 October 2009 Whittaker confirmed to Mr Stafford of that firm receipt of the firm's correspondence but claimed, that all of the Briany documents were "boxed up" following Hurricane Ivan (in 2004) but that he would look for them and reply in 10 days. Whittaker failed however to make any substantive response to Truman Bodden & Company despite letters to him of 17 September, 13 October and 1 December 2009, and no less than five telephone

messages left for him in November 2009 alone by Mr Stafford of Truman Bodden & Company. No cogent – or indeed any – explanation has ever been given for this failure to respond or to produce the corporate records of Briany. At no stage did Whittaker respond to the above firm’s letters and calls to suggest that the deceased did not own the said interest or suggest that she had transferred it.

Whittaker’s wrongful acts and deceits.

16. From the time of incorporation of Briany until the year 2005, Whittaker as a director filed Annual Returns pursuant to s.41 of the Companies Law (2013 Revision) and its predecessor revisions, identifying the members and officeholders of Briany correctly, showing the deceased and himself as 50% shareholders and both as directors. Whittaker was aware from at least 2002 that as set out above, the deceased’s mental capacity had deteriorated so that she was unable to make any decisions or act for herself. From and after 2005 in the circumstances set out below, Whittaker effectively set out to attempt to steal the deceased’s shares for himself and unlawfully enrich himself thereby. At no stage did the deceased know of or agree to any transfer of her shares or to her removal as a director by Whittaker, and in any event she lacked the mental capacity to object as Whittaker well knew.
 - a. On or about 31 March 2006 Whittaker wrongfully, in breach of contract, duty and trust executed as Director/Secretary and submitted to the Cayman Islands Companies Registry a document purporting to be the Annual Return of Briany reflecting an AGM held on 31 December 2005 and showing himself as the sole shareholder and sole director in Briany, and representing that the deceased had ceased to be a member since the last Annual Return was filed. Thereafter Whittaker as a director submitted similar Annual Returns each year to the Companies Registry purporting to show himself as the sole shareholder and sole director of Briany. Such returns were not authorised by the Board of Briany, were false, void and of no effect and the deceased remained a shareholder despite Whittaker’s false returns.
 - b. An inspection of the Register of Members of Briany conducted at the offices of FCM on 12 March 2013 pursuant to s.44 of the Companies Law (2013 Revision) disclosed that the deceased was falsely recorded in the Register of Members as having transferred her 50% shareholding in Briany to Whittaker on 31 December 2005, with Share Certificate No. 3 being issued that date to Whittaker as shareholder of all 100 of the shares in Briany.
 - c. In 2013 and for the first time when challenged by the Plaintiff’s present attorneys, Whittaker produced certain false and forged documents to justify his actions.
 - i. A purported resolution of the directors of Briany dated 31 December 2005 which stated that “the transfer of 50 shares from Peggy Lustig, with love and affection, to R.E. Whittaker be and is hereby approved”. In fact, there was no such transfer “with love and affection” or at all in December 2005 or at any time. In the previous year’s Annual Return Whittaker had described himself as “Director and Secretary”. In fact the deceased had been married to her second husband, a Dr John Kelly, for many years and did not refer to herself as “Lustig”.

- ii. An undated document addressed to Whittaker stating:

"Dear Ray,

For reasons we have discussed and of which you and I both approve I hereby tender my resignation as Director/Secretary of Briany Ltd."

The document was signed "Peggy", and was said to be "In the presence of" followed by two initials which (having regard to the document next referred to) may have been "P.R." and intended to refer to one Peter Ribbins. Peter Ribbins died on 12 December 2010. In fact the signature "Peggy" is not the handwriting of the deceased and the initials "P.R." are not the handwriting of Peter Ribbins. The document is a forgery.

- iii. A purported transfer endorsed on the deceased's share certificate for 50 shares to Whittaker. The document is purportedly dated "February 10 1999(" [sic] bears a signature "Peggy V Lustig and with initials "P.R." followed by the words "Peter Ribbins". In fact, the signature was not the signature of the deceased and the initials "P.R." were not written by Peter Ribbins. The document is a forgery.

17. Following questions from the Plaintiff's attorneys, Whittaker produced a "File note" made by him which purported to refer to a conversation with the deceased in February 1999 in the course of which she supposedly gave him (i) a signed transfer "witnessed by Pete" together with (ii) her resignation as a director also witnessed by "Pete". The "File note" is a false document composed at some time well after its purported date, to give some credence to Whittaker's actions. At no stage did the deceased give Whittaker such documents nor were they witnessed by Peter Ribbins.

