IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO FSD 175 of 2015(IMJ)

BETWEEN

HARVEY RIVER ESTATE PTY LTD,
FOUR LITTLE GIRLS PTY & ORS.

Applicants

AND

1. **PETER CLARENCE FOSTER**
2. **ARABELLA LOUISE FOSTER**
3. **BANKSIA HOLDINGS LIMITED**
4. **THE PARTNERSHIP OF ANNE PATRICIA LARTER, ALAN JONES, MIRALESE PTY LTD AND LEIGH JOHNSON TRADING AS "STC SPORTS TRADING CLUB"**

Respondents

AND

CAYMAN NATIONAL BANK

Discovery Respondent

IN CHAMBERS

Appearances:	**Mr. T Lowe Q.C. and Ms. J Williams of Harneys for the Applicant** **Mr. K Farrow Q.C., for the 2nd and 3rd Respondents**
Before:	**The Hon. Justice Ingrid Mangatal**
Heard:	**28 April 2016**
Draft Judgment Circulated:	**3 June 2016**
Judgment Delivered:	**9 June 2016**

HEADING

Injunctive relief as protective measure in aid of foreign proceedings - Section 11A of the Grand Court Law (2015 Revision) - Proprietary claim - Mareva Relief - Application for Variation of Injunction

JUDGMENT

1. On the 2 November 2015, Smellie CJ made an interim injunction order, amongst others, by which it was ordered as follows:

> " .....:
>
> 1. *LEAVE TO SERVE OUT*
>
> *That the Applicants have leave to serve the ex-parte Summons and this order out of the jurisdiction on the First, Second and Fourth Respondents in accordance with Order 11 of the Grand Court Rules (2015)*
>
> 2. *DISPOSAL OF ASSETS*
>
> *(1) The Respondents must not remove from the Cayman Islands or in any way dispose of or deal with or diminish the value of any of the assets specified in Schedule 3 to this Order which are in the Cayman Islands up to the value of US$8,195,775.29.*
>
> *(2) If the total unencumbered value of the assets specified in Schedule 3 to this Order exceeds US$8,195,775.29, the Respondent may remove any of those assets from the Cayman Islands or may dispose of or may deal with them so long as the total unencumbered value of the assets specified in Schedule 3 and still in the Cayman Islands remains above US$8,195,775.29.*
>
> 3. *DISCLOSURE OF INFORMATION*
>
> *Each Respondent must provide the Applicants' attorneys with the following information within 7 days from the date this order is served on it:*
>
> *(1) Full details of the location of any assets held, either directly or indirectly, by the First, Second, Third or Fourth Respondents which were invested by the Applicants and/or any other individuals in the Sports Trading club and the STC Sports Trading Club Partnership in the Cayman Islands or otherwise.*
>
> 4. *USE OF INFORMATION*
>
> *To the extent that the Applicants obtain any information as a result of this Order such information may be used by the applicants in the proceedings it has issued against the Respondents and others in Australia and includes for the*

avoidance of doubt any enforcement action in relation to those proceedings."

This Order was granted ex parte and the Injunction was to remain in force until the return date. On the 27 November 2015 the Applicants filed a summons for continuation of the Injunction until further order of the Court, and the return date set was 27 January 2016. On the 15 January 2016 the Third Respondent filed a summons seeking a variation of the Injunction Order. This also came on for hearing before the Chief Justice on 27 January 2016.

3. On the 27 January 2016, by consent of the Applicants and the Second and Third Respondent it was ordered (a) that both summonses be adjourned for a date to be fixed, not before 10 February 2016, and (b) that the Injunction remain in force until further order of the Court.

4. The Applicants' Summons sets out the present application for the following:

> *"for an Order that the Injunction Prohibiting Disposal of Assets in the Cayman Islands made on 2nd November 2015 continue in force until further order of the Court"*

5. The Summons by the Third Respondent sets out the application for the following:

> *"..that the Order herein made on 2 November 2015 ("the Order") may be varied by inserting the following paragraph after paragraph 2 of the Order:*
> ***Exceptions to this Order***
> *This Order does not prevent the Third Respondent from paying out of the accounts held by the Third Respondent at Cayman National Bank, being the accounts of the Third Respondent referred to in Schedule 3 to this Order ("the Banksia Accounts"), the following sums in respect of legal advice and representation:*
> *(1) To HSM Chambers, the Second and Third Respondent's Cayman Island attorneys, the legal fees incurred by the Second and Third Respondents, or either of them, as parties to this action up to and including the 27 January 2016 less the sum of*

US$9,965.00 paid by the Second Respondent's mother on account of such fees;

(2) To HSM Chambers, such further reasonable sums incurred by the Second and Third Respondents, or either of them, as parties to this action;

(3) To Jeff Horsey, solicitor, of Upper Coomera, Queensland, Australia, such further reasonable sums incurred by the Second and Third Respondents, or either of them, or by Bella Development Limited or East Ocean Capital Limited as parties to an action proceeding in the Supreme Court of New South Wales, Equity Division, Case No. 20115/332497;

Provided that, in respect of the sums referred to in sub-paragraphs (2) and (3) above, no withdrawal from any of the Banksia Accounts shall be made unless and until the Third Respondent's Cayman Islands attorneys shall have given 14 days' notice in writing to the Applicants' Cayman Islands attorneys specifying the sum to be withdrawn, the account from which such sum is to be withdrawn and full details of the relevant fees comprised within such sum and if the Applicant's Cayman Island attorneys shall within such period of 14 days serve notice in writing on the Third Respondents' Cayman Islands attorneys, objecting to the proposed withdrawal and stating the grounds of such objection, the withdrawal shall not be made without further order of the Court"

6. The matter was reassigned to me by the Chief Justice on or about 26 February 2016, and both summonses came on for hearing on the 28 April 2016.

7. The relevant law is section 11A of the Grand Court Law (2015 Revision) (***"the Grand Court Law"***), which places on a statutory footing the jurisdiction of this Court to grant interim relief in aid of foreign proceedings.

BACKGROUND TO THE APPLICATION

8. The Applicants are 132 investors who invested (or loaned) money to an entity known as the 'Sports Trading Club' which operated in Australia.

9. At the time when the Injunction was granted on 2 November 2015, the proceedings that were intended to be brought in Australia had not yet commenced. However, they have since been brought. On 12 November 2015, the Applicants (and other investors in the Sports Trading Club), commenced substantive proceedings in the Supreme Court of New South Wales against a number of defendants, including the First, Second, and Third Respondent. Broadly, that claim is for the following: breach of contract, restitution, misleading and deceptive conduct in contravention of certain Australian statutes, the torts of deceit, conversion and conspiracy and claims arising out of the existence of a constructive trust.

10. At the ex parte hearing, the application was supported by the affidavit of Kevin Sorgiovanni, sole director and shareholder of the first-named applicant Harvey River Estate Pty Ltd, sworn 29 October 2015, and that of Kenneth Gamble, sworn 30 October 2015. Mr. Gamble is a private investigator, and Executive Director of Gamble Investigations International, based in Sydney, Australia.

