

**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

Cause No.: FSD 204 of 2016 (IMJ)

BETWEEN

STEVEN GOODMAN

Plaintiff

AND

**(1) DAWN CUMMINGS
(2) DMS GOVERNANCE LIMITED**

Defendants

AND

**TANGERINE INVESTMENT MANAGEMENT LIMITED
(In Official Liquidation)**

Third Party



**APPLICATION CONSIDERED ON THE PAPERS
BY HON JUSTICE INGRID MANGATAL**

Written submissions received from Campbells on behalf of the First Defendant:	8 October 2018
Written submissions received from Conyers Dill & Pearman on behalf of the Plaintiff:	15 October 2018
Written Reply submissions received on behalf of the First Defendant:	18 October 2018
Draft Ruling Circulated:	1 November 2018
Ruling Delivered:	5 November 2018

HEADNOTE

Consequential matters arising after judgment on 4 preliminary issues – whether judgment to be entered at this stage in favour of First Defendant in respect of Third Party Proceedings – Whether Plaintiff should be ordered to make an interim payment on account of costs – The appropriate costs order to be made against the Third Party.

RULING

1. On 13 September 2018, I delivered a written unreported judgment (“the Judgment”) in respect of the trial of four Issues (“Issues 1-4”). By a Consent Order, agreed between the Plaintiff, the Defendants, and the Third Party (“Tangerine”), dated 21 August 2017 and signed by the Court, it had been agreed (amongst other matters), that Issues 1-4 be tried as preliminary issues.
2. The parties have a number of remaining areas of dispute, consequent on the Judgment, as to essentially:
 - (a) whether judgment should at this stage be entered in favour of the First Defendant in respect of the Third Party Proceedings;
 - (b) whether the Plaintiff should be ordered to make an interim payment on account of costs; and
 - (c) The appropriate costs order against Tangerine. Whether the following Costs order sought by the First Defendant at paragraph 11 of a draft judgment, should be made now:



“11. Further, and in any event, pursuant to the indemnity, Tangerine shall pay to the First Defendant:

11.1 the difference between the First Defendant’s actual costs of and occasioned by the Trial and the Application to Amend and the Interim Payment; and

11.2 all amounts in respect of the legal fees, costs and expenses she incurs in future in defending these proceedings and in respect of any applications relating thereto;

All such amounts to be paid by Tangerine, for the avoidance of doubt and in accordance with Article 154, in advance of the final disposition of the proceedings and within 28 days of written demand by the First Defendant’s attorneys.”

3. To put this matter in perspective, it is perhaps helpful to set out a bit of chronology. The First Defendant's Third Party Notice was filed on 4 July 2017.
4. On the 1st September 2017, both Tangerine and the Plaintiff filed Defences to the Third Party's Notice. Tangerine, in addition to the Defence, also filed a claim against the Plaintiff, in which it claimed, amongst other relief, the following (Paragraph 4):

“Third Party Claim Against the Plaintiff

If, which is denied, it is ultimately determined that the First Defendant is entitled to any of the substantive relief sought in the Third Party Notice such that the Indemnity Provisions are deemed to be enforceable as against the Third Party, the Third Party seeks a declaration from this Honourable Court that it shall be indemnified by the Plaintiff in respect of any liability incurred as a result of an Order made by this Honourable Court.”

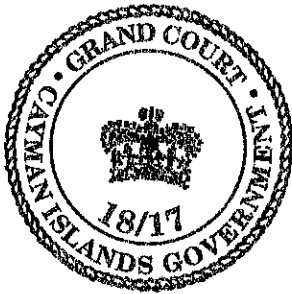


5. By a Consent Order which I signed on 15 September 2017, which was entered into, oddly, only by the Plaintiff and Tangerine, (and without the knowledge of the Defendants), it was agreed that Tangerine's Claim against the Plaintiff be discontinued, with no order as to costs. It was also agreed that Tangerine *“shall be at liberty to reinstate the Third Party claim or otherwise issue third party proceedings against the plaintiff in respect of the issues raised in the Third Party Notice at any time hereafter should it deem it appropriate to do so.”*
6. However, prior to Tangerine making a claim against the Plaintiff, (and which it subsequently discontinued), on 21 August 2017, it was agreed by the Plaintiff, the Defendants, and Tangerine, amongst other matters, (at paragraphs 2.1-2.4), as follows:

“Third Party Directions

2.1 The Third Party (or the Plaintiff as assignee of the Third Party) shall serve its Defence to the Third Party Notice and any claim in respect of the Plaintiff on or before Friday, 1 September 2017.

