

17-2-12

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO FSD: 10 OF 2012

IN THE MATTER OF THE EVIDENCE (PROCEEDINGS IN OTHER JURISDICTIONS) (CAYMAN ISLANDS) ORDER 1978

AND IN THE MATTER OF A REQUEST FOR INTERNATIONAL JUDICIAL ASSISTANCE IN RESPECT OF A CIVIL PROCEEDING NOW PENDING IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF ORANGE, CENTRAL JUSTICE CENTER BEFORE THE HONOURABLE ROBERT J. MOSS, DEPARTMENT C-23 ENTITLED AS FOLLOWS:

BETWEEN	GRAY 1 CPB, LLC	PLAINTIFF
AND	GULFSTREAM FINANCE, INC; BRUCE ELIEFF; KATHY ELIEFF; DOES 1 – 50 INCLUSIVE	DEFENDANTS

**IN CHAMBERS
BEFORE THE HON. CHIEF JUSTICE ANTHONY SMELLIE
17TH FEBRUARY 2012**

APPEARANCES: Mr. Oliver Payne of Ogiers for the Plaintiff

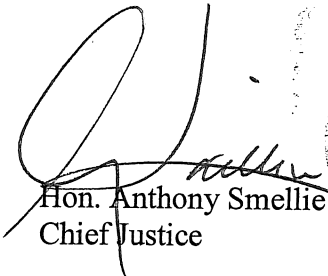
REASONS FOR JUDGMENT

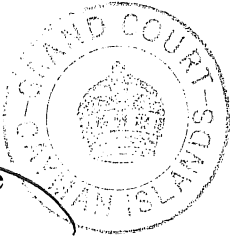
1. This is an Application on behalf of the Plaintiff Gray 1 CPB, LLC ("Gray 1") for documentary and oral evidence from 16 intended witnesses to be produced pursuant to a Letter of Request issued to this Court by the Superior Court of the State of California for the County of Orange (the "Californian Court") and dated 9 January 2012. The Application is brought in accordance with Grand Court Rule Order 70, rule 2 in the form of an Ex-parte Originating Summons dated 24 January 2012.

(16) Exbury Holdings, Ltd.

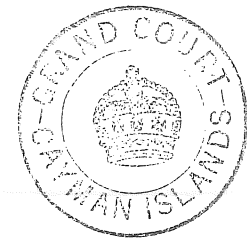
52. In granting these Orders, I place particular emphasis on the following findings:

- (a) I accept that the description of documents requested contained in the Letter of Request is adequate having regard to the authorities, especially as to the requirement of particularity;
- (b) I accept that the form of oral testimony from the intended witness fairly respectively relates to the matters in dispute in the US Action and may be obtained without oppression or unfairness; and
- (c) I accept that the documents are of kinds and such vintage that they ought still to be in the possession of the respondents, in particular having regard to the obligations of professional service providers under Cayman Islands Law.


Hon. Anthony Smellie
Chief Justice



Oral Judgment given on February 17 2012.
Written Judgment delivered on 22nd May, 2012



IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO FSD: 10 OF 2012

IN THE MATTER OF THE EVIDENCE (PROCEEDINGS IN OTHER JURISDICTIONS) (CAYMAN ISLANDS) ORDER 1978

AND IN THE MATTER OF A REQUEST FOR INTERNATIONAL JUDICIAL ASSISTANCE IN RESPECT OF A CIVIL PROCEEDING NOW PENDING IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF ORANGE, CENTRAL JUSTICE CENTER BEFORE THE HONOURABLE ROBERT J. MOSS, DEPARTMENT C-23 ENTITLED AS FOLLOWS:

BETWEEN	GRAY 1 CPB, LLC	PLAINTIFF
AND	GULFSTREAM FINANCE, INC; BRUCE ELIEFF; KATHY ELIEFF; DOES 1 – 50 INCLUSIVE	DEFENDANTS

**IN CHAMBERS
BEFORE THE HON. CHIEF JUSTICE ANTHONY SMELLIE
17TH FEBRUARY 2012**

APPEARANCES: Mr. Oliver Payne of Ogiers for the Plaintiff

REASONS FOR JUDGMENT

1. This is an Application on behalf of the Plaintiff Gray 1 CPB, LLC ("Gray 1") for documentary and oral evidence from 16 intended witnesses to be produced pursuant to a Letter of Request issued to this Court by the Superior Court of the State of California for the County of Orange (the "Californian Court") and dated 9 January 2012. The Application is brought in accordance with Grand Court Rule Order 70, rule 2 in the form of an Ex-parte Originating Summons dated 24 January 2012.