11. For this hearing, Mr. Gamble has also sworn another three affidavits, and before me are affidavits of Arabella Foster (2), of Michael Ryan (2) (a former associate of the First Respondent Peter Foster), of Norman Covich (a friend of Mr. Ryan's), and of William Duffy, Attorney for Sportstraders Limited.

12. The Applicants' underlying claim is set out in detail in the skeleton argument for the 2 November hearing, as well as in Mr. Gamble's First Affidavit.

THE UNDERLYING CLAIM

13. The Sports Trading Club invited membership to the club through a document named "Associate Membership Proposal" (the "STC Prospectus") through what is described as a "Loan and Profit Share Agreement", although in reality the loans appeared to be treated and referred to by the club and the Applicants interchangeably as investments and loans.

14. The scheme as described by the Applicants is as follows:

1.1 Members could loan (invest) a minimum of AU$50,000 and a maximum of AU$250,000 to the Sports Trading Club Partnership;

1.2 The period of the loan/investment was between one and three years;

1.3 STC Australia would (it said) invest the money in the "lucrative sports trading industry" (essentially sports betting) and members would earn 50% of the profits made on the trades;

1.4 Members could follow the trades on the Club's website and would receive alerts;

1.5 Profits could be withdrawn monthly based on a formula.

15. Mr. Lowe Q.C., who appears for the Applicants, submits that the Club appears to have been an elaborate scam promoted through a sales and marketing campaign in Australia. Reference was made to the "pitch document" and to an advertisement, which offered the opportunity to *"change your life in 44 seconds. Earn $5000 per week"*.

16. On the basis of the representations made in the STC Prospectus and the pitch document, the Applicants "loaned" sums above AU$50,000 to STC Australia, being approximately AU$9,176,000 in total. Each of the Applicants signed a Loan and Profit Share Agreement.

17. Following an Australian news story about the Sports Trading Club (and Mr. Foster) on 30 October 2014, the General Manager of STC Australia, Anne Larter, sent an email to all investors offering them the opportunity to terminate their accounts and receive a refund. The Applicants all requested a refund (albeit some did so after a deadline purportedly put in place by STC Australia had expired).

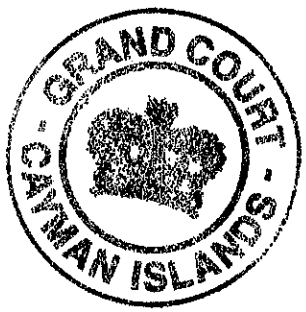
18. The Applicants say that other than payments of principal, none of which were paid in full, totaling AU$180,147.55 to 16 of the 132 Applicants, no payments whatsoever (whether by way of repayment of principal or profits or by way of refund), have been received by the Applicants.

19. The scam is set out in great detail in Mr. Gamble's First Affidavit. However, the Applicants' written submissions for the November 2015 hearing, at paragraph 10, helpfully summarize, and suggest that the highlights include:

"10.1 The STC Prospectus presented the STC Scheme as a sophisticated, professionally run investment opportunity operated out of offices in Sydney. It cited academic papers and articles in globally renowned publications to give the impression of legitimacy. It referred to a "Chief Investment Officer", "highly trained account managers" and a "Senior Analyst" who had experience of sports and investment and professional qualifications in quantitative disciplines such as science, accounting and mathematics to add credibility to its operations. It traded off the association of the "Science Research Director" (Dr. Allan Snyder) with internationally famous and credible individuals. ..Any loan provided was described as being "100% secured against the value of the Australian rights and by way of personal guarantee by the General Partner."

10.2 The Pitch Document described the opportunity as one in which the investors "can't lose money". .. It described STC as having 7 traders in the Sydney office, and offices in Hong Kong and London...The STC traders were described as "the best paid in the business" and the trading environment was said to be placid and calm " a bit like the google offices...but without the bean bags and the chanting music in the background"..

10.3 The reality, as revealed by Mr. Gamble's investigations, could not be further from the impression given in these documents:



i) *There is little doubt that, rather than being run by highly experienced and well trained investment professionals, the STC Scheme was promoted and run by Peter Foster, under the pseudonym "Mark Hughes", and his associates.*

ii) *Peter Foster is a convicted criminal with a long history of involvement in alleged scams. His involvement in the SensaSlim scam led the Australian Court to describe him as "...directly culpable and, further, utterly without remorse or contrition".*

iii) *The Sydney offices described in the Prospectus, which Peter Nolan (who used the pseudonym Tom Nolen) described to Mr. Sorgiovanni as "the trading floor", were simply a service office and there were no operations at the address given.*

iv) *STC Australia's 'trading', such as it was, in fact appears to have been conducted by Peter Foster and Peter Nolan from a residential property at 14 Magnolia Place, Ewingsdale, Byron Bay, New South Wales.*

v) *The property in Ewingsdale was rented in the name of Russell Charles Leighton. Mr. Leighton had in fact never rented a property in New South Wales, and the documents were presented to the real estate agents without his knowledge or permission.*

vi) *Dr. Allan Snyder, the alleged Scientific Research Director, has indicated, contrary to the impression given, "my only role at STC was to find a savant who could give predictions about major golf tournaments".*

vii) *The results of the trades presented to investors, as described by KRS, are highly suspicious. Entries for profits and losses repeatedly appeared in the same amounts, notwithstanding that bets were apparently placed on different sporting events and on different dates..."*

THE PROTAGONISTS AND THEIR RELATIONSHIPS

20. I have gratefully adopted the description given by the Applicants in their written submissions for this hearing, as to the various protagonists and their relationships.

21. The First Respondent Peter Foster is described in paragraphs 17-21 of Mr. Gamble's First Affidavit, as a convicted fraudster, who has consistently engaged in criminal activities over the past thirty years. He was released from prison in October 2015, after serving one of several prison sentences imposed on him over the years.

22. The Second Respondent, Arabella Foster, is the niece of the First Respondent, Peter Foster.

23. Jill Foster who is not a party to these proceedings, appears to be the sister of the First Respondent and the mother of the Second Respondent.

24. Luigina Foster who is not a party to these proceedings, appears to be the mother of the First Respondent and Jill Foster, and the grandmother of the Second Respondent.

25. William Duffy who is not a party to these proceedings, but is an affiant against the Applicants, is an associate of Mr. Foster and was previously the sole director of Sports Trading Club Limited in Vanuatu, and was (and is) the sole signatory of an account held in that company's name in Vanuatu. (Vanuatu is a Republic, located East of Australia, west of Fiji).

