IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: POCL 8 of 2014

IN THE MATTER OF AN APPLICATION FOR A RESTRAINT ORDER PURSUANT TO SECTION 45 OF THE PROCEEDS OF CRIME LAW ("POCL") (2016 REVISION)

AND IN THE MATTER OF THE ORDER OF THE COURT DATED 18 DECEMBER 2015

AND IN THE MATTER OF:

1. **ROBERT BANDFIELD**
2. **ANDREW GODFREY**
3. **KELVIN LEACH**
4. **ROHN KNOWLES**
5. **BRIAN DE WIT**
6. **CEM CAN**

AND

7. **IPC MANAGEMENT SERVICES LLC**
8. **IPC CORPORATION SERVICES INC**
9. **IPC CORPORATION SERVICES LLC**
10. **TITAN INTERNATIONAL SECURITIES INC**
11. **LEGACY GLOBAL MARKETS SA**
12. **UNICORN INTERNATIONAL SECURITIES LLC**
13. **PINNACLE FINANCIAL GROUP (Cayman) LTD**

APPLICANTS (as underlined)

Appearances:

Mrs. Nicholas Dixey and Mr. Colm Flanagan of Nelson & Co. on behalf of the Applicants:
- **Kelvin Leach,**
- **Titan International Securities Inc.**
- **Pinnacle Financial Group (Cayman) Ltd.**

Ms. Toyin Salako, Crown Counsel on behalf of the DPP

Before:	**The Hon. Mr. Justice Charles Quin Q.C.**
Heard:	**21st March 2017**
Applicants' Supplementary Written Submissions	**31st March 2017**
DPP's Supplementary Written Submissions	**13th April 2017**
Judgment delivered:	**27th April 2017**

HEADNOTE

The Proceeds of Crime Law – Applicability *of s. 44 and s.45 as read with Schedule 5 – Procedural flaw and lack of evidence – Application of s.7 of Schedule 5 – Material Non-disclosure on ex parte application for an External Restraint Order pursuant to POCL*

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JUDGMENT

INTRODUCTION

1. This is an application – dated the 6th January 2017 – brought by Mr. Kelvin Leach ("Mr. Leach"), Titan Securities Inc. ("Titan") and Pinnacle Financial Group (Cayman) Ltd. ("Pinnacle") ("the Applicants") for an Order to discharge the *ex parte* Restraint Order made by me on the 18th December 2015.

2. The application is grounded by the Affidavit, sworn by the First Applicant, Mr. Leach on the 5th January 2017 in Belize City, Belize.

3. Mr. Leach avers that Titan was incorporated in Belize on the 28th February 2011 and that he was the President of Titan with responsibility for overseeing all the daily operations from its inception.

4. Mr. Leach further avers that Pinnacle was incorporated on the 24th October 2013 and is a subsidiary of Pinnacle Financial Services Ltd. ("PFSL"). Mr. Leach avers that he is the beneficial owner of Pinnacle.

5. On the 18th December 2015 this Court made an *ex parte* External Restraint Order pursuant to the Mutual Legal Assistance (USA) Law (2015 Revision) ("MLAT Law") and pursuant to s.45 of the POCL restraining realizable property of the Applicants – Mr. Leach, Titan and Pinnacle and, in particular, restrained and froze four accounts in the name of the Applicant Pinnacle – held with Cayman National Bank ("CNB") and one account in the name of the Applicant Titan (and Legacy Global Markets S.A. ("Legacy")) held with Caledonian Bank Limited ("Caledonian Bank").

The alleged facts set out in the Letter of Request dated the 2nd July 2015 from the United States Department of Justice ("USDOJ") claimed that the Applicant Mr. Leach was an employee of the Applicant Titan and a director of the Applicant Pinnacle and, further, that Titan and Pinnacle shared the same address., the Matalon, Coney Drive, Suite 403, Belize City, Belize.

GROUNDS OF THE APPLICATION

6. In summary, the Applicants rely on three grounds in their Application to set aside the *ex parte* Restraint Order granted by this Court on the 18th December 2015 as follows:

(a) The Applicants submit that the *ex parte* application made before me on the 18th December 2015 did not comply with the POCL (2016 Revision) and (2014 Revision), as it was at that time, in that, the mandatory conditions set out under s.44 of the POCL had not been satisfied and therefore the threshold for making the Restraint Order had not been met.

(b) The Applicants submit that the *ex parte* application was not supported by an Affidavit, a Declaration, or any other written statement by the appropriate authority of the foreign county and they submit further that there was insufficient evidence and information before the Court to ground the *ex parte* application.

(c) The Applicants contends that the Applicant to the *ex parte* application was guilty of material non-disclosure by not bringing to the Court's attention the judgment of Benjamin CJ of the Supreme Court of Belize in ***FIU v. Bandfield, Godfrey Leach et al***, dated the 7th November 2014, and the judgment of Williams J. of this Court in the matter of ***Brian de Wit et al*** on the 8th June 2015.

CHRONOLOGY BEFORE THE GRANTING OF THE RESTRAINT ORDER

7. On the 2nd July 2015 the Cayman Islands Mutual Legal Assistance Authority ("CIMLAA") received a formal request from the USDOJ[1] pursuant to the MLAT Law for assistance to restrain certain accounts in the name of the Applicants and for the production of relevant documents.

