IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 222 OF 2017 (IKJ)

BETWEEN:

BANCO INTERNATIONAL DE COSTA RICA, S.A.
PLAINTIFF

AND

(1) BANANA INTERNATIONAL CORPORATION
(2) BANACOL DE COSTA RICA, S.A.
(3) BANACOL CORPORATION
DEFENDANTS

Appearances:

Ms Kate McClymont and Ms Sally Bowler of Broadhurst LLC on behalf of the Plaintiff /Judgment Creditor

Before: The Hon. Justice Kawaley

Heard: 23 July 2018

Date of Decision: 23 July 2018

Reasons Circulated: 30 July 2018

Reasons Delivered: 7 August 2018

HEADNOTE

Ex parte application for post-judgment freezing injunction and bankers books inspection order-governing principles

REASONS FOR DECISION

Introductory

1. On October 27, 2017, the Plaintiff issued a Writ of Summons and Statement of Claim seeking to enforce a money judgment obtained against the Defendants in the New York State Court on September 8, 2015. On October 31, 2017, the Plaintiff filed an Ex Parte Summons seeking leave to serve out under GCR Order 11 rule 1(1) (m). On November 23, 2017, I granted that application. On January 23, 2018 the Defendants applied to set aside that Ex Parte Order. I dismissed that application on April 11, 2018 for reasons which were delivered on April 23, 2018. The Plaintiff entered judgment in default on May 28, 2018 for principal and interest totalling more than US$24 million.

2. On June 15, 2018, the Plaintiff/Judgment Creditor filed an Ex Parte Summons seeking:

   (a) an injunction freezing the Defendants'/Judgment Debtors' assets within and without the Cayman Islands ("Worldwide Freezing Order"); and

   (b) a disclosure order pursuant to section 8 of the Evidence Law (2011 Revision) as against Banco Colpatria Cayman Inc. (the "Bank") in respect to any and all bank accounts held by the 1st Defendant at the Bank ("Banking Books Order").

3. Due to my unavailability, that Ex Parte Summons was not heard until July 23, 2018 when I granted Orders substantially in terms of both Orders sought. I now give reasons for that decision.

Factual matrix

4. The main rationale for the present proceedings was to enable the Plaintiff to domesticate its New York judgment and use enforcement tools to ascertain what funds entered and left the bank account the 1st Defendant admitted it recently had in the Cayman Islands. An important aspect of the Plaintiff's pre-judgment jurisdictional case was that this account had been used by the 1st Defendant to evade its core contractual obligation to pay the proceeds of fruit sales into an escrow account established in New York as part of the repayment mechanism under agreements pursuant to which monies were lent by the Plaintiff to the 1st Defendant.

5. Correspondence placed before the Court for the purposes of the present application demonstrated that when the 1st Defendant notified the Plaintiff in early 2014 that it was no longer going to adhere to another contractual obligation designed to secure its repayment obligations, the Plaintiff promptly responded by commencing the New York proceedings. It was admitted in the jurisdictional hearing that during the same broad timeframe leading up to the commencement of the New York proceedings, substantial

sums which should have been paid into the escrow account established under the finance agreements, were being paid into the 1st Defendant's Caymanian account. It also emerged at the end of the jurisdictional hearing, that although the Defendants purported to exhibit copies of "*bank statements*" in evidence, the exhibited documents had been created by the Defendants from actual bank documents. This was highly suspicious and indicative of the fact that the 1st Defendant was unable or unwilling to produce true copies of its Bank statements. The suggestion that this was merely done because difficulties had been experienced in accessing original bank statements after the Bank ceased operations was unconvincing. In rejecting the proposition that the Plaintiff had failed to show that any useful purpose would be served by obtaining and enforcing a Caymanian judgment, I ruled:

> "*18. Ms King fairly argued that it was unclear precisely what enforcement tools the Plaintiff would be able to deploy in this jurisdiction as her clients were domiciled elsewhere. That uncertainty is a far cry from providing positive support for this Court finding that the benefits of enforcement are so clearly futile that the Plaintiff should be denied the chance to place itself in a position to be able to initiate enforcement procedures altogether. The remedies which may potentially be deployed are not only flexible; their purpose often entitles the judgment creditor to apply ex parte without notice for various forms of relief. This Court should be slow to stifle enforcement efforts before they have been even initiated, particularly at the instance of non-cooperating judgment debtors.*"

6. Ms McClymont took the Court through a detailed review of documents evidencing a course of conduct by the 1st Defendant designed to evade its pre-judgment obligations to the Plaintiff. In the Third Affidavit of Stephanie Feldman, the following conclusory averments were made. These averments I considered were supported by the material before this Court and the Defendants' conduct earlier in these proceedings:

> "*57. To date the Defendants have gone to great lengths and expense in the Cayman Islands and New York to wilfully evade enforcement of the NY Judgment….*"

Legal findings: the requirements for obtaining the Worldwide Freezing Order

The Court's statutory and inherent jurisdiction

7. Although the principles governing the grant of ex parte freezing injunctions are well settled, counsel rightly placed a broad array of relevant authorities before the Court.

