BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

BVIHCV2007/0316

BETWEEN:

ANSOL LIMITED

Claimant

AND

ELLERAY MANAGEMENT LIMITED
HAMER INVESTING LIMITED

Respondents

Appearances:

Mr. Christopher Young and Ms. Patricia Adams of Harney, Westwood & Riegels for the Claimant
Mr. Michael Faye and Ms. Clare-Louise Whiley of Ogier for the Respondents
Mr. Andrew Bolton and Mr. Stephen Dougherty of Appleby (Interested Party-TadAZ)

2008: February 15th and 26th

JUDGMENT

(Civil Practice and Procedure – Discovery – leave sought to disclose documents discovered for a collateral purpose – principles on which court will grant leave – whether documents subject to legal professional privilege – CPR 2000 Part 28.17)

[1] **JOSEPH-OLIVETTI, J.:** This is an application by Ansol Limited ("Ansol") for an order that they be permitted to disclose in proceedings in the High Court of Justice in London, Case Ref. 2006 Folio 271, between Tajik Aluminum Plant ("TadAZ") and Ansol and others the reports pertaining to the affairs of Hamer prepared by the Official Receiver pursuant to an order of court in Claim No. BVIHCV183/2005[1] and relevant correspondence between the Official Receiver and the parties to the BVI claim.

[1] The parties to his claim were the same parties as are now before the court.

Background

[2] Ansol relied on the affidavit of Mr. Stephen John Tricks[2] filed on 24th December 2007 together with the exhibits thereto and also its written submissions. The Respondents did not file any evidence in opposition but relied on their written submissions.

[3] To put this application in perspective one needs to consider the background. TadAZ, a state-owned aluminum smelting plant in Tajikistan commenced proceedings in London in May 2005 against a number of defendants including Ansol.[3] In July 2005 Ansol brought a counterclaim by way of a Part 20 claim against TadAZ, OJSC Russian Aluminum ("Rusal") Hamer Investing Ltd. ("Hamer") and other Part 20 Defendants. At the time, Hamer, a BVI company was owned by Ansol and Rusal through its subsidiary Elleray equally.

[4] According to Mr. Tricks the dispute arose out of the supply of alumina and other raw materials to and the production of aluminum by TadAZ. Some of the supplier companies including Ansol were controlled by Mr. Nazarov, the third Defendant in the English proceedings. In May 2003 Rusal and Ansol entered into a joint venture to carry out joint projects including in relation to TadAZ. Hamer served as the joint venture vehicle in relation to the TadAZ trade. It appears that TadAZ's claim is for an alleged fraud over TadAZ. The case summary of TadAZ at SJT1 sets out the full extent of the fraudulent scheme which is termed a "corrupt and fraudulent scheme" effected by Mr. Nazarov and companies owned, associated or controlled by him.

[5] Understandably, Ansol and Elleray could not agree on how Hamer should act in the English proceedings. As a result, Elleray commenced the BVI proceedings on 22nd July 2005 asking that Hamer be wound up on the just and equitable ground as Hamer was considered deadlocked and for joint liquidators to be appointed. It properly joined Ansol in the action. In the interim, Elleray applied for the appointment of a provisional liquidator or a receiver to determine the stance which Hamer should take in the English proceedings.

[6] Ansol opposed Elleray's application but subsequently, Ansol and Elleray agreed that the Official Receiver, Mr. Christopher Hill be appointed as receiver and manager of the assets of Hamer. This was done by order of 21st December 2005. By this order the Official

[2] A partner in Clyde & Co. a law firm of London who together with Harney Westwood & Riegels represent Ansol.
[3] Ansol was incorporated in Guernsey on 22nd September 1998

Receiver was to 'investigate what action should be taken in Hamer's best interests including…in relation to (a) proceedings commenced in the English High Court under claim number HC05C01237 ("the English Proceedings") and (b) its receivables and payables including any debt owed to it by Tajik Aluminum Plant'.

[7] Under the said order the Official Receiver was to file in court and serve on the parties, a report of his investigation and any proposed action by February 2006 and he had power to serve a redacted report where there was conflict between the interests of any of the shareholders and Hamer but the parties had liberty to apply to see the full report. A further order dated 24th April 2006 also directed the Official Receiver to file and serve a further report. Both orders provided for the unredacted reports to be sealed by the Court. Two unredacted reports were filed and served by the Official Receiver pursuant to the orders.

[8] The proceedings in the BVI were subsequently settled. However, the English proceedings continue save for the Part 20 claim against Hamer which was settled. It is remarked that as a result of this settlement, Elleray is now the sole owner of Hamer and Hamer has issued arbitration proceedings in Switzerland against TadAZ in relation to the debt allegedly owed by TadAZ to it.