- 2.2 *The Plaintiff shall serve his defence to any claim brought by the Third Party by Friday, 15 September 2017.*
- 2.3 *The First Defendant shall serve her Reply to the Defence to the Third Party Notice, if any, on or before Friday, 15 September 2017.*
- 2.4 ***Thereafter the Third Party Proceedings shall be listed for the determination of the following preliminary issues:***



1. *Whether the Third Party's Articles of Association (the "Articles") were incorporated into the terms of the First Defendant's appointment as a director.*
 2. *Whether the provisions of the Articles extend to former directors.*
 3. *Whether the First Defendant is entitled to rely on Article 154 of the Articles in circumstances where she seeks to rely on indemnification pursuant to an implied contract as opposed to indemnification pursuant to an implied contract as opposed to indemnification pursuant to the Articles as per the wording of Article 154;*
 4. *Whether the First Defendant is entitled to rely on Article 154 of the Articles as against the Third Party in respect of the expenses incurred in defending this action; and*
 5. ***On the assumption that the above issues are determined in the affirmative, whether the Plaintiff is obliged to provide a "back to back" indemnity in favour of the Third Party pursuant to the terms of the Deed of Assignment entered into between (1) the Third Party, (2) the Plaintiff and (3) Ian Stokoe in his capacity as one of the former Joint Official Liquidators of the Third Party) on 18 March 2014."***
7. However, on the occasion when Issues 1-4 were heard, the Plaintiff's Attorneys, jointly with Tangerine's attorneys, applied for the fifth preliminary issue ("Issue 5") to be adjourned. This was stoutly resisted by the First Defendant's Attorneys. I ultimately granted the adjournment requested by the Plaintiff's Attorney, and made an order that the First Defendant's costs thrown away by reason of the Plaintiff's application for the



adjournment be paid by the Plaintiff to the First Defendant in the agreed sum of US\$30,000 on or before 30 November 2017.

The Defendants' submissions

(a) Whether Judgment should at this stage be entered in favour of the First Defendant in respect of the Third Party Proceedings;

8. The Defendants' position is that each of the issues set out in the Third Party Notice and the Defences to the Third Party Notice has been conclusively resolved by the Judgment on Issues 1-4, and, save for the declaration sought in relation to priority in the liquidation, the Court should enter judgment in the First Defendant's favour in the Third Party Proceedings.
9. It was noted in this context that Issue 5 arises, and requires determination, independently from the Third Party proceedings in order, it is posited, to confirm the Plaintiff's contractual obligation to indemnify Tangerine, pursuant to the back-to-back indemnity he gave as the price for the Court agreeing to sanction the Deed of Assignment. Further, that Issue 5 was first introduced as a preliminary issue at the request of Walkers (for Tangerine), and endorsed by Conyers (for the Plaintiff) at a stage where the Third Party proceedings had not even been issued. It was submitted that therefore, even if the Court enters judgment on the Third Party proceedings, Issue 5 remains live and will require determination.
10. In essence, the First Defendant's position is that Issue 5 is a free-standing issue that was introduced before the Third Party Proceedings were even issued. The Court recalls that at the hearing in November 2017, at the time when Mr. Rees QC on behalf of the Plaintiff, was applying for the adjournment of Issue 5, Mr. Valentin QC on behalf of the 1st Defendant, referred to Order 33 Rule 3 of the *Grand Court Rules* 1995 (Revised Edition) (the "*GCR*"), which deals with the trial of issues and states as follows:

"Time, etc. of trial of questions or issues (O.33, R.3)



3. *The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.”*

(b) Whether the Plaintiff should be ordered to make an interim payment on account of costs

