IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 222 OF 2017 (IKJ)

BEWTWEEN:

BANCO INTERNATIONAL DE COSTA RICA, S.A.
PLAINTIFF

AND

(1) BANANA INTERNATIONAL CORPORATION
(2) BANACOL DE COSTA RICA, S.A.
(3) BANACOL CORPORATION
DEFENDANTS

Appearances:

Mr Kyle Broadhurst and Ms Sally Bowler of Broadhurst LLC on behalf of the Plaintiff/Judgment Creditor

Ms Gráinne King and Ms Jessica Williams of Harneys, for the Defendants/Judgment Debtors

Before:	**The Hon. Justice Kawaley**
Heard:	**1 October 2018**
Date of Decision:	**24 October 2018**
Draft Judgment Circulated:	**24 October 2018**
Reasons Delivered:	**24 October 2018**

HEADNOTE

Enforcement of New York judgment in the Cayman Islands-ex parte post-judgment Freezing Order-compliance with discovery obligations-uncooperative stance of Defendants as judgment debtors-application by Defendants to limit scope of discovery obligations-application by Plaintiff for further relief-procedure for obtaining permission to enforce a Freezing Order abroad

RULING-APPLICATION TO VARY EX PARTE FREEZING ORDER
(in Chambers)

Introductory

1. The present proceedings were commenced by Writ of Summons issued on October 27, 2017 to enforce the judgment granted by the Supreme Court of the State of New York on September 8, 2015 in favour of the Plaintiff against the Defendants in the basic amount of US$19,750,000 (the "New York Judgment"). On April 11, 2018, I refused the Defendants' application to set aside service of the Writ on them on jurisdictional grounds, for reasons delivered on April 23, 2018 (the "Recognition Ruling"). The Plaintiff obtained Judgment in Default of Defence on May 28, 2018[1].

2. On June 15, 2018, the Plaintiff applied for an Ex parte Worldwide Freezing Order ("Freezing Order") and a 'Bankers Books Order' (under section 8 of the Evidence Law). I was regretfully unable to hear that application until July 23, 2018 when I made Orders substantially in the terms sought, for reasons delivered on August 6, 2018. Paragraph 8 of the Freezing Order fixed October 1, 2018 as the Return Date for the Plaintiff's Summons and on July 24, 2018 the Plaintiff issued an *inter partes* Summons returnable for that date. The main purpose of the present proceedings was to obtain post-judgment discovery in aid of enforcement of the New York Judgment. The most significant part of the Freezing Order was paragraph 2 ("***DISCLOSURE OF INFORMATION***"):

> "*(1) The Defendants must inform the Plaintiff in writing at once of all of his assets whether in or outside the Cayman Islands and whether in his own name or not and whether solely or jointly owned, giving the value, location and details of all such assets.*
>
> *(2) The Defendants must provide the Plaintiff with copies of the following documentation:*
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> *a. all historical and up to date bank statements for any accounts which they currently hold, or have previously held, in the Cayman Islands;*

[1] The Judgment was made (.i.e. signed) on May 28, 2018 but filed on June 4, 2018.

b. *account numbers, account names, international banking codes (where relevant) and the registered address of the originating banking institution in respect of all payments received into those accounts;*

c. *account numbers, account names, international banking codes (where relevant) and the registered address of the destination banking institution in respect of all payments remitted or deducted from those accounts; and*

d. *any other documents relating to any banking facilities or services provided to the Defendants within the Cayman Islands, to include all documents relating to any security offered by the Defendants to a third party.*"

3. On September 27, 2018, the Thursday before the scheduled Monday return date, the Defendants issued a Summons seeking the following relief:

"*1. an order that the Defendants' obligations under paragraph 2 of the order made by the Hon. Justice Kawaley on 23 July 2018 (**Freezing Order**) are discharged; or in the alternative*

2. an order that the Freezing Order be varied by replacing paragraph 2(2), 2 (2) b. and 2(2) c respectively with the following:

'(2) The Defendants must, to the best of their abilities, provide the Plaintiff with copies of the following documentation…'

b. 'account numbers, account names, international banking codes (where relevant) and the registered address of the originating banking institution in respect of all payments received into those accounts from May 2010 onwards';

c. 'account numbers, account names, international banking codes (where relevant) and the registered address of the destination banking institution in respect of all payments remitted or deducted from those accounts from May 2010 onwards'.