Nature of underlying foreign proceedings

2. The Letter of Request was issued in civil proceedings pending before the Californian Court with case number 30-2010-00361680 (the "US Action"). The US Action arises from Gray 1's allegations that the Defendants have conspired together, and possibly with others, to record fraudulent encumbrances on real and personal property located in the State of California and legally owned by some of the Defendants (Bruce and Kathy Elieff) in an effort to prevent Gray 1 from obtaining satisfaction of a judgment obtained by it against Bruce Elieff in an initial amount of \$9.16 million.
3. According to the evidence of Mr Edward Morales, an attorney for Gray 1 in the US Action; it is Gray 1's case that the intended witnesses from whom evidence is sought in the Cayman Islands, were involved, innocently or otherwise, in transactions apparently connected with transfers of money through certain Cayman Islands entities holding Cayman Islands bank accounts. Gray 1 avers that these transactions formed part of a fraudulent scheme used by Bruce Elieff to create fictitious loans up to an aggregate value of \$150 million dollars, with such loans constituting the purported basis for the granting of security interests over assets belonging directly or indirectly to him. Gray 1, as an unsecured judgment creditor of Bruce Elieff, seeks to set aside those security interests or encumbrances which stand in the way of the enforcement of its judgment against the known Elieff assets. I understand that the position relating to those security interests is to be determined at the trial of the US Action by the Californian Court, with the trial set for 16 April 2012. It is in that context that the Letter of Request has been issued and the evidence sought for that

trial. I note that the Californian Court requires the evidence by 16 March 2012 and that the matter before me is therefore urgent.

The Law: Jurisdictional basis

The Evidence Order

4. The jurisdictional basis for the Order sought by this Application is statutory: the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978 (the “Evidence Order”). The Evidence Order extended to the Cayman Islands the provisions, as adapted, of the Evidence (Proceedings in Other Jurisdictions) Act 1975, a United Kingdom statute which incorporated into United Kingdom domestic law, the provisions of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1968 (the “Hague Convention”).

5. Section 1 of the Schedule to the Evidence Order provides:

“Where an application is made to the Grand Court for an order for evidence to be obtained in the Cayman Islands, and the court is satisfied -

(a) that the application is made in pursuance of a request issued by or on behalf of a court or tribunal (“the requesting court”) exercising jurisdiction in a country or territory outside the Cayman Islands; and

(b) that the evidence to which the application relates is to be obtained for the purposes of civil proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated,

the Grand Court shall have the powers conferred on it by the following provisions of this Act.”

6. I must be satisfied that each of the three conditions precedent identified above in section 1 of the Schedule to the Evidence Order, is fulfilled in order to establish that I

have jurisdiction to make an order to assist the requesting court. I find that each condition precedent has been satisfied:

- (a) as to the first, this Application is for an order for evidence to be obtained in the Cayman Islands;
- (b) as to the second, this Application is made pursuant to the Letter of Request issued by the Honourable Robert J Moss of the Superior Court of the State of California for the County of Orange and dated 9 January 2012, exercising jurisdiction in the USA, being a country or territory outside of the Cayman Islands; and
- (c) as to the third condition, I note that when construing the phrase “*evidence ... to be obtained for the purpose of civil proceedings*” (same as that contained in section 1(b) of the Schedule to the Evidence Order), Lord Diplock observed “*I would not be inclined to place any narrow interpretation on the phrase ... In my view “civil proceedings” includes all the procedural steps taken in the course of the proceedings from their institution up to and including their completion and, if the procedural system of the requesting court provides for the examination of witnesses or the production of documents for the purpose of enabling a party to ascertain whether there exists admissible evidence to support his own case or to contradict that of his opponent* [It is apparent from pages 8 and 9 of the Letter of Request that the California Code of Civil Procedure 2027.010 does so provide], *the High Court has jurisdiction to make an order under the Act.*” See *Rio Tinto Zinc Corporation v Westinghouse*

Electric Corporation [1978] AC 547, per Lord Diplock at pages 633 and 634,
para. A.

