



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE NO. FSD 118 OF 2021 (RPJ)

IN THE MATTER OF THE CONFIDENTIAL INFORMATION DISCLOSURE ACT, 2016

IN THE MATTER OF AN APPLICATION BY THE KUWAIT PORTS AUTHORITY

In Chambers

Before: The Hon. Justice Raj Parker

Heard: On the papers

**Draft Ruling
Circulated** 21 March 2024

Ruling Delivered: 28 March 2024

HEADNOTE

Costs -Order 62 - section 24 of the Judicature Law- discretion -nature of Confidential Information Disclosure Act 2016 proceedings-overall justice in the case

240328- In the Matter of an Application by the Kuwait Ports Authority- FSD 118 of 2020 (RPJ) Ruling

RULING

Introduction

1. This costs determination follows the application of Kuwait Ports Authority ("KPA") (the "Application") for orders and directions pursuant to sections 3(2) and 4(2) of the Confidential Information Disclosure Act, 2016 (the "Act"). The Application was brought by originating summons seeking orders that KPA be permitted pursuant to Section 4 of the Act to share information (the "Disclosure Documents") with the State of Kuwait for use in arbitration proceedings.¹
2. On 27 May 2021, Smellie CJ ruled that (a) KPA had *locus standi* to make the Application, (b) KPA should serve the Application on the Attorney General, the State of Kuwait, The Port Fund L.P. (the "Fund"), and Port Link GP Ltd, General Partner of the Fund (the "GP"), and (c) the parties would have the right to be heard and make submissions concerning the disclosure of the Disclosure Documents for use in the arbitration proceedings ("Smellie CJ's Order").
3. A two-day hearing was held on 1 and 2 February 2022. Leading Counsel appeared on behalf of each of KPA, the State of Kuwait, Maria Lazareva ("ML") and the GP. The State of Kuwait supported KPA's Application. The Application was opposed by ML and the GP.
4. The Application was granted by written Judgment dated 8 March 2022 (the "Judgment").
5. Pursuant to section 4(2) of the Act, the Court directed disclosure of certain documents from KPA to the State of Kuwait for use in the arbitration proceedings brought by ML against the State of Kuwait, in cause number ICSID Case No UNCT/91/1 (the "Arbitration"). There was no appeal from the Judgment.
6. The Court said in paragraph 147 of the Judgment that it was inclined to order that KPA is awarded the costs of its Application to be paid by the GP and Ms Lazareva equally. It said nothing about the State of Kuwait's costs.
7. That indication was given over two years ago and events have moved on. No sealed order was made in the proceedings at the time the Judgment was delivered, and no disclosure has taken place.

¹ The application sought permission to disclose approximately 1,000 documents that KPA had obtained pursuant to section 22 of the Exempted Limited Partnership Act (2021 Revision)

240328- In the Matter of an Application by the Kuwait Ports Authority- FSD 118 of 2020 (RPJ) Ruling

8. There was a substantial delay following the Judgment in early March 2022. On 12 August 2022, the tribunal in the Arbitration proceedings (the "Tribunal") handed down its award in favour of the State of Kuwait (the "Final Award"). Although the terms of the Final Award are confidential to the parties to the Arbitration (ML and the State of Kuwait), it is apparently public knowledge that the Tribunal declined jurisdiction in relation to ML's claim. The parties were then unable to agree on the effect of the Final Award.
9. Having considered the parties' written submissions, on 25 January 2024 the Court ordered that:
- "Notwithstanding the Court's Judgment and Ruling, no order for disclosure of the Disclosure Documents into and for the purposes of the Arbitration shall be made, the Tribunal having issued its Final Award on 12 August 2022."* (the "January 2024 Order")
10. The parties having been unable to agree, the Court has invited written submissions on costs in relation to the proceedings, all of which the Court has carefully considered.²

Determination

Law

Discretion

11. In accordance with section 24(1) of the Judicature Act (2021 Revision) (the "Judicature Act"), the costs of and incidental to all civil proceedings are in the discretion of this Court.
12. O.62, r.1(2) of the Grand Court Rules (as revised) (the "GCR") provides that:

"The powers and discretion of the Court under Sections 24 and 24A of the Judicature Act ... (as amended and revised) (which relates to the costs of proceedings in the Court) shall be exercised subject to and in accordance with this Order."