[9] With respect to the English proceedings I am given to understand that the bulk of the disclosure in both the main action and the Part 20 claim took place in December 2006. Pursuant to the English rules of civil procedure TadAZ applied for Ansol to disclose in respect of the BVI proceedings inter alia, any reports of the Official Receiver (whether in draft or as filed) and relevant correspondence, relevance to be as determined by the English rules, between the Official Receiver and the parties. It is noted that Ansol has disclosed all documents in its possession relating to the BVI proceedings save for the reports and the said correspondence. These were not disclosed based on Harney Westwood & Riegels' advice to Ansol that the documents were confidential and that they needed permission to do so from the Court.

[10] Mr. Tricks deposes that both Ansol and TadAZ have accepted that the Official Receiver's reports are relevant to the English proceedings and that Ansol should disclose them. With respect to the correspondence, they would determine relevance on examining each item. To that end TadAZ and Ansol obtained a consent order from the English court on 18th October 2007 requiring Ansol to make an application in the BVI Court for permission to

disclose the Official Receiver's reports and the said correspondence in the English proceedings on TadAZ's request.

[11] TadAZ has now so requested and this is the application we are now called upon to determine.

Ansol's Submissions

[12] Mr. Christopher Young, learned Counsel for Ansol, made this application pursuant to CPR 2000 Part 28.17 and/or the inherent jurisdiction of the court. Essentially, Counsel submits that the documents are relevant to the English proceedings Ansol and TadAZ having so agreed and that it is in the interests of justice for the documents to be disclosed. Further, that although the documents are confidential this is not a bar to disclosure as the limiting principle to the equitable doctrine of confidence operates so as to allow disclosure where there is a clear countervailing public interest. He relied on the cases of **Bank of Crete SA v Koskotas (No. 2) [1993] 1 All ER 748** and **Re Barings plc and others, Secretary of State for Trade and Industry v Baker and others [1998] 1 All ER 673**. He urged that Ansol is required by the order of the English court to make this application therefore it is not seeking to make voluntary disclosure but disclosure under compulsion as Ansol has an obligation to make disclosure in the English proceedings and therefore this court ought to facilitate this.

The Respondent's Submissions

[13] Mr. Fay, learned counsel for the Respondents opposes the application on two main grounds, that of confidentiality and legal professional privilege. In a nutshell, he argues that the reports and the correspondence between the parties and the Official Receiver were not only confidential but came into existence for the dominant purpose of the Official Receiver and his lawyers considering and advising on Hamer's legal position and the action that Hamer should take in the existing London Part 20 proceedings and on the prospective claims against TadAZ. Thus, they were protected by legal professional privilege.

[14] Further, Mr. Fay contended that Ansol made no attempt to explain how the documents sought are relevant in the English Proceedings and that it is a valid concern for the court to itself determine the relevance of the documents in considering whether or not to grant the application as it cannot be bound by Ansol and TadAZ's mere agreement that documents are relevant. Further counsel stressed that disclosure of the documents would prejudice Hamer who are now pursuing the debt against TadAZ in the arbitration proceedings as it was part of the Official Receiver's remit to advise Hamer on the recovery of the very debt. Counsel relied on an extract from Section A Civil Procedure Rules 1998 UK – Disclosure and Inspection of Documents.

Interested Party's Submissions

[15] Mr. Bolton attended as an observer on behalf of the interested party, TadAZ. He was allowed to address the court only on the law. He adopted the submissions of Mr. Young and contended further that the sealing of the Official Receiver's reports does not render the reports confidential and their use subject to the leave of the court and that this has no bearing on a person who already has those documents in its possession. Sealing he says is merely to prevent unauthorized access to documents on the court file. If this were true then it would appear that any person who has the documents can deploy them as he sees fit without seeking leave from the court and as a result Ansol's application is superfluous. This runs contrary to Mr. Young's position as to the effect of the court having sealed the reports.

Discussion

[16] The main questions which have arisen can be put thus – has Ansol made out a proper case for leave to use these admittedly confidential documents for a collateral purpose and/or whether the documents i.e. the reports and the correspondence are subject to legal professional privilege and if so the effect of this on the court's ability to give leave for their disclosure.

[17] The starting point is CPR 2000 Rule 28.17. Rule 28.17(1) provides that a party to whom a document has been disclosed may use the document only for the purpose of the

proceedings in which it was disclosed, unless the document has been read to or by the court or referred to in open court or the party giving disclosure and the party to whom the document belongs or the court gives permission.

[18] And, Rule 18.17(2) gives the court the power to restrict or prohibit the use of a document which has been disclosed even where the document has been read to or by the court, or referred to in open court.

[19] Rule 28.17(1) largely reiterates[4] the well established position at common law whereby a party to litigation is deemed to have given an implied undertaking to the court that documents disclosed for the purposes of legal proceedings will not be used for any collateral purpose without the leave of the court or the party making disclosure. See **Disclosure, Matthew & Malek 2nd Edn. para. 13.01** –

> "The Courts have long since recognised that any party on whom a list of documents is served or to whom documents are produced on discovery or **pursuant to an order of the Court** impliedly undertakes to the Court that he will not use them or any information derived from them for a collateral or ulterior purpose, without the leave of the Court or consent of the party providing such discovery. This is part of the wider principle that:
>
> > "… private information obtained under compulsory powers cannot be used for purposes other than those for which the powers were conferred."

