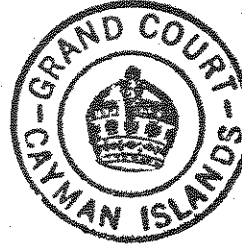


1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **FAMILY DIVISION**

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5 **CAUSE NO. D 177 of 2008**

6
7 **BETWEEN:**

8 **HSW**



9
10 **PETITIONER**

11 **AND:**

12 **JJW**

13 **RESPONDENT**

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16
17 **Appearances:**

Petitioner in Person

18
19 **David McGrath instructed by Samson &**
20 **McGrath for the Respondent**

21
22 **Before:**

The Hon. Mr. Justice Patrick Brooks (Actg.)

23 **Heard:**

18th July 2014

24
25 **JUDGMENT**
26

- 27 1. HSW and her husband, JJW, were divorced in 2009. During their marriage
28 they migrated from England to the Cayman Islands, were blessed with
29 children and acquired two parcels of real property, one in each country. The
30 divorce was finalised after they had concluded an agreement, in writing,
31 concerning issues dealing with the children and with those properties. The
32 agreement was formalised as a Consent Order of this court dated the 9th
33 April 2009. Five years later, one of the properties is still a source of
34 disagreement between them.

1 2. The property in contention is in the Cayman Islands. It was the former
2 matrimonial home (FMH) and has been solely occupied by JJW, as his
3 home, since the divorce. He now wishes to purchase HSW's interest in
4 FMH.

5 3. HSW has no objection in principle to that transaction but objects to JJW's
6 timing of his offer. In addition, the parties cannot agree on a sale price and
7 they cannot agree on the interpretation of the consent order concerning two
8 specific deductions to be taken from the proceeds of sale. JJW contends that
9 the entire sum, representing those deductions, should be applied. HSW, for
10 her part, argues that a proper interpretation of the consent order requires that
11 only a half of that figure be applied.

12 4. Being unable to resolve the issues themselves, JJW has filed a summons
13 asking for the court's intervention. The resolution of their disagreement will
14 turn on an interpretation of the consent order.

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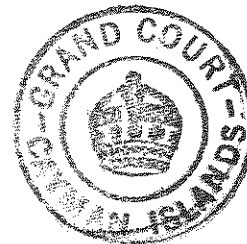
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1 **THE AGREEMENT**

2 5. Before setting out the relevant terms of the consent order it should be noted
3 that although they are the beneficial owners of FMH, the legal owner is LIL,
4 which is a corporate entity. LIL only has one issued share and HSW is its
5 sole shareholder. During the course of the marriage, LIL was used to
6 borrow money to finance the extension of the building at FMH as well as
7 complete the purchase of the property (CG) situated in England. HSW is the
8 sole legal owner of CG, but they were the joint beneficial owners of CG as
9 well.

10 6. LIL's debt was secured by a mortgage against FMH.

11 7. It is in that context that the parties arrived at their agreement, which was to
12 have been the final nail in the coffin containing their marriage. The scheme
13 of arrangement between them, on divorce, was that HSW would purchase
14 JJW's interest in CG and, thereby, become the sole beneficial owner of CG,
15 while JJW would occupy FMH until it was sold. HSW's payment for JJW's
16 interest in CG would await the completion of the sale of FMH. JJW was to
17 have been solely responsible for servicing the mortgage loan and, upon the
18 completion of the sale, there would have been an accounting between them
19 on specific terms, as set out in the consent order.

20 8. The relevant parts of the consent order stated as follows:

21 "...



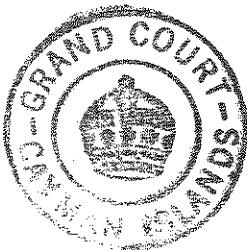
1 *AND UPON this order representing the full and final settlement of all*
2 *ancillary issues arising out of their marriage and the parties hereby*
3 *release all rights, claims or interests, whether legal or equitable, which*
4 *either of them may have against each other in respect of any other assets*
5 *or property of any kind whatsoever which either party may have now or*
6 *in the future, it being intended that the parties should hereby achieve a*
7 *“clean break” in respect of their financial affairs; and that there are no*
8 *outstanding ancillaries, nor claims by either party under the*
9 *Matrimonial Causes Law (2005 Revision) or the Married Women’s*
10 *Property Law (1997) Revision*