Costs normally follow the event

13. GCR O.62, r.4 provides (with emphasis):

"(1) This rule shall have effect unless otherwise provided by any Law."

² Including from: Ogier 29 February 2024; Conyers 29 February 2024; Mourant 1 March 2024 and 12 March 2024; Collas Crill 14 March 2024.

(2) The overriding objective of this Order is that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by him in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court.

[...]

*(5) If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court **shall** order the costs to follow the event, **except** when it appears to the Court **that in the circumstances of the case some other order should be made as to the whole or any part of the costs.**"*

The February hearing

14. The Court accepted that the evidence submitted by KPA at the hearing made "*a plausible case that the documents now at issue are relevant to the Arbitration and might, if admitted by the Tribunal, materially affect its findings.*"³
15. The Court ruled that it would make an order under Section 3(2) of the Act stating, "*It is clear that the KPA acts in good faith and has a reasonable belief that the information is substantially true and contains evidence of wrongdoing.*"⁴
16. The Court decided pursuant to section 4(2) of the Act, to direct disclosure of 158 Disclosure Documents on terms that the GP should review the documents to ensure that the privilege of the Fund and the GP was retained. The original request was for 1000+ documents.
17. The Court stated that:

*"The request falls within the objective and purpose of the Act, and section 4(2) which is intended to be a gateway for the release of confidential information in recognition of the public interest in the due administration of justice. It would not be fair or just to prevent disclosure of the documents to [the State of] Kuwait in all the circumstances. Potential prejudice to Port Link and to ML or the other limited partners is not so great as to warrant refusal of the relief sought by the KPA which has legitimate interest to make the application."*⁵

³ §103 of the Judgment

⁴ §142 of the Judgment

⁵ §143 of the Judgment

18. KPA and (arguably) the State of Kuwait could be viewed as the successful parties in the Application and costs may have been expected to follow the event in the usual course. I say arguably because the State of Kuwait assumed a supporting role, being interested in obtaining the documents from KPA for use in the Arbitration. It was KPA which made the running as the Applicant.

Subsequent events

19. However, the eventual upshot was that there was no disclosure of the particular documents in the Arbitration, which was the very purpose of the Application.
20. The background, as relevant, is as follows. The State of Kuwait in December 2020 asked the Tribunal to postpone the Arbitration hearing so that it could attempt to obtain the Disclosure Documents for use in the Arbitration. That application was refused.
21. The Arbitration commenced in 2018 and the hearing of the merits of the Arbitration commenced in January 2021. It was not until May 2021, after closing submissions had been filed in the Arbitration and three weeks after the final hearing, that the Application under the Act was made by KPA. The Application was not listed until November 2021. The Court is not ascribing blame for these delays.
22. However, the result was that by November 2021, many months had passed after the conclusion of the Arbitration hearing and closing submissions. Moreover, the Tribunal had said on 21 July 2021 that *"absent compelling reasons the tribunal is disinclined to admit further documents."*
23. On 8 March 2022, this Court handed down its decision in relation to the Application. There was then extensive further communication by the parties on the terms of a draft order.
24. On 7 July 2022, a supplementary Ruling was delivered by the Court given that the parties were unable to agree the terms of a draft order following the Judgment. An important issue related to an indemnity sought by the GP. The Ruling stated:

*"Notwithstanding the considerable mitigations of the risk of unauthorised disclosure of the Disclosure Documents [...] having carefully reviewed the written submissions and evidence submitted, the Court considers the confidentiality club and certain of the further undertakings from KPA and Kuwait to be reasonable and necessary in all the circumstances."*⁶