3. Such further orders as this Honourable Court may deem appropriate.

4. Costs."

4. Preparations for the hearing were, for reasons which are unclear but unimportant, somewhat helter-skelter. Ms King complained that she had only belatedly been made aware of the existence of and served with the Reasons for the Ex Parte Orders of July 23, 2018 on September 28, 2018 and also served with the Plaintiff's Skeleton Argument for that hearing late on September 28, 2018. On that date, the Friday before the hearing, various bundles were filed in Court and presumably exchanged by counsel. I was only able to review these on the day before the hearing when I returned to the Island.

5. Out of an abundance of caution, with Ms King reserving the right to apply to discharge the Freezing Order altogether because she had been unable to properly advise her clients on their position, I decided to reserve judgment on what might otherwise have been a comparatively straightforward application. I also felt it important to correct for the record certain erroneous findings made in earlier published judgements in this matter in fairness to the Defendants.

Preliminary matters

6. At the outset it is important for me to acknowledge adverse findings which were unfairly recorded against the Defendants in both (a) my Reasons (delivered on April 23, 2018) for refusing (on April 11, 2018) the Defendants' jurisdictional challenge and in (b) my Reasons (delivered on August 6, 2018) for, *inter alia*, granting (on July 23, 2018) the Freezing Order. The first finding was as follows:

> "*15. The Defendants' Secretary-General JDT Botero also swore an Affidavit confirming that the 1st Defendant did have a bank account which was now closed. Exhibited to his Affidavit were documents described as "bank statements", which he deposed showed the last deposit being made on July 2, 2014. When pressed by Mr Broadhurst as to whether the exhibited statements actually emanated from the Bank, Ms King was forced to concede in reply that in fact the statements were created by her clients from their own records and were not copies of statements issued by the Bank.*"

7. Further references were made to the notion that the exhibited statements had been compiled by the Defendants in a draft version of paragraph 7(b) of the Ruling and in paragraph 17, which read as follows:

"*17. In this factual matrix I found immaterial that the Plaintiff was unable to adduce positive evidence of any connection between the 2nd and 3rd Defendant and the Cayman Islands. The corporate connections between the Defendants make it plausible that monies which were held by the 1st Defendant in the Bank locally were remitted to the 2nd and/or 3rd Defendant. The Defendants placed before the Court documents which were described as "bank statements" but which were in fact quite different. This diminished the weight which I was able to place upon their documentary evidence."*

8. I gave a summary oral decision on April 11, 2018 at a hearing which I recall took place by video-link. The Defendants' counsel in commenting on the draft of my Ruling made the following comments by email on April 23, 2018:

"*I note at paragraphs 7b, 15 and 17 of the draft judgment the proposition that the defendants had themselves created the bank statements which had been exhibited to Mr Botero's evidence. This was absolutely not the case, nor was it my submission. Again, I apologise if my submission was in some way unclear or led to the wrong impression being given. My submission that the statements came from various places including from the defendants' records was meant to convey the fact that they had difficulty obtaining records from the bank (which are my instructions) and that various statements had been amongst their records for different amounts of time (as opposed to having been created or reconstructed from their records). The appearance of some statements was different to others because certain of the statements had been downloaded from the website of the bank some years ago when the account was active. I do not wish to foreshadow His Lordship's views or how he would be minded to reword the relevant paragraphs in the event he accepts this explanation; therefore, I have not marked up the paragraphs in question, save for paragraph 7. I would however, be most grateful if the correct factual position could be recorded.*"