11 *It is hereby ordered by consent that:*

- 12 1. *The Petitioner [HSW] do retain sole ownership of [CG] and*
13 *the Respondent [JJW] do relinquish any claim he has against*
14 *it.*

- 15 2. *The Petitioner do account for US\$294,000 in relation to the*
16 *Respondent foregoing any interest in [CG], such sum to be*
17 *accounted for from the net proceeds of sale of [FMH]*
18 *property.*

- 19 3. *The Respondent do continue to pay the Royal Bank of Canada*
20 *liability charged against [FMH] but that any capital*
21 *reduction below \$509,000 should be on his account upon the*
22 *sale of [FMH].*



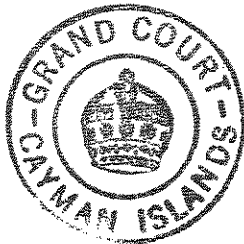
1 4. *The Respondent do continue to pay the property insurance in*
2 *respect of [FMH].*

3 5. *The Respondent do pay to the Petitioner the sum of*
4 *US\$107,702 in respect of his pension rights and upon the*
5 *payment of such sum any pension rights standing to the*
6 *benefit of either party shall remain the sole entitlement of the*
7 *party in whose name the benefit stands.*

8 6. *In addition to the lump sum buy out payment above the*
9 *Respondent do pay to the Petitioner an additional US\$32,298*
10 *on account of her share of the net proceeds of the sale of*
11 *[FMH].*

12 7. *The Petitioner shall retain ownership of her RBC US\$*
13 *savings account at a value of US\$110,000 and shall account*
14 *for half of this amount in the accounting exercise upon the*
15 *sale of [FMH].*

16 8. *[FMH] shall remain on the market for sale at a price to be*
17 *agreed between the parties or in the event of disagreement to*
18 *be fixed by the Court with reference to the evidence/opinion*
19 *of at least one real estate agent. Upon its sale the net*
20 *proceeds of sale after extinguishing the mortgage and*
21 *applying any necessary accounting above and below the net*
22 *proceeds to be divided equally.*

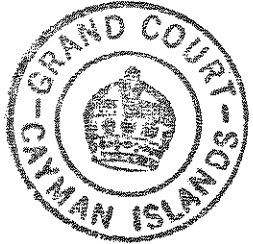


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9. *Any other asset or liability shall remain the property of the party in whose possession or name the respective asset or liability lies at the date of this Order.*

10. – 16. [concerning issues to do with the children]

17. *The Respondent do contribute US\$10,000 to the Petitioner’s legal costs to be accounted from the net proceeds of sale of [FMH]. (Emphasis supplied)*



THE DISPUTE

9. Since the filing of the consent order, JJW has paid off the mortgage debt that encumbered FMH. It is accepted by the parties that the figure to be applied in that regard is US\$509,000.

10. JJW then proposed to purchase HSW’s interest in FMH and secured a valuation of it from professional valuers. The valuers appraised the market value of FMH at US\$1,844,000, which figure they also assessed as being the “open market value”. They also assessed a value of US\$1,567,000 as being the “market value with a restricted marketing period”, such as is used in the case of forced sales.

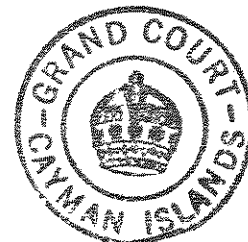
1 11. Using the valuation as a springboard, correspondence ensued between the
2 parties. Over time, the issues in dispute were reduced to those mentioned
3 above. They are particularised as follows:

4 a. HSW is concerned that JJW has waited until the real estate market is
5 in the doldrums before making his offer to purchase. A further wait,
6 she contends, may bring about a better value.

7 b. JJW wishes to purchase the property using a valuation of
8 US\$1,681,150 (based on a deduction from the market value and a
9 further compensation for the fact that no realtor's fees would be
10 incurred), while HSW is prepared to sell using the value of
11 US\$1,705,500, being the average of the open market value and the
12 market value with a restricted marketing period.

13 c. JJW contends that the sum of US\$294,000 referred to in paragraph 2
14 of the consent order, should be deducted from the net proceeds of
15 sale, while HSW's position is that only half of that figure should be
16 applied.