7. Thus, I have to be satisfied that the evidence is required for the purpose of civil proceedings in the requesting court, but in the ordinary way, in the absence of evidence to the contrary, I should be prepared to accept the statement by the requesting court that such is the purpose for which the evidence is required. See again: *Rio Tinto* (above), per Lord Diplock p.634, para. A-B.
8. Page 1 of the Letter of Request states in clear terms that the Superior Court of the State of California for the County of Orange “requests international judicial assistance to obtain testimony and documents to be used in a civil proceeding before [the Superior Court of the State of California] in the above-captioned matter... [and that Court] ... is satisfied that this request is required to produce evidence necessary for trial.”
9. Consistent with the approach of Lord Diplock in the House of Lords in *Rio Tinto* (above) and which was carefully considered in the leading decision of the Cayman Islands Court of Appeal in *United States v Carver and Four Others* [1980-83 CILR 297 – this Application satisfies the three conditions in section 1(a) and (b) of the Evidence Order. I am therefore satisfied that I have jurisdiction to give effect to the Letter of Request.

The Exercise of Discretion

10. Having determined that I have the jurisdiction to make an order giving effect to the Letter of Request, I must consider whether as a matter of the exercise of discretion I ought to make or refuse to make such an order in accordance with the Court's powers.

11. Guidance as to the starting point for the exercise of that discretion is contained also in the House of Lord's decision in Rio (above). At page 634, lines B to E, Lord Diplock stated

"...the court should hesitate long before exercising its discretion in favour of refusing to make an order unless it was satisfied that the application would be regarded as falling within the description of frivolous, vexatious or an abuse of the process of the court."

12. In the same case, at page 612, Lord Wilberforce stated

"I am of the opinion that following the spirit of the Act which is to enable judicial assistance to be given to foreign courts, the letters rogatory ought to be given effect to so far as possible; ...". At page 618, paragraph E, Viscount Dilhorne stated "In the interests of comity, it is, and I trust will continue to be, as Lord Denning M.R. said in this case in this Court of Appeal (ante, p. 560H) "it is our duty and our pleasure to do all that we can to assist" the requesting court."

13. This dictum was recently endorsed by Quin J. sitting in this Court in the Matter of Lancelot Investors Fund Limited [2009 CILR 7], page 24, paragraphs 69 and 70:

"The Cayman Islands has enjoyed international standing as a major financial centre for almost 40 years and the Grand Court of the Cayman Islands has actively assisted foreign courts to give effect to The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1968.

Indeed, the Grand Court has, on many occasions, assisted American courts and, to adopt the classic language of Lord Denning sitting in the Court of Appeal in Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp. (7) ([1978] A.C. at 560): "It is our duty and our pleasure to do all we can to assist [the foreign] court, just as [the English court] would expect the [foreign] court to help us in like circumstances." In that particular case, the House of Lords ruled on appeal that the High Court in England should assist in a letters rogatory application made by the District Court of Virginia in the United States."

The Powers of the Grand Court to give effect to an application for judicial assistance

14. The powers of the Grand Court to give effect to an application for assistance are extensive. They are set out in section 2 of the Evidence Order. Section 2(1) provides:

"... the Grand Court shall have power, on such application as is mentioned in section 1 above, by order to make such provision for obtaining evidence in the Cayman Islands as may appear to the court to be appropriate for the purpose of giving effect to the request in pursuance of which the application is made; and any such order may require a person specified therein to take such steps as the court may consider appropriate for that purpose."

15. Section 2(2) provides in relevant part:

"Without prejudice to the generality of subsection (1) above, but subject to the provisions of this section, an order under this section may, in particular, make provision –

- (a) for the examination of witnesses, either orally or in writing;
- (b) for the production of documents;
- (c) ...
- (d)"

16. As noted in *United States v Carver* (above), the Court has power to accept or reject the foreign request in whole or in part, whether as to oral or documentary evidence; and it can and should delete from the foreign request any parts that are excessive either as regards witnesses or as regards documents. The Court will act on the principle that it should *salve* what it can but should decline to comply with the foreign request insofar as it is not proper or permissible or practicable under Cayman law to give effect to it (at pages 309 and 310). The court must also be astute to avoid, while seeking to "*salve what it can of a request*" not in effect, to rewrite the

request. This court has no power to change the nature of a request (see *First American v Zayed* 2000 CILR 57 and *Voluntary Purchasing Group Inc v Insurers Int'l Ltd.* 1994-95 CILR 84).

