

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No. FSD 104 of 2017 (RPJ)

IN THE MATTER OF THE CONFIDENTIAL INFORMATION DISCLOSURE LAW, 2016

AND IN THE MATTER OF SAFEGUARD MANAGEMENT CORP (AS TRUSTEE OF THE
TIMIS TRUST)

IN OPEN COURT

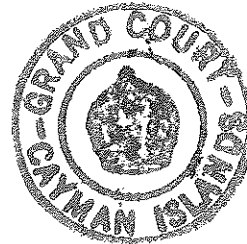
Appearances: Mr Paul Murphy and Ulrich Payne on behalf of the
Plaintiff
Mr Ronan Gallagher and Marc Kish of Harneys on behalf
of Gerald Metals S.A.
Mr Peter Tyers-Smith and Ms Pamela Mitchell of Kobre &
Kim on behalf of the Trustees of the XYZ Trust

Before: The Hon. Justice Raj Parker
Heard: 2nd June 2017
Draft Judgment Circulated: 30th June 2017
Judgment Delivered: 6th July 2017

HEADNOTE

Financial regulation-Confidential Information Disclosure Law-Order for disclosure in
LCIA proceedings-objection to identity-relevance-discretion-trustees duties-stranger to
trust-supervisory jurisdiction of Court.

JUDGMENT



INTRODUCTION

1. SM applies pursuant to section 4 of the Confidential Information Disclosure Law, 2016 ("CIDL") for a ruling concerning a disclosure order made by an arbitral tribunal constituted under the arbitration rules of the London Court of International arbitration ("LCIA"), concerning certain information which is confidential to SM and UVW.

2. The LCIA tribunal (Messrs Christopher Symons QC, Sir Gordon Langley and Andrew Foyle) ordered disclosure by SM of documents for the period 1 July 2015 to 30 September 2015 evidencing:

(i) the terms of and/or giving effect to the direct or indirect transfer of the Timis Trust's 30% interest in two offshore blocks in Senegal to UVW (as trustee of the XYZ Trust) in or around August 2015 ("the Senegal transfer"), including any contract for the Senegal transfer; and (ii) the receipt by the Timis Trust of any consideration for the Senegal transfer (including any bank statements) ("the confidential information").

3. By way of summons SM seeks direction as to whether the confidential information should be disclosed, and if so, whether there should be any conditions attached.

4. On 6 June 2017 this Court ordered Gerald and UVW to be served with SM's application. The Attorney General had also been served and confirmed by letter dated 25 May 2017 that there was to be no appearance on his behalf.

5. The CIDL provides by section 4 that if a person is asked to produce a document by way of discovery in any proceeding (which it is accepted by the parties includes LCIA proceedings-see s.2 Evidence law 2011) whether within or without the Islands, which contains any confidential information, he is to apply for directions.

"Confidential information includes information, arising in or brought into the Islands, concerning any property of the principal, to whom a duty of confidence is owed by the recipient of the information."

6. The parties all agree SM holds confidential information to itself and to UVW. I am told that these comprise a Deed of Appointment, a Deed of Indemnity, Bank statements and Minutes of meetings.

7. Section 4 (6) further provides that upon hearing an application for directions the judge shall direct-

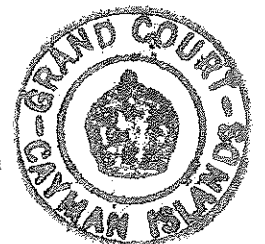
(a) that the evidence be given; (b) that some or all of the evidence shall not be given; or (C) that the evidence be given subject to conditions which the judge may specify whereby the confidentiality of the information is safeguarded.

Section 4 (7) (c) provides that a judge may order, to safeguard the confidentiality of a document to be given under subsection (6) (C), that the reference to the name, address and description of any person, be restricted.