9. The Plaintiff's counsel responded:

"*Paragraph 15 – where the statements were obtained from was not confirmed at the hearing. We consider that the position as stated at the hearing can be accurately represented by changing "created" to "obtained" in paragraph 15.*"

10. I deleted draft paragraph 7(b)[2] altogether from the final Ruling, because I accepted that that sub-paragraph incorrectly recorded as uncontroverted fact (i.e. the continuing state of the evidential record) something which was actually controversial. However, I did not alter paragraph 15, even to the minor extent proposed by the Plaintiff, because that paragraph explained the view I took of the evidence, rightly or wrongly, at the time of making the relevant decision. In hindsight I ought perhaps to have mentioned the Defendant's counsel's assertion that I misunderstood her concession in a footnote, for the record. That might have prevented a repetition of the error, albeit a somewhat nuanced error. The purported bank statements did not on their face appear to emanate from the Bank and their provenance had not been clearly explained by the Defendants' counsel. The possibility of misunderstanding was twofold. Ms King was in all likelihood taking instructions, directly or indirectly, from persons whose first language was not English. I was located at a remote location conducting the hearing via video-link.

11. These mitigating factors do not apply to the ex parte hearing which took place on July 23, 2018 when I sat in the Cayman Islands. In a Skeleton Argument submitted by the same counsel who appeared at the jurisdiction hearing (Mr Broadhurst did not appear at the actual ex parte hearing), the Plaintiff submitted:

> "*The only disclosure offered by the Defendants in the Recognition Proceedings in support of their position that the Cayman account has been closed and that there are no other assets in the jurisdiction, were documents purporting to be bank statements for that account covering a three month period... Despite both of the Defendants' deponents affidavits and its Skeleton Argument filed in those proceedings declaring that the Statements were bank statements provided by the Bank, the Defendants conceded at the hearing of the Recognition Proceedings that they were not.*" [emphasis added]

12. Reliance was placed in a footnote on paragraphs 15 and 17 of my Reasons for Ruling delivered on April 23, 2018. I did not recall in the course of the ex parte hearing, nor was I reminded, that counsel in commenting on a draft of that judgment had sought to clarify the true extent of that concession, albeit adding further information (that the statements were sourced from the Bank's website) than had been provided at the actual

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[2] It had provided: "*(b) the only evidence presently advanced by the 1st Defendant about that account was in the form of their own reconstruction of the relevant Bank records rather than copies of original Bank records*".

April 11, 2018 hearing, either orally or by way of written submissions or evidence. This resulted in the following further findings being made in my Reasons delivered on August 6, 2018:

> "*5…It also emerged at the end of the jurisdictional hearing, that although the Defendants purported to exhibit copies of "bank statements" in evidence, the exhibited documents had been created by the Defendants from actual bank documents. This was highly suspicious and indicative of the fact that the 1st Defendant was unable or unwilling to produce true copies of its Bank statements. The suggestion that was merely done because difficulties had been experienced in accessing original bank statements after the Bank ceased operations was unconvincing…*
>
> *17… In summary, the 1st Defendant had firstly failed to pay monies it had contracted to pay into an escrow account to secure its repayment obligations both before and after the New York Judgment was obtained. It had also concealed or disguised its true financial position in relation to its account with the Bank in the course of the present proceedings and generally failed to cooperate with judgment enforcement efforts.*"

13. Looking at the impugned "bank statements" in the light of Ms King's explanation at the *inter partes* hearing, which was by the Return date now supported by evidence (i.e. that the most recent bank statements were sourced online), I have been persuaded that my initial suspicions about their provenance were unjustified. Mr Victor Velasquez, President of each of the Defendants, deposed in his Second Affidavit dated August 21, 2018:

> "*9……As can be seen from the documents provided, the format of certain of the bank statements (i.e. those pertaining to the years from 2010 onwards) are different in appearance to those pre-dating 2010. This is due to the latter having been printed from the bank's website as opposed to being postal statements.*"