Section11 of the Grand Court Law confers on this Court the same jurisdiction as is conferred on the English High Court and its various Divisions. Section 37 of the Senior Courts Act 1981 (UK) provides:

> "*(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.*"

8. GCR Order 29 rule 1 provides:

> "*(1) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's writ, originating summons, counterclaim or third party notice, as the case may be.*
>
> (2) Where the applicant is the plaintiff and the case is one of urgency such *application may be ex parte on affidavit but, except as aforesaid, such application must be made by motion or summons.*
>
> *(3)The plaintiff may not make such an application before the issue of the writ or originating summons by which the cause or matter is to be begun except where the case is one of urgency, and in that case the injunction applied for may be granted on terms providing for the issue of the writ or summons and such other terms, if any, as the Court thinks fit.*"

9. Ms McClymont acknowledged that the passage of time between the filing of the application and the hearing made it difficult to rely on urgency alone to justify an ex parte hearing. I accepted her alternative submission that there was a risk that if prior notice was given of the application some (admittedly ill-defined) steps might be taken by the Defendants to undermine the efficacy of the relief sought.

10. In terms of the exercise of the discretion to grant interlocutory injunctive relief, counsel relied upon this Court's decision in *Walker International Holdings Limited and another-v- Olearius Limited and others* [2003 CILR 457]. Smellie CJ, considering the discretion to grant injunctive relief against a party in respect of whom no substantive cause of action was asserted by the applicant, approved the following statement of Mummery J in *T.S.B. Private Bank Intnl.S.A.-v-Chabra* [1992] 1 W.L.R. 231 at 241:

> "*In considering this submission I bear in mind four preliminary but important points. I first take note of the wide terms of section 37(1) of the Supreme Court Act 1981 which empowers the court to grant an injunction in all cases where it appears to the court to be just and convenient to do so. Secondly, the whole basis of the Mareva jurisdiction is that, where a plaintiff has shown a good arguable case, the court, in order to protect the plaintiff's interests, has*

jurisdiction in a proper case to grant an interlocutory injunction restraining a defendant from disposing of or dissipating his assets, where the refusal of such an injunction would involve a real risk that a judgment obtained by the plaintiff would be stultified and remain unsatisfied.

Thirdly, the jurisdiction of the Court should be exercised with caution and great care should be taken not to be oppressive to the persons restrained, either in the carrying on of a business or in the conduct of everyday life.

Fourthly, the practice of the court on the grant of Mareva injunctions is an evolving one which has to remain flexible and adaptable to meet new situations as and when they arise."

Distinctive context of applications for post-judgment freezing orders

11. I considered that in the present case the need for caution was somewhat diluted as even though at the pre-judgment stage the Plaintiff did not assert a substantive cause of action against the 2nd - 3rd Defendants, those Defendants were for all enforcement purposes now Judgment Debtors. Moreover, the judicial statement set out above provided indirect support for the now well-recognised principle that post-judgment freezing orders may indeed be sought and granted. Two brief citations of authority not placed before me provide support for this broad proposition. They also illustrate how the evidential bar an applicant has to meet in terms of showing a risk of dissipation of assets will generally be somewhat lower in the post-judgment context.

12. Firstly, Burton J held in *Nomihold Securities Inc.-v-Mobile Telesystems Finance SA* [2011] EWHC 337 (Comm):

> "*4. The basis for the fear of dissipation, the hurdle being inevitably lower in relation to what could be called a post judgment freezing order, characterising the award as if it were a judgment for this purpose, than a pre-trial freezing order, was nevertheless a heavy burden for the Claimant to establish and Gloster J was satisfied, after an ex parte hearing, that they did so establish it.*"