11. The First Defendant submits that, as a matter of principle, this is a matter in which a forthwith costs order would be appropriate in relation to the costs leading to the Judgment on Preliminary Issues 1-4, on the basis that those issues have been finally determined by way of a trial.
12. However, the First Defendant is content for the issue to be addressed by means of an interim order for payment on account of costs, pursuant to *GCR* Order 62 rule 4(7)(h), pending taxation, such sum to be paid by Mr. Goodman.
13. Reference has been made to the decision of Jacobs J in *Mars (UK) Limited v Teknowledge Limited*, unreported, 11 June 1999, and to *Blakemore v Cummings* [2010] 1 WLR 983, and the dicta of Elias LJ.
14. The First Defendant submits that the Court has ordered the Plaintiff to pay the First Defendant’s costs, and that there is no good reason not to require an interim payment in this case. In addition, reference was made to the Court’s holding that the First Defendant is entitled to an indemnity as against Tangerine in respect of her costs. The argument continues that Mr. Goodman, as assignee of the cause of action, should be required to satisfy the Court’s order that he pay the costs, and particularly so in circumstances where, the First Defendant says, the Plaintiff is apparently intent on resisting his obligations under the back-to-back indemnity given to Tangerine.



Reference was made to Campbells' invoices since 1 July 2017, which they say have almost exclusively been concerned with the preparation and trial of the Preliminary Issues. Reference was also made to Leading Counsel Mr. Valentin's fees. It was argued that it is not likely that less than 60% of these invoices would be recoverable on taxation in relation to the Trial, and that Mr. Valentin's fees would be recovered in their totality. This would give a total of approximately US\$210,000.00. In the circumstances, the First Defendant invited the Court to make an order that the Plaintiff make an interim payment on account, due within 28 days, of US\$175,000, representing approximately 83% of US\$210,000.

16. Reference was also made to the fact that the Court has ordered that the Plaintiff pay the costs of and occasioned by the Application to Amend (which has been dismissed). These costs are properly for the Plaintiff in the main action. It was submitted that although these costs are technically, interlocutory, they are not significant additional costs, and that it would not be sensible to make a different costs order (in terms of timing) for those costs, and the costs of the trial.

(c) The appropriate costs order against Tangerine

17. Paragraph 11 of a draft judgment submitted by Campbells on behalf of the First Defendant, addresses this issue (see paragraph 2(c) above). It was submitted that this simply gives effect, by way of an affirmative order to the indemnity found in the Articles, which the Court has held to be binding on Tangerine.

The Plaintiff's submissions

(a) Whether Judgment should at this stage be entered in favour of the First Defendant in respect of the Third Party Proceedings

18. It is the Plaintiff's submission that the Third Party Proceedings were always intended to dispose of Issue 5; that Issue 5 was not a 'bolt-on' or an afterthought.

19. The Plaintiff argues that whilst it may be convenient to the First Defendant to have judgment entered in the Third Party Proceedings, any such order would be contrary to the terms of the Directions Order agreed by all of the parties, and approved by the Court.
20. Reference was made to the fact that at the hearing in November 2017, when the Plaintiff's Leading Counsel applied for Issue No. 5 to be adjourned, there was significant debate as to whether Issue No. 5 should be heard. The Plaintiff asserts that Leading Counsel for the First Defendant went to great lengths to persuade the Court that Issue 5 should have been heard at that time, thus indicating the First Defendant's clear belief and understanding that Issue 5 was an inextricable part of the Third Party Proceedings.
21. The Plaintiff also alludes to the fact that, pursuant to the consent order of 16 November 2017, he paid to the First Defendant the sum of \$30,000 being "*costs thrown away*" as a result of the adjournment of Issue No. 5.
22. It was argued that against this backdrop, it is an impossible argument for the First Defendant that the Third Party Proceedings have been resolved at this time. It was submitted that the position of the First Defendant is clearly set forth with a view to improving its position in respect of Issue No. 2, as to costs on account.
23. The Plaintiff says that this can be made good by considering the following: had Issue 5 been determined at the November hearing in favour of the Plaintiff, the First Defendant would not have been entitled to the order which it seeks in paragraph 7 of the draft judgment (which is subject to paragraph 6), both of which read as follows:



"AND IT IS ADJUDGED, ORDERED AND DIRECTED AS FOLLOWS:

6. *Paragraph (6) of the Prayer contained in the Third Party Notice, namely the claim for a declaration that all amounts payable by Tangerine to the First Defendant pursuant to the indemnity contained in the Articles are liquidation expenses in the liquidation*



of the Company, be reserved to the liquidation proceedings of Tangerine (FSD Cause no. 25 of 2013).

7. *Subject to paragraph 6 above, judgment be entered in favour of the First defendant in respect of the Third Party Proceedings.”*

24. In sum, the Plaintiff submits that the Third Party Proceedings are not determined until such time as Issue 5 is determined.