8. The Request from the USDOJ confirmed that there is an investigation and prosecution of the Applicants and others for money laundering, securities fraud and conspiracy to defraud the United States.

9. The USDOJ Request contained a detailed statement of facts relating to the applicants' activities in the USA, Belize, the Cayman Islands and elsewhere. The substantial allegations against the Applicants and others were that they had engaged in significant illegal market manipulation and, further, that the Applicants had laundered the proceeds of this illegal market manipulation schemes into accounts opened by the Applicants in the Cayman Islands. The Request was supported by details of the accounts opened by Mr. Leach and the movement of alleged illegal funds into accounts with CNB and Caledonian Bank in the names of the other two applicants – Pinnacle and Titan.

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[1] See Affidavit of Brian D Morris which accompanied MLAT request (as yet undisclosed to applicants) **[8/1-17]**

10. The USDOJ Request exhibited at Exhibit A the Indictment Number CR14-00476 laid by Ms. Lorretta Lynch – the US Attorney General for the Eastern District of New York on the 8th September 2014 – against the Applicants and others before Glasser J of the US District Court of New York. The indictment set out detailed facts which supported the allegations against the Applicants who were charged with conspiracy to commit securities fraud, conspiracy to defraud the US and a money laundering, conspiracy from on or about January 2006 up to September 2014.

11. On the 30th June 2015 Levy J – a judge of the US district Court for Eastern District Court of New York issued a seizure order for all funds on deposit in Caledonian Bank in the name of the Applicant Titan.

12. On the 2nd July 2015 Levy J issued a second seizure warrant for all funds on deposit in the name of the Applicant Pinnacle with CNB.

13. On the 14th July 2015 the CIMLAA Authority acknowledged receipt of the Request from the USDOJ and asked for further additional material.

14. On the 27th August 2015 the USDOJ supplied the additional material sought by the CIMLAA in a letter from the Acting Director of the USDOJ, Ms. Mary Rodriguez.

15. On the 15th December 2015 the CIMLAA considered the Request and the additional material provided by the USDOJ and issued a Certificate pursuant to s.6 of the MLAT Law and instructed the DPP to apply on its behalf for a Restraint Order for the accounts (listed in the USDOJ Letter of Request dated the 2nd July 2015) with CNB and Caledonian Bank in the names of the Applicants Pinnacle and Titan and another entity, Legacy Global Markets, SA ("Legacy")

16. Section 6(1) of the MLAT Law reads:

> *"6. (1) Upon receipt of a request, the competent authorities in the Islands shall execute the request, in accordance with, but subject to, the provisions of the Treaty. Where the execution of a request requires the issue under the law of the Islands of a subpoena, search warrant, order for the seizure of any article or other necessary order by a magistrate, justice of the peace or officer of a court, a certificate given by the Cayman Authority that the issue of any such document or order is required for the purposes of a request to which this Law relates shall be sufficient authority for the issue or making of the same without further enquiry."*

17. It appears that upon receipt of a Request from the Requesting USDOJ the CIMLAA shall execute the Request in accordance with the provisions of the Treaty. Furthermore, under the MLAT Law, a Certificate given by the CIMLAA shall be sufficient authority for the issue or making of the same without further enquiry. I find that this procedure was properly followed and the CIMLAA certified that the Request from the USDOJ met the obligations and requirements of the Treaty.

18. On the 18th of July 2015 Crown Counsel, Ms. Salako, appeared before me on behalf of the Cayman Authority in application for an *ex parte* Restraint Order to, *inter alia*, freeze and restrain the four accounts in the name of the Applicant Pinnacle, with CNB, and, the single account in the name of the Applicant Titan, with Caledonian Bank.

19. With Crown Counsel was Detective Constable Keith Taylor of the Financial Crime Unit of the RCIPS, who had sworn an Affidavit, dated the 16th December 2015. The Application was supported by a Court bundle which included the Affidavit of DC. Taylor, the CIMLAA's request for additional material from the USDOJ, the Indictment, the seizure Warrants, the affidavit of the Assistant US Attorney, Brian Morris, dated the 2nd July 2015, the additional USDOJ material, copies of the relevant portions of the MLAT Law and the POCL and the written submissions of Crown Counsel.

20. The facts in relation to the USDOJ investigation are set out in the Request, the Indictment, the additional material and the affidavit of Brian Morris. As far as I can recollect, and as far as my notes reflect, that was the material put before me by Crown Counsel and DC Taylor on the 18th December 2015.

21. I made notes during the hearing on the 18th December 2015 which set out the material I relied upon and the submissions made before me pursuant to the MLAT Law and POCL. At the hearing on the 21st March 2016 I provided both parties with copies of my notes of the hearing of the 18th December 2015.

22. My notes reflect that, in particular, my attention was drawn to Article 1 of the MLAT Law, s.187 of the POCL, Schedule 5 of the POCL as read with s.45 and s.44 of the POCL.

CHRONOLOGY AFTER THE GRANTING OF THE RESTRAINT ORDER

23. On the 23rd May 2016: Mr. Leach's co-defendant, Mr. Robert Bandfield ("Mr. Bandfield") entered a guilty plea in relation to Count 3 of the US Indictment – that is, conspiracy with Mr. Leach and others to launder money. At the time of entering his guilty plea Mr. Bandfield agreed to forfeit US$1 million and further also consented to forfeit all of his rights and interests to the five accounts which are currently the subject of the Restraint Order dated the 18th December 2015.