13. The point is clearly a somewhat nuanced one, because Burton J described the hurdle faced by the applicant as being "*inevitably lower*" yet "*nevertheless a heavy one*". However, the hurdle may be materially lower where the judgment obtained by the applicant itself provides support for the grant of a post-judgment freezing order by recording a judicial determination that a risk of dissipation exists. Admittedly only indirect support for this somewhat obvious proposition may be found in *VB Football Assets-v-Blackpool Football Club (Properties) Ltd.* & Others [2018] EWHC 1232 Ch (23 May 2018). In the latter case, following judgment, a freezing order was made in favour of the judgment creditor. Simultaneously, a stay in favour of the judgment debtors was granted without a formal application supported by evidence being filed. In refusing an application to set aside the injunction, Marcus Smith J held:

> "*22.... There was no argument on the part of the Respondents that the granting of the Freezing Order was inappropriate. Such a submission could have been made. The Respondents could have contended that there was no risk of dissipation. Had such a contention been advanced, no doubt the Petitioner would have responded (if so advised) with evidence in support of its contention that the imposition of a post-judgment freezing order was appropriate, if in their view the findings in the Judgment were insufficient to sustain an application for a freezing order*." [Emphasis added]

14. In the present case, my interlocutory finding that the Defendants were (as regards the New York Judgment) "*non-cooperating judgment debtors*" based on the evidence adduced at the pre-judgment phase of these proceedings went some way towards supporting a post-judgment risk of dissipation finding.

Applications for worldwide freezing orders and establishing a risk of dissipation

15. The Plaintiff's counsel, adopting a precautionary approach, relied on the general requirements for establishing a risk of dissipation, in particular, in relation to a worldwide freezing injunction. She referred firstly to *Classroom Investments Incorporated–v-China Hospitals Incorporated and China Healthcare Incorporated* [2015 (1) CILR 451], relying in particular upon the following passages in the judgment of Smellie CJ in that case:

> "*59. To obtain a personal worldwide freezing order, the court must be satisfied that Classroom has a good arguable case for damages on the merits, that there is real risk of dissipation of assets, and that there is a reason to believe that the defendant's assets within the jurisdiction may be insufficient to meet the claimant's claims...*"

16. The good arguable case requirement clearly did not arise for determination in the present post-judgment context. All the evidence placed before the Court at the *inter partes* application to set aside leave to serve the Defendants out of the jurisdiction suggested that the assets still within the jurisdiction were likely to be insufficient to meet the Default Judgment. Ms McClymont rightly submitted that proof of a risk of dissipation was the key requirement which had to be made out in all the circumstances of the present case. The parameters of this requirement she defined by reference to the following pronouncements of Smellie CJ in the *Classroom* case:

> "*63. This court is also well aware of the following general principles to be applied in dealing with the question of risk of dissipation:*
>
> *(a) The applicant must demonstrate a real risk that the respondent will engage in activities outside the usual and ordinary course of its business which will have the effect of dissipating its assets and*

making it more likely that a judgment in favour of the plaintiff will go unsatisfied: JP Morgan Multi-Strategy Fund L.P. v. Macro Fund Ltd....(2002) CILR 569, at para 14);

(b) *The applicant must adduce solid evidence of a real risk of the judgment remaining unsatisfied unless the defendant is prevented from dealing with his assets within the jurisdiction: Bank of Nova Scotia v. Emerald Seas Ltd.... (1984-85 CILR, 180 at para. 35). While this requirement may be entirely appropriate in a purely domestic Mareva-type situation, as Mr Levy submits, the notion...has to yield somewhat in a case where assets are held ...across the globe, so that no one court would have jurisdiction over the defendant in the place where relief is sought...*"

17. Counsel's review of the evidence demonstrated that the requirements of (a) were met. In summary, the 1st Defendant had firstly failed to pay monies it had contracted to pay into an escrow account to secure its repayment obligations both before and after the New York Judgment was obtained. It had also concealed or disguised its true financial position in relation to its account with the Bank in the course of the present proceedings and generally failed to cooperate with judgment enforcement efforts. The requirements of (b) (preventing the Defendants from dealing with their assets within the Cayman Islands) did not on the present facts need to be met. For essentially the same reasons that I found that the Plaintiff had made out a jurisdictional case against the 2nd and 3rd Defendants (namely their close commercial and corporate ties to the 1st Defendant), I was satisfied that a case for post-judgment injunctive relief had been made out against all three jointly and severally liable Defendants/Judgment Debtors. I accepted the following arguments set out in the Plaintiff's Skeleton Argument:

"43...i. The Defendants are jointly and severally liable to the Plaintiff pursuant to the Cayman Judgment;

ii. The First Defendant identified in its letter of 20 January 2014 that at least the Second Defendant has sold assets which they were prohibited from doing pursuant to clause 6.2 of the Finance Agreement. They failed to account to the Plaintiff from the proceeds of those sales or confirm where those funds are located; and

iii. The Defendants are part of the same group of companies managed by the same Secretary General and President and therefore under the same mind management and control.