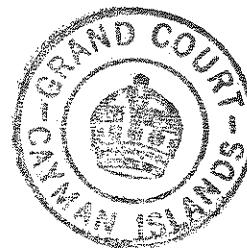
17 d. JJW contends that the sum of US\$10,000 referred to in paragraph 17
18 of the consent order should be deducted from the net proceeds of
19 sale, while HSW's position is that only half of that figure should be
20 applied.



- 1 12. HSW supported her position by referring to submissions prepared in advance
2 of the hearing at which the consent order was made. She submitted that the
3 intention was for her to be compensated in equity for the fact that she would
4 be out of funds for whatever time it took for FMH to be sold. She argued
5 that the court should grant her equitable relief and that one of the methods of
6 providing that relief was by the method of equitable accounting.
- 7 13. HSW sought to make her stance more attractive by placing it in the context
8 of a sale of the entire property. In this context, the differences between them
9 may be shown in a table (all figures in US\$):

Item	JJW's position	HSW's position	Paragraph # in consent order
FMH sale price	1,681,150	1,705,500	
Mortgage debt	-509,000	-509,000	
Net proceeds of sale	1,172,150	1,196,500	
HSW says deduct for CG		-294,000	2
HSW says deduct for legal fees		-10,000	17
Balance to be divided equally	1,172,150	892,500	8
Balance after the division	586,075	446,250	
JJW says deduct for CG	-294,000		2
JJW says deduct for legal fees	-10,000		17
Deduct advance payment	-32,298	-32,298	6
Deduct for RBC account	-55,000	-55,000	7
Sum due to HSW	194,777	358,952	

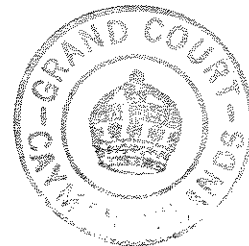
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1 14. In supporting her stance in respect of the purchase price and the method of
2 accounting that she has advocated, HSW relied on two main principles.
3 Firstly, she contended, that JJW's application for the court to order a sale to
4 him, was not contemplated by the consent order and the consent order
5 should not be varied except in specific circumstances. Her second principle
6 is that the method of accounting that she has advocated is founded on the
7 concept of equitable accounting mentioned above.

8 15. HSW further stated that paragraph eight of the consent order refers to the
9 "net proceeds of sale" and that that term must imply the sale price after the
10 costs of the sale alone have been applied. She contended that if the parties
11 meant, by the consent order, that it was from her share of the net proceeds of
12 sale that the deductions would have been made, the consent order would
13 have said so, as it did in paragraph 6.

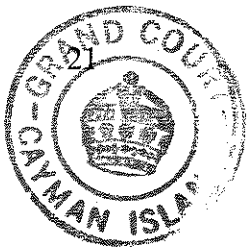
14 16. The principle of equitable accounting arises, she argued, from the fact that
15 JJW has had the benefit of FMH since the divorce. Under that concept he
16 should account for his use of FMH. Her approach, she contended, will
17 compensate her for the benefit that he has enjoyed.



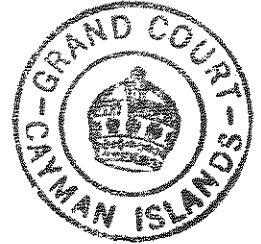
1 17. JJW's position is that a common sense, fair and logical interpretation of the
2 consent order could only result in HSW accounting for all that she received
3 by virtue of that agreement. Mr McGrath, on behalf of JJW, submitted that
4 HSW's interpretation of the provisions of the consent order is flawed. He
5 argued that she seeks to impose on both parties, an obligation that rests on
6 her alone.

7 18. He submitted that her interpretation ignores the plain language of the
8 consent order, and in particular paragraph 2 thereof. Whilst he conceded
9 that paragraph 17 was less definitive than paragraph 2, in imposing an
10 obligation on HSW to account, he submitted that both paragraphs 2 and 17,
11 considered in the context of commercial and accounting requirements,
12 mandated that she alone should account for the benefit that she alone has
13 received.

14 19. On the issue of the variation of the consent order to allow JJW to purchase
15 HSW's interest in FMH, learned counsel argued that this type of variation
16 would be permitted by the principles governing variation of consent orders.
17 He accepted that variations are not readily granted but stressed that what
18 JJW sought was not a radical change but a modification along the lines of
19 the "mechanics" of the transaction as contemplated by the consent order. Mr
20 McGrath argued that this modification would have been along the lines of an
application under an order of "liberty to apply", which is sometimes made.