24. On the 23rd May 2016: A preliminary order for forfeiture was filed at the US District Court Eastern District of New York and signed by the presiding judge, Glasser J.

25. I have been informed that following the grant of the preliminary order it is the custom of the US District Court of the Eastern District of New York to issue a legal notice of the aforesaid forfeiture which was published on the official US Government website www.forfeiture.gov from the 21st June 2016 to the 21st July 2016. The purpose of this legal notice was for any person or entity to make a claim of interest to the property, subject to the preliminary order of forfeiture. This preliminary order of forfeiture dated the 23rd May 2016 is exhibited to the affidavit of DC Barbaron dated the 22nd March 2017.

26. The Court has been informed that only one person has made a claim and further that none of the Applicants for the discharge of my Restraint Order has made a claim of interest, subject to the forfeiture order.

27. I have been informed by Crown Counsel that the USDOJ is in the process of resolving this single claim. Once that is resolved I am informed that a final order of forfeiture will be made followed by a supplementary request to the CIMLAA for further assistance.

LEGISLATION

28. Section 187 of the POCL relates to external requests and orders and reads:

> *"187. Schedule 5 shall apply to external confiscation orders and to any proceedings which have been, or are to be, instituted and which may result in external confiscation orders being made in foreign countries."*

29. Schedule 5 sets out the modification to the Law when applied to external Confiscation Orders and related proceedings and reads:

> ***"SCHEDULE 5***
> ***Modifications to the Law When Applied to External Confiscation Orders and Related Proceedings***
> *section 187*
> *Introductory*
> *1. This Schedule shall apply to external confiscation orders registered under this Law and to any proceedings which have been or are to be instituted and which may result in such external confiscation orders being made and, to the extent that it is at variance with this Law in relation to the administration and enforcement of external confiscation orders and proceedings which may result in external confiscation orders, the terms of this Schedule shall prevail.*
>
> *General interpretation*
> *2. In this Schedule*
> *(1) The ....*
> *(2) Proceedings are instituted in a particular country when*
> *(a) under the law of the foreign country concerned, one of the steps specified in specified in relation to that country in an order made under this Law has been taken there in respect of alleged conduct by the defendant to which this Law applies; or*
> *(b) an application has been made to a court in a foreign country for a confiscation order, and where the application of this paragraph would result in there being more than one time for the institution of proceedings, they shall be taken to have been instituted at the earliest of those times.*
> *(3) Proceedings are concluded*
> *(a) when (disregarding any power of a court to grant leave to appeal out of time) there is no further possibility of an external confiscation order being made in the proceedings; or*
> *(b) on the satisfaction of an external confiscation order made in the proceedings (whether by the recovery of all property liable to be recovered, or the payment of any amount due, or otherwise)."*

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30. Section 5(1) of Schedule 5 reads:

> *"5. (1) The powers conferred on the Grand Court by paragraph 6(1) are exercisable where -*
> *(a) proceedings have been instituted against the defendant in a foreign country;*
> *(b) the proceedings have not been concluded; and*
> *(c) either an external confiscation order has been made in the proceedings or it appears to theGrand Court that there are reasonable grounds for thinking that such an order may be made in them of at least the minimum amount."*

31. Section 6 specifically deals with Restraint orders and s.6(1) and 6(2) read:

> *"6. (1) The Grand Court may, by order (referred to in this Schedule as a restraint order") prohibit any person from dealing with any realisable property, subject to such conditions and exceptions as may be specified in the order.*
> *(2) Without prejudice to subparagraph (1), a restraint order shall be subject to section 45."*

32. As directed by s.6(2) of Schedule 5 I now turn to s.45(1) and (2) of the substantive Law which reads:

> *"45. (1) Where any of the conditions set out in section 44 is satisfied the court may make a restraint order prohibiting any specified person from dealing with any realisable property held by him subject to such conditions and exceptions as may be specified in the order.*
> *(2) A restraint order may provide that it applies -*
> *(a) to all realisable property held by the specified person whether or not the property is described in the order; or*
> *(b) to realisable property transferred to the specified person after the order is made."*

33. Finally s.44 sets out the conditions for the exercise of the Court's power and reads:

> *"44. (1) The court may grant a restraint order in accordance with section 45 if any one of the following conditions is satisfied -*
>
> *(a) a criminal investigation has been started in the Islands with regard to an offence and there is reasonable cause to believe that the alleged offender has benefited from his criminal conduct;*
>
> *(b) proceedings for an offence have been started in the Islands and not concluded and there is reasonable cause to believe that the defendant has benefited from his criminal conduct;*
>
> *(c) .....*

GROUND 1 – FAILURE TO MEET THE THRESHOLD

34. The jurisdiction to make a Restraint Order by way of assistance to a foreign country ("an External Restraint Order") pursuant to the POCL is conferred by s.187 and Schedule 5 of the POCL.

35. The Request for an application for an External Restraint Order – where the Request for assistance has been made by the USDOJ is pursuant to the MLAT Law and the law provides the statutory and procedural legal framework to give effect to the USDOJ's Letter of Request.

36. The Certificate signed by the CIMLAA certifies that a Restraint Order is required for a Request under the MLA (USA) Law and it is authorisation for the issue or the making of the Order without further enquiry, but still pursuant to the POCL.