14. This Affidavit was a far more direct and formal way of placing on record the Defendants' explanation of why the later bank statements looked different to the earlier ones. An email to the Court in the context of commenting on a draft judgment was an appropriate means of clarifying an apparent concession made by counsel, but it also advanced new and contentious factual assertions which I clearly declined to accept in finalizing the Recognition Ruling. In an ideal world, the Defendants'

counsel might have filed an Affidavit setting out what was set out in paragraph 9 of the Second Velasquez Affidavit, but that would have been a far from obvious step to take at that stage of the proceedings. In an ideal world, the Plaintiff's counsel in the course of the ex parte hearing at the end of which the Freezing Order was obtained might have reminded the Court of the Defendants' counsel's comments on the draft Recognition Ruling. That was also, on proper analysis, far from an obvious step to take because the Ruling said what the Ruling said and no application had been made to appeal or otherwise impugn the relevant findings. The findings were, at the end of the day, based on a view taken of documents which was not controverted by evidence at either the *inter partes* or ex parte hearings. In an ideal world, I would have remembered the comments made by the Defendants' counsel on the draft Recognition Ruling, notwithstanding that the comments were buried in an email chain relating to a previous hearing and not reflected in any documents before me for the purposes of the ex parte applications. Had I recalled this partially disputed explanation for the appearance of the later bank statements (or been reminded of it), I would in all likelihood not have confirmed the finding I made in Court at the end of the *inter partes* hearing.
Two points arise from this conclusion.

15. Firstly, to the extent that the Defendants have reserved the right to complain about material non-disclosure (or perhaps an unfair presentation) on the part of the Plaintiff at the hearing of the application for the Freezing Order, no need to decide the implications of what occurred strictly arises. However, my provisional view is that the unfair findings which I recorded in my Reasons occurred due primarily to a serious of unfortunate events which come nowhere close to constituting grounds, standing by themselves, for discharging the Freezing Order altogether on the grounds of material non-disclosure or an unfair presentation of the facts.

16. Secondly, my misplaced suspicions about the later bank statements must be viewed in their wider context. In big picture terms there were ample other grounds for cynicism about the Defendants' conduct. They had been shown to have taken deliberate steps to evade their contractual obligations prompting the Plaintiff to commence the New York Proceedings. The fact that apparently, at the same time as those remedial legal steps were being initiated the 1st Defendant's business ceased operating, presented a factual matrix which was eyebrow-raising in the extreme. This together with the Defendants' generally uncooperative (if not positively obstructionist) stance to their obligations as judgment debtors in New York and the Cayman Islands very arguably provided more than sufficient alternative grounds for the Freezing Order being made.

17. I say 'very arguably' because, as I have already noted, the Defendants have reserved the right to apply to set aside the Freezing Order altogether. This section of the present judgment should not be viewed as encouragement for them to do so.

Findings: should the Defendants' obligations under paragraph 2 of the Freezing Order be discharged altogether?

18. The Defendants' Skeleton Argument sensibly focussed more on the variation application than on seeking to make out a case for relieving the Defendants altogether from any further disclosure obligations under paragraph 2 of the Freezing Order. Mr Broadhurst had a simple answer to the proposition that the Court should accept that the Defendants' disclosure obligations had been fully met. Even if the Defendants had to date fully met their disclosure obligations, it was in any event appropriate that they be subject to ongoing disclosure obligations in support of the Freezing Order as enforcement efforts were continuing with little or no assistance from the Defendants. There was no answer to this submission.

19. However there was no substance to the contention that the Defendants had fully complied with their discovery obligations by the Return Date. The Plaintiff's counsel's careful analysis vindicated, to some extent at least, the following conclusory submission set out in the Plaintiff's Skeleton Argument:

> "*19. It is submitted that given the foregoing there can be no reasonable debate as to whether the Defendants have complied with the Freezing Order. They plainly have not.*"

20. As will be seen below, Ms King eventually sensibly agreed that further disclosure should be given by the Defendants in compliance with some (but not all) of the Plaintiff's requests for further specific discovery.