Statutory limitations on the powers of the Grand Court to give effect to an application for judicial assistance

17. The limitations on the power of the Court to grant requests of this sort are contained in subsections 2(3) and 2(4) of the Schedule to the Evidence Order. They read as follows:

“(3) An order under this section shall not require any particular steps to be taken unless they are steps which can be required to be taken by way of obtaining evidence for the purposes of civil proceedings in the court making the order (whether or not proceedings of the same description as those to which the application for the order relates); but this subsection shall not preclude the making of an order requiring a person to give testimony (either orally or in writing) otherwise than on oath where this is asked for by the requesting court.

“(4) “An order under this section shall not require a person - (a) to state what documents relevant to the proceedings to which the application for the order relates are or have been in his possession, custody or power; or (b) to produce any documents other than particular documents specified in the order as being documents appearing to the court making the order to be, or to be likely to be, in his possession, custody or power.”

18. Subsections (3) and (4) of section 2 thus contain four requirements of which the Court should be satisfied:

- (a) The request must seek evidence which is necessary for the trial of the action;
- (b) There must be evidence as to the existence of the particular documents sought;
- (c) The documents must appear to be or to be likely to be in the possession, custody or power of the intended witness; and

(d) As regards oral evidence, that in addition to it being necessary evidence at trial, there is reason to believe that the intended witness has knowledge of the matters relevant to the issues at trial [*Charman v Charman* [2006] 1 WLR 1053, page 1066, lines E to F].

19. The Affidavit of Edward Morales presents evidence on each of these requirements in respect of the intended witnesses.

Evidence necessary for the trial

20. Subsection (3) of section 2 applies to both oral and documentary evidence and it explains that this Court, in giving effect to the Letter of Request, can require only such steps to be taken as it could require to be taken of the purposes of domestic civil proceedings. Under the procedural rules of this Court, depositions of witnesses, may be taken before examiners for use at the trial, but the subject-matter of such depositions is restricted to the evidence admissible at the trial: Grand Court Rules (1995 Revision) O.38, r.9 and O.39, rr. 1 and 2. The evidence requested in the Letter of Request can therefore only be ordered to the extent that this Court is satisfied that it is confined to evidence which will be admissible at the trial of the US Action before the Superior Court of Californian Court.
21. The request for the production of documentary evidence must satisfy both the requirements of subsections 2(3) and 2(4) of the Evidence Order. The existence of subsection (4) can be traced back to the United Kingdom's reservation, made in accordance with article 23 of the Hague Convention on Evidence which declared that: "the United Kingdom will not execute letters of request issued for the purpose of obtaining pre-trial discovery of documents." [Per Lord Fraser of Tullybelton in *In re*

Asbestos Insurance Coverage Cases [1985] 1 WLR 331, at page 336, paragraphs D to E].

22. Based on the evidence of Mr Edward Morales, I find that the Letter of Request is plainly directed towards obtaining evidence necessary to establish the existence of the alleged fraudulent scheme as a conduit for the allegedly sham US\$150 million Elieff Loan which is in issue in the trial of the US Action. Moreover, I note that page 63 of the Letter of Request specifically provides: “This [(the Californian)] Court is satisfied that this request is required to produce evidence necessary for trial.” This Court has made clear that it will ordinarily accept the statement in a letter of request that the evidence requested “is required for trial” and the further assurances of counsel that that is the true purpose for which the evidence is sought. [*In the Matter of United States District Court’s Request*, Grand Court, per Henderson J., 23 January 2007 [2007 CILR Note 2 and *First American v Zayed* (above)].

Evidence as to the existence of the particular documents sought

23. Subsection 2(4) of the Evidence Order in effect contains two further requirements which I must be satisfied have been met. The first is that the particular documents have been specified with sufficient particularity; the second is that the documents must be actual documents, about which there is evidence which satisfies me that the documents exist, or at least that they did exist, and that they are likely to be in the respondents' possession. They cannot be conjectural documents (i.e. documents which might or might not have existed): per Lord Fraser of Tullybelton in *In Re Asbestos Insurance* (above), page 338, lines A-B.