(b) Whether the Plaintiff should be ordered to make an interim payment on account of costs

25. The Plaintiff asks the Court to note that no Cayman authority was cited by the First Defendant in support of the order it seeks as to interim payment on account. It was respectfully submitted that this is because such an order would be regarded as exceptional in this jurisdiction. It was further submitted that this was not a case in which the Court should exercise its discretion and order that an interim order for payment on account of costs should be made.

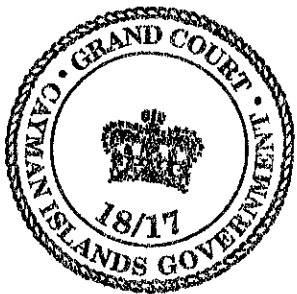
26. It was submitted by the Plaintiff that essentially, the question is whether the Third Party Proceedings have indeed been determined, and as discussed above, the Plaintiff submits that they have not been.

27. However, interestingly, in the written submissions on behalf of the Plaintiff, at paragraphs 17 and 18, it is stated as follows:

“17. It is not denied that the First Defendant is entitled to her costs of Preliminary Issues 1-4 to be paid in any event. However, Issue 5 is yet to be determined, and if the Plaintiff is successful he can expect to have the costs he has incurred in respect of Issue 5 paid by the First Defendant.

18. In such circumstances, the respective cost awards would “net-off” and the balance would be payable one way or another.”

28. The Plaintiff's submissions also go on to say that there is a risk of an improper or incorrect award being made.
29. It was also submitted that the invoices and fee notes submitted have been redacted and therefore it may be dangerous to make an interim assessment as to quantum, in circumstances when the narratives as to work done have been redacted.
30. However, says the Plaintiff more fundamentally, the invoices and fee notes provided suggest that the First Defendant has not actually incurred any costs herself, and as such, any order requiring a sum to be paid by the Plaintiff would be in breach of the indemnity principle. In the case of the Campbells' invoices, they are addressed to the Second Defendant, and in the case of leading Counsel's fee notes, although addressed to the First Defendant, they are marked "*care of*" the Second Defendant.
31. Reference was made to the old authority of *Harold v Smith* (1860) 5 H & N 381, where the Court held that:



"Costs as between party and party are given by the law as an indemnity to the person entitled to them: they are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them. Therefore, if the extent of the indemnification can be found out, the extent to which costs ought to be allowed is also ascertained."

32. Reference was also made to *Cook on Costs*, Middleton & Rowley, 2018, page 205, where in more modern parlance, the principle is described as follows:

"... the receiving party is entitled only to be indemnified for the actual liability to his solicitor and cannot make a profit out of the costs recovered from the other party."

33. It was submitted that if, in the final analysis, notwithstanding the foregoing, the Court is minded to exercise its discretion and make an interim order for costs, the quantum should be far less than sought by the First Defendant. The Plaintiff concedes that Campbell's estimate of 60% of the fees sought, as being likely to be recovered on taxation, is not unreasonable. However, the Plaintiff seeks that the Court, as in *Mars*, be cautious and order that 60% of these costs be paid, which would amount to US\$126,000.
34. Furthermore, it was pointed out that in *Mars*, the Court saw fit to make an order that an interim payment be made in installments and it was submitted that that would be an appropriate order here.

(c) The appropriate costs order against the Third Party, Tangerine

35. The Plaintiff took up this issue on Tangerine's behalf. It was argued that this issue will be one of consequence to the Plaintiff if the First Defendant succeeds in respect of Issue 5 in due course.
36. As stated previously, the hearing of Issues 1-4 found that the First Defendant was entitled to rely upon the terms of Article 149 of Tangerine's Articles. For ease of reference, I set out the terms of Article 149 here:



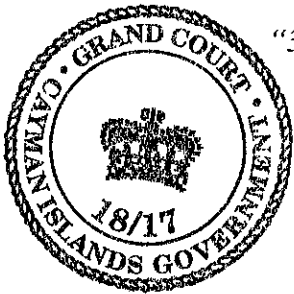
"[The First Defendant] shall, in the absence of wilful neglect or default, be indemnified and held harmless out of the Assets of the Company against all liabilities, loss, damage, cost or expense (including but not limited to liabilities under contract, tort, and statute) incurred or suffered [by her] or by reason of any act done, conceived in or omitted in the conduct of Tangerine's business or the discharge of [her] duties..."

