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 CHAMBERS

Appearances:	Ms. Lexa Hilliard QC and Ms Katie Pearson of Harneys on behalf of Gerald Metals S.A. Mr Peter Tyers-Smith and Ms Pamella Mitchell of Kobre & Kim on behalf of the Trustees of the XYZ Trust Mr Paul Murphy on behalf of Safeguard Management.
Before:	The Hon. Justice Raj Parker
Heard:	19 September 2017
Draft Judgment Circulated:	26 September 2017
Judgment Delivered:	28 September 2017

GRAND COURT CAYMAN ISLANDS

HEADNOTE

Confidential Information Disclosure Law 2016-nature of proceedings held 'in chambers'-common law principle of "open justice"-use of materials generated in applications under section 4-Practice Direction No 3 of 1997.

JUDGMENT

Introduction

1. In the first week of June 2017 I heard argument and on 6 July 2017 delivered a judgment concerning an application by Safeguard Management (SM) pursuant to section 4 of the Confidential Information Disclosure Law 2016 (CIDL). The application related to a disclosure order made by an LCIA arbitral tribunal concerning certain information which

was confidential to SM and the Trustee (UVW) of a Trust then known only as the XYZ Trust.

2. SM sought directions as to whether the confidential information should be disclosed and if so whether there should be any conditions attached.

3. Gerald Metals SA (Gerald) and UVW, the Trustee of the XYZ Trust, both intervened in that application. Gerald's counsel Mr Gallagher submitted that the documents should be disclosed without any redaction concerning the identity of the Trustee, because an essential feature of the disclosure was to allow the arbitral tribunal to assess the terms of an alleged concealed related party transfer and its propriety.

4. The parties agreed that SM held certain information confidential to itself and to the Trustee of the Trust which *was* caught by the Order for disclosure against SM and I decided that the due administration of justice in the arbitration proceedings and the public interest was served by making an Order under section 4 of CIDL in which discovery of those documents should be given on the terms requested, with the condition that facts which might reveal the identity of the Trustee be excluded and kept confidential.

5. I decided that identification evidence concerning the identity of the Trustee was not required by the disclosure order on its terms. If I was wrong about that I decided that as a matter of discretion, that all facts which might reveal the identity of the Trustee be excluded and kept confidential.

6. It was clear from the material that I had been referred to at the hearing that Gerald were seeking to join the Trustee to the litigation it had commenced in the Commercial Court in London and I took the view that it should not be permitted to use the disclosure order in the arbitration to obtain information by using the Cayman proceedings with which to do that. The information (as to the identity of the Trustee) was not necessary for the prosecution of its claim in the arbitration itself. Gerald clearly wanted facts directed towards identity evidence because, assuming it was successful in the arbitration, it would need to enforce its claim. It would be bound by the LCIA Rules (Rule 30) not to use the documents disclosed for purposes other than the arbitration. But that Rule would not preclude Gerald from making use of identification evidence to prosecute or enforce its claim in other proceedings.

7. In fact the LCIA arbitration tribunal delivered its award on 21 July 2017 without having received the documents that SM had been ordered to produce. Moreover I am told by Leading counsel for Gerald, Ms Hilliard QC, that the documents themselves have never been disclosed to Gerald by SM, although they were identified in a confidential schedule to an Order of this court (see below). I should say in passing that they seem to be quite limited in scope.

8. Gerald was successful in its arbitration claim and has also recently obtained an ex parte order from the Commercial Court requiring the disclosure of the identity of UVW, which has now been complied with.

9. Therefore in these proceedings UVW can now be referred to as FPC Management Inc and the FPC Capital Trust (FPC). I am told by Ms Hilliard QC for Gerald that SM and FPC have common directors.

10. Whilst there has been much recent activity in the Commercial Court in London including the obtaining by Gerald of a freezing order against FPC on 14 September 2017, there have also been continuing disputes between Gerald and FPC in Cayman following my judgment on 6 July 2017.