24. I note that the meaning of the expression “particular documents specified in the order” in subsection 2(4)(b) of the Evidence Order was considered in the House of Lords in both Westinghouse and In re Asbestos Insurance (both above).

25. In Westinghouse, Lord Diplock observed:

“The requirements of subsection (4)(b), however, are not in my view satisfied by the specification of “particular documents” which I would construe as meaning individual documents separately described.”

26. Following consideration of Lord Diplock’s construction, Eveleigh LJ in the Court of Appeal in In re Asbestos Insurance [1985] E.C.C. 355 - which like this Application, was concerned with a letter of request from the Superior Court of California - commented:

“I am ... unable to regard Lord Diplock as saying that each individual document must be separately listed as one document and then described with a particularity that might be expected from a person who had that document in his hand.” (paragraph 13).

27. Slade LJ, in the same case, commented:

*“For the purpose of determining the construction and effect of an order, it does not, in my opinion, suffice merely to look at the wording of the order itself; one has to look at it in its context, in the light of the evidence in response to which the order was made. Though Lord Diplock referred to ‘individual documents separately described’, nevertheless, in agreement with Eveleigh L.J. on this point, I do not think he intended to say that each document must be separately listed as one document and then described with a particularity that might be expected from a person who had that document in his hand. If it is otherwise sufficiently identified, I would not, for example, think it necessary that the date of or parties to a particular document should be stated. **In many contexts a compendious, generic description may amount to an adequate description of each and every particular document comprised in the relevant category.** If the order in its context is in substance an order for production of particular documents, which could have been separately listed it matters not, in my opinion, that for the sake of economy in drafting they are referred to by a compendious generic description. To take a simple example, an order might, in my opinion, properly be made for the production of*

a respondent's 'monthly bank statements for the year 1984' with a stated bank, if the evidence showed that regular monthly statements had been sent to the respondent over the stated period and were likely to be still in his possession" (at paragraph 47) (emphasis added).

28. The House of Lords endorsed the Court of Appeal's approach in this regard: per Lord Fraser of Tullybelton, in *In Re Asbestos Insurance* (above), at 337, paragraph H to page 338 paragraph A -B:

"I do not think that by the words "separately described" Lord Diplock intended to rule out a compendious description of several documents provided that the exact document in each case is clearly indicated. If I may borrow (and slightly amplify) the apt illustration given by Slade LJ in the present case, an order for production of the respondents' "monthly bank statements for the year 1984 relating to his current account" with a named bank would satisfy the requirements of the paragraph provided that the evidence showed that regular monthly statements had been sent to the respondent during the year and were likely to be still in his possession."

29. The Courts of the Cayman Islands have effectively followed the English position. Two cases are of particular assistance in the determination of this Application on this point.

- (a) First, the leading Cayman Islands Court of Appeal decision in *United States v Carver* (above) - an analogous case insofar as it concerned a request from the US District Court for the District of Columbia for the production of documents and oral testimony from two banks: Barclays Bank International Ltd, Grand Cayman, and Bank of Nova Scotia, Grand Cayman. In that case, Rowe J.A. (with whom Kerr, Ag. P. and White J.A. both agreed) made the following material observations:

"The documents referred to in the Westinghouse case were of the most diverse, varied and complex variety. Consequently, the language of the members of the House of Lords must be looked at against those facts.

On the other hand, the traditional description of bankers; books used by bankers' in the ordinary course of business has been "ledgers, day books and account books....An outsider would be at a disadvantage if he were to be compelled to know the precise system of accounting used by the bank and the precise and particular documents in which the bank's accounting records are kept. What such a third person must show is that he requires information regarding a particular transaction made on a particular day, in respect of a particular account. Where the banker is merely required to place his hands upon and to pick up the letter which forwarded the cheque, or the lodgement slip which evidenced the transaction or the cable confirming the transaction, could that be said to be in the nature of a fishing expedition? I think not. These documents are manifestly the conduits through which money may be transferred to the credit of an account and the request for their production is at least analogous to the request for the letter in reply to correspondence, the existence of which has either been admitted or is not denied.