44. Accordingly, it is submitted that the Defendants' conduct (whether considered alone or together) establishes a course of conduct on the part of the Defendants which, absent an order being made by this Court, is likely to result in the Defendants dissipating their assets with the consequence that the Plaintiff's judgments will remain unsatisfied.

Disclosure

18. The fact that broad disclosure of the Defendants' current and historic asset position was sought was also relied upon as justifying modification of the usual requirement that proof of dissipation of assets within the jurisdiction is required. Earlier in his judgment in *Classroom*, Smellie CJ opined as follows:

> "*41. Also, the fact that Hospitals' and Healthcare's assets may be said not to be in Cayman is nothing to the point. As Millet L.J. pointed out in Cuoghi, where disclosure is needed, that is most appropriately requested in the court of the defendant's home jurisdiction. Moreover, as Millett L.J. has also observed in Cuoghi, disclosure can be the most valuable part of the relief sought in the home jurisdiction, without disclosure an applicant may not be able to apply to local courts for effective orders against assets abroad…*"

19. In my judgment the principle articulated by the Chief Justice in a somewhat different factual context applies with equal force to the present case. Here, the Cayman Islands are not any of the Defendants' "*home jurisdiction*". The evidence establishes and the Defendants admitted that assets were in this jurisdiction and the Plaintiff has established that it is likely that valuable information about where those assets came from and went to exists within this jurisdiction. Disclosure is the most important part of the relief sought in the present proceedings and this is no less the case because it is not the Defendants' home jurisdiction. The need for flexibility in the Mareva jurisdiction contended for over 25 years ago by Mummery J in *T.S.B. Private Bank Intnl.S.A.-v-Chabra* [1992] 1 W.L.R. 231 at 241 and approved by Smellie CJ some 10 years later in *Walker International Holdings Limited and another-v- Olearius Limited and others* [2003 CILR 457] at paragraph 61 is, surely, an enduring requirement whenever this Court is called upon to grant interim injunctive relief:

> "*…the practice of the court on the grant of Mareva injunctions is an evolving one which has to remain flexible and adaptable to meet new situations as and when they arise…*"

This Court has previously held that it is acceptable at the ex parte stage to seek broad disclosure, leaving it to the defendant to seek appropriate modifications of the relief initially granted. The Worldwide Freezing Order seeks disclosure of up to date and historic information and copies of statements relating to any accounts held in the Cayman Islands within 21 days. In *Meridian Trust Company Limited and another-v-Batista Da Silva and others* [2017(1) CILR 370], a far larger and more complex case than the present one, Mangatal J adopted the following principled and practical approach to a complaint that the disclosure order she had initially granted was burdensome:

> "*110…the burdensome nature of the disclosure orders, which has now at this inter partes stage come home to me with greater force, can be dealt with by*

granting longer time periods for compliance. Indeed, even the applicants themselves appear to have belatedly and/or discerningly recognised this in the longer periods of time that they are now proposing in the latest draft order. These are matters well within my discretion, a discretion which includes the power to make appropriate adjustments and variations in orders as and when deemed appropriate."

20. Because of the limited information available to the Plaintiff about the likely volume of documents the Defendants are required to disclose and their history of non-cooperation, it was in my judgment appropriate to impose a period of time for compliance of 21 days, which is only 7 days longer than the standard time period within which to comply at the ex parte stage. Modifications can in due course be made in the future if the need arises.

Legal findings: requirements for obtaining the Bankers Books Order

21. The primary statutory jurisdiction for the Bankers Books Order is found in the Evidence Law (2018 Revision). Section 8 provides as follows:

> "*8. (1) On the application of any party to a legal proceeding a court may order that such party be at liberty to inspect and take copies of any matter in a banker's book for the purpose of such proceeding, and an order under this section may be made with or without summoning the bank or any other party, and shall be served on the bank three clear working days before the same is to be obeyed unless the court otherwise directs.*
>
> *(2) Any order made under subsection (1) shall be without prejudice to the Confidential Information Disclosure Law, 2016, and for the purposes of that Law compliance with such an order by a bank or officer thereof shall, for the purposes of this Law, be deemed to be giving in evidence of the matter in the banker's book to be inspected thereunder.*"

