IN THE GRAND COURT OF THE CAYMAN ISLANDS

CIVIL DIVISION

CAUSE NO. G 229 OF 2024

AND IN THE MATTER OF AN APPLICATION BY AB (CAYMAN) LIMITED

IN CAMERA

Before:	The Hon. Justice Kawaley
Appearances:	Ms Gemma Bellfield and Ms Nour Khaleq of Ogier (Cayman) LLP for the Applicant ("AB Cayman") Mr Peter Sherwood of Carey Olsen for the Respondents ("C and D")
Heard:	28 October 2024
Draft Judgment Circulated:	7 November 2024
Judgment Delivered:	28 November 2024

Confidential information-whether Cayman company should be granted permission to supply information to US affiliate to enable affiliate to comply with US discovery obligations-judicial precedent-effect of prior decision of court of coordinate jurisdiction-Confidential Information Disclosure Act 2016, section 4

JUDGMENT

Background

1. By an Ex Parte Originating Summons dated 13 September 2024, AB Cayman sought directions pursuant to section 4 of the Confidential Information Disclosure Act (2016 Revision) (the "Act"). As far as preliminary relief is concerned, a Confidentiality Order was sought as well as directions for service and the filing of responsive evidence. On 27 September 2024, considering the matter on the papers. I made a Directions Order providing for service on various parties, including the Attorney General (as required by section 4(4) of the Act) and C and D. I also granted essentially standard confidentiality directions, including a private hearing.

2. Substantively, AB Cayman sought an Order permitting it to disclose information concerning two clients, C and D, to an affiliate of the Applicant, AB, to enable AB to respond to production requests ("Production Requests") served on it as a party to certain foreign proceedings (the "Foreign Proceedings") by the plaintiff in those proceedings. Only C and D (of those served) participated in the effective hearing of the Ex Parte Originating Summons. From the Applicant's Written Submissions for the directions hearing, it was clear that the application was grounded upon section 4(2) of the Act.

3. The Respondents raised an important and interesting legal objection to the application. They contended that section 4(2) only applied situations where the party seeking relief from confidentiality obligations was either (a) itself under compulsion to provide evidence in local or foreign proceedings as a party to such proceedings, or (b) proposing to give evidence itself in any proceedings. The alternative argument that if jurisdiction existed the Applicant should be required to provide its affiliate with redacted documents (concealing the identities of C and D) was, for factual reasons, any argument which required little analysis to reject.

The factual matrix

4. AB Cayman contracted separately with C and D many years ago to provide a "Custody Account". It had no responsibility for making investment decisions. Investments decisions were made by AB pursuant to an agreement between AB Cayman and AB in which the latter agreed to treat information received from the former as confidential. It is broadly common ground that:

   (a) the Foreign Proceedings relate to investments made on behalf of C and D;

   (b) AB is required by virtue of the Production Requests and as a matter of US law to produce documents which would reveal the identity of its underlying investors (including C and D); and

   (c) the Foreign Proceedings do not allege wrongdoing on the part of AB or its underlying investors.

5. Ms Bellfield fairly contended that this sort of investment structure is likely to be fairly common. Accordingly, the desire of a Cayman-based entity to assist a foreign affiliate to comply with production requests made against them in foreign proceedings indirectly concerning underlying Cayman-based investments had implications wider than the context of the present case.

6. On the face of the Production Requests, redacted material could only be provided if reliance was placed on legal professional privilege. It is agreed that before the Foreign Proceedings were commenced against AB, D signed an authorisation letter consenting to AB Cayman disclosing certain information which potentially provides an alternative legal ground for contending that the information can be disclosed irrespective of the position under the Act. It also seems clear from the Applicant's evidence, that AB may in any event be required to disclose documents within its possession, custody or power within the US which are not covered by the definition of "*confidential information*" in section 2 of the Act.

The statutory provisions-preliminary view

7. Section 4 of the Act provides as follows:

> "***Evidence of confidential information directions***
>
> *4. (1) In this section — 'give in evidence' means make a statement, produce a document by way of discovery, answer an interrogatory or testify during or for the purposes of any proceeding; and 'proceeding' means any court proceeding, civil or criminal, and includes a preliminary or interlocutory matter leading to or arising out of a proceeding.*
>
> *(2) If a person intends to or is required to give evidence in or in connection with any proceeding being tried, inquired into or determined by any court, tribunal or other authority, whether within or without the Islands and the evidence consists of or contains any confidential information within the meaning of this Law, the person shall apply for directions in accordance with this section before giving that evidence, unless the person has been provided with the express consent of the principal.*
>
> *(3) An application for directions under subsection (2) shall be made to and be heard and determined by, a Judge of the Grand Court.*
>
> *(4) Notice of an application under subsection (3) shall be served on the Attorney General and if the Judge so orders, to any person who is a party to the proceedings relating to the application being made.*
>
> *(5) The Attorney-General may appear as amicus curiae at the hearing of an application under this section and any party on whom notice has been served under subsection (4) is entitled to be heard with respect to the application, either in person or by an attorney-at-law representing the person.*
>
> *(6) Upon hearing an application under subsection (3), a 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.