Overview

21. In paragraph 19 of the Reasons for granting the Freezing Order, I held:

> "*...The evidence establishes and the Defendants admitted that assets <u>were</u> in this jurisdiction and the Plaintiff has established that it is likely that valuable information about where those assets came from and went to exists within this*

jurisdiction. Disclosure is the most important part of the relief sought in the present proceedings…"

22. The importance of discovery for the Plaintiff is demonstrated by the fact that the Defendants seek to be relieved of the burdens of discovery, in large part based on their admitted insolvency, without offering the sort of reassurances or making even the sort of tentative open settlement proposals that responsible insolvent judgment debtors would normally proffer. Instead, as I observed in the course of the hearing, they appear to have expended resources in complying with the Freezing Order in a cumbersome and mechanistic way without seeking to identify more efficient means of providing genuinely helpful information or proposing a more commercially pragmatic global solution. Ms King confirmed that no open settlement proposals had yet been made by or on behalf of the Defendants. Admittedly, the Plaintiff has been demanding strict compliance with the Freezing Order and the Defendants are entitled to be anxious about being held in contempt of a Court Order.

23. The most glaring illustration of the Defendants' lack of forthrightness is the absence of any adequate and straightforward explanation of what their current financial situation is and how it came about. When they were borrowing (and guaranteeing the borrowing of) nearly US$ 20 million from the Plaintiff, they were apparently vibrant companies involved in a multi-million dollar business. They were, presumably, sufficiently solvent to persuade the Plaintiff of their fitness to borrow and guarantee the borrowing of substantial sums. According to their current evidence, they have no employees whatsoever and between them only one bank account with a balance of US$10. It was disclosed in the course of the hearing that affiliate by the name of C.I. Banacol S.A. is funding their attorneys and, presumably, the work done to comply with the Freezing Order.

24. Insolvent debtors are usually expected to take steps to preserve their assets for the benefit of their creditors. The Defendants have done little to dispel the strong suspicion that they have instead in the months leading up to the obtaining of the New York Judgment and since deliberately put their assets beyond the reach of their creditors and the Plaintiff in particular. The New York Judgment was based in large part on a finding (that the 1st Defendant did not seemingly dispute) that its diversion of the sale proceeds from its main customer was made to an affiliate which shortly thereafter filed for bankruptcy. It is now known that the main customer was itself part of the Defendants' corporate Group. This background may in part explain the sudden financial decline of the 1st Defendant although the precise circumstances in which the 1st Defendant became insolvent and ceased trading altogether remain shrouded in mystery in the context of these proceedings.

25. On top of this, the Defendants have obtained funds from an affiliated party which were used to fund their legal costs initially in a vain attempt to prevent the Plaintiff from enforcing the New York Judgment in this jurisdiction. Thereafter similarly sourced funds have been used to respond to the post-judgment Freezing Order in what appears to me to be a very formalistic way. Had the Defendants wished to demonstrate their desire to meet their substantive obligations, they might have initially responded to the Freezing Order by (a) seeking to obtain funds to partially satisfy the Judgment even to a minimal extent, and/or (b) formulating settlement proposals designed to limit the risk of costs being wasted in the judgment enforcement process.

26. In the course of the hearing I noted that the Defendants were required to assist the Court to achieve the overriding objective and that it was surprising, even if audited financial statements did not exist, that historic management accounts could not be produced as a shorthand way of shedding light on the Defendants' overall financial position. The fact that the Freezing Order did not expressly require the production of financial statements seemed to me to be entirely beside the point. If the Defendants' primary position was that they were hopelessly insolvent with no realisable assets and unable to afford strict compliance with overbearing discovery obligations, they ought to have focussed their efforts on identifying the most economical way possible of demonstrating their true financial position to the Plaintiff. When asked about whether the corporate structure depicted in a diagram exhibited to the Fourth Affidavit of Stephanie R. Feldman was accurate and up to date, Miss King confirmed that it was not but that she would take instructions and anticipated that an up to date diagram would be provided to the Plaintiff.