I am not persuaded that any of the members of the House of Lords who made speeches in the Westinghouse case, had they been discussing a case concerning bankers' books, would have established a rule that a call for the books in which a banker in the ordinary course of business accounted for a specific transaction, would not be a call for particular documents. Accordingly, in my view, a banker to whom an order was made to produce "all correspondence, ledgers, day books and account books used in its ordinary course of business" in which it recorded the receipt of a particular sum, on a particular day, which funds it credited to a particular account, would be able to place his hands directly on such records, and therefore to that extent such a description would sufficiently satisfy the statutory requirement of "particular documents, etc" in s.2(4)(b)". (emphasis added) United States v Carver and Four Others [1980-83 CILR 297], pages 319, lines 3 to 40.

- (b) Secondly, *Voluntary Purchasing Group Inc. v. Insurco Intl. Ltd.* (above) page 97, line 40 to page 98, line 3, in which I articulated the position in the following terms:

*“The test to be applied in relation to the production of documents is whether ‘particular documents’ were specified, that is individual documents separately described, although it is permissible to have a compendious description of several documents, provided that evidence of the actual documents is produced to satisfy me that they do exist or at least had existed. . . .” and, citing *United States v Carver and Four Others* [1980-83 CILR 297, I held “that whether the general standards of specificity may be satisfied in the context of any particular case will necessarily depend on the circumstances”.*

- (c) I also note the comments of Justice Murphy who in reference to my comments in the *Voluntary Purchasing* decision (above) observed:

“He quite rightly and sensibly indicated in that case (1994–95 CILR at 98) that – “reasonable inferences must be drawn... in the absence of direct evidence of the existence of such documents – direct evidence which, in all the circumstances, it would be unrealistic to require the applicant to produce.” Needless to say, in many applications of this type it would not only be unrealistic but unfair to the applicant given the purposes for which the 1978 Order was intended.” [In the matter of a request for international judicial assistance from the Canton of Berne [1996 CILR 179] at page 196, lines 36 to 42.

30. The present Letter of Request utilises the language specifically approved by the Court of Appeal in *USA v Carver* (above) which in the circumstances of that case, was found to meet the requirement as to particularity contained in section 4(2) of the Evidence Order. Having considered the Letter of Request as it relates specifically to

each of the 16 witnesses, I am satisfied that the requirements of section 4(2) of the Evidence Order have been met regarding the Letter of Request before me in this case.

31. I also find that the documents referred to in the Letter of Request are actual documents, about which there is evidence in the form of the Morales affidavit helpfully referencing the requests to each of the 16 intended witnesses.

Likelihood of possession, custody or power

32. The Morales affidavit provides evidence in respect of the intended witnesses as to the likelihood that the documents requested are in the possession, custody or power of the relevant witness.
33. In addition, I note that several of the intended witnesses are subject to the Money Laundering Regulations (as revised). Section 5 of these Regulations states that a person may not form a business relationship, or carry out a one-off transaction in the Cayman Islands without keeping records. Section 12 further provides that the records should be evidence of a person's identity, and record any relevant account files, business correspondence, and details relating to all transactions carried out by that person in the course of relevant financial business.
34. Further, the Cayman Islands Monetary Authority ("CIMA") Regulatory Handbook issued pursuant to the Monetary Authority Law, at page 45 provides:

"Monitoring and Record Keeping
Institutions should keep appropriate evidence of client identification, account opening or new business documentation. Adequate records identifying relevant financial transactions should be kept for a period of five years following the closing of an account, the end of the

transaction, or the termination of the business relationship. In the case of transactions such as Trust transactions, the institution should have in place procedures to retain records for longer periods. The licensee should maintain adequate records such that a client's transactions can be isolated, the nature of the transaction identified, its form, and where it took place."

35. The intended witnesses respond as representatives of institutions which fall under the Regulatory regime of CIMA and/or the Money Laundering Regulations. In view of the regulatory provisions, the evidence of Mr Morales and the nature and vintage of the documents sought, I consider there to be very good reason to conclude that these documents are or are likely to be in the possession, custody or power of the intended witnesses.

Oral Testimony

36. Article 3(f) of the Hague Convention provides that "*A Letter of Request shall specify ... the questions to be put to the persons to be examined or a statement of the subject-matter about which they are to be examined...*". The format elected by the requesting court must reasonably ensure that its request can sensibly be enforced and without oppression. (See *First American v Zayed* (above), page 73, line 30 and page 74, lines 90 to 95).
37. The English Court of Appeal case of *Charman v Charman* (above) was concerned with an appeal of a High Court decision to issue a letter of request to the Bermudian Court under the Evidence (Proceedings in Other Jurisdictions) Act 1975. In that case, Wilson LJ commented:

"In the present case the request to the Bermudian court is both for the production of documents and for the taking of oral evidence. The nexus between the two was, as it happens, recently considered by Kawaley J in a valuable judgment in the Supreme Court of Bermuda in Netbank v Commercial Money Center [2004] BDa LR 46. Before him was an issue as to the enforcement of a letter of request from Ohio for oral evidence to be taken from employees in Bermuda of an insurance company. Into the Island's Evidence Act 1905 had been inserted provisions identical to those in the English Act of 1975. The judge observed, at p.11: "Typically, perhaps, oral examinations relate almost exclusively to the requested documents, so, if the documents are not properly sought, oral examination falls away. ... I respectfully agree with Kawaley J about the typical case." [page 1066, lines A-B].

38. I note that the Letter of Request before me follows the "typical case", by adopting the subject-matter approach linked to the documents sought in its requests for oral examination of the intended witnesses.

39. Whilst it has been said that there should be reason to believe that the intended witness has knowledge of the matters relevant to the issues at trial [see *Charman v Charman* above], even if it may be thought that the intended witness does not have knowledge in respect of all matters asked of him, that would be no basis for me to refuse to give effect to a letter of request on grounds of oppression or unfairness. As Lord Fraser of Tullybelton noted in *In re Asbestos Insurance*:

"It may be that [the witnesses] will be asked for evidence about matters which are outwith their experience, and which they are not qualified to deal with. If so, they can say so. It would be quite inappropriate, even if it were possible, for this House or any English court to determine in advance the matters relevant to the issue before the Californian courts on which each of these witnesses is in a position to give evidence."

40. Lord Fraser then cited with approval the dictum of Lord Keith of Kinkel in the *Westinghouse* case:

"In the face of a statement of letters rogatory that a certain person is a necessary witness for the applicant, I am of opinion that the court of

request should not be astute to examine the issues in the action and the circumstances of the case with excessive particularity for the purpose of determining in advance whether the evidence of that person will be relevant and admissible. That is essentially a matter for the requesting court."

41. Against the background of judicial comity with which the Letter of Request is to be approached, so long as I am satisfied that the designated person will or may be in a position to give at least some evidence which is relevant, I should not refuse the request on any assessment I might make as to the knowledge of the intended witness to give testimony bearing on the stated subject matter.
42. In light of the evidence before me and the authorities set out above, I find that the form of request for oral testimony from the intended witnesses regarding the stated subject matters, fairly relates to the matters in dispute in the US Action and may be readily enforced without oppression or unfairness.

Person to take and manner of taking examination

43. Grand Court Rules Order 70 sets out the relevant court rules regarding applications brought pursuant to the Evidence Order. O.70, r.4 (1) provides:

"Any order made in pursuance of this Order for the examination of a witness may order the examination to be taken before any fit and proper person nominated by the person applying for the order or before such qualified person as the Court deems fit."

Proposed Examiner

44. Gray 1 seeks the appointment of Ms Cherry Bridges, partner of the law firm of Ritch & Conolly to act as Examiner in respect of the Letter of Request. I have read the affidavit of Ms Bridges dated 10 February 2012 in which she confirms her

willingness to act as Examiner. I find Ms Bridges to be a fit and proper person to act as Examiner and order that she hereby be appointed to that position.

Manner of Examination - Special directions: Videotaping

45. Order 70, r.4(2) provides:

"Subject to rule 6 and to any special directions contained in any order made in pursuance of this Order for the examination of any witness, the examination shall be taken in the manner provided by Order 39, rules 5 to 10 and 11(1) to (3) ..."