37. The Plaintiff concedes that Preliminary Issues 1 and 2 would be covered by the terms of Article 149. However, it was submitted that Preliminary Issues 3 and 4 do not arise "by reason of any act done, conceived in or omitted in the conduct of Tangerine's business or

the discharge of her duties.” Further, that Preliminary Issues 3 and 4 are simply enforcement issues.

The First Defendant’s Submissions in Reply

38. The First Defendant filed brief submissions in reply. As regards the second issue, of payment on account of costs, the First Defendant notes that no authority from any jurisdiction has been cited in support of the Plaintiff’s submission that the jurisdiction to order an interim payment is only to be exercised in exceptional circumstances. It was submitted that the position in this jurisdiction is correctly stated by Parker J in *Re Argyle Funds SPC Inc (In Official Liquidation)* (FSD 163 of 2017), at paragraph 34, where he stated:

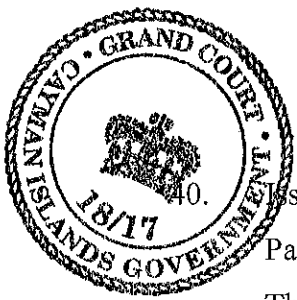


“34. *It seems to me that the relevant provision of the Grand Court Rules (Order 62, r. 4(7)(h) gives the court a discretion to order litigants to make a payment on account of costs and in the exercise of its discretion the court is entitled to do justice on a principled basis. However there is no reversal of burden which obtains in England following the introduction of the CPR Rule.*”

Discussion and Analysis

(a) Whether Judgment should at this stage be entered in favour of the First Defendant in respect of the Third Party Proceedings

39. In my judgment, the First Defendant is entitled to judgment on the Third Party Proceedings as set out in paragraph 7 of the draft judgment submitted on her behalf. Each of the issues set out in the Third Party Notice and the Defences to the Third Party Notice have been conclusively and finally resolved by the Judgment on Preliminary Issues 1-4 and, save for the declaration sought in relation to priority in liquidation, the Court should enter judgment in the First Defendant’s favour in the Third Party Proceedings.



Issue Number 5 arises, and requires separate determination, independently from the Third Party Proceedings. It is in my view obvious that Issue 5 was a “*bolt-on*” regarding the Third Party Proceedings. Issue Number 5 was a freestanding issue that was introduced before the Third Party proceedings were issued. It is true that the issue briefly made an appearance expressly in the Third Party Proceedings, through Tangerine’s Third Party claim. However, that claim was withdrawn without the consent of the First Defendant. The fact that in November 2017 the First Defendant expected that Issue 5 would have been dealt with at the same time as Issues 1-4, as contemplated in the 21 August 2017 Consent Order for directions, does not change the fact that there are no other defences pleaded or otherwise in relation to the Third Party Notice that remain alive or unresolved after the Judgment on Issues 1-4.

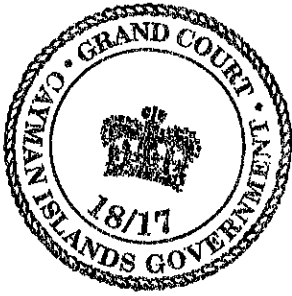
41. Judgment will therefore be entered as sought in the First Defendant’s draft judgment. In my view, the draft is correctly headed “Judgment”, and not “Order”, as suggested by the Plaintiff.

(b) Whether the Plaintiff should be ordered to make an interim payment on account of costs

42. I have found that the First Defendant is entitled to Judgment on the Third Party Notice, and thus much of the argument about the Court’s jurisdiction to make an order for an interim sum on account of costs falls away. There is a need to distinguish between an amount paid on account of costs in respect of a matter that has already been determined, as here, and the question of interim orders for costs when a matter has not yet been determined. It is in respect of the latter that there may be some argument; but that does not apply here and there is therefore no need to get into that debate. In other words, there is a difference between the stage at which costs are taxed, and the issue of the Court’s power to order a payment on account of costs where it has ordered costs to be taxed.