11. At a hearing on 8 August 2017 I invited the parties to try to reach an accommodation regarding the removal of a reference to certain confidential documents in a pleading which Gerald had filed in the Commercial Court in London, which I understand Gerald has agreed to do.

12. However, in the context of attempting to reach agreement on a consent order to deal with this and in relation to negotiations to dispose of a Summons and Notice of Motion dated 20 July and an ex parte on notice Summons dated 4 August 2017 and a Notice of Motion dated 7 September 2017, a point has arisen upon which both parties seek the determination of this court. I am told by counsel that a ruling on this question may well be the only matter of substance (apart from costs) between the parties that is left to be decided in these proceedings, which may otherwise be disposed of by consent.

13. The issue would seem to be an important one as it relates to the status of matters raised, recorded and submitted in CIDL proceedings held in chambers.

14. Mr Tyers-Smith for FPC argues that the materials produced in the Cayman CIDL proceedings including all affidavits, exhibits, skeleton arguments, and transcripts of all hearings and the confidential documents themselves (which were the subject matter of the application) as defined in a confidential schedule to an Order of this court dated 17 July 2017, should remain confidential and not be used, produced or referred to elsewhere, unless of course, they come into the public domain or are disclosed by a party (other than Gerald) to the Commercial Court claim or other legal proceedings. That of course begs at least one question which is whether they are already in the public domain, which in turn requires an assessment of the nature of the CIDL proceedings held in chambers and the principle of open justice.

15. Mr Tyers Smith submits that the proceedings commenced by SM pursuant to CIDL are by their nature confidential to the parties. He contends that the proceedings before the court, including the hearing in June 2017

which preceded my judgement, and all proceedings relating to enforcement of orders and transcripts of any hearings, including the hearing of 8 August 2017, are confidential and may not be used by Gerald for any other purpose. This he submits is not only an important question of principle, but as a practical matter he says there has been a history of misuse by Gerald of confidential information for the purpose of advancing its claims in related litigation which should not be allowed to continue.

16. Certainly it is the case that reference was made by Gerald to information deriving from these proceedings as set out in the confidential schedule in the paragraph of the Commercial Court pleading (mentioned above) which identified the relevant documents and the date on which it was alleged UVW participated in the alleged conspiracy. As I have said Gerald has offered to withdraw that information from the pleading.

17. Ms Hilliard QC for Gerald rejects Mr Tyers-Smith's contentions and submits that proceedings pursuant to CIDL should not be treated any differently to other civil proceedings in this jurisdiction and that save in exceptional circumstances justice is to be administered in public. It makes no difference to this principle whether the proceedings are in open court or in chambers. She says there are no exceptional circumstances here. She submits that it has always been open to FPC to apply for express confidentiality restrictions or to seal material if it was concerned about their use and it has failed to do so.

Decision

18. On 24 June 2016 the Legislative Assembly of the Cayman Islands repealed the Confidential Relationships (Preservation) Law (2015 Revision). On 15 July 2016 CIDL was passed into law to provide for the circumstances under which confidential information may be disclosed. The primary purpose of CIDL was to remove the criminal sanctions which pertained to the previous law if confidential information was disclosed, to allow for disclosure in an increased number of circumstances, and to dispel the misconception that the Cayman Islands was a jurisdiction which promoted secrecy. I note in passing that the Grand Court Rules have not yet been updated pursuant to S.5 of CIDL to prescribe rules and forms governing the procedure for applications of this nature.

19. It is a well-known general principle that trustees must keep the affairs of the trust as well as personal information relating to beneficiaries of the trust confidential. When applications are made by third parties for disclosure of confidential information relating to trusts, especially where information is sought to assist objectives in litigation, it is open to the trustee to make an application to the Grand Court under section 4 for directions as to whether or not to disclose the confidential information in question, and if so on what terms.