(7) In order to safeguard the confidentiality of a document, statement, answer or testimony ordered to be given under subsection (6)(c), a Judge may order —

(a) that the divulgence of the document, statement, answer or testimony be restricted to certain persons named by the Judge in the order;

(b) that evidence be taken in private in a manner specified by the Judge to ensure privacy; and

(c) that the reference to the name, address and description of any person be made by the assignment of alphabetical letters, numbers or symbols representing the name, address and description of the person, the key to which reference shall be provided to restricted persons named by the Judge.

(8) A person receiving confidential information by operation of subsection (3) is as fully bound by the duty of confidence, as if the information had been disclosed to the person in confidence by the principal.

(9) In considering what order to make under this section, a Judge shall have regard to —

(a) whether the order would operate as a denial of the 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, the requirements of the interests of justice."

8. In the present case it is contentious whether the Applicant's proposed provision of information to an affiliate falls within section 4 at all. The following subsections are most obviously relevant:

(a) section 4 (1) defines "*give in evidence*" in a way which suggests giving evidence as a witness. As the term "*give in evidence*" does not appear in the following subsections, it seems obvious that the definition should be read as governing the term "*give evidence in*" which is found in subsection (2);

(b) section 4(2) is expressed in terms which suggest that a person will '*give evidence in*" proceedings as a witness;

(c) section 4(6)(c) is expressed in terms which suggest that the applicant will be directly giving the relevant evidence and accordingly will be effectively bound by any conditions which the Court imposes; and

(d) section 4(7)(a) is expressed in terms which suggest that responding to a discovery or production request (in addition to giving oral or written testimony) falls within the ambit of the section.

9. As a matter of preliminary analysis, these provisions cumulatively suggest that the applicant will be either a party or a witness in the relevant proceedings and that the Court's jurisdiction is designed to balance (1) the rights and/or duties of the applicant *qua* party or witness and (2) the relevant confidentiality obligations from which a release is sought.

The competing constructions

10. The Applicant's Written Submissions relied most broadly on the contention that the application fell within the broad policy objectives of the section:

> "*37. An order under the Act in a case such as this is consistent with the objectives of the Act, as outlined in In re Ansbacher (Cayman) Ltd [1998 CILR 169] in*

respect of the Confidentiality Relationships (Preservation) Law, the predecessor to the Act:

> *'The Law was amended in 1979 to insert s.3A (now s.4 in the latest Revision) to achieve two main objectives by the intervention of the courts. The first was to ensure that the public and private interests in the protection of the confidential affairs of those who conduct lawful business in the Cayman Islands are duly observed. The second—also a matter of great public interest—is to ensure that where appropriate, information which might otherwise be protected can be divulged to assist the administration of justice in the Cayman Islands or, as the case might be, in the courts of foreign countries to which the obligations of judicial comity are owed.'* "

11. However only one authority was directly relied upon as supporting the proposition that disclosure by a non-party and non-witness could be authorised under section 4 of the Act: *In the Matter of the Kuwait Port Authority*, FSD 118/2021 (RJP), Judgment dated 8 March 2022 (unreported). In that case Parker J pivotally held:

> "*123. Applications should not be limited in my view to only parties to the proceedings or persons who intend to or are required to give evidence in the proceedings themselves. They should not be limited to the conventional ways for a party who intends to, or is compelled to, itself give evidence in proceedings. The words 'or in connection with' imply a wide variety of circumstances where evidence can be provided... In my view reading CIDA as a whole one should construe s.4(2) to give the Court a wide jurisdiction to hear an application by a person such as the KPA in this case, intending to provide evidential material, in this case to another person, for use in proceedings to which it is not a party.*"

12. Ms Bellfield rightly submitted that this Court should not depart from one of its earlier decisions unless satisfied that the earlier decision was wrong. Reliance was placed on, *inter alia*, the judicial precedent principles applicable to previous decisions by courts of coordinate jurisdiction articulated by Mangatal J in *Re China Shanshui Cement Group Limited* 2015 (2) CILR 255, principles which I followed in *Simamba-v-Health*

Services Authority 2019 (2) CILR 213. These principles were common ground in the present case. In *Simamba* (at paragraph 69), I cited the following passage from the judgment of Gloster J (as she then was) in *Lornamead Acquisitions Limited -v- Kaupthing Bank HF* [2011] EWHC 2611 (Comm) at paragraph 53[1]:

