IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 175 OF 2015 (DDJ)

BETWEEN:

HARVEY RIVER ESTATE PTY LTD
FOUR LITTLE GIRLS PTY LTD
THE INDIVIDUALS AND COMPANIES LISTED AT SCHEDULE 4 OF THE ORDER DATED 2 NOVEMBER 2015

Plaintiffs

- and -

(1) PETER CLARENCE FOSTER
(2) ARABELLA LOUISE FOSTER
(3) BANKSIA HOLDINGS LIMITED
(4) THE PARTNERSHIP OF ANNE PATRICIA LARTER, ALAN JONES, MIRALESTE PTY LTD AND LEIGH JOHNSON TRADING AS 'STC SPORTS TRADING CLUB'

Defendants

- and -

CAYMAN NATIONAL BANK

Discovery Respondent

- and –

JILL LOUISE FOSTER

Applicant

JUDGMENT
DELIVERED ON 2 DECEMBER 2021

Mr Justice Doyle:

1. There is before the Court an application of Jill Louise Foster (the "Applicant") for an order that paragraph 1(d) of schedule 3 to an Order made by Chief Justice Smellie on 2 November 2015 and continued by an Order of Mrs Justice Managtal of 9 June 2016 be deleted.

2. The Applicant is plainly interested in these proceedings and I am content that she be joined as a party to these proceedings for the purposes of her application.

3. I also record that I am satisfied that Harneys, the advocates on record for the Plaintiffs, have been served and are on notice of today's hearing. I note from their email of 26 November 2021, that they do not currently have instructions to appear. They indicate in that email that they will let Nelsons, who act for the Applicant, know as soon as possible if that changes.

4. I also note that Mr. John Harris of Nelsons, who appears on behalf of the Applicant today, sent an email on 23 November 2021 10:31AM to Arabella Foster with the summons and affidavit in support. No acknowledgement or substantive reply appears to have been received.

5. I note also the emails from Mr. Harris to Lachlan Greig dated 1 December 2021 11:40AM and 11:50AM. In his 11:50AM email, Mr. Harris refers to a telephone call with Mr. Lachlan Greig and states "I note that you remain without instructions to attend and have so advised the judge."

6. I have considered the hearing bundle and the documents attached to the email from Mr Harris dated 1 December 2021 10:42AM including the skeleton argument and the draft order.

7. It is unfortunate that those on record as the attorneys of the Plaintiffs have not attended court today to explain their position.

8. As long ago as 2 November 2015, Chief Justice Smellie granted on an ex parte basis an asset freezing order (the "Asset Freezing Order") against the respondents. There was also a disclosure order and leave given to the applicants to use any information obtained in proceedings that had been issued in Australia or were about to be issued in Australia. Paragraph 9 provided that the respondents or anyone notified of the Asset Freezing Order may apply to the Court at any time to vary or discharge the Asset Freezing Order, but they must first inform the applicants' attorneys in writing on at least three days' notice.

9. On 9 June 2016, Justice Mangatal continued the Asset Freezing Order until further order of the Court.

10. From the judgment of Justice Mangatal provided in the documentation placed before the Court it appears that the Plaintiffs commenced proceedings in Australia in respect of the Sports Trading Club and they were obtaining the Asset Freezing Order in aid of such foreign proceedings.

11. It appears that judgment was granted on 9 June 2017 in Australia for - I assume that is Australian dollars - $7,903,189.50 plus interest at $1,845,025.68 against the 6th, 10th, and 11th defendants. The 11th defendant was Arabella Louise Foster ("Arabella") and further judgements were granted in 2019. Copies of such judgments have not been made available to me. I am informed that enforcement action was taken against Arabella but not against the Cayman National Bank account the subject of the application presently before the court. I am informed that Arabella was declared bankrupt on 28 April 2018 and a trustee appointed. I am further told that the bankruptcy was discharged on 21 April 2021.

12. By summons dated 21 October 2021, the Applicant applied to be joined as a party and for an order that the Asset Freezing Order, be "amended and that paragraph 1(d) of Schedule 3 to the said Order be deleted" and that the Plaintiffs pay her costs of the summons.