22. The procedural underpinning for this statutory jurisdiction is found in GCR Order 38 rule 19:

> "*(1) An application under Section 8 of the Law for an order that a party be at liberty to inspect and take copies of any matter in a banker's book shall be made by summons to a Judge in Chambers.*
>
> *(2) An application under paragraph (1) may be made ex parte.*
>
> *(3) The application shall be supported by an affidavit stating -*

(a) *the nature of the proceedings and the reasons why the inspection is necessary;*

(b) *how the entries of which inspection is sought will be admissible in evidence at the trial of the action;*

(c) *the period over which it is proposed that the inspection should extend; and*

(d) *whether the accountholder has consented to the inspection and, if not, whether any relevant directions have been made under Section 4 of the Confidential Relationships (Preservation) Law (1995 Revision)."*

23. The Plaintiff's counsel was again careful to fully explore the statutory jurisdiction, consistent with the ex parte character of the application. It appears that the jurisdiction derives from section 7 of the Bankers Book Evidence Act 1879 (UK). There were seemingly not initially rules of court governing such applications in England. It was argued unsuccessfully in *Arnott-v-Hayes* (1887) 36 Ch. D 731 that it was impermissible to apply ex parte for such relief and without filing evidence in support of the application. Order 38 rule 19 makes it clear that:

(1) applications must be supported by affidavit evidence explaining the nature of the proceedings and why the evidence is needed;

(2) applications may be made ex parte;

(3) applications must indicate how the information sought will be admissible "*at the trial of the action*"; and

(4) applications must indicate whether the accountholder has consented and if not whether any directions have been made under section 4 of what is now the Confidential Information Disclosure Law 2016 ("CIDL").

24. To understand the derivation of the Caymanian statutory provision, it is helpful to compare the source provision in the 1879 UK Act which does not appear to have been significantly modified to this day:

"7. *On the application of any party to a legal proceeding a court or judge may*

order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. An order under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed, unless the court or judge otherwise directs."

25. Section 8 (1) of the Evidence Law faithfully follows the language of the UK provision. However it introduces a distinctive local requirement to ensure compliance with the CIDL. Halsbury's Laws Volume 48 paragraph 230, which was helpfully placed before the Court, explains the rationale and practice under the 1879 UK Act:

> "*The main object of these provisions is to enable evidence to be procured and given, and to relieve bankers from the necessity of attending and producing their books. They enable a party, who formerly had the right to issue a subpoena duces tecum to compel bankers to produce their books and to attend and be examined on them, to obtain an order for leave to inspect and take copies of the books. They do not give any new power of disclosure, or take away any previously existing ground of privilege...*
>
> *The power to order inspection is a discretionary power, and will be exercised with great caution, and on sufficient grounds only...The order will be made only where the entries of which inspection is sought will be admissible in evidence at trial...*"

26. Order 18 rule 19 appears to codify common law rules on how applications to inspect bankers' books should be conducted. The way in which the key requirements were met in relation to the present application will be addressed below.

Can an application under section 8 of the Evidence Law only be made prior to judgment for the purposes of a trial?

27. I was satisfied that the relevant power applied as much in a post-judgment context as in the pre-judgment one. Order 38 rule 19 makes reference to "*the trial*", but in my judgment that merely reflects the context of the cases which inform the Rule rather than the limits of the statutory jurisdiction. Section 8 speaks of "*a legal proceeding*", without any express or implied limitation. In one of the earliest English cases under the source provision, section 7 of the UK 1879 Act, *Arnott-v-Hayes* (1887) 36 Ch. D 731, Cotton LJ insightfully observed (at 737):

> "*The main object of the section is to enable evidence to be given at the trial. I do not say that it cannot be used for any other purpose; but in the present case the object sought is to obtain evidence for the trial.*"

28. The above-cited extract from Halsbury's Laws cites a case which illustrates the flexibility of the bankers' books jurisdiction: *Douglas-v-Pindling* [1996] AC 690 (PC). In that case a Commission of Inquiry was empowered to issue summonses under the Bahamian Bankers Books Act. The Judicial Committee (Lord Keith) opined as follows:

> *"15... consideration falls to be given to the manner in which a Commission of Inquiry should direct itself in deciding whether or not to issue a summons giving it access to entries in a banker's books. In their Lordships' opinion it is not helpful to approach the matter by drawing analogies with the rules which apply to discovery in contested civil litigation or with the approach adopted by the courts in connection with the production of bankers' books evidence in criminal trials. In contested civil litigation there are specific issues identified by the pleadings which require adjudication, and the relevance to these issues of bankers' book evidence may not be too difficult to determine. The same is basically true of criminal trials where specific charges are the subject of investigation. By contrast a Commission of Inquiry starts with no specific issues or charges. It has only its terms of reference, which may be extremely wide, as they are in the present case. Its function is inquisitorial, not adversarial. It must pursue lines of inquiry and in doing so may find that other lines of inquiry appear to be requisite, including investigation into some individual's or company's bank account. Bank accounts are subject to an obligation of confidence owed to the customer, and that confidence should not lightly be interfered with..."*