> "*Volume 11, paragraph 98 of Halsbury's Laws states as follows:*
>
> *'98. Decisions of co-ordinate Courts.*
>
> *There is no statute or common law rule by which one Court is bound to abide by the decision of another Court of co-ordinate jurisdiction. Where, however, a judge of first instance after consideration has come to a definite decision on a matter arising out of a complicated and difficult enactment, the opinion has been expressed that a second judge of first instance of co-ordinate jurisdiction should follow that decision; and the modern practice is that a judge of first instance will as a matter of judicial comity usually follow the decision of another judge of first instance unless he is convinced that that judgment was wrong .... (emphasis supplied.)*'
>
> …"

13. Mr Sherwood's primary submission was that the *Kuwait Port Authority* case was distinguishable because the 'parallel' jurisdiction under section 3(2) of the Act was involved. In the alternative, he did not shrink from advancing the contention that *Re Kuwait Port Authority* was wrongly decided as a matter of statutory construction. He argued, reinforcing my preliminary view of the natural and ordinary meaning of the words in section 4(2) of the Act, that it was impermissible for the Court to read in additional meaning in light of the clear and unambiguous language expressed in the statute. He also pointed out that the disclosure sought in that case related to wrongdoing, so another basis for disclosure could have been found in section 3 which provides:

> "*(2) A person who discloses confidential information on wrongdoing, or in relation to a serious threat to the life, health, safety of a person or in relation to a serious threat to the environment, shall have a defence to an action for breach of the duty*

[1] (Mangatal J cited the same extract from *Halsbury's* in *China Shangshui* at paragraph 60).

> *of confidence, as long as the person acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing, of a serious threat to the life, health, safety of a person or of a serious threat to the environment.*" [Emphasis added]

14. Section 3(2) by its terms provides a defence against disclosure of confidential information reasonably believed to afford evidence of wrongdoing without any constraints upon the context in which the disclosure occurs. Effectively, confidentiality does not attach to credible evidence of wrongdoing. Ms Bellfield in reply was unable to directly undermine the force of this submission.

Findings: the proper construction of "give evidence in or in connection with any proceeding" in section 4(2) of the Act

15. There appears to be broad judicial consensus that the old canons of statutory construction (such as the 'literal rule', the 'mischief rule' and the 'golden rule') have been supplanted by a simpler modern rule. The meaning of statutory language must be elicited adopting a purposive approach, which derives the legal meaning from (a) the language used, (b) the wider statutory context and (c) the purpose of the enactment. While the process of purposive construction may potentially be a broad one, Sir Geoffrey Vos aptly observed in *Asda Stores Limited-v-The Commissioners for Her Majesty's Revenue and Customs* [2014] EWCA Civ 317:

> *"19. I agree with both the FTT and the Upper Tribunal that a purposive construction is appropriate in construing the Code, but I do not agree that the clear words of the Code can simply be ignored or jettisoned as Mr Cordara seems to suggest….Even a purposive construction must pay some regard to the terms of the Code that is being construed…."* [Emphasis added]

16. In the present case, the express statutory words of section 4(2), the wider context of the statute as a whole and the purpose of the Act all point in the same direction:

    (a) the express terms of section 4(2), applying the definition in section 4(1), clearly manifest a legislative intention that the provision should apply to a

person who is proposing to make evidence or information available as party or witness in legal proceedings;

(b) the wider context of section 4, including especially the terms of section 4(7)(a), supports the proposition that "*give evidence in or in connection with*" contemplates just that, the provision of evidence by a party through discovery or as a witness before or at trial; and

(c) the purpose of section 4 appears clearly to be to confer a jurisdiction upon the Court to determine to what extent (if any) confidentiality ought to be lifted in the wider interests of the administration of justice. This judicial balancing exercise will, experience suggests, typically be carried out by hearing the main protagonists, the party wishing to give evidence and the party to whom the duty of confidence is owed (assuming the application is opposed). The legislative purpose underpinning this judicial balancing exercise would be undermined if the section were to be construed as effectively available whenever an applicant with no direct role in the deployment of the confidential information in the relevant proceedings wished to make it available for use therein.

17. Before considering the *Kuwait Port Authority* case, brief mention must be made of the other decisions of this Court dealing with section 4 of the Act. In summary:

(a) in *Re Anbascher (Cayman) Limited* 1998 CILR 169, Smellie J (as he then was) declined to grant directions under section 4 of the Confidential Relationships (Preservation) Law (which corresponded to the current section 4(2)) of the Act on jurisdictional grounds. The applicant contended it was "required" to give evidence, but was unable to establish this jurisdictional requirement;

(b) in *Re Anbascher (Cayman) Limited* 2001 CILR 214, Smellie CJ (as he by then was) granted directions being satisfied that the bank intended to deploy confidential information in foreign proceedings, the "required" ground no longer being pursued, to protect its own interests (at paragraph 84). Smellie

CJ's helpful summary of the purpose of section 4 (at paragraph 90) is set out below;

(c) in *Re Cayman Securities Clearing and Trading Ltd SEZC*, Cause 223/2014, Judgment dated 14 October 2014 (unreported) Williams J considered what constituted "proceedings" for the purposes of section 4 and found that this requirement was not met;