Section 4 (9) provides that in considering what order to make the judge shall have regard to:

(a) whether the order would operate as a denial of rights of any person in the enforcement of a claim;

(b) any offer of compensation or indemnity made to any person desiring to enforce a claim by any person having an interest in the preservation of confidentiality;



(c) in any criminal case, requirements of the interests of justice

Approach

8. When determining an application the court must weigh the competing interests and decide, in the exercises of its discretion, whether and if so how, to direct disclosure, having regard to the administration of justice in the proceedings to which the application relates: see (In the matter of the Cayman Securities Clearing and Trading Ltd SEZC (unreported) 14 October 2014 at paragraph 6, per Justice Williams.

Justice Williams had earlier said at paragraph 5:

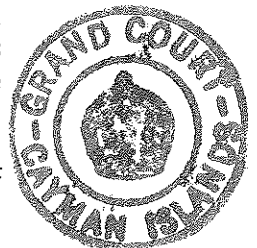
“Section 4 of the law is intended to be a gateway for the release of confidential information, not primarily for the sake of any partisan interests, but in recognition of the public interest both local and abroad in the due administration of justice. It is a provision which deals only with the circumstances under which confidential information might be given in evidence. I am cognisant that its purpose is not intended to meet the discovery obligations of parties in litigation”

See also in *Re Ansbacher (Cayman) Ltd*; per Smellie C.J 2001 CILR at 271.

9. Having regard to the administration of justice in proceedings to which the application relates will include considering whether the information may be obtained through alternative means -see *Del Cobre de Chile*[1999] CILR 42 , a decision of Smellie C.J.

The parties' contentions.

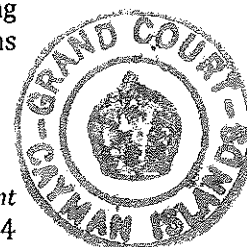
10. Mr Gallagher of behalf of Gerald submits that the documents ordered to be disclosed by the LCIA tribunal should be disclosed without any redaction and that the identity of the Trustee of the XYZ trust, UVW, is an essential aspect of the disclosure to allow the tribunal to assess the terms of an alleged concealed related party transfer and its propriety.
11. There is some urgency in the application because the arbitration hearing took place between 12 and 14 June 2017 and I am told that an award will not be rendered until disclosure is provided. The arbitrators had made it clear that SM were to take appropriate steps to comply with the disclosure order and make an application to the Cayman court without delay in order to do so . In doing so they were ordered to keep the tribunal informed of progress and to obtain consent for the timely disclosure of the documents. Gerald complains that despite the tribunal order being made on 1 May 2017 the documents have still not been disclosed and that SM had delayed until 22 May 2017 before making an application to the Cayman Court. I make no comment as to Mr Gallagher's complaint in this regard save to say that this court has dealt promptly with the



application and two hearings arising from it, in order to render this judgement as quickly as possible.

12. Mr Gallagher submits that the tribunal's decision on disclosure came after considering the arguments from SM and Gerald and should be given in full including as to the identity of UVW. It only ordered one restriction so that where necessary, bank statements should be redacted to protect innocent third parties.
13. He submits that there is no dispute that SM authorised the transfer of the Timis Trusts 30% partnership interest in the two offshore blocks in Senegal ("the Senegal oil interests") to a new trust .If the transfer was a non related party transfer for market consideration and not an attempt to dissipate assets to avoid potential enforcement, disclosure would have been immediately forthcoming without any difficulty. Instead there has been collusion by SM and UVW to circumvent and defeat the order of the tribunal.
14. UVW accept that in principle disclosure may be directed by the court on this issue as ordered by the LCIA tribunal, but that it should be tightly controlled and that any such disclosure must not reveal the identity of UVW. Mr Tyers -Smith for UVW submits that on the face of the disclosure order of the tribunal and on a proper interpretation of it identification evidence is not required. If he is wrong about that he says that the court should nonetheless exercise its discretion to refuse the disclosure of identification evidence on the facts of this case.
15. Of course, the documents once disclosed will remain confidential and will not be available for use outside the arbitration. However, Mr Tyers - Smith submits that Article 30 of the LCIA Rules would not expressly prevent Gerald from using information as to the identity of UVW to commence litigation in related proceedings. Indeed he submits that is the very purpose of Gerald's argument for UVW's identity to be revealed.
16. He further submits that UVW has a duty to protect the financial privacy of those concerned with the XYZ trust and must also protect the trusts assets for the benefit of the beneficiaries.
17. Mr Tyers -Smith also maintained that where there is an undetermined claim which attacks a trust ,which may fail or turn out to be misconceived, not only will disclosure require exceptional circumstances but it is likely to be contrary to public policy-see In the matter of H [1996 CILR 237] per Smellie J. It follows that a stranger to a trust should not be permitted to obtain a **what** amounts to pre-action disclosure in the context of the exercise of a supervisory jurisdiction, such as under the CIDL.
18. Mr Murphy on behalf of SM adopted Mr Tyers-Smith's submissions. In addition he submits that a number of serious allegations and accusations made in the first affidavit of Nicholas Marsh , a a partner in Quinn Emmanuel which represents Gerald, are strenuously denied by SM and are in any event irrelevant to this application. The allegations suggest that SM will do everything within its power not to disclose and/or delay the disclosure of relevant documents having collaborated with UVW and having co-conspired in an unlawful means conspiracy to prevent Gerald from satisfying the debt under the guarantee.