27. This background clearly explains why the Plaintiff feels justified in adopting a robust approach to its judgment enforcement procedures in the present proceedings. However, even a legitimately aggrieved judgment creditor must litigate in a proportionate manner. Accordingly, the Court's duty is (a) to ensure that the Defendants comply with their legitimate discovery obligations and no more, and (b) to avoid a situation where the Plaintiff's understandable frustrations result in the discovery process being carried out in a disproportionate manner.

28. The main factual focus of inquiry revolves around the local bank account held by the 1st Defendant, and transactions using that account during the period when the 1st Defendant was being financed by the Plaintiff. The New York Judgment was based on a claim to recover monies lent under a December 13, 2012 Finance Agreement (lent to the 1st Defendant and guaranteed by the 2nd and 3rd Defendants). However, the US Complaint also referred to an earlier 2010 Finance Agreement. The claim was brought because of a breach of the Finance Agreement in January 2014, when the borrower informed the Plaintiff by letter that it had terminated a contract with all of its suppliers and buyers and arranged for those same buyers and suppliers to deal directly with one

another resulting in the proceeds of that contract being paid to C.I. Banacol, thereby depriving the Plaintiff of security for the Finance Agreement. C.I. Banacol is now under reorganization in Colombia. The Defendants acknowledge that C.I. Banacol is part of the same corporate Group and point out in these proceedings that the Plaintiff is involved in those proceedings and has alternative access to certain information therein.

29. This is the factual matrix which I bear in mind when considering the Defendants' application to vary the Freezing Order (and the Plaintiff's application for further specific discovery and other relief) below.

Findings: the Defendants' application to vary the discovery obligations under the Freezing Order

The variation issues

30. The Defendants' variation application may be distilled into the following proposals:

(a) The Defendants' basic discovery obligations should be qualified by the words "*to the best of their ability*";

(b) the Order for the production of historic banking records without any temporal limitation should be limited to the period "*from May 2010 onwards*".

31. The first point was somewhat cosmetic, but was nevertheless supported by the following passage from paragraph 19-026 of '*Gee on Injunctions*', Sixth Edition to which Ms King referred:

> "*Paragraph 9(1) of the example order uses the words 'to the best of his ability' and where these words are used this sets the standard of care for what the defendant must do. The words apply to the particular defendant's ability, and so if the defendant is elderly or disabled, allowance should be made for this in deciding whether there has been a breach of the order.*"

32. Mr Broadhurst by way of a forensic traverse referred the Court to the preceding sub-paragraph in the same text, submitting that there was no evidence that the Defendants

met its requirements in responding to the discovery obligations under the Freezing Order. According to *Gee*:

> "*The defendant's obligation under a disclosure order ancillary to Mareva relief which requires him to give information about his assets to the claimant, is not only to answer honestly but also to make reasonable inquiries to ensure that his answers are accurate.*"

33. I characterise this limb of the variation request as cosmetic because it was not buttressed by any clear and/or credible evidence that the Defendants deserve special dispensations in regards to compliance with their ongoing discovery obligations. I refuse this variation request.

34. The request for historic banking records going back to 2002 when the Cayman bank account was opened was said to be oppressive. The Defendants, despite formally contending that documents before April 2010 (the date of the first Finance Agreement) were irrelevant, disclosed bank statements going back to 2002 per the terms of the Freezing Order and shortly before the hearing disclosed documents which record outgoing payments responsive to para 2(2) c of the Freezing Order for the year 2006, such schedules back to 2010 already having been produced.

35. I am bound to acknowledge that this 'voluntary' disclosure is an illustration of the Defendants doing their best to assist the Plaintiff by producing material they considered they were not legally obliged to produce which the Plaintiff contended was required to be produced under the Order. It was difficult for me to see why further banking records were relevant. Mr Broadhurst, beating something of a strategic retreat on this issue, pointed out that the pre-2010 records which had been disclosed did serve at least one useful purpose. They demonstrated that the Cayman account had been used for general business purposes over an extended period of time, contrary to the sworn evidence in paragraph 10 the First Velasquez Affidavit that it was merely used by the bank "*as an escrow account*".