13. The summons is in effect an application to vary the terms of the Asset Freezing Order so that it does not cover an account (number specified) held in the name of Ms. Arabella Louise Foster ("the Account"). The Applicant seeks an order simply deleting paragraph 1(d) of Schedule 3.

14. The Applicant says that she is the mother of the Second Defendant Arabella and the sister of the First Defendant. The Applicant says the Account was originally opened by Arabella but was assigned to the Applicant on 30 October 2015. The Applicant says that she has been a signatory of the Account since September 2015.

15. The Applicant says that on 30 October 2015 she instructed the bank to make four payments out of the Account, totalling USD$ 350,000.00, leaving a balance of USD$ 339,951.45. These payments were made. On the same date she says she instructed the bank to make two further payments, one of USD$ 150,000.00 to the Applicant's mother and one of USD$ 100,000.00 to the Applicant.

16. Before these payments were made, the bank were informed of the Asset Freezing Order and the Account was frozen.

17. The Applicant says she "did see" the Order made by the Chief Justice on 2 November 2015 and the judgment of Justice Mangatal delivered on 9 June 2016 but she does not specify when.

18. It is curious that the Applicant did not immediately contact the bank in early November 2015 to say that the payments should be made in view of the fact that the Account had been assigned to her, and she could have produced evidence in support of that to the bank and agreed, or an application could have been made to vary the Order then. She says she became seriously ill at the time of "these events". She says that she was not served with any papers relating to these proceedings and "only learned about them much later." That may partly explain the position and the lack of an application in November 2015 or shortly hereafter.

19. The Applicant refers to Arabella's bankruptcy being discharged on 21 April 2021and the trustee in bankruptcy making no claim against the Account "having accepted that the Account had been properly assigned to" the Applicant. No evidence from the trustee bankruptcy has been placed before me.

20. The Applicant adds that she understands that funds held in other accounts which were the subject of the Asset Freezing Order have been paid out pursuant to judgments obtained against Arabella. The Applicant is of ill health and wishes access to "her funds in the Cayman Islands" to assist in the discharge of her medical care.

21. I note the correspondence between Higgs & Johnson and Harneys of 2019 and 2020. I also note a letter dated 15 October 2021 from Nelsons to Harneys and Harneys' response of 26 October 2021 and Harneys' indication that they were taking their clients' instructions. I note also the email from Cayman National Corporation Limited dated 23 November 2021 10:05AM indicating that "CNB takes no position on this matter and will abide by any relevant court order".

22. It is unfortunate and unsatisfactory that Harneys on behalf of the Plaintiffs have chosen not to update the court in respect of the Australian proceedings. The Asset Freezing Order was granted in aid of those proceedings. I note the evidence filed by the Applicant in connection with the Australian proceedings.

23. Mr. Harris has also on foot this morning referred to an extract from the English White Book. The 1997 edition, paragraph 29/1/34 in respect of conduct after grant of Mareva injunctions. It is indicated there that the plaintiff should press on quickly with his action after obtaining an injunction. It is stated that where a plaintiff has still not set down an action for trial after two and a half years after the grant of the injunction the court may discharge the injunction. It is further indicated that the English Court of Appeal held it to be an abuse of process for a litigant to obtain an injunction and then to not prosecute the action. A litigant is under a duty to either proceed with his claim or to apply on his own motion to have the injunction discharged.

24. Mr. Harris relies on this authority to support his submission that the Plaintiffs themselves should have applied some time ago now to discharge the Asset Freezing Order in this case. There is some considerable force in that submission.

25. Having considered all the evidence and documentation put before the Court together with the skeleton argument and the helpful oral submissions of Mr. Harris this morning, I am satisfied that it is appropriate to grant the relief claimed. There is no opposition presented by the Plaintiffs to the relief which is requested. I am content to grant an order in terms of the draft, such draft to incorporate the amendments which I specified during my exchanges with counsel. That is my judgement in respect of this matter.

David Doyle

THE HONOURABLE JUSTICE DAVID DOYLE
A JUDGE OF THE GRAND COURT