26. Ms. Foster had, at all material times, a role in the management of each of the following Hong Kong companies: Sports Trading Club Ltd (STC Hong Kong), Bella Development Ltd (Bella Development) and East Ocean Capital Ltd. (East Ocean). Of particular relevance in relation to Ms. Foster's role is that:

(a) Ms. Foster opened the BDL Hong Kong Account, the STC Hong Kong Account and the EOC Hong Kong Account;

(b) Ms. Foster was named as the sole signatory for each of those accounts and authorized user of applicable phone and internet banking services on the relevant opening forms;

(c) The Applicants claim that documents obtained by way of disclosure orders in Hong Kong do not evidence any change in Ms. Foster's status as signatory and authorized user of applicable phone and internet banking services.

27. Ms. Foster had, at all material times, a role in the management of the Third Respondent. Of particular relevance is that:

1.6 Ms. Foster opened the Banksia US$, Euro and GBP Accounts;

1.7 Ms. Foster was named as the sole signatory for each of those accounts on the relevant opening form;

1.8 By a form submitted on 15 September 2015, the Third Respondent requested that Jill Foster be added as an authorized signatory of those accounts;

1.9 The Applicants aver that documents obtained by way of a disclosure order in this jurisdiction do not evidence any change in Ms. Foster's and Jill Foster's status as signatory to those accounts.

PROCEDURAL HISTORY AND PROCEEDINGS IN OTHER JURISDICTIONS

The Cayman Injunction Order

28. As previously outlined, on 2 November 2015, the Applicants obtained the Injunction.

29. The Injunction prohibits the disposal by the Respondents of assets within the Cayman Islands to the value of US $8,195,775.29, pursuant to section 11A of the Grand Court Law and was sought by the Applicants in aid of proceedings that (at that time) were to be commenced in Australia.

30. In addition to the Injunction, the Applicants also obtained ancillary relief. The Applicants say that Ms. Foster has purported to comply with the disclosure order by letter from HSM dated 4 December 2015. None of the other respondents have done so.

The Orders Obtained in Hong Kong

31. On 29 October 2015, the Applicants obtained an order from the High Court of Hong Kong restraining the Defendants from dealing with any of their assets up to a value of AU$11,567,600 (other than in accordance with the terms of that order) and requiring the Defendants to disclose every asset over which they had interest or control, anywhere in the world, the value of which was AU$5,000 or more. A copy of the Hong Kong Order was provided.

32. On 13 November 2015, the Hong Kong Court ordered that the Order continue.

33. On 15 December 2015, STC Hong Kong, Bella Development, East Ocean and Ms. Foster applied to vary the Hong Kong Order to allow release of funds from the STC Hong Kong Account, the BDL Hong Kong Account and EOC Hong Kong Account to pay for legal costs. The Plaintiffs made a cross application seeking an order that prohibited the Defendants being heard on their own application until they had properly complied with their disclosure obligations under the Hong Kong Order. The hearing of these applications was fixed for 27 April 2016. In a short up-dating affidavit, Mr. Gamble's Fourth Affidavit, filed 27 April 2016, Mr. Gamble advised as follows in relation to the proceedings in Hong Kong:

"8. I am advised by the Plaintiffs' lawyers in Hong Kong, Holman Fenwick Willan ("HFW"), that at the hearing on 27 April 2016 ("the Hearing"), the Honourable Madame Justice Mimmie Chan ("the Judge"):

(1) Was satisfied that the Plaintiffs had shown proprietary claims over the assets frozen by the Hong Kong Order;

(2) Found that the Hong Kong Defendants had not shown with full and frank evidence that they had no alternative source of legal funding (besides the funds frozen in Hong Kong); and

(3) Found that the Hong Kong Defendants had not complied with their disclosure obligations under paragraphs 3(1) and 3(2) of the Hong Kong Order.

9. In light of her findings, the Judge ordered amongst other things that:

(1) The Variation application be dismissed;

(2) The Hong Kong Defendants be barred from being heard by the Hong Kong Court until such time as they comply with paragraphs 3(1) and 3(2) of the Hong Kong Order; and

(3) The Hong Kong Defendants pay their costs of and occasioned by the Variation Application and the Hadkisson Application on an indemnity basis."

Orders obtained in Vanuatu

34. On 2 November 2015, the Applicants obtained an order from the Supreme Court of the Republic of Vanuatu restraining STC Vanuatu from dealing with any monies in their possession or control in the STC Vanuatu Account and removing from Vanuatu any of its assets within that jurisdiction up to the value of AU$9,067,595. A copy of this Order was also provided.

The Substantive Claims in Australia

35. On 12 November 2015, the Applicants and other investors in the Sports Trading Club ("the Plaintiffs") commenced substantive proceedings in the Supreme Court

of NSW against a number of defendants, including the First Respondent, Second Respondent and Third Respondent.

THE APPLICATION FOR THE CONTINUATION OF THE INJUNCTION

36. As stated previously, by consent of the Second and Third Respondents, the Injunction Order is presently in force until further order of the Court. The Applicants in essence are applying for the Injunction to continue in force and effect until further order of this Court, and they are opposed to the relief sought by the Second and Third Respondent. Mr. Lowe submits that, given the nature of the jurisdiction under which the Injunction Order was made, it is likely that no substantive proceedings will take place in this matter until after the trial of the action commenced in the Equity Division of the Supreme Court of New South Wales.

37. The Second and Third Respondent in their evidence appear to oppose the continuation of the Injunction. The Third Respondent's application is supported by the First Affidavit of Ms. Foster for herself and in her capacity as a director of the Third Respondent. Mr. Gamble's Third Affidavit was filed in opposition to the Third Respondent's application, as well as in support of the continuation of the Injunction.

38. Mr. Lowe Q.C. submits that these Affidavits, along with those of Ryan, Duffy, and Covich, disclose a conflict of evidence as to the authenticity of a Licence Agreement said by Mr. Duffy to have been signed by himself and Mrs. Larter and purportedly witnessed by Mr. Ryan in December 2012.

39. It is common ground between Mr. Lowe and learned Queen's Counsel Mr. Farrow that the Licence Agreement is important. Mr. Lowe says that this is so because it is the basis upon which it is said that the funds the subject of the fraud were transferred lawfully from Australia to Hong Kong (then, for some of the funds, on through Vanuatu to Cayman). The argument continues that, if the

Licence Agreement can be shown to be a false document then the proprietary claim is a good one and the application for a variation must fail. The Respondents say that Mr. Ryan witnessed the execution of the Licence Agreement; Mr. Ryan upon two occasions has said that he did not do so. He also says that emails attributed to him have been fabricated. Mr. Lowe submits that Mr. Ryan's evidence is to be preferred to, and is far more credible than, that of close associates of a known criminal who has been previously imprisoned for dishonesty.

CONTINUATION OF THE INJUNCTION: THE APPLICANTS' PROPRIETARY INTEREST IN THE FUNDS

Overview of the Movement of funds

40. The Applicants state that they paid monies to an account at Westpac Bank in Australia (the "Westpac Account") in the name of STC Australia. They say that the funds moved from the Westpac Account to STC Hong Kong, then to Bella Development and East Ocean, and then to the Second Respondent and the Third Respondent.