46. This Application seeks a direction that the oral testimony be given before a reporter and videographer. This is in accordance with the request of the Californian Court as set out in the Letter of Request. It is to be noted that since the US v Carver (above), the Cayman Courts have been willing to give effect to requests to allow the video recording of a witnesses testimony, with the proviso that videotaping is challengeable by the witness if there is a perceived threat to personal security or liberty [US v. Carver (above) at pages 324 to 326]. Accordingly, I make the direction sought.
47. The Application seeks an Order for directions that Gray 1's US and/or Cayman Counsel has conduct of questioning of the intended witnesses.
48. I order that the Plaintiff's Cayman Counsel shall be permitted to ask any question of each of the said witnesses in respect of the subject matter specified in the Letter of Request during the examinations.
49. Further, that subject to complying with the requirements of the Immigration Law, the Plaintiff's US Counsel shall be entitled to attend the said examination for the purpose of assisting the examination of the intended witnesses by Gray 1's Cayman Counsel.

50. To the extent that a respondent witness anticipates the need to apply for direction pursuant to the Confidential Relationships (Preservation) Law (2009 Revision), such applications must be made forthwith.

Conclusion

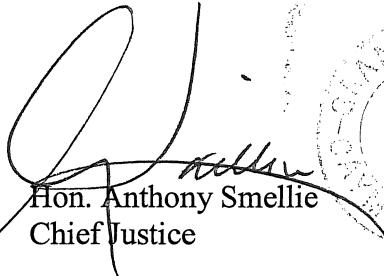
51. For the aforementioned reasons, I hereby grant 16 Orders for the production of documents and/or of oral testimony in respect of the intended witnesses identified in the Letter of Request dated 9 January 2012 and specified below:

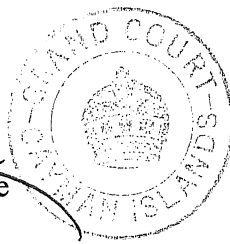
- (1) RBC Royal Bank (Cayman) Limited;
- (2) Butterfield Bank (Cayman) Limited;
- (3) Fidelity Bank (Cayman) Limited;
- (4) Keith High;
- (5) Abacus Capital Inc.;
- (6) Delta Capital Inc.;
- (7) Western International Trust Company Limited;
- (8) Roger Hendrickson;
- (9) Centennial Capital Inc.;
- (10) Paradise Hills SA.;
- (11) Rurik Trust Company (International) Limited;
- (12) Martin Eveleigh;
- (13) Fiona Moseley;
- (14) Crusader International Management (Cayman) Ltd;
- (15) Horse Whisper Ltd; and

(16) Exbury Holdings, Ltd.

52. In granting these Orders, I place particular emphasis on the following findings:

- (a) I accept that the description of documents requested contained in the Letter of Request is adequate having regard to the authorities, especially as to the requirement of particularity;
- (b) I accept that the form of oral testimony from the intended witness fairly respectively relates to the matters in dispute in the US Action and may be obtained without oppression or unfairness; and
- (c) I accept that the documents are of kinds and such vintage that they ought still to be in the possession of the respondents, in particular having regard to the obligations of professional service providers under Cayman Islands Law.


Hon. Anthony Smellie
Chief Justice

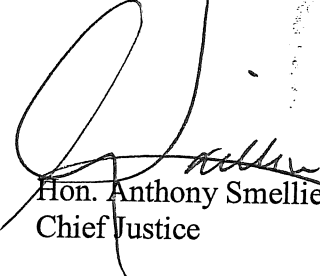


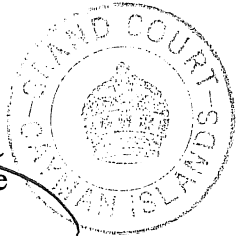
Oral Judgment given on February 17 2012.
Written Judgment delivered on 22nd May, 2012

(16) Exbury Holdings, Ltd.

52. In granting these Orders, I place particular emphasis on the following findings:

- (a) I accept that the description of documents requested contained in the Letter of Request is adequate having regard to the authorities, especially as to the requirement of particularity;
- (b) I accept that the form of oral testimony from the intended witness fairly respectively relates to the matters in dispute in the US Action and may be obtained without oppression or unfairness; and
- (c) I accept that the documents are of kinds and such vintage that they ought still to be in the possession of the respondents, in particular having regard to the obligations of professional service providers under Cayman Islands Law.


Hon. Anthony Smellie
Chief Justice



Oral Judgment given on February 17 2012.
Written Judgment delivered on 22nd May, 2012