26 September 2016

PALLADYNE INTERNATIONAL ASSET MANAGEMENT BV V UPPER BROOK AND OTHERS

FSD 68 OF 2016

NOTE OF RULING

1. I have now had the opportunity to read and consider the submissions made in the two letters from Appleby dated 19 and 20 September and the letter from Walkers dated 19 September. My conclusions are set out in paragraph 11 below.

2. This correspondence relates to the above mentioned proceedings and applications for limited admission of two Queen's Counsel (Mr. Richard Millett and Ms. Maya Lester) which Walkers (attorneys for the Plaintiff) intend to make for the purpose of enabling the Queen's Counsel to appear on behalf of the Plaintiff in the proceedings, including at the hearing of the Defendant's application which is currently to be heard on Wednesday of this week (28 September).

3. I was notified on 14 September that Walkers intended to make the applications on 28 September prior to the hearing of the Defendant's application and that the relevant documentation including work permit approval and the application for admittance would be filed at Court in due course. I was told that Mr. Millett and Ms. Lester would be in London and able to participate in the hearing if their applications for limited admission were granted. I indicated that I was prepared to deal with the applications as requested (and assumed that notice of the applications had been or would be given to the Defendant's attorneys).

4. I have yet to receive the applications and the evidence in support (so that, I should point out, the timetable for the filing of the application and evidence in support set out in Practice Direction No. 4 of 2012 appear not to have been complied with – unless the papers have not yet been sent to me or are in transit) .

5. Appleby have raised a number of concerns and issues. In particular they have submitted that:

   (a). the Court does not have jurisdiction to determine limited admission applications when the Judge is located outside Cayman (the "***Jurisdiction Issue***");

   (b). the applications for limited admission should not be granted on a number of grounds. These include the fact that Walkers cannot establish the need to have two Queen's Counsel appear at the hearing of the Defendant's summons, that the applications are designed to give the Plaintiff an improper benefit as regards the recoverability of the costs of foreign lawyers and that the applications are premature since they should only be made in advance of a hearing at which the attendance of Queen's Counsel can properly be justified (the "***Limited Admission Issue***").

   (c). even if the limited admission applications were to be granted Mr. Millett and Ms. Lester would be unable to participate in the 28 September hearing since even if the application is granted they would need (in accordance with paragraph 9 of Practice Direction No.4 of 2012) to sign the Register of Admitted Attorneys before appearing and therefore if the applications are

made only on the morning of the hearing and they were in London at the time, this requirement would be incapable of being satisfied (the "***Signing Requirement Point***").

6. Appleby have also expressed concerns at what they say was a failure by Walkers to give them notice of the limited admission applications.

7. In my view:

   (a). while I have not seen the limited admission applications and therefore cannot express a view on the merits of the applications (although I recognise that applications for the limited admission of two Queen's Counsel in connection with any proceedings and in particular for the purpose of appearing on a summons for directions are exceptional and very difficult to justify), I am able to decide at this stage the Jurisdiction Issue and the Signing Requirement Point.

   (b). as regards the Jurisdiction Issue, the better view is that applications for limited admissions cannot be determined by a Judge sitting outside Cayman (although there is some room for argument as to whether on a purposive construction of the applicable rules this is or should be the result and there have been a number of examples in practice of such applications being dealt with by a Judge sitting outside Cayman where there has been no objections raised by other parties to the proceedings).

   (c). as regards the Signing Requirement Point, while Practice Direction No.4 of 2012 does on its face stipulate that a foreign lawyer who is granted limited admission is unable to participate in any hearing without signing and until after they have signed the Register, it seems to me that it could be sufficient and acceptable (depending on the circumstances) for the foreign lawyer to participate in a hearing before having signed the Register provided that they had given an undertaking to travel to Cayman and sign the Register within a defined and relatively short period of time and agreed immediately to be subject to paragraph 10 of the Practice Direction and be bound by the relevant professional duties and obligations and be subject to professional discipline as set out therein.

8. The effect of the applicable rules can be summarised as follows:

   (a). the place of a *trial* of a cause or matter, or of any question or issue arising therein, must generally be the Law Courts in Cayman (see GCR O.33, r.1(1)).

   (b). however, where there is a special reason for doing so the Court may order that the trial take place in another jurisdiction provided that the Secretary of State for Foreign and Commonwealth Affairs has issued a certificate (see GCR O.33 r.1(2)).

   (c). but in an appropriate case a Judge may hear any *interlocutory application* where he is present by telephone or video-link (and whether he is physically in the Islands or outside the Islands) or at any place outside the Islands (see GCR O.32, r.28 as amended by the Grand Court (Amendment No. 2) Rules 2011 and Practice Direction No. 2/2012).

(d). the reference to an "interlocutory application" in GCR O.32, r.28 (and "interlocutory hearings" in Practice Direction No. 2/2012) must be intended and therefore interpreted so as:

(i). to fit and dovetail with the direction in GCR O.33, r.1(1) that trials be heard in Cayman;

(ii). to refer to any hearing which is not a trial of "of a cause or matter, or of any question or issue arising therein."