⁶ §23

240328- In the Matter of an Application by the Kuwait Ports Authority- FSD 118 of 2020 (RPJ) Ruling

*"As to indemnities, the position is different. By [paragraph] 145 of the CIDA Judgment the Court had carefully delineated disclosure and collateral purpose issues in mind to safeguard the process. It did not have indemnities in mind."*⁷

*"[...] on balance, given the substantial protections that the Court has set out above there is in the Court's considered view no warrant for requiring an undertaking to the Court for an indemnity from Kuwait or KPA."*⁸

*"The parties are invited to submit an order agreed which reflects the decision set out above and which substantially reflects (apart from the indemnities by KPA and Kuwait) the draft order put forward by the GP and Ms Lazareva."*⁹

*"The Court has directed that the costs of the review exercise for the purpose of proposing redactions and this application are to be dealt with separately in the event that parties are unable to agree. In that event, within 21 days of the date when the Order is approved the parties may file and serve short written submissions on the question of costs."*¹⁰

25. On 12 August 2022 (before a final order was sealed in respect of the Judgment and Ruling), the Final Award was handed down in the Arbitration declining jurisdiction.

Decision

26. KPA (and the State of Kuwait) submit that notwithstanding the significant change in circumstances since the Judgment, the Application still needed to be made and the relief sought was necessary in February 2022 and remained so until at least the Final Award, and so they should be awarded costs as successful parties.
27. That approach, in the Court's opinion would not do justice to the full circumstances of the case in fairness to the responding parties, the GP and ML.
28. The final outcome, in the Court's view, should as a matter of fairness take into account that there will be no disclosure of the particular documents (as recorded in the January 2024 Order), a position which was in substance that contended for by ML and the GP.

⁷ §31

⁸ §38

⁹ §41

¹⁰ §42

29. In the result no party can fairly, in the Court's view, claim victory.
30. Further, this is not an exceptional type of case, where it might be appropriate for the Court to make an 'issue-based' or 'percentage' costs order.
31. The Court in its discretion, having weighed all the competing arguments, has decided that although the Application was granted against resistance from both the GP and ML, the overall justice of the case, and in particular in the circumstances of the outcome, is that there should be no order as to costs.

Delay and relevant circumstances

32. The circumstances need a little further explanation. Since March 2022, the parties blame each other for the delay in having the final order agreed and approved and the costs issues resolved.
33. Numerous events have transpired which caused serious issues between the parties. There were also detailed communications relating to redactions and the form of order. It is not necessary to rehearse those here.
34. The Final Award in the Arbitration proceeding was rendered on 12 August 2022. On 10 November 2022, almost three months after the Final Award was rendered, ML filed an application in Paris, France seeking an annulment of the Final Award ("Paris Appeal").
35. Furthermore, in mid-February 2023, all of the directors of the GP resigned (which followed the removal of the GP's Cayman Islands attorneys as attorneys on record for the GP on 9 February 2023). The GP's registered office service provider resigned at around the same time.
36. On 28 March 2023, in separate proceedings, KPA (and another party) made an application to appoint receivers to the GP to address the "governance void" at the GP. On 2 May 2023, voluntary liquidators to the GP were also appointed. On 6 October 2023, a judgment was given in respect of the governance of the GP and it was confirmed that the Receivers are in control of the GP for the purpose of these proceedings.
37. On 18 December 2023, the State of Kuwait finally wrote to the Court to request that the Court settle the terms of the Order. The State of Kuwait sought orders that the Disclosure Documents be disclosed for use in the Paris Appeal. ML sought orders that no disclosure be made.

38. As stated above, the January 2024 Order, provided that, notwithstanding the Judgment and Ruling, no Order for disclosure of the Disclosure Documents should be made.