Movement of funds from Australia to Hong Kong

41. Between August 2014 and October 2014, AU$3,999,851.94 was transferred in tranches from the Westpac Account to an account at HSBC in Hong Kong in the name of STC Hong Kong ("the STC Hong Kong Account").

42. No transfers were made to the STC Hong Kong Account other than from the Westpac Account.

Movement of funds within Hong Kong

43. In addition to the STC Hong Kong Account, the Applicants identified two accounts in Hong Kong of relevance:

    a) The BDL Hong Kong Account in the name of Bella Development;

b) The EOC Hong Kong Account in the name of East Ocean.

Between August 2014 and October 2014, AU$1,000,000 and US$1,000,000 was transferred in tranches from the STC Hong Kong Account to the BDL Hong Kong Account.

45. Between August 2014 and October 2014, US$2,000,000 was transferred in tranches from the STC Hong Kong Account to the EOC Hong Kong Account.

Movement of funds from Hong Kong to the Cayman Islands

46. The Applicants identified four accounts in the Cayman Islands of relevance:

a) the Banksia US$ Account, the Banksia EUR Account and the Banksia GBP Account, (together the CNB Accounts) each in the name of the Third Respondent; and

b) the Arabella Account in the name of Ms. Foster.

47. As noted earlier, Ms. Foster was (and is) a signatory of the CNB Accounts, along with Jill Foster from on or around 15 September 2015.

48. Ms. Foster was, and is, a signatory of the Arabella account, along with Jill Foster from on or about 21 September 2015.

49. The Applicants go on to allege that between 21 October 2014 and 30 October 2015, US$624,976.80 was transferred in tranches to Banksia's US$ Account from Bella Development and an unidentified source (or sources).

50. Between the 26 August 2014 and 15 October 2015, US$270,370.80 was transferred in tranches from the Banksia US$ Account to:

a) A trust account of a law firm (Fisher Dore Criminal lawyers) located in Queensland, Australia where the First Respondent

was, at or around the time of transfer, imprisoned. The transfer was marked " FOSTER LEGAL FEES"

b) An account in the name of Mr. Duffy;

c) An account in the name of Luigina Foster.

51. On 28 October 2014, €388,852.41 was deposited by Bella development to the Banksia EUR Account.

52. On 15 October 2015, €80,066.95 was transferred from the Banksia EUR Account to Miralese Account.

53. On 23 October 2014, GBP£309,214.11 was deposited into the Banksia GBP Account by Bella Development.

54. On 13 October 2014, GBP£16,994.42 was transferred from the Banksia GBP to an unidentified recipient.

55. Between 7 October 2014 and 22 October 2014, US$749,915.60 was deposited in tranches to the Arabella Account by East Ocean.

56. On 30 October 2015, US$350,000 was transferred in tranches from the Arabella Account to unidentified recipients.

57. The Applicants claim a proprietary interest in the assets the subject of the Injunction. They say that the evidence shows that the proceeds of the fraud have been traced to the relevant bank accounts with Cayman National Bank, thus, the Applicants say that the assets in the relevant bank accounts belong to them.

58. Reference was made by Mr. Lowe to the decisions of Smellie CJ in ***Classroom Investments v China Hospitals Inc*** [2015] Unreported, 15 May 2015, and ***Johnson & Johnson and another v Stephen Medford and another*** [2015],

Unreported, 29 June 2015. These authorities were of course, also referred to at the ex parte hearing.

59. One of the fundamental questions the Court must answer when considering an application under section 11A of ***the Grand Court Law*** is whether the Court, if it were itself seized of the substantive proceedings, would grant the relief sought. As pointed out in the Applicants' written submissions for the ex parte hearing, in ***Classroom***, Smellie CJ also accepted that when the Court is considering whether to exercise its discretion to make an order relating to a proprietary interlocutory injunction, the Court applies the well-known principles in ***American Cynamid v Ethicon Ltd*** [1975] A.C. 396.

60. Mr. Lowe submits that the "gateway test", as the Chief Justice described it in ***Classroom*** for meeting the requirements of Section 11A has been satisfied, and that there is no basis upon which the Court should discharge the injunction. The claims in Australia remain on foot and the injunctions granted in Hong Kong and Vanuatu remain in force.

THE SECOND AND THIRD RESPONDENTS' SUBMISSIONS IN OPPOSITION TO THE CONTINUANCE OF THE EX PARTE INJUNCTION ORDER GRANTED 2 NOVEMBER 2015

61. Mr. Farrow Q.C. in his helpful written submissions, dealt separately with the Second and Third Respondents' opposition to the continuance of the Injunction, which he referred to as "the Principal Issue", and Summons seeking a variation to permit certain payments to be made out of the Banksia accounts frozen by the Injunction. The variation was referred to as "the Alternative Issue". As Mr. Farrow sensibly observed, if the Court declined to continue the Injunctions, it would be unnecessary to proceed with the Alternative Issue.

62. In his written submissions, Mr. Farrow indicates that it is accepted, for the purposes of the hearing, that the funds currently standing to the credit of the CNB

accounts of the Second and Third Respondent can be traced back to the funds transferred from STC Australia to STC Hong Kong. However, it is the Second and Third Respondents' contention that the funds transferred from STC Australia to STC Hong Kong were so transferred pursuant to the Licence Agreement. Further, that STC Hong Kong accordingly received those funds as a bona fide purchaser for value. Learned Queen's Counsel says that if this is established, there can be no proprietary or other claim against either STC Hong Kong or any other person or entity to whom those funds were subsequently transferred and, in particular, against either the Second or Third Respondent in respect of the CNB accounts.

63. Learned Counsel submits, that what the Applicants have to establish is that the Licence Agreement was part of a fraudulent conspiracy between those then involved in the management of STC Australia and STC Hong Kong to defraud subscribers to the Australian enterprise. He submits that there is simply no evidence which supports such an allegation.

64. Accordingly, Mr. Farrow submits that the Principal Issue is whether, on the totality of the evidence adduced, the Applicants have established that the evidence discloses a "serious issue to be tried" and that, in respect of that issue, they have a "real prospect of success", that is, a real prospect of obtaining a permanent injunction at the trial. Reference was made to ***Kelly & Ors v Fujigmo Ltd and Ors*** [2012] (2) CILR 222, 227-229 per Smellie CJ. Once that threshold is satisfied, questions of the adequacy of damages and the balance of convenience might arise.

65. Interestingly, Mr. Farrow indicates that it is accepted that the question whether the Applicants have a proprietary interest in the funds standing to the credit of the CNB accounts is a serious one to be tried. However, it is the contention of the Second and Third Respondent that, on the evidence before the Court, the Applicants' claim in that regard has no real prospect of success. Learned Counsel

submits that that contention turns largely on the evidence relating to the genuineness of the Licence Agreement.