29. I was satisfied that the jurisdiction conferred by section 8 of the Evidence Law applies to the pre-judgment and post-judgment phase of civil proceedings. The phrase *"trial of the action"* in Order 38 rule 19 (3) (b) cannot properly be construed as reducing the scope of the jurisdiction conferred by the primary legislation which the rule is designed to support.

Were the grounds for making the Bankers Book Order made out?

30. The judgment enforcement phase of civil litigation has a different character and serves a different function to the adversarial pre-judgment phase. Its main purpose is to uphold the integrity of the Court's processes and respect for the rule of law by ensuring that litigants who exercise their rights of access to the courts are not deprived of the fruits of their judgments. Although adversarial hearings may from time to time take place, the Court's function is, it seems to me, a materially distinctive one. The Court when exercising its supervisory jurisdiction over liquidators or trustees is primarily to have the best interests of the liquidation stakeholders or trust beneficiaries in mind. Somewhat similarly, in the judgment enforcement sphere, the Court is required to have the best (public) interests of the judgment enforcement in mind, as well as seeking to vindicate the (private) rights of the judgment creditor and judgment debtor.

31. Keeping these contextual distinctions in mind, the same general test applies to an application under section 8 of the Evidence Law made for judgment enforcement purposes as applies at the pre-judgment stage. The judgment creditor must demonstrate both that the bankers' books which are sought to be inspected and copied are relevant to the enforcement process and admissible in the enforcement proceedings. It must also surely be demonstrated, where the relevant account belongs to a party to the proceedings, that (a) it is not possible or convenient to obtain the documents from the party, and (b) that there are good grounds for seeking an order ex parte. As Kay LJ stated in one of the cases placed before the Court, *South Staffordshire Tramways Company-v-Ebbsmith* [1895]2 Q.B. 669 at 677:

> "*It has been said, however, in the cases on the subject, that the Court ought to act with great caution when asked to order inspection of the account of a party to the action under this Act; and it is obvious, if that be so, that they ought to act with still greater caution when the account of which inspection is sought is that of some person who is not a party to the action. I should say that the Court would never dream of ordering such inspection without having that person before them.*"

32. In the present case it was obvious that the prospects of effectively obtaining the bank statements from the 1st Defendant were slim. The 1st Defendant had sought to prevent judgment being entered, and filed what purported to be bank statements but were in fact its own iteration of the original documents. The only explanation proffered was that the 1st Defendant could not access copies of the original statements. It seemed likely that any copies of original statements would be located abroad, but that original documents or electronic records would be found with the Bank. The Bank was within the territorial jurisdiction of this Court. As far as the propriety of proceeding ex parte is concerned, the Rules expressly permit ex parte applications. Without reference to authority, it seemed to me that a lower bar had to be met to justify not giving notice at the post-judgment stage having regard to the nature of the relief being sought and the facts of the present case. There was a tangible risk that the Defendants might take steps to undermine the efficacy of the application in circumstances where it was impossible to identify any plausible grounds for opposing the application. The Defendants had already acknowledged the existence of at least one account with the Bank and its relevance to the present proceedings. Moreover, unlike the position in England in 1895 when the *South Staffordshire Tramways* case was decided, Caymanian law has added a new layer of protection for both banks and their customers: the Confidential Information Disclosure Law 2016.

The relevance of the Confidential Information Disclosure Law 2016

33. GCR Order 38 rule 19(3) requires the affidavit supporting an application under section 8 of the Evidence Law to state:

"(d) *whether the accountholder has consented to the inspection and, if not, whether any relevant directions have been made under Section 4 of the Confidential Relationships (Preservation) Law (1995 Revision).*"

34. The Plaintiff/Judgment Creditor through its evidence admitted that it had not obtained the 1st Defendant's express consent to the application nor applied for directions under section 4 of the 2016 Law. The supporting Third Feldman Affidavit suggested that it was for the Bank, after being served with the Bankers Book Order, to consider whether it wished to take this step.

35. It was argued by counsel that the Defendants had impliedly consented through disclosing earlier in these proceedings what it contended were the only bank statements it was able to produce because the Bank had ceased operations. This was an interesting submission. I was not minded to accept this argument at the hearing because (a) it was not expressly supported by the Third Feldman Affidavit as it might have been, and (b) it was not a sufficiently clear point in any event.