The nature of the proceedings

39. There is another factor in relation to the Court's decision not to follow the usual rule with regard to costs. The Court notes that these proceedings were brought pursuant to the Act (for a party wishing to disclose confidential information to obtain directions from the Court before doing so) where the Court weighs the competing interests in the exercise of its discretion. The Act envisages interested parties being heard to aid the Court in exercising its discretion pursuant to section 4 of the Act. That was enabled by Smellie CJ's Order (see above). The GP and ML were accordingly heard.
40. The Court takes the view that in all the circumstances having done so, neither should have an adverse costs order made against them.
41. ML provided the Court with information regarding her competing interests as to why the confidential information should not be released. It is right to also record that she also ran arguments that:
- a) KPA did not have standing to seek directions under section 4 because it did not intend and was not required to "give evidence" in any proceedings;
 - b) KPA had no legitimate interest to protect by the intended disclosure;
 - c) The court should exercise its discretion to refuse to order disclosure, taking into account, what ML submitted was:
 - i) an absence of compulsion;
 - ii) an absence of legitimate interest and prejudice;
 - iii) an absence of consent from the Fund and other limited partners;
 - d) The existence of alternative means for the State of Kuwait to seek disclosure;
 - e) The indiscriminate nature of the proposed disclosure and lack of clarity and certainty as to the assertion of relevance;
 - f) The Tribunal's earlier rejection of the same arguments of relevance;
 - g) The advanced stage of the arbitration;

- h) "*Kuwait's tactical manoeuvring before the Tribunal*"; and
 - i) The likely disruption to the Arbitration and prejudice to Ms Lazareva.
42. The GP as the party holding the confidential information had separate arguments as to why it should not be released. The GP made detailed arguments about confidentiality, privilege and redactions. It founded its position on the fact that it owed duties of confidence to the limited partners of the Fund and was under a duty to take steps to preserve confidentiality, privilege and with regard to data protection.¹¹
43. The GP was not under the control of the receivers at the time the application was made or at the time of the hearing in February 2022, and the receivers have no direct knowledge of the procedural events of the litigation prior to 1 June 2023 when they were appointed.
44. It is right to record that the GP also ran a number of other arguments:
- a) lack of jurisdiction of the Court and lack of standing of KPA to make the Application pursuant to Section 4(2) of the Act and/or section 3(2) of the Act;
 - b) that the Court should discharge Smellie CJ's *Ex Parte* Order to the effect that KPA had standing due to a failure on the part of KPA to present the *ex parte* application fully and frankly;
 - c) that, should the Court find that it does have jurisdiction, the Court should not make the Order sought by KPA in the exercise of its discretion on the grounds that: KPA does not have a legitimate interest to protect;
 - d) that the State of Kuwait should have sought disclosure by means of a Letter of request from the Paris Court;
 - e) on the balance of prejudice; and
 - f) certain Affidavit evidence provided by KPA in support of the Application was inadmissible opinion evidence.
45. As can be seen, these proceedings had adversarial elements in that they were contested. Nevertheless the 'winners and losers' analysis is not so easily applied to an application under the Act where the Court is faced with a difficult balancing exercise and weighs the competing interests of the parties. The analysis in ordinary commercial litigation is different.

¹¹ The Disclosure Documents had been provided by the GP to KPA following a contested application made by KPA to this Court under s.22 of the Exempted Limited Partnership Act.

46. The Court declines in all the circumstances to order that KPA and the State of Kuwait (as they each contend) are entitled to their costs to be borne by the GP and ML on a joint and several basis.
47. For completeness neither will it order that KPA should pay the GP's costs, which the receivers argue would be on the basis that they were 'innocent parties', stuck in the middle of a dispute between ML and the State of Kuwait. The Court does not accept that submission.
48. The fair, just and reasonable result in light of the fact that there is no overall successful party to whom costs should be awarded, given the nature of the Application and the final outcome whereby no order for disclosure was made in the Arbitration, is that there should be no order as to costs.



THE HON. MR. JUSTICE RAJ PARKER
JUDGE OF THE GRAND COURT