37. Section 5(1) of Schedule 5 of POCL sets out the circumstances in which the Grand Court has the power to order an External Restraint Order as read with s.6(1):

> *"5. (1) The powers conferred on the Grand Court by paragraph 6(1) are exercisable where -*
> *(a) proceedings have been instituted against the defendant in a foreign country;*
> *(b) the proceedings have not been concluded; and*
> *(c) either an external confiscation order has been made in the proceedings or it appears to the Grand Court that there are reasonable grounds for thinking that such an order may be made in them of at least the minimum amount."*

38. It is clear that criminal proceedings have been instituted against the Applicants in the Eastern District of New York as can be seen by the Indictment referred to in paragraph 11 above and referred to by the Assistant District Attorney, Brian Morris, who has conduct of the criminal proceedings against the Applicants in the USA

39. I agree with the submission from Counsel for the Applicants that before granting an External Restraint Order the Court must also be directed to s.45 and therefore s.44 of POCL because s.6(2) of Schedule 5 clearly stipulates that an External Restraint Order shall be subject to s.45 of POCL.

40. The Applicants submit that the DPP's application in December 2015 must meet the criteria of s.5(1) of Schedule 5 and the conditions set out under s.44, namely, that:

> *"...a criminal investigation has been started in the islands" with regard to an offence and there is reasonable cause to believe that the alleged offender has benefitted from his criminal conduct."*

41. The Applicants submit that although the Crown asserted at paragraph 17 in their written submissions before me in December 2015 that "*a criminal investigation has been started in relation to the five individuals by the Central Authorities of the USA*" there is a lack of evidence to demonstrate that any criminal investigation has been started within the Cayman Islands as required by s.44(1) of POCL.

42. On the 18th December 2015 Ms. Salako submitted at paragraph 16 of her written submissions that "s.*6(2) of Schedule 5 provides that the Restraint Order shall be subject to s.45 of POCL" and specifically referred the Court to s.44 and s.45 and s.46.*" Paragraph 17 of the Crown's written submissions set out specifically the Crown's submission – that a criminal investigation has been started in the Cayman Islands pursuant to s.44(1)(a). My notes of the hearing on the 18th December 2015 also specifically refer to s.45 and s.44(1) as read with s.187 and Schedule 5 of POCL.

43. I come now to examine the Affidavit of DC Keith Taylor of the FCU of the RCIPS, which affidavit was sworn on the 16th December 2015 and put before this Court on the 18th December 2015. At paragraph 3 of his affidavit DC Taylor avers that "*my knowledge of the facts deposed to at this hearing derive from my investigation of the matter to date and from consideration of the application from the USA and its contents.*" (*emphasis supplied*).

44. Officer Taylor goes on to swear at paragraph 6: "*This application is based on the premise that a criminal investigation has been started in the USA which would constitute an offence which occurred within the Cayman Islands.*"

45. Officer Taylor then details the facts alleged in the Request from the USDOJ and refers to the seizure warrants dated the 30th of June 2015 and the 2nd of July 2015 at paragraph 8, and, in particular, the specific Cayman Islands accounts named in the seizure warrant in the name of Titan at Caledonian Bank, and in the name of Pinnacle at CNB. Officer Taylor's evidence details the activities of the Applicants and in particular the evidence that Pinnacle was a Financial Services firm registered in the Cayman Islands.

46. Officer Taylor deposes to the activities of the Applicant Mr. Leach and the others named in the USA Indictment and specifically referred to the fact that Mr. Leach opened two corporate savings accounts in Pinnacle's name at CNB in Grand Cayman and the significant sums of money deposited into those accounts, which Officer Taylor contends is consistent with Titan's fraudulent operations. Officer Taylor goes on to state that the investigation revealed that Titan frequently opened US dollar and CA dollar accounts at Caledonian Bank and CNB in Grand Cayman on the same day(s). At paragraph 30 Officer Taylor avers that the Applicant, Mr. Leach, opened further accounts at CNB in the name of Pinnacle and at paragraph 31 sets out the sums of money contained in these accounts. Officer Taylor avers at paragraph 32 that Pinnacle had no legitimate business and was used by the Applicants and others named in the US Indictment to launder the proceeds of the securities frauds conducted by IPC on behalf of their clients (the Applicants et al) or no business records identifying a close connection between Pinnacle, IPC and Titan.

47. At paragraph 37 Officer Taylor further avers that:

> "*the investigation by the US and the Cayman Islands revealed that Titan, Legacy and Unicorn did not conduct any legitimate business activities but rather they were shell entities established by IPC to conceal the true beneficial ownership interests of IPC's clients' fraudulent securities transactions.*" (*emphasis supplied*)

48. At paragraph 3 Officer Taylor avers that his:

> *"knowledge of the facts deposed herein derives from his knowledge of the investigation into the matter to date and from consideration of the application from the USA".*

49. Officer Taylor then goes on to state at paragraph 4 that he had:

> *"reasonable grounds to suspect that the subjects named in the body of this Request for Assistance have committed, facilitated and benefitted from the offences contained within and that it is necessary to make this application to restrain the funds held with CNB and Caledonian Bank which are both licenced banks regulated by the Cayman Islands Monetary Authority"*

50. I note that the Crown have slightly varied their stance and, as a fallback position, now argue that the criminal investigation in the Cayman Islands is not necessary because s.5 of Schedule 5 sets out what is required before the Court can grant an application for an External Restraint Order. With respect to Crown Counsel, I do not accept, and, consequently reject, that submission.