1 20. He submitted that HSW would not be disadvantaged by the order sought.
2 What the order would do, he argued, is give effect to the commercial intent
3 the parties had in 2009. Learned counsel submitted that securing a sale is
4 what was intended and that JJW is prepared to complete the transaction
5 within 30 days of the court giving him permission to purchase.



6 *ANALYSIS*

7 *a. The requirement to account*

8 21. The parties are correct in stating that it is the consent order to which the
9 court should look for resolving the issues raised in this application. The
10 cases dealing with equitable accounting were aimed mainly at the situation
11 where one party had been ousted from the matrimonial home. In those
12 circumstances the court took the view that the party occupying the home
13 should pay an occupational rent. The principle did not apply where the party
14 residing away from the home was free to return.

15 22. In *Re Pavlou (a bankrupt)*¹, Millet J. so said at page 959:

16 *"I take the law to be to the following effect. First, a court of equity will*
17 *order an inquiry and payment of occupation rent, not only in the case*
18 *where the co-owner in occupation has ousted the other, but in any other*
19 *case in which it is necessary in order to do equity between the parties*
20 *that an occupation rent should be paid.... The true position is that if a*
21 *tenant in common leaves the property voluntarily, but would be welcome*
22 *back, and would be in a position to enjoy his or her right to occupy, it*
23 *would normally not be fair or equitable to the remaining tenant in*
24 *common to charge him or her with an occupation rent which he or she*
25 *never expected to pay."*

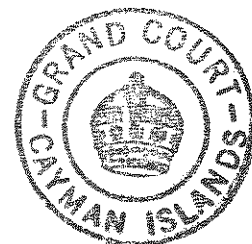
¹ [1993] 3 All ER 955

1 23. A principle that may be taken from that dictum is that if parties are in
2 agreement as to the occupation of the co-owned property, as opposed to the
3 ousted party being resigned to accept his or her status, then the party who is
4 outside of the property would not normally be entitled to an occupational
5 rent. This is not an inflexible principle, but would depend on the
6 circumstances of each case. The principle stated above may be supported by
7 reference to the judgment of Judge Behrens, who, at paragraph [48] of
8 *Ketteringham and Another v Hardy*² stressed that it was the common
9 intention of both parties that would govern the liability to account in
10 circumstances such as those.

11 24. Lady Hale, in *Stack v Dowden*³, indicated at paragraph [93] of their
12 Lordships' judgment, that the principle of equitable accounting had been
13 superseded in England and Wales by the provisions of the Trusts of Land
14 and Appointment of Trustees Act 1996 of that jurisdiction. It was not clear
15 whether there are similar statutory provisions in this country, and counsel
16 was unable to assist in that regard. Nonetheless, based on the reasoning
17 above, it must be found that the terms of the consent order in this case would
18 exclude any reference to the principle of equitable accounting. The consent
19 order was expressly stated to be the final settlement of all issues between the
20 parties.

² [2011] EWHC 162 (Ch),

³ [2007] 2 All ER 929



1 25. It is for the court to interpret the meaning of the consent order to determine
2 what the common intention of the parties was at the time they struck their
3 bargain. To this end, the court is particularly impressed by the term used in
4 paragraph 2 of the consent order. For ease of reference, the paragraph is
5 repeated:



6 “2. The Petitioner do account for US\$294,000 in relation to the
7 Respondent foregoing any interest in [CG], such sum to be
8 accounted for from the net proceeds of sale of [FMH] property.”

9 The context of the requirement for HSW to account is that she had been
10 provided with property valued at US\$294,000. In the absence of a provision
11 that she should account for less, she must account for the entire sum as the
12 paragraph has stipulated.

13 26. Similarly, in paragraph 17, the context is that she was provided with an
14 advance of US\$10,000 to assist her with her legal fees. The order does not
15 contain any provision that JJW is to pay those fees. If she is to account for
16 that advance, she must do so in full, unless specifically directed otherwise.