The failure to reply to enquiries.

18. By letter of 2 October 2013 the Plaintiff's attorneys wrote to Whittaker, making a number of specific enquiries as follows:

Share Certificate No. 001 of Briany Ltd

1. Would you advise when, where, by whom and on what typewriter or word processor and printer each of the typewritten entries were made on Share Certificate No. 001 of Briany Ltd and the subject of a suggested transfer which you have identified as dated 10 February 1999, including where that typewriter or word processor and printer are presently located.

2. Would you identify where, when and in whose presence the handwritten entries, which you have identified in your letter of 27 March 2013 as the signatures of Peggy Lustig Kelly and Peter Ribbins, were made on Share Certificate No. 001.

Undated resignation as Director/Secretary of Briany Ltd

3. Would you advise when, where, by whom and on what typewriter or word processor and printer the undated resignation as Director/Secretary of Briany Ltd which you have identified in your letter of 27 March 2013 as the resignation of Peggy Lustig Kelly, was produced including where that typewriter or word processor and printer are presently located.

4. *Would you identify where, when and in whose presence the handwritten entries, which you have identified in your letter of 27 March 2013 as the signatures of Peggy Lustig Kelly and Peter Ribbins, were made on the aforesaid undated resignation document.*

The File Note

5. *Would you advise when, where, by whom and on what typewriter or word processor and printer the "File note" (produced under cover of your email of 19 April 2013) was prepared, and whether it was prepared on 12 February 1999 as the opening line appears to suggest.*

Your letter of 27 March 2013

6. *Your letter of 27 March 2013 refers on the third page to various dated exchanges and documents passing between you, Rex Crighton of Crighton Realty and David Hendry of W.S. Walkers. Would you kindly produce those documents referred to, and all documentation in your possession related to the purchase by Briany Ltd of that parcel known as North Side Block 54A, Parcel 74.*

7. *You state at several points during your letter of 27 March 2013 that you "purchased" the North Side parcel referred to above. For the avoidance of doubt are you suggesting you personally funded the US\$90,000.00 purchase by Briany Ltd and the stamp duty thereon, from your funds advanced to Briany Ltd or to the vendor on its behalf? If so, would you kindly produce any documentation evidencing your advance of funds in this respect, and if not, would you advise who funded the purchase of the North Side parcel by Briany Ltd.*

19. Whittaker has made no reply to the said queries. The only inference from

- (i) his silence; and
- (ii) his failure in the year 2009 (as set out in para 15(vi) above) to deny that he was bound to transfer the shares (apart from his lame excuse that all of the Briany Ltd documents were "boxed up" following Hurricane Ivan");
- (iii) his admissions to the Plaintiff and her brothers in their meetings and discussions referred to at paragraph 15 above that the deceased's estate was and remained the owner of the 50 shares; and
- (iv) his production of false and forged documents

is that at no stage did the deceased authorise any transfer of shares or removal of herself as director of Briany so that the deceased, and after her death the estate, at all times remained the owner of the shares and that the Annual Returns showing Whittaker as the sole director and shareholder and the purported transfer and resignation documents mentioned above were and are void and of no effect.

The Sale of the Property.

20. In about January 2012 the Plaintiff discovered that by a Transfer of Land executed on 2 December 2011 and registered with the Land Registry of the Cayman Islands on 22 December 2011, Whittaker, without the knowledge and consent of the Plaintiff and purporting to act as sole

director of Briany Ltd had sold the Property to the National Trust for the sum of US\$1,439,025.00.

21. The Plaintiff instructed Messrs Hampson and Company who by a Company Registry search discovered that Whittaker had been filing returns since 2006 (as set out above) showing himself as sole director and shareholder of Briany and so informed the Plaintiff. At no stage prior thereto had Whittaker said anything to the Plaintiff or to her brothers to suggest that he was the sole shareholder of Briany but had in all communications with them accepted and acknowledged that the deceased and after her death the estate was the owner of 50% of the shares in Briany.
22. Following further inquiries it appears that Whittaker purported to pass the following resolution of Briany on 22 November 2011:

“BRIANY LTD.