51. On the 18th December 2015, before I could grant the DPP's *ex parte* application for an External Restraint Order, I had to satisfy myself that:

> *"A criminal investigation had been started in the Cayman Islands with regard to an offence,"*

52. On the 18th December 2015 I was satisfied that on the evidence of Officer Taylor as detailed above that as an officer with the FCU of the RCIPS, and, from his investigation of the matter to date he has knowledge of the facts to which he deposes. Furthermore he refers to the investigations in the USA and the Cayman Islands which investigations clearly link the Applicants, Mr. Leach and Applicants Titan and Pinnacle to accounts within CNB and Caledonian Baank – both Cayman Islands institutions.

53. Accordingly, I am satisfied that on the evidence put before me on the 18th December 2015 that Officer Taylor has started a criminal investigation in the Cayman Islands with regard to offences and, further that Officer Taylor has shown in his affidavit a basis for his belief that

> *"there is reasonable cause to believe that the alleged offenders (the Applicants) have benefitted from criminal conduct."*

54. Accordingly, from a close examination of Officer Taylor's affidavit, the Request from the USDOJ, the covering letter from the Acting Director, the USDOJ additional material, and the Affidavit from the Assistant District Attorney, Mr. Brian Morris, exhibiting the Indictment that the conditions set out in s.44(1) have been satisfied that the Court was right to hold that the threshold had been met and that a criminal investigation had been started in the Cayman Islands with regard to offences for which the Applicants have been charged in the Indictment before Lasser J of the US District Court, Eastern District of New York. Accordingly I dismiss the Applicants' first ground.

GROUND 2 - PROCEDURAL FLAWS AND LACK OF EVIDENCE

55. Section 5 of Schedule 5 provides that:

> *"5. (1) The powers conferred on the Grand Court by paragraph 6(1) are exercisable where -*
>
> *(a) proceedings have been instituted against the defendant in a foreign country;*
>
> *(b) the proceedings have not been concluded; and*
>
> *(c) either an external confiscation order has been made in the proceedings or it appears to the Grand Court that there are reasonable grounds for thinking that such an order may be made in them of at least the minimum amount.*
>
> *(2) Those powers are also exercisable where the Grand Court is satisfied that proceedings will be instituted against the defendant in a foreign country.*
>
> *(3) Where the court has made an order under paragraph 6 (1) by virtue of subparagraph (2) -*
>
> *(a) the Director of Public Prosecutions shall notify the court immediately if proceedings have not been instituted; and*
>
> *(b) the court shall discharge the order if the proposed proceedings are not instituted."*

56. Section 7 of Schedule 5 reads:

> *"7. An application under paragraph 6(5) shall be accompanied by an affidavit, a declaration or any other written statement by the appropriate authority of the foreign country deposing to or specifying -*
>
> *(a) where proceedings have been instituted, the conduct in which the defendant is alleged to have engaged (exhibiting a copy of the indictment, information or charge), and the grounds for believing that the defendant engaged in that conduct;*
>
> *(b) where proceedings will be instituted, the conduct in which the defendant will be alleged to have engaged, and the grounds for believing that the defendant engaged in that conduct;*
>
> *(c) where an external confiscation order has been made, the amount payable under the confiscation order;*
>
> *(d) where an external confiscation order has not been made -*
>
> *(i) the grounds for the belief that the defendant derived a benefit of a stated amount as a result of the conduct;*
>
> *(ii) the grounds for the belief that the amount that might be realised is at least the stated amount;*
>
> *(iii) where the defendant proceedings have been instituted, the grounds for believing that an external confiscation order may be made and the amount likely to be payable under such a confiscation order; or*

(iv) where proceedings are to be instituted, the grounds for believing that an external confiscation order is likely to be made and the amount likely to be payable under such a confiscation order;

(e) a description of the property in respect of which the order is sought;

(f) the grounds for the belief that the property is realisable property;

(g) the name and address of the person who is believed to be in the possession of the property; and

(h) the names and addresses of any parties who may have an interest in that property, and the nature of their interest."

57. The Applicants accept that Officer Taylor's affidavit was properly filed according to the Grand Court Rules (GCR) but submit that other material was not properly filed and, therefore, the application should not have been considered by the Court on the 18th December 2015. In particular, the Applicants take exception to the Affidavit sworn by Brian Morris – the Assistant US Attorney assigned to the Eastern District of New York and submit that the Assistant US Attorney cannot constitute an "Appropriate Authority" within the meaning of POCL.

58. Although the "Appropriate Authority" is not defined within POCL, the Applicants rely upon the former Proceeds of Criminal Conduct (Designated Countries) Order 2003 Revision which states that, for the purpose of that law, the Appropriate Authority was the Director of International Affairs Criminal Division Department of Justice. Accordingly, the Applicants submit that Mr.Morris cannot be an Appropriate Authority and therefore his affidavit should not be considered by the Court.

59. POCL (Law 10 of 2008) was first enacted by the Legislature on the 1st August 2008. POCL was revised on the 31st July 2014 and POCL (2014 Revision) was gazetted on the 7th November 2014. The POCL Amendment Law 2015 was passed on the 29th April 2015. Finally, POCL was again revised in September 2016 and POCL (2016 Revision) is now the operating POCL.