Analysis

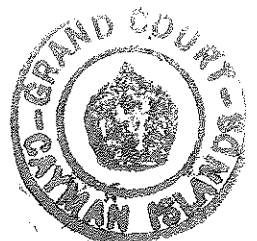


19. It has been necessary for me to familiarise myself to some extent with the issues in the LCIA arbitration and indeed parallel litigation in order to better understand how to approach the essential question which arises on this application: was the identity of UVW a part of the order for disclosure made by the LCIA tribunal and should it be allowed by this Court.
20. The first affidavit of Claudio Beuehler ("CB") sets out the relevant background and exhibits relevant materials to the disclosure application to the LCIA tribunal. CB is a director of SM.
21. At paragraph 16 he sets out Gerald's reasons for making the disclosure application on 21 April 2017 which can be identified from the table he produces at Exhibit "CB 1" (also referred to as the Redfern schedule) .In summary he says Gerald sought disclosure of documents for the following reasons:
- (a) the requested documents would be evidence of and/or support the inference that SM was not acting in good faith in their negotiations with Gerald and Gerald was thereby entitled to abandon restructuring negotiations which SM claims prevent the deed of guarantee being enforced; and
 - (b) the requested documents will establish the state of mind of SM at the date when the deed of guarantee was allegedly discharged.
22. He says at paragraph 17 that SM objected to disclosure on the basis that the request did not arise from SM's pleaded case and it was an abuse of process aimed at obtaining from the tribunal a disclosure order that had already been refused by the High Court of Justice of England and Wales. Gerald responded to SM's objections.

The arbitral tribunal's decision on 1 May 2017 was that:

"In these proceedings (SM) make allegations against (Gerald) of bad faith and further allege it would be inequitable for (Gerald) to resile from certain representations. In the circumstances it seems to the tribunal that (Gerald) are entitled to investigate the background to the allegations. The tribunal is not convinced that the recent High Court applications and decision to refuse production of documents is relevant. The tribunal has to consider the application made in this arbitration on its merits. The tribunal notes that the recent decision of Knowles J .was one of timing rather than admissibility. It is clear that the Senegal transfer is an important part of the factual matrix against which the matters which the tribunal needs to decide have to be considered. While the documents are part of the background the tribunal takes the view that they are relevant to the case and material to the outcome. This is a limited class of documents which once produced will be subject to the confidentiality regime of the arbitration. In the exercise its discretion the Tribunal orders disclosure of the documents in the terms of the request made. Any bank statements produced may be suitably redacted".