(d) in *Re Safeguard Management Corporation* 2017 (2) CILR 1, the applicant sought directions in order to comply with a disclosure order made against it in an arbitration proceeding it was a party to. Parker J held that the information sought was not subject to the relevant disclosure order, but if it was he would permit disclosure subject to redactions;

(e) in *Discover Investment Company-v-Vietnam Holding Asset Management Limited* 2018 2 CILR 424, I held that where a party was required to comply with a *Norwich Pharmacal* Order, no separate directions under section 4(2) were required. As an aside, I observed that section 4(2) was "*potentially quite wide in its sphere of operation*", but in that case the respondents (who sought directions under section 4(2)) were being required to produce confidential evidence by an Order of this Court.

18. *Re Kuwait Port Authority* is the only case to decide that section 4(2) applies to disclosure otherwise than by a party intending to, or required to, directly give confidential information in evidence in legal proceedings. Whether this was permissible was the subject of adversarial argument in a case in which four leading counsel appeared. Parker J held:

"*124. In my view reading CIDA as a whole one should construe s. 4(2) to give the Court a wide jurisdiction to hear an application by persons such as the KPA in this case, intending to provide evidential material, in this case to another person, for use in proceedings to which it is not a party*."

19. Every case turns on its own facts. The weight to be attached to this interpretative decision can only be meaningfully assessed by taking into account the factual context and the legal submissions which were made. The factual matrix can be briefly stated. The Kuwaiti State was party to arbitration proceedings and wished to deploy documents obtained by the Authority in litigation before this Court (concerning wrongdoing in relation to a fund) in those arbitration proceedings. The Authority, a public institution, wished to provide the documents to the Kuwaiti State for use in the arbitration. An important part of the decision is the fact that the application was not made under section 4(2) alone. Parker J opened his summary of the submissions as follows:

> "*44. Ms Rachael Reynolds QC for KPA relies on the 'wrongdoing' gateway' set out in Section 3 (2) of the Act, but also seeks directions pursuant to Section 4 (2) of the Act and the protection of a Court order declaring that the proposed disclosure of the Section 22 Documents to Kuwait may be made…*
>
> *48. Ms Reynolds QC submitted that the Court could simply make an Order under section 3 (2) which would protect the KPA from liability for breach of confidence and there would be no need for direction under section 4 and no need for an exercise of discretion under section 4…*" [Emphasis added]

20. The section 4(2) jurisdiction was, significantly, relied upon as alternative jurisdictional ground. Parker J then records Kuwait's counsel as supporting the section 4(2) application and counsel for the two opposing party both contending that section 4(2) was not available. The second party is recorded as contending that "*Section 3(2) is not relevant unless a cause of action is pleaded alleging wrongdoing; where it does so it can seek a declaration under s.3(2) if it is in doubt*" (paragraph 93). The Judge expressly rejected the argument that section 3(2) was not available on these grounds (at paragraph 107) and decided to consider the application based on:

(a) section 3(2);

(b) section 4(2) noting "*it may be the case that Ms Reynolds QC only developed this in oral submissions, but that is no reason to shut out the argument*" (paragraph 108); and

(c) in circumstances where the party which was going to "*give evidence*" was in substance a joint applicant for directions which made the standing point a highly artificial one in all the circumstances of that case.

21. Although Parker J described the section 4(2) jurisdiction question as "*the 'meat' of the application*" (paragraph 114), his primary finding was concisely summarised under "***Conclusion***" as follows:

> "*142. I am prepared to make an Order under section 3(2) of CIDA\. 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 (within the definition of the FOI section 50.)*"

22. His secondary finding was that directions should also be given under section 4(2), the alternative jurisdiction the applicant only relied upon at the hearing in oral argument and the jurisdiction which he understandably seems to have regarded as being more controversial. Although not expressed explicitly as an alternative finding, in my judgment the meaning Parker J assigned to section 4(2) was one reached in the following circumstances:

(a) by way of alternative to the primary finding;

(b) without apparently receiving the benefit of full, focussed argument on the section 4(2) point as a freestanding legal issue[2]; and

[2] The accuracy of this interpretation of the Kuwait Judgment was contested by Ogier based on their involvement in that case, but I accepted Carey Olsen's objection that any such change in this or similar passages went beyond the permissible range of editorial corrections. However, I have modified (see e.g. paras 30, 45 (a), (b) and 47) my originally blunt characterisation of the issues decided in *Kuwait* to make it clear that I distinguish it not on the basis of how the case was argued, but because the issues he had to decide arose in a materially different context.

(c) having the benefit of the proposed third-party recipient of the confidential information before the Court, able to address the use to which the information would be put as well as being in a position to be bound by any conditions which the Court might impose. This factor made the application appear very similar to the section 4(2) applications which had previously been dealt with by this Court.

23. I accept Mr Sherwood's short submission that it was clear from the terms of section 4 that "*give evidence*" meant just that and did not extend to providing documents to a third party, which in turn would give evidence in any proceedings. I find that the reasoning in *Re Kuwait Port Authority* lacks the cogency one would expect when a point has been fully argued in a focussed way. On the authority of *Shanda* [2020] UKPC 2 (Lady Arden at paragraph 27), Parker J accurately summarised the governing principles of statutory interpretation:

> "*116. The Court ascertains the intention of the legislature from the words used in a statutory provision read in their proper context, and also in light of any material which shows what mischief was sought to be addressed.*"

24. However, in considering the meaning to be attached to "*give evidence in*" in section 4(2), the governing definition in subsection (1) was all but ignored. That term was defined as follows: "*make a statement, produce a document by way of discovery, answer an interrogatory or testify during or for the purposes of any proceeding*". That definition reinforces the natural and ordinary and legal meaning of the term "*give evidence in*", which conveys the idea of a party responding to discovery or a witness providing evidence. Two forms of activity appear to be contemplated:

(a) testifying "during" a proceeding (as a witness); and/or

(b) producing documentary evidence "*for the purpose of*" a proceeding (as a party or as a witness).

25. It is only if one ignores the governing definition of "*give evidence in*" in section 4(1), that one is able to construe the words "*in or in connection with any proceeding*" in section 4(2) as extending the operation of section 4 to applicants intending to provide evidence for a third party to give in evidence. It amounts to allowing the tail of the subsection to wag the dog. The alternative findings in *Re Kuwait Port Authority* on a jurisdictional ground, which (it is impossible to repeat too often) was seemingly relied upon by the applicant in that case as an afterthought, were based in part on the finding that:

> "*123…The words 'in connection with' imply a wide variety of circumstances where evidence can be provided. The phrase needs to be given meaning beyond simply what forms of evidence limited and defined by the definitions in section 4 (1) can be given in, or within, proceedings*."

26. The apparent justification for this broad and purposive approach to construing section 4(2) was that this Court had previously consistently "*given the words of section 4(2) meaning…to render it an effective and flexible gateway for the Court to consider the competing interests concerning the disclosure of confidential information for the purposes of proceedings to further the administration of justice*" (paragraph 121). None of the previous cases (reviewed above) in fact support any flexibility at all as regards the jurisdiction to grant directions under section 4(2), a conclusion which is easier for me to reach because the present application is focussed solely on this issue.

27. Unless a definition is completely unintelligible, it should be applied to the construction of the relevant terms in the statute. No canon of statutory construction permits an inconvenient definition to be judicially ignored or entirely re-written. A contextual construction involves seeking to find conformity between different parts of a statute, and there is no obvious inconsistency between the statutory definition of "*give in evidence*" in subsection (1) and the words "*in connection with*" in subsection (2). The linguistic infelicity of the definition may properly be ignored because it has no impact on the core meaning which it conveys. In *Wyre Forest District Council for Secretary of State for the Environment* [1990] 2 AC 357 (which was not referred to in argument but which illustrates an incontrovertible point), Lord Lowry (at page 365E) opined as follows:

> "*My Lords, I have to say that I regard the council's proposition as quite untenable: if Parliament in a statutory enactment defines its terms (whether by enlarging or by restricting the ordinary meaning of a word or expression), it must intend that, in the absence of a clear indication to the contrary, those terms as defined shall govern what is proposed, authorised or done under or by reference to that enactment.*"[3]

28. Mr Sherwood's compressed submission that section 4(2) could not properly be construed in the way it was in *Kuwait Port Authority*, having been weighed in the scales, is not found wanting. He questioned the coherence of one further specific aspect of the reasoning in that case. Parker J (at paragraph 120) opined that the argument that section 4(2) required the applicant to be directly intending to give evidence:

> "*would lead to an anomalous outcome. That is to say that if the KPA is intending to -simply to share the documents with Kuwait for use in the Arbitration Proceedings it cannot avail itself of section 4 because it is not giving evidence.*"

29. C and D's counsel fairly asked: why would that result be anomalous? I agree that the anomaly is not explicitly explained nor is it obvious. Having reviewed cases dealing with section 4 spanning 25 years, the *Kuwait Port Authority* case in 2022 is the only case (before the present one) where an attempt was made to indirectly supply evidence blessed by a direction under section 4 of the Act. Section 4 as it has traditionally been applied is entirely workable and rational and consistent with the discernible purpose of the Act. More specifically than that, no anomaly arose on the facts of the *Kuwait Port Authority* case, because it was clear that a declaration could be granted under section 3(2) in any event.

[3] Cited in *Royal Borough of Windsor & Maidenhead-v-Bonnie Smith* [2012] EWCA Civ 997 at paragraph 20 (per Etherington LJ, Rix and Patten LJJ concurring).

30. It is important to emphasise that the reasoning under scrutiny did not, as I read it, form the primary basis for that decision. Alternative findings are inherently vulnerable to attack and will in most cases have very limited precedential value. Once a judge has confidently decided that relief can properly be granted on one largely uncontroversial legal basis, it is humanly impossible to bring the same rigour to analysing an alternative basis for granting the very relief that has already been determined to be deserving of relief. I have personally generally found arguments advanced in the same hearing on alternative legal bases particularly difficult to clearly decipher. If the Marquis of Queensberry Rules applied to legal contests, attacks on alternative judicial findings would, perhaps, not be allowed. Even if I am wrong in characterising the section 4 (2) analysis as alternative, a Judge asked to grant relief which is probably not strictly needed is placed in an analogous position.

31. Ms Bellfield, appreciating the difficulties a strict reading of section 4(2) presented to her cause, invited the Court to consider the wider public interest in this Court assisting foreign courts to fairly adjudicate claims where confidential information was held in the Cayman Islands, a situation which could safely be assumed would be a common occurrence. Public policy considerations cannot be brought into play when construing legislation unless there is a sufficient connection between the statutory terms and the policy considerations said to be at play.

32. The most obvious judicially recognised public policy consideration arising from the terms of section 4 themselves is the discretionary balancing of interests, confidentiality on the one hand and the wider administration of justice on the other. This policy objective supports rather than undermines the need for the party seeking directions to be the same party which is seeking to "*give evidence*". Such a person will usually be best equipped to explain the way in which the information is proposed to be deployed and will necessarily have submitted to this Court's jurisdiction and be bound by any conditions which may be imposed. As Smellie CJ stated in *Re Anbascher* (2001):

> "*90. The whole purpose of s.4 is to provide a framework in which the court can decide in the exercise of its discretion, and having regard to all the circumstances including the competing interests and rights, whether or not to direct disclosure by the giving of evidence. If directions are given for*

disclosure, the interests or rights of the principal who objects will inevitably be affected. This may be in deference to the conflicting interests or rights of the fiduciary who applies or it may be, as it often is, in deference to the wider interests of the administration of justice. Coming as it does within s.4 of the CR(P)L, Ansbacher's application, if founded upon an insufficient interest when compared with those of others which conflict, should be dealt with by refusal of the directions sought. It would not, in my view, be inappropriate to refuse them on grounds of abuse of process when the process engaged is provided by statute for precisely that purpose of seeking directions."

33. These observations highlight the importance of distinguishing the question of whether the Court has jurisdiction to grant directions, a hard-edged point, and the broader and more flexible question of whether and, if so, what directions should be granted. They also illustrate that Smellie CJ assumed that the conflicting interests would generally be those of "*the principal who objects*" and "*the fiduciary who applies*". As I have already noted above, a meaningful evaluation of the competing interests implicitly requires the applicant and the party deploying the evidence to be one and the same.

34. It is true that the *Kuwait Port Authority* case suggests that this requirement will in practical terms be met where the application is substantively supported by a third party who proposes to deploy the confidential information in proceedings and submits to the jurisdiction of this Court. But this cannot be permitted to obscure the fact that section 4(2) explicitly confers jurisdiction only on the person who intends or is required to give evidence to apply for directions. This is the proper construction of section 4(2). Does this create an inconvenient fetter on the ability of this Court to assist the administration of justice foreign courts where a Cayman-based applicant wishes to make confidential information available to an overseas affiliate for use in foreign proceedings? Does this not run counter to the Court's well-recognised policy of assisting foreign courts? I reject these somewhat beguiling high-level policy arguments for two main reasons.

35. Firstly, an issue which was canvassed during the hearing, Cayman entities bound by the Act are free to conclude disclosure agreements with their clients which will contractually permit disclosure of confidential information to counterparties for the purposes of regulatory or judicial compliance. My strong suspicion is that such

agreements are today standard market practice and the reason for their absence (save as regards one recent agreement with D) in the present case is the relative antiquity of the client/service provider relationship. Where the information discloses evidence of wrongdoing, section 3(2) will be available and vague notions of judicial assistance cannot be allowed to become an unbridled horse which tramples on all other legal principles in its path.

36. Secondly, a matter which I have only discerned after further deliberation, is the potential ability of the proposed recipient of confidential information protected by the Act to itself apply for section 4(2) relief. Without, obviously, deciding this point, I can see no reason in principle why a party such as AB cannot jointly apply with AB-Cayman for directions under section 4(2) of the Act. It is the party that seeks to "*give evidence*" and seemingly is by virtue of the commercial arrangements between it, AB (Cayman) and the Respondents, already privy to at least some of the confidential information already. It is the Applicant's positive evidential case that AB received confidential information about AB (Cayman)'s clients subject to express confidentiality obligations. The possibility that the identities of C and D might be revealed by AB apart from the present application (because some documents in its possession never entered this jurisdiction and so fall beyond the purview of the Act) can have no bearing on the proper interpretation of section 4(2) of the Act.

37. Section 4(2) is not a gateway for an applicant to obtain a release from duties of confidence merely to assist a third party to deploy the applicant's confidential information in legal proceedings. But in many cases, as in the *Kuwait Port Authority* case (and possibly in the present case as well), a party which does not owe the primary duties of confidence to underlying clients may come into the possession of confidential information in one context which it wishes to deploy in another. I can see no obvious reason in principle as to why such a party cannot itself apply for directions under section 4(2) of the Act.

38. It remains to consider whether:

(a) I am bound as a matter of judicial comity by the contrary findings in *Kuwait Port Authority* as to the standing requirements of section 4(2); and

(b) if so, whether I should find that decision was wrong and should not be followed.

Is the decision in Re *Kuwait Port Authority* on the construction of section 4 (2) of the Act potentially "binding" as a matter of judicial comity?

39. Helpful recent judicial guidance on the fundamentals of the law relating to the doctrine of precedent was provided by Doyle J in *Re HQP Corporation*, FSD/2021 (DDJ), Judgment dated 7 July 2023 (unreported):

> "*10. Sir Christopher Clarke, the President of the Court of Appeal of Bermuda in The Corporation of Hamilton v The Attorney General [2022] CA (Bda) Civ 6, stated:*
>
> > *'90. It is sometimes suggested (and was suggested by Mr Myers) that the question whether a decision on an issue forms part of the ratio depends on whether the decision was necessary in order to produce the result which the Court reached. In my judgment this is too simplistic a view.'*
>
> *And added:*
>
> > *'91. In order to decide what was the ratio of any decision it is necessary, in my view, to examine the route which the Court took in order to see whether the point in issue was an essential part of the Court's reasoning.'*
>
> *11. Neil Duxbury in The Nature and Authority of Precedent (Cambridge University Press 2008) ("Duxbury") at pages 12-13 states:*
>
> > *'... precedents set by courts do not merely claim the attention of, but actually bind, other courts. This is the doctrine of stare decisis - i.e., earlier judicial decisions must be followed when the same points arise again in litigation.'*

12. Duxbury at pages 113 - 116 deals with the topic of 'Distinguishing' and the following are extracts from his treatment of the subject:

> *'"Distinguishing" is what judges do when they make a distinction between one case and another … we distinguish within as well as between cases. Distinguishing within a case is primarily a matter of differentiating the ratio decidendi from obiter dicta - separating the facts which are materially relevant from those which are irrelevant to a decision. Distinguishing between cases is first and foremost a matter of demonstrating factual differences between the earlier and the instant case - of showing that the ratio of a precedent does not satisfactorily apply to the case at hand [page 113] …*
>
> *Most courts will distinguish cases fairly routinely and without controversy … courts are not only drawing a distinction but also arguing that the distinction is material, that it provides a justification for not following the precedent. Not just any old difference provides such a justification: the distinction must be such that it provides a sufficiently convincing reason for declining to follow a previous decision … The judge who tries to distinguish cases on the basis of materially irrelevant facts is likely to be easily found out. Lawyers and other judges who have reason to scrutinize his effort will probably have no trouble showing it to be the initiative of someone who is careless or dishonest, and so his reputation might be damaged and his decision appealed. That judges have the power to distinguish does not mean they can flout precedent whenever it suits them …' [page 114]*"

40. These principles do not strictly apply to the question of whether previous decisions of a court of coordinate jurisdiction should be followed as a matter of judicial comity. However, they serve as a helpful reference point illustrating the most rigorous restrictions which could potentially apply to the present legal context. The judicial comity principle clearly only applies to the sort of findings which would in the judicial precedent context be considered as forming part of the *ratio* of a decision. These

principles are referred to with a view to making explicit the formal legal basis for the decision which I would in any event have reached.

41. It was not disputed that the alternative finding on the scope of the jurisdiction to grant directions under section 4(2) of the Act formed part of the *ratio decidendi* of the decision in *Re Kuwait Port Authority*. The precedential status of alternative findings is a somewhat obscure legal issue, but there appears to be some support for the proposition that a fully considered alternative finding may be viewed as forming part of the "*alternative ratio*" of a judicial decision: *R (Conway)-v-Secretary of State for Justice* [2017] EWHC 2447 (Admin), per Sales LJ (at paragraph 79).

42. In the context of judicial comity and previous coordinate decisions, which was addressed by counsel in argument, there is the central requirement of a decision which has received the benefit of full argument. In *Lornamead Acquisitions Limited -v-Kaupthing Bank HF* [2011] EWHC 2611 (Comm) Gloster J justified following an earlier High Court decision in the following terms:

> "*56. Following the approach set out in the passage quoted from Halsbury (supra), and in circumstances where:*
>
> *i) Burton J's decision:*
>
> *a) was made after hearing full argument on the point in issue from three separately represented parties over the course of three days;*
> *b) was set out in a cogent and fully reasoned judgment, with its conclusions expressed in the clearest and strongest terms; and*
> *c) was supported by reference, among other things, to the evidence of Kaupthing's own expert on Icelandic law, on whose evidence Kaupthing also relies in the present case;*
>
> *ii) Burton J's decision was clearly 'a definite decision on a matter arising out of a complicated and difficult enactment', which, moreover, affected the recognition of Kaupthing's insolvency status, in relation to which it was highly unsatisfactory to have differing views at first instance;*
>
> *iii) there are clearly arguments to the contrary to those presented by Mr. Goldring;*

> *iv) the decision in Rawlinson will now fall to be considered by the Court of Appeal in any event;*
>
> *I have concluded that, in the interests of judicial comity, and deployment of judicial resources, the appropriate course is for me to say that, despite my doubts, I am not 'convinced' that Burton J was wrong and that, accordingly, I should follow his decision…*"

43. Here, although the findings relied upon were (based on my reading of the Judgment) alternative and did not as a result receive the benefit of full, focussed argument, it was not disputed that Parker J's decision was "*a definite decision arising out of a complicated and difficult enactment*". Mr Sherwood primarily invited me to distinguish the *Kuwait Port Authority* case because its context was different. I accept that it is self-evident that no question following an earlier decision as a matter of judicial comity can arise unless the previous decision is contextually relevant in essentially the same way that a binding precedent must be. If a potentially binding precedent may be distinguished and not followed on the grounds that the point previously decided was different to the point subsequently in issue, a previous decision which is only liable to be followed out of judicial deference cannot sensibly be viewed as liable to be followed even if it is distinguishable.

44. The passage quoted by Doyle J on 'distinguishing' earlier decisions almost threatens to bring down fire and brimstone upon judges who misuse this technique for declining to follow a decision which would otherwise be viewed as binding. If one is considering a previous decision of a court of coordinate jurisdiction, which can be departed from if considered wrong, the approach to distinguishing such previous decisions ought in principle to be less restrictive than in the context of potentially binding precedents. However, I bear in mind that the overarching legal policy, the goal of promoting consistency in the law, is the same and distinguishing previous decisions of this Court should be approached with both restraint and care.

45. Nonetheless, in the final analysis, I have no difficulty in concluding that *Kuwait Port Authority* is distinguishable for the fundamental reason that although section 4(2) of the Act was considered and its jurisdictional scope decided on facts which were in some

respects materially similar, the factual and legal differences far outweigh the similarities:

(a) the relevant legal findings were reached either (1) as alternative findings with the primary findings being based on an entirely different legal and factual basis (wrongdoing, and the section 3(2) defence) or (2) on the assumption that section 3 (2) applied in any event;

(b) Parker J clearly did not consider section 4 (2) to be the sole or primary basis for permitting disclosure (even if he did view it as the formal centrepiece of the application), because he expressly stated "*Ms Rachel Reynolds QC for KPA relies on the 'wrongdoing gateway' set out in Section 3(2) of the Act, but also seeks directions pursuant to Section 4 (2) of the Act and the protection of a Court order declaring that the proposed disclosure…may be made*" (paragraph 44) section 4(2) point,; and

(c) because the party which intended to use the confidential information was before the Court supporting the application and could presumably have been joined as a joint applicant if required, the applicant's standing was an artificial and entirely technical point. In practical and substantive terms, the standing point which arises for determination in the present case did not have to be decided in the *Kuwait Port Authority* case.

46. For these reasons, I find that the *Kuwait Port Authority* case is clearly distinguishable from the present case and (1) no need to follow it as a matter of judicial comity arises and (2) I may properly decline to do so.

47. I see no need in these circumstances to consider whether a decision made in such strikingly different factual and legal circumstances was "wrong". Parker J's decision on the substantive merits in *Re Kuwait Port Authority* was clearly right under section 3(2) and very arguably right under section 4(2) as well, on the assumption that the technical standing impediment could have been resolved. And even if I am wrong in apprehending that formal reliance was placed on section 3 (2) in that case, Parker J was

clearly right to assume that section 3 (2) operated so as to render reliance on section 4 (2) a mere formality.

Summary

48. For these reasons I find that the Applicant lacks standing to seek directions under section 4(2). I see no reason why C and D should not have their costs in relation to the present application. Subject to hearing counsel as to the terms of the Order and costs, I would adjourn rather than dismiss the Applicant's Summons to afford AB an opportunity to consider if it wishes to apply to be joined to seek essentially the same relief AB (Cayman) has been found not entitled to seek. Its application was otherwise entirely meritorious, and I would have summarily rejected the request for redactions to be made if disclosure was approved.

HONOURABLE IAN RC KAWALEY
JUDGE OF THE GRAND COURT