36. Without deciding this peripheral factual point, I agree that a broad approach to the discovery exercise was justified at the ex parte stage in light of the Defendants' generally non-cooperative stance. Nevertheless in support of the plea for a temporal limitation on the bank records to be produced, Ms King aptly commended to the Court for illustrative purposes the following findings of Mangatal J in *Meriden Trust-v-Batista* [2017 (1) CILR 370] at 399 where she held:

"*110. In my judgment, in the circumstances of this case, the historic disclosure orders should remain in place, but should be modified as suggested by the applicants to September 1st, 2012 and in the other manners suggested by them….*"

37. I agree that paragraph 2 sub-paragraphs b. and c. should be amended in the terms proposed by the Defendants to include the temporal limitation of "*from May 2010 onwards*". The practical result is that, the Defendants having already disclosed incoming and outgoing payment schedules going back to 2010 and also documents recording outgoing payments for 2006, they are discharged from any general obligation to either (a) produce pre-2006 documents, and/or (b) produce further pre-May 2010 documents. This does not preclude the Plaintiff from making future requests for specific documents which may be relevant to explain post-May 2010 material.

Summary

38. The Defendants' variation application is allowed in part to the extent that their obligation to disclose and produce copies of banking records is limited to the period "from 2010 onwards".

The Plaintiff's application for further relief

39. The Plaintiff in paragraph 21 of its Skeleton Argument sought disclosure of the following three further categories of documents:

(1) "*Disclosure of all assets held directly or indirectly by the Defendants identifying with specificity the nature of the asset, its location, its value and details relating to same. For the avoidance of doubt this will include in the case of land the specific location of the land. In the case of receivables this will include reference to the specific contractual relationship and full particulars of the receivable including details of all debtors*";

(2) "*That the Defendants disclose the source of all funds paid to Harneys as a retainer or otherwise including specifically account numbers, account names, international banking codes and the registered address of the original banking institution from which funds were received*";

(3) *"That the Defendants disclose all bank accounts wherever located utilized by the Defendants either directly or indirectly from 2010 to present, providing account numbers, account names, international banking codes and the registered address of the banking institution. That the Defendants provide bank statements for all such bank accounts for the same period.*"

40. In light of critical observations from the Bench about the Defendants' uncooperative stance and the inadequacies of the List of Assets which had been supplied, Ms King, wisely, did not strongly oppose the first two of these requests altogether. She submitted:

(1) her clients were willing to supply the further particulars sought as regards the land (she did not appear to me to identify any principled objection to providing further particulars on receivables);

(2) a short factual Affidavit on the source of funds to Harneys could be provided, if the Court so required.

41. I find the further discovery sought by the Plaintiff in paragraph 21(d) (i)-(ii) should properly be granted.

42. Counsel complained that the request for disclosure of "*all bank accounts wherever located*" was overreaching. There was sworn evidence that the Cayman bank account was the only account used by the Defendants and the Freezing Order only presently required the production of copies of bank statements in relation to that account. Mr Broadhurst was forced to concede that the Plaintiff had not yet identified any other accounts. In my judgment in these circumstances there is no sufficient basis at this stage for requiring the Defendants to disclose further bank accounts when there is no evidential basis for concluding that such further accounts exist. I decline to grant the third category of further discovery.