36. Section 4 of the 2016 Law, so far as is relevant for present purposes, provides as follows:

"*(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 the 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.*"

37. The section also provides that applications shall be to a Judge of the Grand Court and empowers this Court to limit the extent to which confidential information may be admitted in evidence. "*Confidential information*" is defined by section 2 as including "*information...concerning any property of a principal, to whom a duty of confidence is owed by the recipient of the information*". It was clear that a duty was imposed on the Bank to seek directions under the Law, unless its client consented to the access to the bank records which the Plaintiff sought. It was less obvious that the Plaintiff seeking to rely on the material procured through an order under section 8 needed to apply for directions under the Confidentiality Law. The Plaintiff's counsel also referred the Court to section 3 of the 2016 Law, which provides that disclosure:

"*(a) in compliance with the directions of a court pursuant to section 4;*

(b) in the normal course of business, express or implied, of a principal...

shall not constitute a breach of the duty of confidence and shall not be actionable at the suit of any person."

38. Ms McClymont's research revealed an authority on an earlier version of the 2016 Law, being the Confidential Relationships (Preservation) Law ("CRPL"), namely, *Ferrostaal AG-v-Jones and others* [1984-85 CILR 143]. In this case the plaintiff applied for an order under section 8 of the Evidence Law before filing its statement of claim. Hull J declined to grant the application on the grounds that the Plaintiff was required first to apply for directions under section 4 of the CRPL. It was argued in the Plaintiff's Skeleton:

> *"53. However, the decision in Ferrostaal A.G was determined on old, far more restrictive law with regard to obtaining and disclosing confidential information, and is distinguishable from this matter for the following reasons:*
>
> > *a. At the time of that application, the CRPL provided that it was a criminal offence for a party to willfully attempt to obtain or disclose confidential information unless in accordance with (inter alia) directions from the Grand Court or another law. Pursuant to the CIDL this is no longer a criminal offence; and*
> >
> > *b. The CIDL now provides a person disclosing confidential information on wrongdoing with a defence to an action for breach of the duty of confidence as long as the person acted in good faith and in the reasonable belief that the information was substantially true. That defence was not previously available at the time of the application."*

39. I had little difficulty with accepting that the scope of confidentiality had evolved in the Cayman Islands over the last 30 years with a distinct drift towards greater transparency, at the public policy level at least. Section 3A of the Confidential Relationships (Preservation) Law 1976 (introduced in 1979) clearly adopted a more robust approach to protecting confidentiality. Section 3A (2) mandated that an application for directions under the Confidentiality Law should be served on the Attorney-General who could appear as *amicus curiae*. Although these provisions are admittedly still in force today, it would be surprising if the Attorney-General were to take an interest in participating in standard civil applications in litigation involving private parties. However, there no longer appear to be criminal sanctions imposed for non-compliance with the Confidentiality Law.

40. It was not immediately obvious from the judgment that the public policy importance of confidentiality was a relevant part of the reasoning which resulted in the conclusion that it was wrong to make an order under section 8 before directions had been given under the precursor to section 4 of the 2016 Law. However, on careful reading, it is apparent that there were two main competing arguments:

(1) Mr Andrew Jones for the Plaintiff, supported by Mr Giglioli for the

bank (who merely sought to assist the Court on the point of construction), argued that section 8 of the Evidence Law took precedence over the Confidentiality Law, and that there was no need for the plaintiff to apply for directions under section 3A of that Law before an order under section 8 of the Evidence Law was made. Alternatively, the Court had sufficient material before it to make an order under the Confidentiality Law if any directions were required;

(2) Mr Anthony Smellie for the Attorney General argued that as section 8 expressly provided that it was "subject to" the Confidentiality Law, no question of conflict between the two statutes arose. In effect, Section 8 mandated compliance with section 3A.