17 27. The effect of HSW’s approach is that she would not account in full but
18 would only account for a half of the value that she had received. Using her
19 approach, it would be both parties accounting for the sums mentioned in
20 paragraphs 2 and 17. In applying the sums, before dividing the net proceeds
21 of sale between them, each party would be giving up one-half of each sum,
22 whereas it was HSW alone who received the benefit.

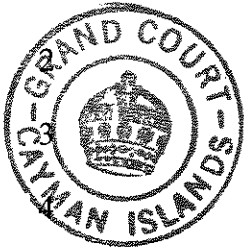
1 28. Is there any provision in the consent order that specifies that HSW need only
2 account for one-half of the value with which she has been provided? She
3 has pointed to paragraph 8 of the document. For these purposes she has
4 stated that the portion that reads “[u]pon its sale the net proceeds of sale
5 after extinguishing the mortgage and applying any necessary accounting
6 above and below the net proceeds to be divided equally”, indicates that the
7 accounting is to be done before the net proceeds are divided. It perhaps
8 could also be said that paragraph 6 supports her stance when it states,
9 “US\$32,298 on account of her share of the net proceeds of the sale”, in that
10 it specifically refers to her share of the net proceeds of the sale.

11 29. Neither of these provisions specifically restricts HSW’s obligation to
12 account for the value that she has received. No other provision exempts her
13 in whole or in part from that obligation. Her interpretation of clauses 2 and
14 17 is flawed and must be rejected. She must account for the entire sums and
15 JJW’s position must be applied.

16 *b. The sale price*

17 30. Whereas HSW’s proposed figure of US\$1,705,500 is easily calculated, the
18 same cannot be said of JJW’s figure of US\$1,681,150. It is true that he
19 arrived at that figure by “splitting the difference” between his original offer
20 of US\$1,656,800 and HSW’s figure. JJW did not, however, share with the
21 court the mathematical explanation for the figure of US\$1,656,800. He
22 merely stated at paragraph 12 of his affidavit filed on 29 May 2014:





1 *"I have therefore proposed the notional sale price of US\$1,656,800. I*
2 *have come to this figure by making a reasonable reduction to the*
3 *higher...market value, and then deducting a percentage equivalent to the*
4 *costs of sale if we were to sell through realtors."*

5 Nor does JJW share the figures he understands to be chargeable in the event
6 of a sale through realtors. Mr McGrath did say, however, that the realtor's
7 charge is normally five per cent of the sale price.

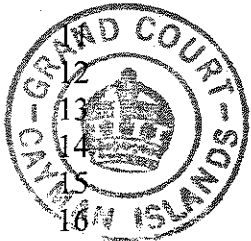
8 31. Accordingly, if a sale were to be ordered as JJW has requested, it should be
9 on the basis of HSW's figure of US\$1,705,500. HSW, in her affidavit,
10 obliquely suggested that the valuations were low and that FMH may well
11 sell for more. She referred to speaking with other realtors. She has not
12 produced any evidence that would cause the court to doubt that the valuation
13 that has been placed before it reflects other than a true market value – either
14 on the open market or in restricted marketing circumstances. Her stance that
15 a better price may be had is untenable.

16 *c. Whether a sale should be ordered*

17 32. In opposing the application, HSW relies on paragraph 8 of the consent order.
18 She asserted that the paragraph requires FMH to be placed on the market and
19 to remain there until sold. She contended that a sale of her half interest is
20 not contemplated by the consent order and that what JJW seeks is a variation
21 of the consent order. She accepted that the court may, by s.23 of the
22 Matrimonial Causes Law (2005 Revision), vary orders of this type. She

1 stated, however, such variations are only done in specific circumstances, and
2 the present case does not satisfy those requirements. HSW relied on, among
3 others, the cases of *Range v Range*⁴ and *Gilman v Gilman and Another*⁵, in
4 support of her stance. In *Range*, the Court of Appeal stressed the final
5 nature of a consent order and the fact that, bearing the imprimatur of the
6 court, it was more than just an agreement between the parties. The judgment
7 of the court was that the authority to vary such orders should be “*sparingly*
8 *exercised where the order itself appears to contemplate finality*” (page 441).