RESOLUTION OF THE SOLE DIRECTOR, RAYMOND E. WHITTAKER

NOVEMBER 22, 2011

BE IT RESOLVED, that the Company enter into negotiations with the National Trust of the Cayman Islands (National Trust) with respect to the sale of its property registration NORTHSIDE 54A, 74 being 118 acres Approximate area,

AND,

BE IT FURTHER RESOLVED, that Sole Director Raymond E. Whittaker is authorized to complete these negotiations including signing any and all documents required for the Sale and Transfer of the property to the National Trust as well as to terms, receipt and disbursement of the proceeds therefrom as he in his Absolute Discretion decides”.

23. Accordingly Whittaker has disbursed to himself or to some entity of his or may disburse the proceeds of the sale of the Property. For the reasons set out above, he has and had no entitlement to disburse 50% of the proceeds to anyone but the Plaintiff.

The personal claim.

24. The claim in contract: Since the Plaintiff as executor of the estate remains the owner of 50% of the shares of Briany, she is entitled to payment of one half of the net sum received on the sale of the Property by Briany to the National Trust which Whittaker has disbursed to himself. In the absence of information from Whittaker, the Plaintiff claims one half of the sum as money had and received amounting to US\$719,512.50. Alternatively, pursuant to the agreement set out in the Written Statement pleaded at paragraph 7 above, the Plaintiff is entitled to the first US\$100,000 with the balance including any other profit in the company to be divided equally. In the premises the Plaintiff is entitled to a minimum of US\$769,512.50 so calculated. Whittaker has failed to make any payment and has denied his liability to do so; accordingly the Plaintiff claims the same sums in breach of contract together with interest.
25. The claim in unjust enrichment: In the circumstances, Whittaker has been enriched by the receipt of a benefit being either of the sums set out above, such enrichment was at the expense of the Plaintiff, Whittaker's retention of the enrichment would be unjust and there is no defence or bar to the claim. The Plaintiff claims the said sums of US\$769,512.50 alternatively US\$719,512.50 together with interest.
26. The claim in trust: In breach of the fiduciary duties owed to the deceased and thereafter to the Plaintiff, Whittaker has wrongfully failed to pay to the Plaintiff the sums due as set out above and

holds the same as trustee for the Plaintiff. The Plaintiff seeks payment of the said sums of US\$769,512.50 alternatively US\$719,512.50 pursuant to or by reason of breach of trust together with interest at the trustee rate.

27. Rectification of the Register: The Plaintiff is entitled to be shown as holder of 50 of the 100 issued shares in Briany and seeks a declaration that the Register of Members be rectified pursuant to s.46 of the Companies Law (2013 Revision) so as to show that the deceased and then the Plaintiff as executrix has at all times been a 50% shareholder and director of Briany and such relief as is consequent upon such declaration.

The derivative claim (alternative to the personal claim).

28. The company (the 2nd Defendant) is Briany and the shareholding and directorships therein are set out above. The Plaintiff seeks relief on behalf of Briany. Under the Articles of Association of Briany and under the general law Whittaker as director owed duties to Briany to comply with its said Articles and a fiduciary duty in relation to its property.
29. In breach of his duties and as set out above, Whittaker has produced and filed Annual Returns to the Registrar of Companies falsely representing himself as sole shareholder and sole director of Briany, has falsified the Register of Members of Briany to record himself as sole shareholder under Share Certificate No. 3, produced a forged resignation of the deceased as director of Briany, and has purported to act and held himself out as sole director of Briany including to the National Trust. Further, in breach of such duties, and by means of these false representations and forged documents Whittaker has obtained Briany's property for himself, being the net proceeds of the sale of the Property. In the circumstances Briany has suffered serious loss and damage.
30. The Plaintiff seeks orders requiring Whittaker to reimburse Briany with all sums received by him on the sale of the Property together with interest at the trustee rate. The Plaintiff further seeks a declaration that the Register of Members be rectified so as to show that the deceased and then the Plaintiff as executrix has at all times been a 50% shareholder and director of Briany and such relief as is consequent upon such declaration.

Endorsement as to interest.

31. The Plaintiff under her personal claim, or alternatively on behalf of Briany under the derivative claim, seeks pre and post-judgment interest on the sums claimed and damages awarded respectively at the trustee (compounded interest) rate in the exercise of the Court's equitable jurisdiction.
32. Alternative to such claims for interest at the trustee rate, the Plaintiff under her personal claim, or alternatively on behalf of Briany under the derivative claim, asserts an entitlement to pre-judgment interest on the sums claimed and the damages claimed respectively above, pursuant to s.34 of the Judicature Law (2013 Revision) and the Judgment Debts (Rates of Interest) Rules 2010 at the rate of 2%% per annum from 2 December 2011 being the date of Whittaker's transfer of the Property to the National Trust to the date of judgment, accruing in the case of the Plaintiff's personal claims for US\$769,512.50 at US\$50.07 per diem, and alternatively on her personal claim for US\$719,512.50 at US\$46.82 per diem.