66. Given that the Applicants' claim is for equitable relief, it was argued that there is also a subsidiary issue which arises, namely, what significance is to be attached to the fact that, in support of their claim, the Applicants have adduced evidence, in the form of the First and Second Affidavits of Michael Ryan, which learned Counsel submits are demonstrably false.

THE LICENCE AGREEMENT

67. Mr. Farrow submitted that the starting point must be the Licence Agreement itself. Taking it at face value, he submits that there is no reason to doubt that it was signed and witnessed on the date that it bears by the persons, namely, Mr. Duffy on behalf of STC Hong Kong, Ms. Larter on behalf of STC Australia and, as a witness to their respective signatures, Mr. Ryan whose signatures appear on the copy before the Court. Whether, as between STC Australia and STC Hong Kong, the Licence Agreement represented a good commercial bargain is not to the point. Mr. Gamble, in his Third Affidavit at paragraph 82 states that he is suspicious as to the authenticity of the Licence Agreement. Learned Counsel submits that it is not entirely clear what this means. It could mean one of two things, neither of which is clearly expressed, he opines, in the Applicants' evidence.

68. Leaving aside the evidence of Mr. Ryan, it could mean, he submits, that the Licence Agreement was signed on a date later than it bears to give a semblance of legitimacy to what were in truth voluntary payments made by STC Australia to STC Hong Kong with a view to transferring the proceeds of a fraudulent enterprise out of the Australian jurisdiction. On this basis, the question would be not <u>whether</u> the Licence Agreement was signed but <u>when</u> it was signed. (Counsel's emphasis) Most likely, Mr. Farrow surmises, the Applicants will say that it was in fact signed subsequent to receipt of notice of the Hong Kong order

dated 29 October 2015, the first notice either STC Hong Kong or Ms. Foster would have had of the Applicants' claim. If it was signed significantly later than the date that it bears this would be some evidence in support of the Applicants' principal contention that the Licence Agreement was part and parcel of some fraudulent conspiracy. Unfortunately for the Applicants, posits learned Counsel, the evidence in support of an allegation that it was not signed when it purports to have been signed simply does not "add up".

69. Mr. Farrow made the submission that in any event, if the Applicants' case is that the Licence Agreement was signed by Mr. Duffy and Ms. Larter but not on the date that it bears, Mr. Ryan's evidence does not help them. His evidence is not that he did indeed witness the signatures but in, say, October 2015 but that he did not witness them at all. Thus he is not in a position to deny Mr. Duffy's evidence as to when and where it was signed by him and Ms. Larter since, according to him, he was not present.

70. Learned Queen's Counsel referred to the evidence which he says supports the contention that the Licence Agreement was signed when it purports to have been signed. The most cogent evidence in this respect, he submitted, is the press release dated 3 January 2013. The date of the press release was some 14 days after the date of the Licence Agreement, There can be no question as to the date of this document, he argues, since it was released not by STC Australia itself but through a press agency, PRLOG. Reliance is also placed on the Limited Power of Attorney dated 11 December 2012 which learned Counsel contends was clearly executed in anticipation of Mr. Duffy signing the Licence Agreement, as he did some 10 days later. Further reliance is placed on STC Australia's marketing material which is exhibited to Mr. Gamble's First Affidavit. Although this material is not dated it must have been available, Mr. Farrow argues, to potential subscribers before the first subscription was made which, in so far as the Applicants are concerned, was 25 February 2013.

71. As to the alternative way in which the Applicants' principal contention might be expressed, namely, that although signed on the date that it bears, it was part of a pre-conceived plan to defraud members of the Australian public, there is, learned Counsel contends, no evidence to support this. Such evidence would have to implicate those involved with the management of STC Hong Kong at the time, namely, Ms. Foster, as the ultimate beneficial owner, and Mr. Duffy, the donee of the Limited Power of Attorney referred to above. As for Ms. Foster, she is admittedly the niece of Peter Foster, a convicted fraudster, but that amounts to no more than a misfortune, not evidence against her, says Mr. Farrow. As for Mr. Duffy, Mr. Gamble deposes to the fact that he understands "Mr. Duffy to be a close associate and long-term friend of Mr. Foster" Mr. Farrow submits that this is again, no evidence of fraud. The Applicants' evidence rests on no more than "guilt by association".

72. Mr. Farrow then proceeds to discuss in detail other questions raised by Mr. Gamble as to the genuineness of the Licence Agreement. One of the matters raised by Mr. Gamble is that Mr. Ryan's signature as a witness to the respective signatures of Mr. Duffy and Ms. Larter is forged.

73. Ms. Foster's primary contention is that Mr. Ryan's evidence should be discounted on the ground that it is not reliable and is inconsistent with the emails which he sent to both Mr. Duffy and Mr. Covich. Accordingly, the Court should, it was argued, proceed on the basis that Mr. Ryan did indeed witness the signatures of Mr. Duffy and Ms. Larter on the date that the Licence Agreement bears. Mr. Ryan's Second Affidavit alleges that these emails were not written by him. Mr. Farrow suggests that his denial of authorship is simply not credible.

74. It was not strongly pursued, but the question of the Respondents getting an opportunity to cross-examine Mr. Ryan was raised. However, I took the view that, separate and apart from jurisdiction issues, it would not be appropriate to have

ordered cross-examination by video-link or otherwise, on an interlocutory injunction application. In any event, to deal with the issue of signing, its genuineness and occurrence would not necessarily be limited to a cross-examination solely of Mr. Ryan. Such a procedure would have all the features of a mini-trial which I am not expected to engage upon on an application such as this.

The Subsidiary Issue

75. Notwithstanding that this is an interlocutory application and the evidence is by affidavit only without the benefit of cross-examination, Mr. Farrow invites the Court to find that, in both his affidavits, Mr Ryan has perjured himself in that he has deposed to facts which he knows not to be true. If that contention is made out, learned Counsel submits, the Applicants, although not personally to blame, must bear the consequences- see ***Bir v Sharma***, the Times, 6 October 1988. They have, through their agents, Counsel submits, attempted to practice a deception on this Court and, accordingly, the Court should refuse to continue the injunction granted by the Order.

76. The legal basis for that contention is that the Applicants are seeking equitable relief and must approach the Court with clean hands. It was accepted by learned Counsel that there must be some connection between what, in this case, is the reliance on perjured evidence and the equitable relief which is sought: Reference was made to ***Dering v Earl of Winchelsea*** (1787) 1 Cox 318 and, for a more modern application of the principle, ***J Willis & Son v Willis & Anor*** [1986] 1 EGLD 62., CA. However, here, it was argued, there is such a connection, namely, the ability of the Applicants to satisfy the threshold test for interlocutory injunctions referred to above. The only issues between the Applicants and Ms. Foster, the argument continues, is whether the Licence Agreement was a bona fide commercial arrangement between the parties and whether, which comes to the same thing, the payments made by STC Australia to STC Hong Kong were made pursuant to the Licence Agreement. It is the Second and Third Respondents' contention that, absent Mr Ryan's evidence, the Applicants have no

"real prospect of success" on those issues and that Mr Ryan's perjured evidence was introduced for the sole purpose of increasing that prospect.