60. The interpretation section of POCL – s.2(1) identifies and defines a number of significant positions, posts and words, but does not identify or define Appropriate Authority. If it had been the intention of the Legislature to specifically identify and define "Appropriate Authority" for the purpose of an application for an External Restraint Order, there were several opportunities to include a definition of "Appropriate Authority" and it would have been a very simple exercise to include such a definition.

61. As there is no definition, the Court is left in a quandary – with attorneys and judges wrestling with what or who should constitute the Appropriate Authority. On the 18th December 2015 the Court was provided with the following documentation:

(a) A formal Request for assistance dated the 2nd July 2015 from the Central Authority of the USA and signed by the Deputy Director of the Office of International Affairs, Criminal Division, USDOJ.

(b) A letter dated the 2nd Jul 2015 from the Acting Director of the Office of International Affairs, Criminal Division, USDOJ.

(c) An affidavit dated the 6th July 2015 sworn by the Assistant District Attorney, Brian Morris who (with others) is "*responsible for the investigation, prosecution and trial*" of the three Applicants and others.

(d) The Certificate, dated the 16th December 2015, from the CIMLAA pursuant to s.6 of MLAT Law 1986, giving effect to the Request and requiring the DPP to apply to this Court for orders, inter alia, that the Applicants be restrained from dealing with their accounts in CNB and Caledonian Bank.

62. In the CICA decision in ***Bertoli et al v. Malone (as CIMLAA)***[2] the Court stated at the first holding:

> *"the purpose of the Law and the Treaty was to speed up the processes involved in the investigation, prosecution and suppression of crime between the two countries."*

Accordingly this Court is acutely mindful of its obligations under the Law and the Treaty and what it can do within the Law to give effect to its provisions and its purpose.

63. Leaving aside the Applicants' grounds of, not meeting the threshold, insufficient evidence and material non-disclosure it would be quite absurd if the failure of the revised POCLs to define "Appropriate Authority" would force me to accept the Applicants's submissions that I should disregard Brian Morris' affidavit and discharge the Restraint Order.

64. I agree with the submissions of Crown Counsel that the documentary requirements for the application for an External Restraint Order are extremely wide and that POCL does not require any specific documents other than an affidavit, a declaration or any other written statement from an Appropriate Authority of the Foreign Country.

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[2] 1990-91 CILR 58

65. The POCL does not define "Appropriate Authority" The Assistant District Attorney who with others, "*is responsible for the investigation, prosecution and trial*" of the USA v the Applicants and others Indictment Number 14-CR-46 . For the aforesaid reasons it is my ruling that Assistant District Attorney Brian Morris is the Appropriate Authority in this case for the purpose of s.7 of Schedule 5, and his affidavit together will the "*other written statements*" from the USDOJ meet the requirements of s.7(1)(a) of POCL and is admissible for the purpose of these proceedings.

66. In the second part of Ground 2, the Applicants submit that there is an absence of witness statements or any substantial evidence to support the Crown's application for the Restraint Order granted on the 18th December 2015 and that there is insufficient evidence for the court to find there is reasonable cause to believe that the Applicants had benefitted from criminal conduct. This alleged lack of supporting documentation and evidence cannot be saved by what the Applicants submit are "*unsustainable and unsubstantiated*" conclusions.

67. Section 7 of Schedule 5 of POCL sets out the requirements to support an application for an External Restraint Order and provides that the Appropriate Authority of the Requesting Country must provide one of the following:

(a) An Affidavit

(b) A declaration

(c) Any other written statement

68. On the 18th December 2015 I was provided with the formal request from the USDOJ which sets out detailed facts. I was further provided with the additional USDOJ information sought by the CIMLAA and on the 18th December 2015 and the Affidavit of the Assistant District Attorney Brian Morris, who has conduct of the proceedings against the Applicants in the United States together with a certified copy of the Indictment (from the USDOJ) and certified copies of the Seizure Requests. The material before me in December 2015 set out with substantial detail the conduct alleged and the grounds for believing that the Applicants engaged in that conduct.

69. The question I have to ask myself is whether on my review of all the material presented by the DPP before me on the 18th December 2015, there is reasonable cause to believe that the Applicants have benefitted from criminal conduct? In December 2015 I conducted a detailed examination of the material and, again, for the purposes of this inter partes application I have conducted a further detailed examination of the material put before me on the 18th December 2015.

70. There is evidence that IPC set up a number of shell companies for its clients. The shell companies established by IPC included Titan and Legacy. There is evidence to suggest that these shell companies were established on behalf of IPC so as to conceal the true ownership interests of publicly traded companies in the USA and there is evidence to support that the concealment of the ownership allowed IPC clients to manipulate the stock market by using their ownership interests to engineer price movements and trading volumes in the stocks for various publicly traded companies.

71. I accept that the concealment of the true beneficial ownership is a violation of the US Securities law. I accept that there was reasonable cause to believe that the proceeds of the alleged fraud from the illegal trading in securities was laundered by IPC on behalf of their clients.

72. There is no controversy that the Applicant Mr. Leach was president of the Applicant Titan. There is no controversy that the Applicant Mr. Leach served as a director of Pinnacle – which shares the same mailing address as Titan. There is no challenge to the fact that the Applicant Mr. Leach, from the 22nd September 2013, was manager, secretary and president of Pinnacle. There is no challenge to the information that the investigations carried out by the USDOJ/US Authority has revealed that the named companies did not carry out any legitimate business transactions.