43. The Plaintiff also submitted in paragraph 29 of its Skeleton:

> *"e. To reflect the fact that the enforcement of the NY Judgment/Cayman Judgment is a worldwide effort concerning the transfer of funds across multiple jurisdictions, that the Plaintiff be released form the undertakings at paragraph 7 and 8 of Schedule 1 of the Freezing Order and be permitted to commence proceedings against the Defendants in any other jurisdiction, use information obtained in this jurisdiction for the purpose of civil proceedings in another jurisdiction and, given the Defendants have disclosed assets in other jurisdictions, to permit the Plaintiff to enforce the Freezing Order in those other jurisdictions."*

44. The relevant undertakings set out in the Schedule 1 to the Order read as follows:

> "7. *The Plaintiff will not without the leave of the Court begin proceedings against the Defendant in any other jurisdiction or use information obtained as a result of an Order of the Court in the jurisdiction for the purpose of civil or criminal proceedings in any other jurisdiction.*
>
> *8. The Plaintiff will not without the leave of the Court seek to enforce this Order in any country outside the Cayman Islands."*

45. The Defendants' counsel opposed the application to be released from these undertakings on the grounds that as a matter of legal principle the application should be a formal application one supported by evidence. She referred to the eight principles laid down by the English Court of Appeal (Arden LJ, as she then was) in *Dadourian Group International Inc.-v- Simms* [2006] 1 WLR 2499-2503[3]:

> "*Guideline 1: The principle applying to the grant of permission to enforce a WFO abroad is that the grant of that permission should be just and convenient for the purpose of ensuring the effectiveness of the WFO, and in addition that it is not oppressive to the parties to the English proceedings or to third parties who may be joined to the foreign proceedings.*
>
> *Guideline 2: All the relevant circumstances and options need to be considered. In particular consideration should be given to granting relief on terms, for example terms as to the extension to third parties of the undertaking to compensate for costs incurred as a result of the WFO and as to the type of proceedings that may be commenced abroad. Consideration should also be*

[3] The principles were also approved in Gee, '*Commercial Injunctions*', at page 805.

given to the proportionality of the steps proposed to be taken abroad, and in addition to the form of any order.

Guideline 3: The interests of the applicant should be balanced against the interests of the other parties to the proceedings and any new party likely to be joined to the foreign proceedings.

Guideline 4: Permission should not normally be given in terms that would enable the applicant to obtain relief in the foreign proceedings which is superior to the relief given by the WFO.

Guideline 5: The evidence in support of the application for permission should contain all the information (so far as it can reasonably be obtained in the time available) necessary to make the judge to reach an informed decision, including evidence as to the applicable law and practice in the foreign court, evidence as to the nature of the proposed proceedings to be commenced and evidence as to the assets believed to be located in the jurisdiction of the foreign court and the names of the parties by whom such assets are held.

Guideline 6: The standard of proof as to the existence of assets that are both within the WFO and within the jurisdiction of the foreign court is a real prospect, that is the applicant must show that there is a real prospect that such assets are located within the jurisdiction of the foreign court in question.

Guideline 7: There must be evidence of a risk of dissipation of the assets in question.

Guideline 8: Normally the application should be made on notice to the respondent, but in cases of urgency, where it is just to do so, the permission may be given without notice to the party against whom relief will be sought in the foreign proceedings but that party should have the earliest practicable opportunity of having the matter reconsidered by the court at a hearing of which he is given notice."

46. Ms King relied in particular on Guidelines 1-5. The Plaintiff's application was indeed advanced by way of argument only. The Fourth Affidavit of Stephanie Feldman identified various alleged deficiencies with the Defendants' discovery but concluded (at paragraph 35) by merely requesting that "*the Freezing Order be maintained and that the Defendants be required to provide full and proper disclosure*". Mr Broadhurst ultimately indicated that he would not object if the Court saw fit to require a separate application to be released from the undertakings to be made.

47. In light of the arguments advanced on behalf of the Defendants, I decline to entertain the informal application for permission to enforce the Freezing Order overseas.

Conclusion

48. The Plaintiff's application for an Order continuing the Freezing Order with liberty to apply is granted. The Defendants' application to vary the Order is allowed in part. The Plaintiff's application for further specific discovery is allowed in part. The Plaintiff is at liberty to apply formally for permission to be released from the undertakings set out in paragraphs 7 and 8 of the Schedule to the Freezing Order.

49. Unless any party applies within 14 days by letter to the Registrar to be heard as to costs, the costs of the present application shall be awarded to the Plaintiff in any event.

HON JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT