

**IN THE GRAND COURT OF THE CAYMAN ISLANDS**

**CAUSE NO. 223 OF 2014**

**IN THE MATTER OF THE CONFIDENTIAL RELATIONSHIPS  
(PRESERVATION) LAW (2009 REVISION)**

**AND IN THE MATTER OF THE FINANCIAL INDUSTRY REGULATORY  
AUTHORITY**

**AND IN THE MATTER OF THE CAYMAN SECURITIES CLEARING AND  
TRADING LTD SEZC AND OTHERS**

**Appearances:** Mr. John Harris for the Applicants  
Ms. Jacqueline Wilson, Solicitor General for the Attorney General's  
Chambers

**Heard:** 14 October 2014  
**Ex Tempore Ruling:** 14 October 2014  
**Transcript of Ruling provided:** 14 October 2014




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**EX TEMPORE RULING**

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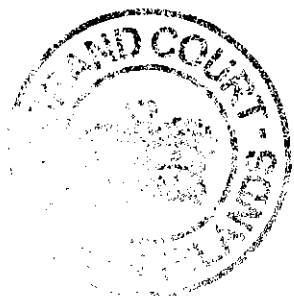
**The Application**

1. This is an ex tempore ruling as the parties require an immediate decision and the reasons for it. The parties were informed that this transcript of the ruling would be made available to them today. It is not intended to read as a written judgment and time does not permit it to be perfected prior to circulation.
2. This is an application, brought by an Originating Summons dated 6 October 2014, for directions to permit disclosure under section 4 of the Confidential



Relationships (Preservation) Law (2009 Revision) (“the Law”). The application is made by Cayman Securities Clearing and Trading Limited SEZC (“CSCT”) and Mr. John Joseph Hurry, the ultimate beneficial owner of CSCT. Mr. Hurry formed and indirectly owns CSCT through a holding company and a trust. The Applicants contend that the only basis upon which the Court could authorise disclosure is under S.4(1) of the Law, as the circumstances do not fall under exceptions set out at S.3(2)(b) of the Law

3. The application has been served on 8 October 2014, as required under the Law, on the Attorney General. The Attorney has replied indicating that he wishes to attend and contends that the Court does not have the jurisdiction to make the requested orders pursuant to S.4(1) of the Law, as there are no proceedings as defined and required under the Law.
4. The Applicants have advised the Financial Industry Regulatory Authority (“FINRA”) of this hearing.
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.



6. In applications such as this, the Court is called upon to weigh the competing interests and decide, in the exercise 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.

7. The Applicants seeks directions as regards their response to a Request from FINRA to disclose confidential information relating to two customers of CSCT, namely Unicorn International Securities (“Unicorn”) and Titan Securities Inc. (“Titan”). Titan and Unicorn have both been served with notice of this hearing by email on 7 October and by hand delivery to their registered offices on 8 October 2014. They do not attend today and there have been no replies from them to the Applicants.

8. The Request from FINRA was received by Mr. Hurry on 19 September 2014. It contains a large request in relation to an examination of SCA seeking disclosure of all corporate and ownership documentation and operational information in respect to CSCT and CSCT Holdings and extensive customer information. I am informed that Holdings has not been active and is merely a holding company with no customer information or other relevant material.

9. Mr. Hurry has been requested to testify before FINRA on October 15<sup>th</sup> and 17<sup>th</sup> 2014.



10. FINRA is a formal designated self-regulatory organisation of the US securities industry under the US Securities Exchange Act of 1934, as amended. It is directly regulated by the US Securities and Exchange Commission (“SEC”). It is not a Government agency, but a regulatory authority carrying out regulatory functions in relation to member brokerage firms and exchange markets. SEC is the government agency which acts as the ultimate regulator of the securities industry, including FINRA. The informative affidavit sworn by Mr. Charles Roe Mills, helps explain the role and powers of FINRA. Time does not permit me to herein set out that detail, but I have carefully reviewed what he has stated.

11. The Applicants submit that although FINRA may not be viewed as being a Court under the meaning of S.4(1) of the Law, that it could be considered as being an “*other authority*.” The Attorney General does not take issue with that contention. Both parties refer me to the case of *In The Matter of Ansbacher (Cayman) Limited* [2001] CILR 214 in which Smellie C.J. drew a distinction between the context in which the words “court or tribunal” should be construed for the purpose of granting mutual legal assistance orders and the context in which “court, tribunal or other authority” should be interpreted for orders of disclosure under S.4 of the Law. Smellie C.J. stated at page 240 para 75:

*“The Evidence (Proceedings in Other Jurisdictions (Cayman Islands) Order 1978 speaks of evidence to be given before a court or tribunal; the CR(P)L speaks of evidence to be given in or in connection with any proceedings before a “court, tribunal or other authority.” The words “or other authority” in s.4 are nonetheless to be construed ejusdem generis with the words “court or*



*tribunal.” While the categories and circumstances contemplated may be wider, the bodies must be of some kind of genus. This means that any “other authority” before which confidential information is to be given in evidence must be one authorised to adjudicate in the sense of being able to decide upon or determine rights or issues.”*

12. I have considered the following affidavits filed on behalf of the Applicants;- from Mr. Charles Mills (US Counsel for Mr. Hurry with respect to an investigation by FINRA) sworn on 13 October 2014 and Mr. Gregory Ruzicka (the Managing Director of the CSCT) sworn on 6 October 2014. I am satisfied that, on the evidence before me, FINRA has powers to both investigate and adjudicate upon breaches in US Securities laws and falls under the definition of “other authority” under S.4(1).
  
13. CSCT have good relations with Scottsdale Capital Advisers LLC (“SCA”) and with Alpine Securities LLC (“Alpine”) in the US. These are both registered with the SEC. SCA, being security brokers, they must be members of FINRA and are therefore subject to the FINRA’s regulatory and enforcement powers. These powers include revoking a member-broker firms’ membership and a natural person’s ability to associate with broker-dealer. In fact the letter of Request specifically provides that any failure by Mr. Hurry *“to respond fully, promptly and without qualification... could expose (him) to sanctions, including expulsion from the securities industry.”*

General comments as follows, when taking the position that it does not, *“in light of the jurisdiction’s commitment to assist foreign regulatory law enforcement agencies in combating money laundering and financial crime, consideration of public policy supports the disclosure of confidential information in appropriate cases.”*

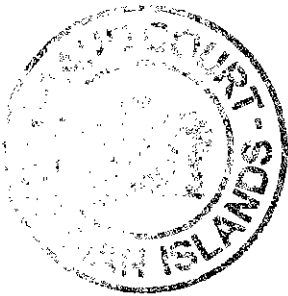
18. The Attorney General refers the Court to S.4(7) of the Law which provides:

*(7) In this section –*

*“court” bears the meaning ascribed to it in section 2 of the Evidence Law (2007 Revision);*

*“given in evidence” and its cognates means make a statement, 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.”*



19. Mr. Mills in his affidavit makes clear that a failure of the Applicants to comply with the Request would not invoke the sanction of the US Courts. The Attorney General submits that in the absence of any enforcement process in the Courts that the Cayman Court would therefore not have any jurisdiction.

20. **In the Matter of Corporacion Nacional Del Cobre De Chile** [1999] CILR 42, Smellie C.J. was considering whether an administrative subpoena of the Commodities Futures Trading Commission which did not yet carry the sanction

of the New York Court constituted proceeding under S.4 of the Law. He stated at 48-49:

*“It is a well-established principle of English common law (and hence of Cayman law) that the courts will not, and are not as a matter of judicial comity obliged to, render assistance to the deliberations of the Grand Jury, which is not a court; see Rio Tinto Zinc Corp. v Westinghouse Elec. Corp. (11) and In re Hall (6). Its analogous position notwithstanding, it must none the less be recognized that the CFTC’s role and remit are entirely proper. The CFTC is described by Mr. Hellman as an independent Federal Civil Regulatory Agency which was created by the US Congress in 1974 to administer and enforce the Commodity Exchange Act. It regulates commodity futures and options trading in the United States in order to protect market participants from manipulation, abusive trade practices and fraud.*

*It appears from the Sanders memorandum of law that pursuant to that mandate and having had notice of “the publicly...disclosed massive trading losses by Codelco,” the CFTC issued an order of investigation “in the matter of trading losses of Corporacion Nacional Del Cobre De Chile” on September 5th, 1996, authorizing members of its staff to conduct an investigation of a number of designated entities and individuals. That order also enabled the taking of testimony and, among other things, the issuance of subpoenas for those purposes.*

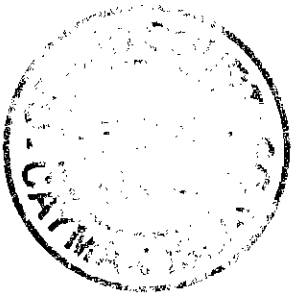
*The CFTC’s investigation in this matter is being conducted, according to the Sanders memorandum of law, to determine “whether, in connection with Codelco’s trading losses, certain persons or entities, including some based in the United States and registered or formerly registered with the CFTC, engaged in acts or practices that violated the Commodity Exchange Acts and*



*Regulations.” This court feels compelled to recognize the legitimate interest which the CFTC has in investigating the allegations involved in the fraud on Codelco in ascertaining whether and to what extent the scheme of mis-pricing of futures contracts and payment of kick-backs violated US laws.”*

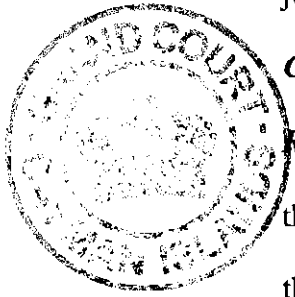
21. In the case of *Re H* [1996] CILR 237 the applicant sought directions on whether he should comply with a subpoena issued by a grand jury in the United States. While there were other reason for dismissing the application, Smellie J. (as he was then) stated at 244:

*“Moreover, it is to be noted that the subpoena in question, which seeks to have effect in this jurisdiction, does not emanate from the Pennsylvania Court but from the grand jury. By this no disrespect is meant to the latter’s proceedings. It is, however, a well-established principle of English common law that the court will not, and is not as a matter of judicial comity obliged to, render assistance to the deliberations of the grand jury, which is not a court: see Rio Tinto Zinc Corp. v Westinghouse Elec. Corp... The affidavit evidence tendered to me in support of this application, apart from the reference to the stay ordered by the Pennsylvania Court, does not go on to explain whether the court has its own order sought to endorse the grand jury subpoena, even while imposing the stay. Even if that were the case, I would be obliged to conclude that there would be an exercise by the US court in these Islands of power which our courts would regard as excessive.”*



22. Although it is submitted that there may appear to be a possible inconsistency between S.4(1) and S.4(7) of the Law, I feel bound by the definition of

proceedings contained in subsection 7. I do not accept the Applicants' submission that S.4(1) should be read as applying "*whenever a person intends or is required to give evidence in , or in connection with, any proceedings being tried, inquired into or determined by ....any other authority*" in isolation to subsection 7. There are no Court proceedings and the evidence tends to show that none can be brought to enforce compliance with the Request. It cannot be argued that the FINRA investigation is even a "*preliminary matter leading to a proceeding.*" ***In Re Coldelco*** the pending notice of motion, was held to be a preliminary to court proceedings and what brought it within the definition in S.4(7) and gave the Court jurisdiction. Smellie C.J. stated that this was the distinguishing factor between ***Coldelco*** and the earlier decision he had made in the unsuccessful application in ***RE H***. I note at para 78 in ***Ansbacher*** the Chief Justice commented that in ***RE H*** the Court accepted that it had jurisdiction to grant directions, notwithstanding that the overseas authority, the grand jury was not a court. Importantly he then went on to note that the grand jury's deliberations were also preliminary to court proceedings in which the indictments it returns are tried and it was this which could bring a grand jury within S.4.



23. Accordingly I decline to give the directions as sought.
  
24. Before closing today I would just like make two additional comments. It is evident to this court that the Applicants have followed the right procedures and responsibly sought to obtain the required directions from the Grand Court today in

order for them to be in a position comply with the request from FINRA. Despite forceful submission made by their counsel made in support of their application, I have declined to make the directions required to enable them to disclose the confidential information. There is little more they could have done to obtain the necessary directions. In light of these observations I give leave, if it is required, to the Applicants to provide a copy of this ruling to their US attorneys and FINRA.

25. I would like to also add that if FINRA may still be able to seek some information using the avenues made available by Mutual Legal Assistance arrangements. However, that will be a matter for the Authority.

**Dated this 14<sup>th</sup> day of October 2014**



**THE HON. MR. JUSTICE RICHARD WILLIAMS  
JUDGE OF THE GRAND COURT**