20. The old law was a relatively early one for this jurisdiction, originally enacted as it was in the mid-1970s. It was introduced at a time when the Cayman Islands' financial services industry was not nearly as extensive as it is today and it was designed to protect the confidentiality of the legitimate commercial activities and business dealings then taking place. It essentially applied the common law duty of confidentiality that already existed between financial institutions and their customers to a wide range of professional relationships dealing with confidential information across the industry. To reinforce the seriousness of the protections it offered, it provided for criminal sanctions for breach of its provisions.

21. As with the previous law, under CIDL, applications should still be made to seek the court's direction where confidential information is required to be given as evidence in relation to any proceeding whether within or outside of the Cayman Islands.

"Confidential information "is defined as including 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.

22. Section 3 deals with the limited circumstances in which a person who owes a duty of confidence may disclose it without being in breach of the law.

23. Section 4 provides that a person who is required to give evidence (which includes producing documents by way of discovery in any proceeding within or without the Islands), which contain confidential information, has to apply for directions from the Grand Court before giving that evidence, unless he has the consent of the principal.

24. As I have said this case commenced with such an application by SM under section 4(3).

25. Section 4(8) makes clear that the person who receives confidential information pursuant to such an application is fully bound by the duty of confidence as if the information had been disclosed to that person in confidence by the principal.

26. So there is no question it seems to me that the information which was the subject matter of the application by SM and which UVW accepted and I ordered should be disclosed (subject to redaction) remains confidential. That much is also made clear from the confidential schedule to the consequential order made which listed the documents to be disclosed in accordance with the direction given under section 4(6)(b) and which has the words *".. Not to be retained on the court file ....No public inspection"* in the title.

27. However, does it follow as Mr Tyers-Smith submits that the entire CIDL proceedings are to be treated as having been held in effect *in camera* so

that no information concerning matters raised in the proceedings themselves through affidavits, exhibits, written arguments, transcripts and the like can be referred to outside of the proceedings?

28. In my judgement they are not to be treated in this way.

29. Certainly the Grand Court hears such applications in chambers ie in private, but it is clear from the relevant Practice Direction going back 20 years (No3/97) that the publication of information relating to proceedings before the court sitting in private shall not, save in exceptional circumstances, in itself be a contempt of court. The Chief Justice made it clear that in view of the sensitivity of many proceedings routinely brought in the commercial or civil jurisdiction of the Grand Court the parties are at liberty to apply for an order against or delimiting publication.

30. Indeed Mr Tyers-Smith, following receipt of my Judgment, wrote to the court on 17 July 2017 asking whether the hearing was dealt with in chambers under GCR Order 103 r.6.

"This appears to be the obvious intention of the rule because if CIDL proceedings do not take place in private, the public at large would be entitled as of right to acquire confidential information by attending court and witnessing the proceedings. We are aware from other cases that it is common for matters heard in private to be adjourned into open court for the purpose of giving judgement, which is what we assume to be the judge's intention in this case,"

31. In response by way of email dated 18 July 2017 the Financial Services Division Judicial administration, having consulted me, said that:

"Yes the hearing was in chambers -and the judgement was in open court, unless anyone has any objections to that."

32. The court therefore expressly confirmed the position. It was open for Mr Tyers-Smith's clients to apply for an order that all or part of the court file should be sealed and not be open to inspection by anyone without leave of the court pursuant to Practice Direction No 1 of 2015, or otherwise for an order against Gerald prohibiting or delimiting use specifically. No such application was made.

In *AHAB v SAAD [2011 (1) CILR 326] at paragraphs 15 and 16* the Chief Justice quoted with approval the following passages from the speech of Viscount Haldane L.C in *Scott v Scott*([1913]) A.C at 453

".... The power of an ordinary court of justice to hear in private cannot rest merely on the discretion of the judge or on his individual view that it is desirable for the sake of public decency or morality that the hearing should take place in private. If there is any exception to the broad principle which

requires the administration of justice to take place in open court, that exception must be based on the application of some other and overriding principle which defines the field of exception and does not leave its limits to the individual discretion of the judge".