23. Reference to a deed of guarantee arises because Gerald's arbitration claim against SM is expressed to be a "simple debt claim" pursuant to a deed of guarantee dated 14 December 2014,see paragraph of 6.1 Mr Marsh's first

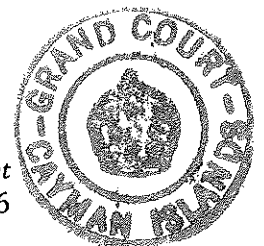


affidavit. Under the guarantee, SM as trustee of the Timis Trust agreed to guarantee the obligations of Timis Mining Corporation (SL) Ltd (TMCSL) arising under a Framework Purchase and Advance Payment Contract dated 14 December 2014.

24. SM denies liability on the basis of discharge by release, or by estoppel. It is alleged by SM that by a share transfer agreement entered into on or about 13 April 2016 SM agreed to transfer shares held by the trust in TMCL (Timis Mining Corporation Ltd) to a subsidiary of Gerald on terms which required the parties to act in good faith in progressing a debt restructuring transaction and which precluded Gerald from enforcing the guarantee. SM contends that Gerald failed to act in good faith in progressing the transaction and has nonetheless received valuable shares in the TMCL. Gerald claims that the state of mind of SM is relevant and aims to show that in the negotiations of the restructuring SM's conduct should be assessed in part by reference to and in the context of, the fact and terms of this concealed transfer at a substantial undervalue.
25. UVW is not a party to the LCIA arbitration. It cannot of course be joined to the arbitration which is between Gerald and SM. It vehemently objects to its identity being revealed by reference to the disclosure order in the arbitration to which it is not a party.
26. Moreover there are other proceedings Gerald has commenced which it is concerned about. I will refer to a few of them which appear to me to be relevant.
27. There is a Chancery claim in London against Mr Frank Timis seeking damages for deceit and a declaration that the Timis Trust was a sham. Those proceedings have been heard by Leggatt J and have resulted in a number of reported judgements.
28. Ms Rebecca Hume of Kobre & Kim who act for UVW by her affidavit of 15 June 2017 states at paragraph 9 that the proceedings were commenced on the same day as the LCIA request for arbitration, on 8 August 2016.
29. In further related proceedings an application was made by Gerald for disclosure of the identities of UVW to join it as a party-see transcript Page 115 of the hearing before Knowles J. on 28 March 2017.
30. It is clear from the transcript that Mr Culver for Gerald was seeking disclosure from Mr Timis of UVW's identity on the basis of the Norwich Pharmacal jurisdiction and by way of specific disclosure in order to bring a claim against UVW in those proceedings. The application was refused on the basis that Gerald should wait for disclosure in the usual course. It is also clear from the transcript that Mr Culver accepted that the identity information had no relevance to the arbitration:

"The arbitration is a claim under the guarantee and it may become relevant in due course months down the line depending on the outcome of that, but we can't sue the new trustee in any event, so it's of no relevance to the arbitration" at paragraph 145.

Mr Justice Knowles said at paragraphs 3 and 4 of his Judgement

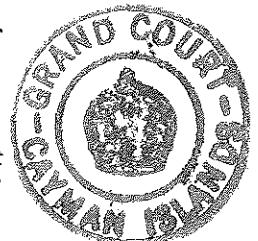


"I have no doubt that I have jurisdiction to make the type of order indicated, and the contrary is not contended. Ultimately, this is, again, a case management decision, but one that I need to exercise against the backdrop not only of the current proceedings, recognising that the course that normally lies ahead, and that I am asked to adjust, is one that involves stages that have been well established in the ordinary course and for good reason in commercial litigation.

"Ultimately, I have reached the conclusion that in this particular case the claimant will have to wait. The point at which disclosure will be carried out by the first defendant is not likely to be that far ahead in the overall scheme of things. I am unpersuaded, given that, that I should require it to be advanced so that part of the disclosure is ordered to be given now. I do understand that that may mean that the point at which the claimant, if so advised and in the events that happen, asks to add the trustee of the new trust as a further defendant is a point that may be delayed, but given the matrix of changes that no doubt will lie ahead in this litigation, that is not unduly problematic".