73. On the other hand, there is evidence to support that the Applicant Pinnacle was a company used to facilitate the laundering of money on behalf of IPC clients. There is evidence to support the allegation that to conceal the illegal transfer of funds from Titan to IPC, Titan opened Pinnacle accounts to break up the transfer and avoid suspicion from the banks. There is evidence to support the allegation that IPC would launder the illegal proceeds of their illegal transactions to the Applicant Titan, and that, the Applicant Titan would then transfer the proceeds to Pinnacle, who would then wire-transfer funds to IPC clients in the USA and Canada.

74. There is evidence that undercover agents dealt directly with the Applicant Mr. Leach and that Mr. Leach confirmed that shell companies had been successfully established to establish brokerage accounts in the name of the undercover agent.

75. There is evidence that the Applicant Mr. Leach opened the account at the CNB in the name of the Applicant Pinnacle and the sole signatory to these accounts was the Applicant Mr. Leach.

76. Accordingly, from my review of the documents which were before me on the 18th December 2015 there is sufficient evidence and information and I thereby found that there was reasonable cause to believe that the Applicants have benefitted from criminal conduct.

77. There was (and is) much more than mere "unsustainable and unsubstantiated conclusions". There was in my view sufficient evidence before me of criminal conduct both in the USA and in the Cayman Islands and that the detailed evidence contained in Officer Taylor's affidavit and within the other documents before me, set out where the proceedings were instituted, the conduct in which the Applicants are alleged to have engaged, and, the grounds for believing that the Applicants engaged in that conduct. The material presented by the DPP on the 18th December 2015 exhibited the Indictment, which charged the Applicants with conspiracy to commit securities fraud, conspiracy to defraud the USA, and, money laundering conspiracy.

The written statements before me, and the affidavit of Officer Taylor set out the grounds for Officer Taylor's belief that the Applicants and others had derived a benefit of stated amounts as a result of their conduct and the grounds for believing that an External Restraint Order should be made.

78. Finally, Officer Taylor's affidavit discloses a clear description of the realizable property located in the Cayman Islands and the names and addresses of the persons or entities in possession of the said properties pursuant to s.7(g) and (h) of Schedule 5

79. For all the aforesaid reasons I reject the Applicants' second ground.

GROUND 3 - MATERIAL NON-DISCLOSURE

80. The Applicants complain that on the 18th December 2015 the Court's attention was not drawn to the decision of Chief Justice Benjamin of the Supreme Court of Belize between the ***FIU v. Bandfield, Godfrey, Leach et al*** dated the 13th November 2014 and the local decision of Williams J in the matter of ***Brian De Wit & Others*** dated the 8th June 2015. The Applicants submit that this was material non-disclosure and as such this Court should exercise its discretion to discharge and set aside the Restraint Order dated 18th December 2015.

81. Crown Counsel, Ms. Salako, who is a highly regarded officer of this Court states that it is her recollection from memory that the Belizean judgment of Benjamin CJ dated the 10th November 2014 was brought to the attention of the Court on the 18th December 2015.

82. However, Crown Counsel with her customary candour accepts that neither Benjamin CJ' judgment nor Williams J's judgment – referenced above – were contained in the DPP's bundle produced to the Court in December 2015, nor were they were attached to Officer Taylors affidavit.

83. I cannot confirm whether the Benjamin CJ's judgment was brought to my attention, but, my notes taken at the time make no mention of either judgment. The Applicants submit that the Crown had direct knowledge of these two judgments and the Crown failed in its duty, upon the hearing of an ex parte application, to make full and frank disclosure of all matters which are material to be taken into account by the Court before deciding whether or not to grant the draconian relief of an External Restraint Order. Consequently the Applicants submit that I should set aside my Restraint Order of the 18th December 2015.

84. In considering this third ground I am taking the position that the DPP's office made an error in not putting the judgments of Benjamin CJ and Williams J in the bundle presented to the Court and consequently there was non-disclosure.

85. In ***In Re Stanford International Bank Ltd***[3]. the English Court of Appeal considered the question of material non-disclosure (and material misrepresentation) and addressed these issues as they relate to an ex parte Restraint Order obtained pursuant to s.447(2) of the UK Proceeds of Crime Act 2002. Hughes LJ[4], stated at paragraph 191 of his judgment

> *"Whilst I respectfully agree with the view expressed by Slade LJ in Brink's Mat Ltd. v. Elcombe [1988] 1 WLR 1350 that it can be all too easy for an objector to a freezing order to fall into the belief that almost any failure of disclosure is a passport to setting aside, it is essential that the duty of candour laid upon any applicant for an order without notice is fully understood and complied with."*

[3] [2011] Ch. 33
[4] As he then was

86. Hughes LJ stated at letter D on page 109 that a prosecutor seeking an *ex parte* order must put on his defence hat and consider that, if he were representing, let's say, for example, the three Applicants in this case, what material might assist the Applicants. In other words, the prosecution must consider any evidence that could advance the Applicants' position.

87. In ***In Re Stanford International Bank Ltd,*** the Judge at first instance, Judge Kramer Q.C., directed himself at the *inter partes* hearing that there are four questions to be asked:

(a) Was there material misrepresentation?