43. Thus, Order 62, r. 9, provides as follows:

“Stage of proceedings at which costs to be taxed (O.62, r.9)



- (1) *Subject to paragraph (2), the costs of any proceedings shall not be taxed until the conclusion of the cause or matter in which the proceedings arise.*
- (2) *If it appears to the Court when making an order for costs that all or part of the costs ought to be taxed at an earlier stage it may order accordingly."*

44. Order 62 r.4 (7)(h), on the other hand, deals with ordering a payment on account as follows:

"General principles. (O.62, r.4)

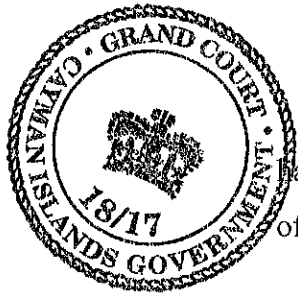
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(7) The orders which the Court may make under this rule include an order that a party must pay-

.....

(h) where the Court orders the paying party to pay costs subject to taxation, a reasonable sum on account of costs, such sum to be assessed summarily."

45. In my judgment, the First Defendant being entitled to Judgment, save for the liquidation issue, she is entitled to have costs taxed, and in advance of taxation, for the Court to order a reasonable amount payable on account of those costs. I am of the view that the sum of US\$126,000.00 is a sum which the First Defendant is highly likely to recover, at a minimum on taxation. Accordingly, I view it as reasonable to order the Plaintiff to pay that sum, along the lines set out in paragraph 10 of the draft judgment. This figure seems a core figure to me, and even if the Plaintiff were to succeed on Issue 5, then the costs on that issue would only fall to be addressed at that stage. The Plaintiff cannot have it both ways; obtaining an adjournment of Issue 5 when it should well have been tried at the same time as Issues 1- 4, and yet arguing for a delay in the First Defendant's entitlement to costs on Issues 1-4, on the basis that Issue 5 has not yet been dealt with, and could



have some “*net-off*” effect. Any potential net-off effect has expired with the separation of the hearing of the Issues at the Plaintiff’s request.

46. I am also of the view that the only relevant Defendant in relation to Issues 1-4 was the First Defendant and not the Second Defendant. Thus the costs claimed plainly should be attributed to costs incurred by the First Defendant, and not the Second Defendant. Further, in my view there is no basis for making an instalment order in this case.

(c) The appropriate costs order against the Third Party, Tangerine

47. I cannot see any distinction such as the Plaintiff has sought to draw between Tangerine’s liability to defend Preliminary Issues 1 and 2, and Preliminary Issues 3 and 4, and I reject that argument.
48. In my judgment, paragraph 11 of the draft judgment submitted on behalf of the First Defendant does simply give effect, by way of an affirmative order, to the indemnity found in the Articles, and which I have held to be binding on Tangerine. I therefore so order.

Paragraph 6 of the First Defendant’s draft judgment

49. The Plaintiff does not challenge this paragraph of the order sought by the First Defendant. However, he expressly reserves the right, which has not been challenged, to seek to make submissions in the determination of this issue in the liquidation proceedings. I will therefore make the order as sought.

Directions for Issue 5 (and the Striking Out application)

50. These are now separate orders to deal with the matters fixed for January 2019. I am content to make the orders set out in the body of the First Defendant’s Written Submissions (paragraph 17), which both parties agree in principle. As regards Issue 5:-

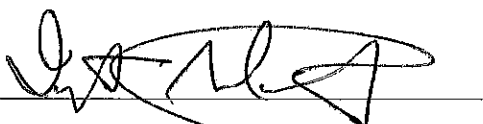
- a) The Plaintiff shall file and serve a Statement of Case setting out its case on Issue 5 and all evidence in support within 14 days of the date of this Order;
- b) The First Defendant shall file and serve its Statement of Case in reply, and any supporting evidence, within 28 days.

51. In relation to the Strike Out application,

- a) The Defendants shall file and serve any further evidence in support of the Strike Out Application within 21 days of the date of this Order;
- b) The Plaintiff shall file and serve any evidence in reply within 21 days thereafter.

52. Listing:

- a) Both matters confirmed as set down for hearing between 17 - 18 January 2019, with a time estimate of 2 days, and with 16 January being reserved for reading.
- b) Preparation of bundles relevant to Issue 5 and the Strike Out Application to be dealt with in accordance with the FSD Guide.
- c) Skeleton arguments and copies of authorities are to be exchanged not later than 5 days before the hearing, and filed in Court along with the agreed bundle of authorities.



**THE HON. JUSTICE INGRID MANGATAL
JUDGE OF THE GRAND COURT**