9 33. In *Gilman*, Levers J opined that the court would only interfere with a
10 consent order if:

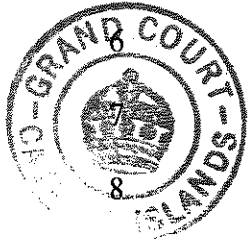


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- “(1) *the basis or fundamental assumption underlying the order had been falsified by a change in circumstances;*
 - (2) *an application because of such changes was made within a relatively short time; and*
 - (3) *the variation would not unfairly prejudice either party who had relied on the consent order to re-establish his or her life.*”

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19 34. Whereas it is true that the parties had, in breach of the consent order, agreed
20 to remove FMH from the market from time to time over the past five years,
21 that agreement does not preclude HSW from seeking to benefit from the
22 principle outlined in *Range*. It is patent, however, that paragraph 8 of the
23 consent order does contemplate that there may be disagreements between the
24 parties and that there may be a need to refer to the courts for resolution. It is
25 true that the disagreement referred to is in respect of the sale price, but, the

⁴ [1988 – 1989] CILR 437

⁵ [2004-2005] CILR Note 19



1 order does not preclude reference to the court in respect of matters that are
2 not dealt with by the consent order.

3 35. No doubt, when the consent order was drafted, the parties contemplated that
4 there would have been no difficulty in securing a sale of FMH on the open
5 market. That was not to be. They have not received one offer of purchase.
6 What they did contemplate was that it would remain on the open market
7 until sold. The price would depend on what the market would allow at any
8 point in time. The identity of the purchaser and the source of the funds were
9 not particularised.

10 36. If it is that the market at this time stipulates US\$1,705,500 as being the
11 figure that FMH can reasonably fetch, then it should be sold for that figure.
12 The fact that the purchaser is JJW does not work to HSW's detriment. She
13 may not want him to have FMH but such personal sentiments have no place
14 in the transaction.

15 37. Apart from the timing of the application, it does not run afoul of the
16 guidelines set out by Levers J in *Gilman*. The court, cannot be so
17 straitjacketed that it would refuse an otherwise worthy application if it would
18 allow the parties "to re-establish his or her life".

19 38. In the circumstances the court should be willing to make an order which
20 allows this aspect of the consent order, now outstanding for five years, to be
21 brought to finality.

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CONCLUSION

39. The consent order between the parties, when properly construed, allows the court to order the sale of the property to JJW. A reasonable price at which it may be sold is the average of the market value and the market value subject to a restricted marketing period. That figure has been identified as being US\$1,705,500, and was one proposed by HSW in negotiations between the parties.

40. Upon the sale being completed, the accounting that is to be done must see HSW giving credit for the full sums mentioned at paragraphs 2, 6, 7, and 17 of the consent order. A fair construction of the consent order would not allow her to account for only one-half of those figures, when she in fact received the full benefit of those values and was specifically required, by paragraph 2, to account for the sum specified therein.

41. As JJW was obliged to seek the permission of the court to vary the consent order, and as each party has had a measure of success, each will bear its own costs.



ORDER

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42. Based on the above reasoning the orders are as follows:

- a. The sums referred to at paragraphs 2 and 17 of the Consent Order dated 9th April 2009 shall be accounted for out of the Petitioner's share of the net proceeds of sale of the parties' former matrimonial home (hereinafter called FMH).
- b. The Respondent is hereby permitted to purchase the Petitioner's interest in FMH and the accounting exercise referred to throughout the Consent Order shall be applied to the notional net proceeds of sale.
- c. Completion of the sale and purchase of the Petitioner's interest in FMH shall be effected by the transfer of all the shares in the company owning FMH, in exchange for the sum found due to the Petitioner upon the completion of the accounting exercise mentioned above.



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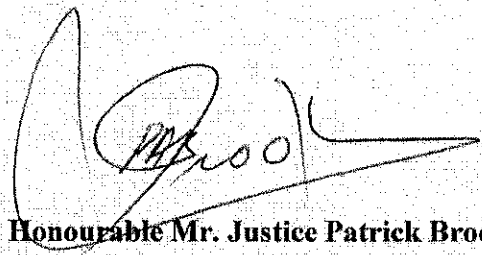
d. The notional sale price of the Petitioner's interest in FMH is hereby fixed at US\$1,705,500, provided that the sale is completed within 42 days of the date hereof.

e. Liberty to apply.

f. Each party shall bear its own costs.

10 **Dated this the 18th day of July 2014**

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**Honourable Mr. Justice Patrick Brooks
Acting Judge of the Grand Court**