The Third Respondent's Summons

77. Mr. Farrow at the commencement of his submissions in respect of the variation, the Alternative Issue, indicated that he would not be pursuing paragraphs 2 and 3 of the Summons. At this stage, he indicated, the Third Respondent is content to limit the relief sought to the payment out of its account with CNB of the costs incurred by HSM Chambers, up to and including, the costs of the hearing of 28 April 2016, less the sum of US$9,965 received on account. In oral submissions, Mr. Farrow outlined how his firm's fees were comprised, and indicated that after taking the payment on account into the equation, there was outstanding the sum of approximately US$42,000.00 and he asked that the Injunction be varied to allow for the Third Respondent to pay this sum from the CNB account to HSM in respect of legal fees.

78. Mr. Farrow QC indicated that in his view, the fact that the Applicants are making a proprietary claim is not a "knock-out punch". He submitted that the Court retains a discretion. Reference was made to ***PWC (Underwriting Agencies) Ltd. v Dixon & Anor*** [1983] BCLC 105, and the decision of Smellie CJ in ***TMSF v Merrill Lynch Bank and Trust Company (Cayman) Limited & Ors,*** Unreported, delivered 26 May 2008, from which learned Queen's Counsel claimed to derive support.

79. It was posited that here, the factors which justify the Court in exercising that discretion in favour of the Third Defendant are as follows:

(1) HSM Chambers is not prepared to continue acting in this matter unless it is at least paid its fees to the date of the hearing.

(2) There is no other source for the payment of those fees. The Second Defendant is subject to a world-wide freezing order in

Hong Kong and the Third Respondent has no assets other than its CNB accounts which are also frozen as a result of the Injunction.

(3) The exception to the Hong Kong Order permitting the Second Defendant to use funds for legal and personal expenses is of no value since, even supposing that as a matter of construction it extends to legal expenses incurred in other proceedings, apart from her interests in Bella, East Ocean and the Third Respondent, all of whose assets are frozen, her free estate is of insufficient value to meet legal expenses on top of personal ones.

(4) The consequences of the above is that the Second Respondent and the Third Respondent will be deprived of the benefit of legal representation in the Cayman Islands, just as the Second Respondent, Bella and East Ocean have lost the benefit of representation in Hong Kong.

80. It is in these circumstances that Mr. Farrow asks the Court to accede to the Third Respondent's summons.

THE APPLICANTS' SUBMISSIONS ON THE VARIATION

81. Mr. Lowe submitted that this is an odd application, in that it seeks a variation of an injunction which would permit funds to be withdrawn from the Third Respondent's Bank Account to meet the existing and future legal fees (although Mr. Farrow has indicated this latter aspect of the application is withdrawn), not only of the Third Respondent, but also that of the Second Respondent Ms. Foster.

82. Mr. Lowe summarises Ms. Foster's evidence, and says that Ms. Foster asserts that she has no assets, other than:

a) Her shares in the Third Respondent;

b) The funds in the Arabella Account, which are purportedly charged to www.betsport888.com;

c) Approximately AU$5,000 in an Australian bank account.

83. However, Ms. Foster in her Affidavit does say that she is an Associate Member of STC Australia, and that the aggregate total loan to STC Australia between her, Jill Foster, and her grandmother is AU$250,000. Ms. Foster has not identified that loan, or the income generated from it, as a potential asset available to her.

84. Further, Mr. Lowe submits, Ms. Foster has previously held herself out as a property developer and appears to have commercial interests in the horse racing/equestrian industry.

85. Mr. Lowe Q.C. submits that there is also no basis on which the court should grant a variation so as to permit payments out of the account. No case has been put forward, he argues, by any of the respondents, that such a variation is necessary. Indeed, he says, as discussed in paragraph 83 above, Ms. Foster has the benefit of an asset worth AU$250,000 that she has failed to date to disclose to the Hong Kong court. She cannot and should not be expected to gain advantage in this court from her refusal to comply with disclosure orders in Hong Kong. Until she gives a full account of her true assets the court should not hear her, he submitted. Although making the point, Mr. Lowe did not press this point to the full extent of for example, making a Hadkisson application, as was made before the Hong Kong Court.

THE LAW

86. As stated above, this application by the Applicants is governed by section 11A of ***the Grand Court Law***.

> ***Interim relief in the absence of substantive proceedings in the Islands***
>
> *11A. (1) The Court may by order appoint a receiver or grant other interim relief in relation to proceedings which-*
>
> *(a) have been or are to be commenced in a court outside of the Islands; and*
>
> *(b) are capable of giving rise to a judgment which may be enforced in the Islands under any Law or at common law.*

(2) The Court may, pursuant to this section, grant interim relief of any kind which it has power to grant in proceedings relating to matters within its jurisdiction.

(3) An order under subsection (1) may be made either unconditionally or on such terms and conditions as the Court thinks fit.

(4) Subsection (1) applies notwithstanding that -

(a) the subject matter of those proceedings would not, apart from this section, give rise to a cause of action over which the Court would have jurisdiction; or

(b) the appointment of the receiver or the interim relief sought is not ancillary or incidental to any proceedings in the Islands.

(5) The Court may refuse an application for the appointment of a receiver or the grant of interim relief if, in its opinion, it would be unjust or inconvenient to grant the application.

(6) In exercising the power under subsection (1), the Court shall have regard to the fact that the power is-

(a) ancillary to proceedings that have been or are to be commenced in a place outside the Islands; and

(b) for the purpose of facilitating the process of a court outside the Islands that has primary jurisdiction over such proceedings.

(7) The Court has the same power to make any incidental order or direction for the purpose of ensuring the effectiveness of an order granted under this section as if the order were granted in relation to proceedings commenced in the Islands.

(8) The power to make Rules under section 19 includes power to make Rules for-

(a) the making of an application for appointment of a receiver or interim relief under subsection (1); and

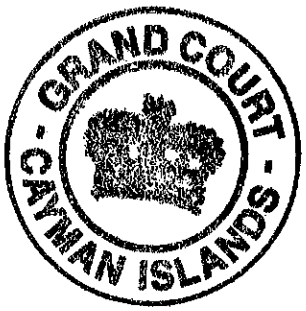
(b) the service out of the jurisdiction of an application or order for the appointment of a receiver or for interim relief.

(9) Any Rules made by virtue of this section may include incidental, supplementary and consequential provisions as the Rules Committee considers necessary.

(10) In this section, "interim relief" includes an interlocutory injunction."