41. Two relevant findings were made by Hull J in *Ferrotaal AG-v-Jones and others.* Firstly, on the question who was required to apply under section 4 of the Confidentiality Law, where it was engaged, the judge held (at 151-152, interpreting a provision essentially the same as section 4(1) of the 2016 Law):

> "*Only two classes of person have standing to apply for directions under section 3A, namely persons who intend to give confidential information in evidence in legal proceedings, and those who are being required to do so.*"

42. Secondly, Hull J held (at 152), accepting the interpretation contended for by Crown Counsel Smellie:

> "*If a party to proceedings in <u>any</u> court (including this court) wishes to obtain an order for inspection under s. 8, he must first make an application under section 3A of the Confidentiality Law to this court. The substantive modification as I see it is this, that he must have the intention of using in the proceedings the information he seeks.*
> *...I do not consider that it creates cumbersome procedural requirements. The Confidentiality Law is a statement of legislative policy, in which the preservation of confidential information is, as the criminal sanctions show, held to be a weighty but not always overriding consideration.*"

43. The change of statutory framework since that decision is material in the following way. Under the 1976 Act, section 4 imposed criminal sanctions on "*any person*" who divulged confidential information without lawful authority, and provided exemptions from criminal liability. Under the 2016 Law, no such criminal penalties exist. Section 3 creates a defence against civil liability for persons who are subject to a duty of confidentiality and disclose information pursuant to directions under section 4. Under the 1976 Confidentiality Law, even after the 1979 amendments, there was no such civil liability defence. In my judgment section 3 of the 2016 Act is indicative of a

legislative policy shift from protecting the misuse of confidential information by persons generally (through criminal sanctions) to enforcing confidentiality obligations imposed on persons who are in receipt of confidential information through civil sanctions. In my judgment the Plaintiff in the present case was broadly correct to contend that it was, in the first instance at least, for the Bank to decide whether it was content to allow inspection without directions or for it to apply for directions from the Court.

44. The point in time at which the 2016 Law is potentially engaged to any material extent would be when the Bank is asked to allow the Plaintiff to inspect the 1st Defendant's banking records. The pertinent confidential relationship is that between the Bank and the 1st Defendant. If the Bank forms the view that the 1st Defendant has expressly or impliedly consented to inspection in the circumstances, it is difficult to see what legislative imperative requires the Plaintiff, a third party, to seek directions under section 4 before even a conditional order under section 8 is initially made. The crucial finding of Hull J in *Ferrotaal AG-v-Jones and others* [1984-85 CILR 143], which in my judgment still holds good under the modern statutory regime, was the following (at 152):

> "*The phrase 'Subject to...' followed by a reference to some other enactment, is a common legislative formula for qualifying the scope of*
>
> *a section. The phrase has a meaning which is plain and directory. The section is to be read subject to the other enactment...*"

45. The question of when, or if at all, directions have to be sought under section 4 is merely a case management question. It makes no sense to require an application for directions under section 4 to be made in each and every case because there may be many scenarios in which the need for directions will not even arise. I felt obliged to proceed in light of modern more flexible case management standards and to adopt a less formal approach than might have been considered routine 35 years ago. This Court today has a positive duty to manage civil litigation in an efficient manner under the overriding objective. Giving due deference to the decision in *Ferrostaal*, I granted an Order under section 8 in a somewhat different form to that sought. I granted an Order under section 8 of the Evidence Law but on terms which left open the possibility of a subsequent application for directions under section 4 of the Confidential Information Law. Rather than requiring the Plaintiff to seek directions under section 4 of the 2016 Law at the outset, I directed that the Plaintiff and the Bank should have liberty to apply for directions under section 4 of the 2016 Law or otherwise seek directions with respect to implementation of the Bankers Book Order, if necessary. The effect of this direction is that the Order will not actually 'bite' unless the Bank, which is in the best position to know whether compliance would entail a potential breach of the duties of confidentiality it owes to its own client, either:

(a) is satisfied that its client's consent has been obtained; or

(b) the Plaintiff or the Bank applies to this Court for directions under section 4.

46. On the face of the Bankers Book Order, the Court is signifying that compliance with the 2016 Law is a condition subject to which the Order is being made. It was impossible to envisage any meaningful directions being given under section 4 without the participation of the Bank. It was also difficult to see why the Court should require such directions to be sought at the outset of the section 8 application in all of the circumstances of the present case. A more formal approach might well be appropriate in other cases, particularly at the pre-judgment stage. Be that as it may, the order made under section 8 of the Evidence Law in this case was made on the express basis that the Plaintiff should not be able to actually enforce it unless the Bank satisfies itself that inspection can take place without any directions or, alternatively, directions are issued by this Court. Having regard to the ex parte nature of the application, the Plaintiff is expected to seek this Court's confirmation that the requirements of the 2016 Act have been met before fully enforcing the ex parte Order.

47. For the above reasons on July 23, 2018 the Plaintiff was granted (on an ex parte basis) a post-judgment Worldwide Freezing Order and (conditionally) a Bankers Book Order under section 8 of the Evidence Law.

IAN RC KAWALEY
JUDGE OF THE GRAND COURT

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