33. Further and alternative to such claim for interest at the trustee rate, the Plaintiff under her personal claim or alternatively on behalf of Briany under the derivative claim, claims post-judgment interest on judgments and on all fixed or assessed costs and orders running from the date of service of the judgment, order or certificate of taxation respectively and at the prescribed rate of 2¾% per annum or such other rate prevailing in accordance with the Judgment Debts (Rates of Interest) Rules 2010.

AND THE PLAINTIFF CLAIMS:

Against Whittaker, under the personal claim

- (i) Under the contract set out at paragraph 20, the sum of US\$769,512.50 alternatively US\$719,512.50 as money had and received, alternatively damages for breach of contract in the said sums together with interest;
- (ii) By reason of the unjust enrichment pleaded at paragraph 25 above damages in the sum of US\$769,512.50 alternatively US\$719,512.50 together with interest;
- (iii) By reason of the breach of trust pleaded at paragraph 26 above restitution or damages for breach of trust in the sum of US\$769,512.50 alternatively US\$719,512.50;
- (iv) By reason of her entitlement as shareholder of Briany a declaration that the Register of Members be rectified pursuant to s.46 of the Companies Law (2013 Revision) so as to show that the deceased and then the Plaintiff as executrix has at all times been a 50% shareholder and director of Briany and such relief as is consequent upon such declaration.
- (v) Interest on the foregoing sums at the trustee rate from 2 December 2011, or alternatively pursuant to s.34 of the Judicature Law (2013 Revision) and the Judgment Debts (Rates of Interest) Rules 2010 interest at the rate of 2¾% per annum from 2 December 2011 at US\$50.07 per diem, or alternatively at US\$46.82 per diem as more particularly set out in the Endorsement as to interest above; and
- (vi) Her costs of these proceedings;

Alternatively pursuant to the derivative claim

- (i) A Declaration that the Register of Members of Briany be rectified pursuant to s.46 of the Companies Law (2013 Revision) so as to show that the deceased and then the Plaintiff as executrix has at all times been a 50% shareholder and director of Briany and such relief as is consequent upon such declaration.
- (ii) An Order requiring Whittaker to reimburse Briany with all sums received by him on the sale of the Property;
- (iii) An accounting by Whittaker to the company pursuant to GCR Order 37 in respect of all dealings and activities by him as director of Briany and in respect of Briany's accounts and assets including the Property, and an order for payment to Briany of any balance found due to it upon taking an account;

- (iv) Interest on the foregoing at the trustee rate, or alternatively pursuant to s.34 of the Judicature Law (2013 Revision) and the Judgment Debts (Rates of Interest) Rules 2010 interest at the rate of 2½% per annum from 2 December 2011 as more particularly set out in the Endorsement as to interest above;
- (v) The Plaintiff be indemnified out of Whittaker's alternatively Briany's assets in respect of the legal costs of the derivative claim;

AND in relation to both the personal and the derivative claims

- (i) Post-judgment interest as more particularly set out in the Endorsement as to interest above; and
- (ii) all other necessary and incidental orders, enquiries and directions, and such further or other relief as to this Honourable Court may seem just.

DATED at Grand Cayman this 29th day of October 2014

Hampson and Co.
Hampson and Company
Attorneys for the Plaintiff

THIS STATEMENT OF CLAIM is filed by Hampson and Company, attorneys for the Plaintiff, whose address for service is that of her said attorneys, at Citrus Grove, 5th Floor, Goring Avenue, George Town, P.O. Box 698, Grand Cayman KY1-1107, Cayman Islands.

DIRECTIONS FOR ACKNOWLEDGMENT OF SERVICE
OF WRIT OF SUMMONS

1. The accompanying form of *Acknowledgment of Service* should be completed by an Attorney acting on behalf of the Defendant or by the Defendant if acting in person.

After completion it must be delivered or sent by post to the Law Courts, P.O. Box 495, George Town, Grand Cayman.

2. A Defendant who states in his Acknowledgment of Service that he intends to contest the proceedings *must also serve a defence* on the Attorney for the Plaintiff (or on the Plaintiff if acting in person).