87. In the ***Classroom*** case, Chief Justice Smellie referred to and accepted that the judicial learning on section 25 of the English Civil Jurisdiction and Judgment Act

1982, (which is similar but not identical to section 11A), was relevant on an application made pursuant to section 11A. In a case decided not long after ***Classroom,*** the Chief Justice again revisited these issues, in ***Johnson & Johnson v Stephen Medford and anor*** [2015] Unreported, 29 June 2015, and summarized them, at paragraph 29, as follows:



i) Where assets are located outside the jurisdiction of the foreign Court which is seized of the substantive proceedings, the Court of the jurisdiction where they are located should not hesitate in an appropriate case to grant appropriate orders;

ii) The question is whether it is "just and convenient" to grant the protective orders. The jurisdiction is not one to be exercised only in exceptional circumstances; it will suffice if it is expedient in the interest of justice to do so.

iii) Whilst this Court should always be cautious in granting a free-standing freezing injunction, it should not be timid to grant such relief so long as there is a good arguable case and there is a real risk of dissipation of assets which could frustrate that case.

88. In relation to (iii) above, Smellie CJ also stated that this test involves the Court answering two fundamental questions:

> *"First, would this Court grant relief if it were itself seized of the substantive proceedings, and, second, would the fact that the substantive proceedings are overseas make the grant of relief inexpedient, unjust or inconvenient?"*

89. At the ex parte hearing in this matter before the Chief Justice, the Applicants sought orders and relief on the basis of the fact that they were making a proprietary claim that the assets within the jurisdiction and held in the name of Ms. Foster and the Third Respondent at CNB, belong to them. They also sought relief on a mareva/freezing injunction basis.

90. The well-known principles in ***American Cynamid*** involve the Court enquiring to see whether there is a serious issue to be tried, or whether there is a real prospect

of success, the question of whether damages are an adequate remedy, and where the balance of convenience lies. The test for determining where the balance of convenience lies, may as the Applicants' written submissions suggest, be distilled down to the following proposition, taken from the Privy Council's decision in ***NCB v Olint*** [2009] UKPC 16, paragraphs 16 and 17 per Lord Hoffman. In assessing whether or not an injunction should be granted:-

> *"..the basic principle is that the Court should take whichever course seems more likely to cause the least irremediable prejudice to one party or the other."*

91. I note that Mr. Farrow in his written submission appeared to make a distinction between the question whether "there is a serious issue to be tried" and "a real prospect of success". However, in my judgment, Lord Diplock's own dicta in ***American Cynamid*** (at pages 407-408) and the dicta of Smellie CJ in ***Kelly v Fujigmo***, cite by Mr. Farrow, at paragraph 10, do not bear out such a distinction.

92. In relation to obtain a freezing order or mareva injunction, the Court must be satisfied that the Applicants have a good arguable case on the merits, and that there is a real risk of dissipation of assets- ***Ninemia*** [1984] 1 All E.R. 398.

RESOLUTION OF THE ISSUES AND ANALYSIS

The Applicants' application for the continuation of the Injunction

Gateway test

93. The requirement s of section 11A have plainly been met. Proceedings which were intended to be commenced by the Applicants have now been commenced in New South Wales. If successful, those proceedings will give rise to a judgment enforceable in the Cayman Islands at common law, for example by the Applicants suing on a judgment and seeking to recover under the same by enforcing against the assets of the Respondents within the jurisdiction.

Assets within the Jurisdiction

94. There are assets within the jurisdiction, which are the subject of the proprietary claim, being the monies held in the CNB accounts in the name of the Third Respondent.

SERIOUS ISSUE TO BE TRIED

95. Mr. Farrow candidly conceded that the question whether the Applicants have a proprietary interest in the funds standing in the CNB accounts is a serious issue to be tried. He had sought to argue that such a claim, though it involves a serious issue, has no real prospect of success. As I have already stated, it seems to me that deciding whether there is a serious issue to be tried, and whether the claim is one that has a real prospect of success are really one and the same thing. But in any event, in so far as the Second and Third Respondent say that this turns on the issue of the genuineness of the Licence Agreement, I agree with Mr. Lowe that the Respondents have not challenged in these proceedings that the money that entered into the Cayman CNB accounts are proceeds of a fraud. Nowhere in the proceedings has the fraud, at least as regards STC Australia been challenged and nowhere in Ms. Foster's affidavit has the summary of the fraud been challenged. Therefore the burden of proof that STC Hong Kong was transferred the funds pursuant to a genuine Licence Agreement and are therefore a bona fide purchaser for value without notice is on the Respondents. I agree with Mr. Lowe Q.C. that all he has to show, for the purpose of these proceedings, is an arguable case that the Respondents cannot prove that.

96. On the evidence. STC Hong Kong is Ms. Foster's vehicle. STC Hong Kong was therefore set up by the niece of a man who it is not denied was at the centre of a fraudulent scheme in STC Australia. Indeed, as Mr. Lowe characterised Ms. Foster's affidavit, the tone would suggest that Ms. Foster, the niece of Peter Foster, ends up being a victim of the fraudulent activity orchestrated by her uncle. As learned Counsel points out, save for the reference in paragraph 9 of Ms. Foster's affidavit to the fact that "Immediately prior to 21 December 2012, STC

Hong Kong (then called Sportstrader Limited) owned the exclusive world-wide rights to the Sports Trading Club systems.", no real particulars are given, no trading systems or business are described, or what property there was that belonged to STC Hong Kong other than this purported Licence, which Mr. Lowe describes as window-dressing. It is also plainly an arguable issue as to whether the purported signature of Mr. Ryan is really authentic. There is additionally, in my view a good arguable case, the higher threshold test required for mareva relief, that funds were misappropriated from the Applicants as a result of the fraudulent Scheme described in Mr. Gamble's First Affidavit, and that the Applicants have a proprietary claim to the funds in the Third Respondent's name in the CNB accounts.

ADEQUACY OF DAMAGES

97. I agree with the submission made at the ex parte hearing, that damages would not be an adequate remedy for the Applicants. The alleged Mastermind of the Sports Training Club, Mr. Foster is a known and convicted fraudster with a history of being involved in elaborate scams. Mr. Foster had recently spent time in prison in Australia for contempt of Court. I agree that there appears to be a real risk that he would not abide by any judgment made by the Court in Australia for contempt of Court.

98. As they did at the ex parte hearing, the Applicants have indicated that they have significant liquid personal assets, have provided the relevant undertaking as to damages and would be able to satisfy an order to pay damages should that eventuality arise.

BALANCE OF CONVENIENCE

99. As to the balance of convenience generally, this is a case in which a serious fraud has been alleged. The scope of the injunctive relief sought is very specific, with the Applicants simply wanting to preserve the status quo until the Australian

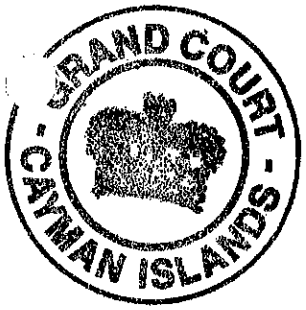
Court can determine the matter, and in respect of which the Applicants believe they have a high probability of success.