(ibid, at 437 – 438)

"It may often be necessary, in order to attain its primary object, the court should exclude the public. The broad principle which ordinarily governs it therefore yields to the paramount duty, which is the care of the ward or the lunatic. The other case referred to, that of litigation as to a secret process, where the effect of publicity would be to destroy the subject matter, illustrates a class which stands out on a different footing. There it may well be that justice could not be done at all if it had to be done in public. As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end must accordingly yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration. The question is by no means one which, consistently with the spirit of our jurisprudence, can be dealt with by the judge as resting in his mere discretion as to what is expedient. The latter must treat it as one of principle and as turning, not on convenience, but on necessity"

33. The Chief Justice went on to say at paragraph 16

"I do not understand the law and practice in our jurisdiction to have departed from those fundamental principles described by Viscount Haldane L.C. While the law in practice recognises that, in exceptional circumstances, the judge may determine the proceedings are taken in private, the general rule is that court proceedings are conducted in public. There are of course already some well-recognised types of proceedings which the rules of the court will allow to be taken in private..... Where, however, other types of proceedings are sought to be taken in private the judge will decide not according to what seems convenient or subjectively in his view to be appropriate, but having regard to what is necessary for the proper administration of justice".

34. And at paragraph 17

"For practical reasons of necessity, proceedings of the kind engaged in this case are routinely taken in Chambers, pursuant to the Grand Court Rules, O.32, and so are treated as taken in private. That fact does not however, automatically cloak them in secrecy. Indeed on the contrary while the public has no right to attend hearings in Chambers they may apply to do so subject to the practical restraints of the accommodation and the nature of the proceedings, and the disclosure of what occurred in Chambers, absent an order prohibiting disclosure, is neither a breach of confidence nor a

contempt of court, provided any such disclosure does not prejudice the administration of justice; Hodgson v Imperial Tobacco[1998] WLR 1056 HL.

35. The Chief Justice had cause to consider the issue again more recently in SPhinX Group (in official liquidation) (unreported 30 January 2017).

36. Once again he confirmed the common law principle that in general the public should have access to court proceedings and access to information about what occurs in such proceedings.

"This is the right to freedom of information about all aspects of the democratic process that enables members of the public to exercise the right to freedom of expression and participation in good governance.... The right to receive information would therefore apply to all court proceedings, even those where the rights and obligations of adverse parties are not being determined. The principle of open justice would ordinarily therefore apply to all court proceedings, including such as the present for sanction of liquidators' decisions and whether partisan or otherwise" Paragraph 10

"In respect of hearings in Chambers, it is relevant to note that such hearings are not automatically to be regarded as 'in camera'. Members of the public can be permitted to attend hearings in Chambers with the permission of the judge. As was stated earlier by this court, the fact that the public does not have an automatic right to attend hearings in Chambers does not however "automatically cloak them in secrecy." Nor is there any automatic restriction on the disclosure of what occurred in Chambers-see (AHAB v SAAD)." Paragraph 14

37. I respectfully agree with the Chief Justice's observations. These CIDL proceedings are for necessary and good reasons held in private (chambers). But they are not held in secret so that no party to them is able to reveal or use information provided in them outside of the proceedings. It follows that neither is any party to them precluded from relying on material produced in them for other purposes, absent a specific order which precludes or limits this. No such order was applied for in this case.

38. There is nothing in CIDL which suggests that anything other than the confidential information subject to the section 4 application should remain confidential and certainly no support for the proposition that the entire procedure under CIDL should be "cloaked in secrecy" which would run contrary to the common law principle of open justice.

39. There may well be circumstances in the context of section 4 CIDL applications where information is so confidential that it needs to be protected from wider dissemination and use. In those cases applications must be made so that the court can decide whether or not certain material should be sealed or evidence given *in camera* based on a specific ground or exception which would justify it as being necessary for the

administration of justice. The court may make orders sealing the court file or limiting publication in such a case as provided for in Practice Direction No. 3/1997.

THE HON. RAJ PARKER
JUDGE OF THE GRAND COURT