Decision and findings

31. It seems to me that identification evidence is not required by the disclosure order made by the LCIA tribunal on its terms. I have carefully reviewed the relevant parts of the relevant columns of the Redfern schedule and borne in mind the context of the application and background to the wider litigation set out in the parties' affidavit evidence and exhibits.
32. The terms of Gerald's request for disclosure is confined to documents for the relevant period evidencing... "the terms of and/or giving effect to...." the relevant transfer to a new trust, including any contract for the transfer and the receipt by the old trust of any consideration for it. I do not see how "terms of" should be read to include the identity of the transferee.
33. The request was made on the basis that the fact and terms of the relevant transfer were relevant to the plausibility of the SM defence that the guarantee was discharged by release in April 2016.
34. Gerald also claimed that the requested documents were highly relevant and material because the fact and terms of the Senegal transfer (including the fact that the transfer was at a substantial undervalue) was evidence of and/or supported the inference that SM were not acting in good faith in their negotiations, so that Gerald was well within its rights to cease restructuring negotiations and to enforce its rights under the guarantee.
35. Those matters clearly go to the terms of the Senegal transfer, and in particular to its timing and the consideration received.
36. The identity of the transferee of the Senegal oil interests is not referred to in Gerald's application or in the tribunal's decision, nor do I see how it can be relevant to the issue.
37. Gerald say in the Redfern schedule that SM had denied that the Senegal transfer was at a substantial undervalue and that;

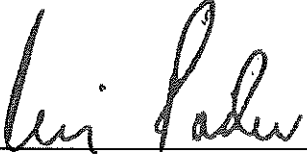


“The tribunal will only be able to assess the terms of this concealed related party transfer and SM's bad faith if it has sight of its terms. “

38. By disclosing those documents requested and ordered the tribunal will be provided with disclosure of the documents in the terms of the request made, which I find does not include the identity of the new trustee, UVW.
39. If I am wrong about that and on its terms the disclosure order made by the LCIA tribunal does include an obligation to disclose the identity of UVW, then as a matter of discretion I direct that disclosure be ordered subject to the condition that all facts which might reveal the identity of UVW be excluded and kept confidential.
40. In this regard I accept Mr Tyers-Smith's submission that a trustee has a positive obligation to protect the financial privacy of those concerned with the trust by maintaining confidentiality over trust documentation- see In the matter of the Polymer Purpose Trust July 19 2011 (unreported per Henderson J).
41. I also accept the proposition that he put forward that a stranger to a trust such as Gerald should not be permitted to obtain what amounts to pre-action disclosure in the context of the exercise of a supervisory jurisdiction such as the CIDL - this is supported by Lewin on Trusts; 19th edition chapter 23 (disclosure by trustees to beneficiaries on demand) paragraphs 23 - 021 'Disclosure under the court's supervisory jurisdiction as a precursor to hostile litigation'.
42. Having balanced the competing interests carefully and taken into account the helpful submissions of Counsel, I have concluded that identification information concerning UVW is not necessary for the prosecution of Gerald's claim in the LCIA arbitration. It was not asked for by Gerald in support of its request for disclosure in those proceedings .The due administration of justice in those proceedings and the public interest is served by making an order under section 4 (6)(b) and (c) of CIDL in which discovery may be given on the terms requested by Gerald with the condition pursuant to section 4 (7) (c) that facts which might reveal the identity of UVW be excluded and kept confidential.
43. Gerald has not persuaded me there has been any collusion between SM and UVW to circumvent the discovery application. Neither has Gerald persuaded me that the allegations of conspiracy in related litigation have any bearing on the issue before me.
44. From the material I have been referred to and reviewed in this case it would appear that Gerald intends to join UVW as trustee of the XYZ Trust in the litigation it has commenced separately from the LCIA arbitration. It should not be permitted to use the disclosure order in the arbitration to obtain facts with which to do that, and which are not necessary for the prosecution of its claim in the LCIA arbitration.



45. I accept that if it is successful in the arbitration it may require identity evidence to enforce its claims, but that is for the future. It will in any event have a proper opportunity to seek disclosure of identity evidence in the litigation it has commenced in the High Court in London, in the ordinary course.



THE HON. RAJ PARKER
JUDGE OF THE GRAND COURT