100. It was the Applicants' submission that the only disadvantage to be suffered by the Respondents is that they will temporarily be unable to use the assets in the Cayman accounts. However, they submit that it however seems plain that the purpose of moving the funds to the Cayman accounts, in an offshore jurisdiction, was not for use for day to day living expenses or for sustaining Ms. Foster or the other Respondents. It was further submitted that there is no evidence that the injunction would disadvantage the Respondents.

101. In any event, they referred to the English Court of Appeal's decision in ***Polly Peck International Plc v Nadir (No. 2)*** [1992] 4 All ER 769 (also relevant to the variation application), where, distinguishing between freezing and proprietary injunctions, Scott LJ stated:

> *"I now come to the question whether, a limited injunction preserving, pending trial, the £8.9 m should be granted. This would not be a mareva injunction. It would not be subject to provisos enabling the use of the money for normal business purposes, or for the payment of legal fees, or the like. There is, in general, no reason why a defendant should be permitted to use money belonging to another in order to pay his legal costs or other expenses. The objection in principle to the grant of a mareva injunction....does not apply to an injunction to preserve a fund that, in the contention of PPI, belongs to PPI".*

102. In my judgment it is clear that the course more likely to cause the least irremediable injustice to one party or the other would be to continue the injunction. Mr. Farrow raised a subsidiary issue about whether Mr. Ryan has perjured himself on affidavit, and if so, since the Applicants are seeking equitable relief they must come with clean hands. In my view, this is not a matter that this Court can determine in this way and I am not entitled to conduct a mini-trial.



There is in my view no ground made out that should deprive the Applicants of equitable relief, or its continuation.

RISK OF DISSIPATION OF ASSETS

103. The main protagonists have moved the assets the subject of the substantive claim by moving the funds held in Australia to various overseas jurisdictions.

104. The Respondents, especially the First Respondent, have experience in intricate, sophisticated international transactions involving movement of large sums of money.

105. Some of the funds being held in the CNB Accounts is being held in the name of a third party Banksia, not in the name of the First or Second Respondent personally. The fact that the assets the subject of this matter are being held in an easily disposable form, i.e. cash, further increases the risk that they can be moved quickly at the direction of the Respondents or any of them.

106. As pointed out in the Applicants' skeleton submissions, the First Respondent was released from prison fairly recently. He does not to the Applicants' knowledge have any legitimate income. There is therefore a risk that he may look to the funds in foreign jurisdictions to make use of.

107. It seems plain, and there is solid evidence before me, as there was before the Chief Justice when he granted the Injunction, that there is a real risk of dissipation of assets.

JUST AND CONVENIENT

108. In my judgment, there is no relevant circumstance here that would make it unjust and inconvenient for the Injunction to continue in force. On the contrary, it

seems fair, just and convenient to adopt this course of continuing the Injunction until further order of the Court.

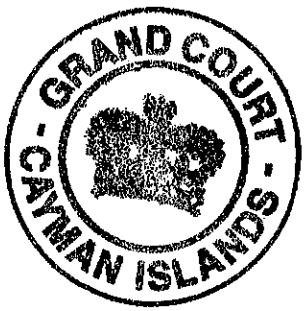
THE THIRD RESPONDENT'S VARIATION SUMMONS

109. Mr. Farrow has forcefully argued that, albeit the Applicants are making a proprietary claim, the Court nevertheless retains a discretion. Reference was made to the decision of Smellie CJ in ***Tasarruf Mevduati Sigorta Fonu ("TMSF") v Merrill Lynch Bank and Trust Company Limited*** Unreported, 16th May 2008, at paragraph 15, where he stated that even where the plaintiff's claim against the injuncted assets is proprietary in nature, the Court may nonetheless, in the exercise of discretion, allow the payment of a defendant's legal fees. However, as pointed out by Mr. Lowe, at paragraph 25 of the judgment where the Chief Justice helpfully summarizes the applicable principles, he stated that it is the defendant that has the burden of satisfying the Court that he has no other funds of his own from which to pay the legal fees or other expenses.

110. Mr. Farrow had also submitted that there are both strong and weak proprietary cases. However, as pointed out in ***United Mizrahi Bank Limited v Doherty*** [1998] 1 W.L.R. 435, referred to by Mr. Lowe, it is only in an exceptional case that the Court would be required to go into the merits for the purpose of satisfying itself that a proprietary claim was so strong that it could be demonstrated that such proprietary claim was well-founded at an interlocutory stage. Absent the intervention of such considerations, the ordinary balancing act would apply in relation to the competing interests of the party making the proprietary claim, and the party seeking to carve out sums, for example legal fees. See also the discussion of these issues in the ***PWC*** case referred to by Mr. Farrow.

111. However, it is fundamental that the Third Respondent, whose application it is, has the burden of demonstrating that it has no other funds from which to pay the legal fees. This is particularly so given the concession made for the purposes of this application, in this a proprietary claim i.e. that the funds currently standing to the

credit of the CNB Accounts of the Second and Third Respondent can be traced back to funds transferred from STC Australia to STC Hong Kong. If the application is really for the benefit of both the Second Respondent Ms. Foster and the Third Respondent, there is no satisfactory evidence, if it is for Ms. Foster, that she has no other funds from which to pay fees. If this money is from the source conceded, it does not detract from whatever finances she has otherwise. It is not as if these funds are mixed up with any others she claims to have in the accounts. I accept Mr. Lowe's submissions that Ms. Foster has not adequately explained the details of her loan or income generated from the AU$250,000 asset referred to in paragraph 83 above.



112. If the application is on behalf of the Third Respondent Banksia, then the same holds true as to the burden of proof. There has been no evidence provided of accounts, or balance sheets, creditors or debtors. I agree with Mr. Lowe that in the instant case, and in all the circumstances, it is not sufficient for it to be simply said in Ms. Foster's First Affidavit, at paragraph 11, that "Banksia's only assets are the amounts standing to the credit of the Banksia accounts which stand frozen by the Order." This bald statement, I am afraid, does not take the matter far and certainly does not discharge the requisite burden of proof.

113. Whilst therefore, Mr. Farrow Q.C. has admirably put forward the best case he could on behalf of his clients, I am not minded to exercise my discretion to vary the Injunction in the manner sought.

ORDERS

114. In respect of the Applicants' summons filed on 27 November 2015, I therefore order that the Injunction first ordered ex parte on the 2 November 2015, and on 27 January 2016, by consent, continued in force until further order of the Court, is hereby ordered to continue in force until further order of the Court, upon the same undertakings previously given. Costs to be costs in the Cause.

115. In respect of the Third Respondent's summons filed 15 January 2016, the relief sought is refused. The costs are to be the Applicants' costs in the Cause.

THE HON. JUSTICE MANGATAL
JUDGE OF THE GRAND COURT