(b) Was there material Non-disclosure as a result of which the order was obtained?

(c) Should the order be discharged?

(d) Should the order be varied?

88. In this case there is no complaint of misrepresentation and the Applicants are applying for a complete discharge and not a variation so Judge Kramer's questions (a) and (d) are not relevant.

89. At paragraph 193 of his judgment Hughes LJ set out the most important and fundamental question which, in my view, I must ask myself in this case:

> *"The principal question is not whether the order was obtained as a result of misrepresentation or non-disclosure but whether the information not disclosed was material to be taken into account in deciding whether or not to grant relief without notice and if so on what terms."*

Hughes LJ went on to say:

> *"once that question is answered in the affirmative one comes to the consequential question of whether the Order made ought to be discharged?"*

90. Following Hughes LJ's clear guidelines in ***In Re Stanford International Bank Ltd,*** I ask myself the first question:

(a) Was material contained in the Judgments of Benjamin LJ and Williams J which should have been taken into account in deciding whether or not to grant the Restraint Order without notice to the other side? For this purpose the Court in my view should:

i. Examine the contents of both judgments to see whether there are any material facts which could undermine or weaken the DPP's ex parte application; and

ii. Examine the contents of both judgments to see whether there are any material facts which would have supported the Applicants' position and which should have been advanced before the Court on the 18th December 2015.

91. The Applicants' Counsel, in their well-reasoned written and oral submissions set out the principles of failing to disclose material facts with clarity and considerable vigour. The Applicants rely heavily on the dicta of the learned Chief Justice in ***Ministry of National Defence Republic of China v. Y & Ors***[5] and the judgment of Williams in the case of ***Brian De Wit & Ors*** and submit that the DPP ought to have brought the judgments of Benjamin CJ and Williams J to the Court's attention on the making of the ex parte application on the 18th December 2015.

92. The Applicants' Counsel submits that as a result of this failure the only reasonable conclusion that can be drawn in that the non-disclosure was material and therefore the *ex parte* Restraint Order should be set aside.

93. Neither the DPP nor the Court takes any issue with the law on material non-disclosure as set out by Counsel for the Applicants.

94. There is no allegation that Crown Counsel deliberately misled the Court nor is there an allegation that there was a deliberate failure to disclose.

95. When I review the Judgment of Benjamin CJ I can find no material facts, which if they had been brought to the attention of the Court on the 18th December 2015 would undermine or weaken the DPP's *ex parte* application.

[5] (G 276/13) unreported 13th June 2014

Secondly, I can find no material facts in the judgment of Benjamin CJ which would support the position of the Applicants. Furthermore, and finally, Counsel for the Applicants has failed to identify any material facts in the judgment of Benjamin CJ which would undermine the DPP's *ex parte* application or advance the case for the Applicants.

96. Consequently, in my view, the information in Benjamin CJ's judgment was not material I would have taken into account in deciding whether or not to grant the ex parte relief. Consequently I am not required to address Hughes LJ's second question as to whether or not the *ex parte* order should be discharged.

97. I turn now to the Judgment of Williams J. Although the Applicant Brian De Wit is also a defendant to the US Indictment along with the three Applicants, Mr. De Wit made clear that the Cayman proceedings in which Mr. De Wit was involved was not related to any request for mutual legal assistance *(see paragraph 27 lines 7-10 of the Judgment of Williams J.*)

98. From my review of Williams J's judgment I could not identify any material facts which would undermine or weaken the DPP's application before me on the 18th December 2015. Secondly, I could not find any material facts which could support the position of the three Applicants. Furthermore, and finally, as with Benjamin CJ's judgment, Counsel for the Applicants has not identified any material facts in the judgment of Williams J which would undermine the DPP's *ex parte* application or advance the case for the Applicants.

99. For the above reasons, in my view the information in Williams J's judgment was not material I would have taken into account in deciding whether or not to grant the *ex parte* relief. Consequently, as with Benjamin CJ's judgment I find that I am not required to address Hughes LJ's second question as to whether or not the *ex parte* order should be discharged.

100. Although there was non-disclosure in December 2015, in my considered opinion, it was not material non-disclosure and, adopting Slade LJ's dicta in ***Brink's Mat*** [6] "*a failure of disclosure is not a passport to setting aside ex parte relief without notice.*"

101. I accept that it was unfortunate that these two decisions were not included in the Court bundle presented to me on the 18th December 2015. However, the Belizean judgment, although in a related matter, was clearly decided on the fundamental reason that the time limit to lay charges pursuant to the Law of Belize against the Applicants and others in that jurisdiction had expired and, further, that the Belizean Financial Investigation Unit failed to satisfy the Court in relation to the requirements under Belizean Law. Therefore, whilst it makes for interesting reading, that judgment is not relevant to the application which was before me on the 18th December 2015. Again, whilst the judgment of Williams J was related to a co-defendant – Brian De Wit – I cannot see how Williams J's decision in that matter would have affected the application before me on the 18th December 2015 as the December 2015 application related to specific accounts with CNB and Caledonian Bank in the name of the Applicants.

[6] [1988] 1 WLR 1350

102. Accordingly I reject the Applicants' third ground and dismiss the application to discharge the ex-parte Restraint Order of the 18th December 2015.

Dated this the 27th April 2017

Honourable Mr. Justice Charles Quin Q.C.
Judge of the Grand Court