(e). an application for limited admission is brought as a separate action. The grant is made in the separate action so as specifically to allow the foreign lawyer to appear in the extant action and is in that sense, a final order after trial of the action, not an interlocutory determination. It therefore technically falls within GCR O. 33 r.1(1) so that the hearing can only take place outside Cayman if the Court determines that there is a special reason and the Secretary of State for Foreign and Commonwealth Affairs has certified that neither he nor the authorities in (any other) country concerned have any objection to the Court sitting in such country. Obviously no such certificate has been sought or obtained in the present case.

(f). I have considered whether, despite the fact that an application for limited admission is technically brought as a separate action so that the hearing of the application can be said to be a trial and a final determination of the relevant cause or matter, nonetheless the reference to an interlocutory application in GCR O.32 r.28 and to "trial of a cause or matter, or of any question or issue arising therein" in GCR O.33 r.1(1) should be construed so as to include within interlocutory applications an application connected with and made for the purpose of another related hearing or application which is itself an interlocutory applications or hearing. However, I do not consider that it would be appropriate to adopt such a wider construction in the present circumstances. This is because first, I have not received proper submissions (with reference to authorities or background materials) or held a hearing on this issue; secondly, as I understand the Court's practice to date, the Court has interpreted the rules as allowing only for interlocutory proceedings and orders strictly so-called, absent the Secretary's certificate and thirdly, since the limited admission application relates to the relevant proceedings as a whole and not to a particular (interlocutory) hearing it seems, as a matter of first impression, difficult to justify a construction which links the limited admission application only to a specific interlocutory hearing which would be the first hearing at which the foreign counsel in question would appear.

9. As regards the Signing Requirement Point:

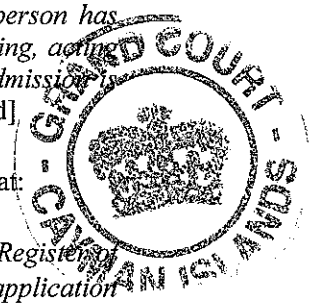
(a). Section 4(1) of the Legal Practitioners Law (2015 Revision) states that:

"A judge shall have power to admit to practise as an attorney-at-law, for the purpose of any specified suit or matter in regard to which the person so admitted has been instructed-

(a) by an attorney-at-law in the Islands; or

(b) where the Clerk of Court has certified that it is not possible to assign the services of an attorney-at-law to a person to whom a legal aid certificate has been granted under section 3 of the Legal Aid Law (1999 Revision), by such person,

any person who possesses the prescribed qualification, if such person has come or intends to come to the Islands for the purpose of appearing, acting or advising in that suit or matter, and an application for such admission is made ***in such manner as the judge may think fit.***" [emphasis added]



(b). the terms of paragraph 9 of Practice Direction No.4 of 2012 state that:

"*If granted limited admission the Applicant is required to sign the Register of Admitted Attorneys either at the time of the application or if the application has been heard prior to the Applicant having come to the Islands, as soon as practicable after his arrival in the Islands* ***and in any event before any appearance in the specified suit or matter in which it is proposed the Applicant should appear.***" [emphasis added].

(c). the Practice Direction makes it clear that the application can be made before the relevant foreign lawyer is in Cayman. If the grounds for limited admission are otherwise made out and an order is made in connection with an interlocutory hearing which can properly be heard off Island by a Judge sitting outside Cayman (say in London), it would be an unfortunate reading of the rules to require the foreign lawyer to travel to Cayman to sign the Register and then return to London to participate in the hearing (if there were good reasons for the foreign lawyer not participating in the hearing from Cayman). Provided that the Court can properly be satisfied that the foreign lawyer is bound by the rules of professional conduct and subject to professional disciple before participating in the hearing then it would, as it seems to me, be unnecessary to require the foreign lawyer to sign the Register before so participating – and an undertaking in suitable form from a Queen's Counsel should be sufficient for these purposes.

10. I have noted but at this stage do not consider it appropriate to comment on the issues raised by Appleby concerning the costs implications and impact on the Cayman legal profession of granting the limited admission applications. These are matters to be dealt with and taken into account in the hearing of the applications.

11. In the circumstances therefore:

(a). the applications for the limited admission of Mr. Millett and Ms. Lester will need to be heard by a local Judge and cannot be dealt with by me at or immediately before the hearing on Wednesday.

(b). it will be a matter for Walkers as to whether they wish to proceed with the hearing without Mr. Millett and Ms. Lester or whether they wish to agree to an adjournment to a date to be fixed, following the making and determination of the applications for limited admission.

(c). if there is to be an adjournment this will give Appleby time to make their own application for the limited admission of any Queen's Counsel who they wish to instruct and have appear at the adjourned hearing. I do consider that it is important that both firms notify each other of and where possible co-ordinate

the procedural timetable for the making of such applications so as to allow the efficient conduct of the main proceedings.

(d). if the limited admission applications are made it will be open to those making them to consider whether the Queen's Counsel concerned are able to attend in Cayman and sign the Register before the adjourned hearing takes place or whether they consider that they can justify the Court permitting, and wish to offer suitable undertakings and invite the Court to permit, counsel to appear at the adjourned hearing in reliance on such undertakings.

12. Finally I would like to apologise to both Appleby and Walkers for the delay in providing my response to and ruling on the matters first raised early last week. I was abroad on business all last week and only returned to London yesterday.

Segal

Nick Segal
The Hon. Justice Segal
26 September 2016

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