If a Statement of Claim is indorsed on the Writ (i.e. the words "Statement of Claim" appear on the top of page 2), the Defence must be served within 14 days after the time for acknowledging service of the Writ, unless in the meantime a summons for judgment is served on the Defendant.

If the Statement of Claim is not indorsed on the Writ, the Defence need not be served until 14 days after a Statement of Claim has been served on the Defendant.

If the Defendant fails to serve his defence within the appropriate time, the Plaintiff may enter judgment against him without further notice.

3. A *Stay of Execution* against the Defendant's goods may be applied for where the Defendant is unable to pay the money for which any judgment is entered. If a Defendant to an action for a debt or liquidated demand (i.e. a fixed sum) who does not intend to contest the proceedings states, in answer to Question 3 in the Acknowledgment of Service, that he intends to apply for a stay, execution will be stayed for 14 days after his Acknowledgment, but he must, within that time, *issue a Summons* for a stay of execution, supported by an affidavit of his means. The affidavit should state any offer which the Defendant desires to make for payment of the money by instalments or otherwise.

See over for notes for guidance

Please complete overleaf

BETWEEN:

EDITH M. PORTER-SHIRLEY, EXECUTRIX
OF THE ESTATE OF PEGGY LUSTIG KELLY, DECEASED

PLAINTIFF

AND

- 1. RAYMOND WHITTAKER
- 2. BRIANY LTD

DEFENDANTS

ACKNOWLEDGMENT OF SERVICE OF WRIT OF SUMMONS

If you intend to instruct an Attorney to act for you, give him this form IMMEDIATELY.

Important. Read the accompanying directions and notes for guidance carefully before completing this form. If any information required is omitted or given wrongly, THIS FORM MAY HAVE TO BE RETURNED.

Delay may result in judgment being entered against a Defendant whereby he may have to pay the costs of applying to set it aside.

1. State the full name of the Defendant by whom or on whose behalf the service of the Writ is being acknowledged.

2. State whether the Defendant intend to contest the proceedings (tick appropriate box)

Yes No

3. If the claim against the Defendant is for a debt or liquidated demand, AND he does not intend to contest the proceedings, state if the Defendant intends to apply for a stay of execution against any judgment entered by the Plaintiff (tick box)

Yes No

Service of the Writ is acknowledged accordingly

Signed

Attorney for the Defendant

Address for service:

Please complete overleaf

Notes on address for service

Attorney: where the Defendant is represented by an attorney, state the attorney's place of business in the Cayman Islands. A Defendant may not act by a foreign attorney.

Defendant in person: where the Defendant is acting in person, he must give his post office box number and the physical address of his residence or, if he does not reside in the Cayman Islands, he must give an address in Grand Cayman where communications for him should be sent. In the case of a limited company, "residence" means its registered or principal office.

Indorsement by Plaintiffs' Attorney (or by Plaintiffs if suing in person) of his name, address and reference, if any, in the box below.

Hampson and Company
Attorneys-at-Law
Citrus Grove, 5th Floor, Goring Avenue
P.O. Box 698
Grand Cayman KY1-1107
Cayman Islands

Indorsement by Defendant's Attorney (or by defendant if suing in person) of his name, address and reference, if any, in the box below.

Notes for Guidance

1. Each Defendant (if there are more than one) is required to complete an Acknowledgment of Service and return it to the Courts Office.
2. For the purpose of calculating the period of 14 days for acknowledging service (or 28 days in the case of a writ served outside the jurisdiction pursuant to an order of the Court), a writ served on the Defendant personally is treated as having been served on the day it was delivered to him.
3. Where the Defendant is sued in a name different from his own, the form must be completed by him with the addition in paragraph 1 of the words "sued as (*the name stated on the Writ of Summons*)".
4. Where the Defendant is a FIRM and an attorney is not instructed, the form must be completed by a PARTNER by name, with the addition in paragraph 1 of the description "Partner in the firm of (.....)" after his name.
5. Where the Defendant is sued as an individual TRADING IN A NAME OTHER THAN HIS OWN, the form must be completed by him with the addition in paragraph 1 of the description "trading as (.....)" after his name.
6. Where the Defendant is a LIMITED COMPANY the form must be completed by an Attorney or by someone authorised to act on behalf of the Company, but the Company can take no further step in the proceedings without an Attorney acting on its behalf.
7. Where the Defendant is a MINOR or a MENTAL PATIENT, the form must be completed by an Attorney acting for a guardian *ad litem*.
8. A Defendant acting in person may obtain help in completing the form at the Courts Office.