[20] And at para. 13.05 the primary rationale for that implied undertaken is stated as being for the protection of privacy –

> "The purpose of the undertaking has been to protect, so far as is consistent with the proper conduct of the action, the confidentiality of a party's documents. It is in general wrong that one who is compelled by law to produce documents for the purpose of particular proceedings should be in peril of having those documents used by the other party for some purpose other than the purpose of the particular legal proceedings and, in particular, that they should be made available to third

[4] **Matthew & Malek** op. cit. suggests that the English rules which are on all fours with ours go further as the owner as well as the party making discovery must permit the collateral use.

parties who might use them to the detriment of the party who has produced them on discovery. So it has been said that the implied undertaking is more a matter of justice and fairness, to ensure that a person's privacy and confidentiality are not invaded more than is absolutely necessary for the purposes of justice. A further rationale is the promotion of full discovery, as without such an undertaking the fear of collateral use may in some cases operate as a disincentive to proper discovery. The interests of proper administration of justice require that there should be no disincentive to full and frank discovery."

[21] Before I come to consider the principles on which the court may permit disclosure it is useful to look in full at the relevant sections of the order appointing the Official Receiver as the reports, were generated and disclosed by him pursuant to that order. We already know the context in which the order was made.

[22] The order of 21st December 2005 provides:-

> "1. The Official Receiver ("the OR") be appointed as receiver and manager of the assets of Hamer Investing Ltd ("the Company") with power to investigate what action should be taken in its best interests including without prejudice to the generality thereof in relation to (a) the proceedings commenced in the English High Court under claim number HC05C01237 ("the English Proceedings") and (b) its receivables and payables including any debt owing to it by Tajik Aluminum Plant.
>
> 2. The OR shall by 28 February 2006 file in court and serve on the Parties a report of such investigation and any proposed action."

[23] The order and the later order provided further that the unredacted reports be sealed. At this juncture it must be asked what the effect of sealing is. In my judgment this is a further restriction put on the use of the reports by the court which it is entitled to do by Rule 28.17(2) as otherwise once the court read the reports then a party could use them without leave. By so doing the Court and the parties, as these were consent orders, recognized

their confidential nature. In my judgment then, sealing, as Mr. Bolton submitted, is not a device merely to ensure that no one had access to them on the court's file.

[24] Now to the principles on which the court will permit collateral use. I note in passing that in **Disclosure op. cit.** it is stated that the application for leave should generally be by application **in the action** in which disclosure was made. See para. 13.38. Here a new action was commenced but this can be regarded as merely a procedural irregularity and properly no issue was taken with that.

[25] The general principle for granting leave is that the court will not do so save in special circumstances and where this will not occasion injustice to the person giving discovery. Thus, cogent and persuasive reasons have to be shown to the satisfaction of the court. See Disclosure op. cit. para 13.3.9 –

> "In **Crest Homes plc v Marks**[5]**,** Lord Oliver formulated the general principle that the court will not release or modify the implied undertaking given on discovery save in special circumstances and where the release or modification will not occasion injustice to the person giving discovery. Thus special circumstances based upon persuasive and cogent reasons for modification or release need to be shown to the satisfaction of the court before leave will be granted to permit collateral use of disclosed documents subject to the undertaking."

[26] **Crest Homes** is highly persuasive authority and although it dealt with the English position prior to the English CPR I have no doubt that the same principles obtain to the relevant provisions with which we are concerned.

[27] On consideration of the evidence and the arguments advanced I am not satisfied that Ansol has established any special circumstances or given cogent reasons to persuade the court to permit the use of the documents in particular having regard to the confidential nature of the reports. In its application, Ansol accepts that all the documents are confidential. Granted, confidentiality is not a bar to disclosure and in deciding whether to order disclosure of confidential documents the court engages in a balancing exercise, the right to privacy against the interests of justice.

---

[5] [1987] AC 829 at 860

[28] No doubt, in this exercise the issue of the relevance of the documents to the proceedings in which they are sought to being used is a factor to be taken into account. In my view, no agreement between the applicant and a third party who has not seen the documents could bar the court from itself looking at the issue of relevance. Here it is curious that TadAZ could speak to the issue of relevance with any weight when it has not even seen the documents.

[29] The main reason given for seeking disclosure is that the documents are relevant to the English proceedings because Ansol and TadAZ have agreed that they are so. That is not good enough. Ansol must show that without disclosure of the documents in the English proceedings some irremediable injustice will be done to Ansol or TadAZ or that it is **necessary** in the interests of justice that the documents be produced. This factor can then be put into the scales and weighed against Hamer's right to privacy. Ansol has not done that. Thus even if confidentiality were the only ground on which the application was opposed no cogent reasons have been advanced to outweigh confidentiality and permit disclosure.

[30] Now to the issue of legal professional privilege. Legal professional privilege protects the confidentiality of communication between solicitor and client for the purpose of obtaining legal advice irrespective of whether the advice concerns pending or contemplated litigation and it also applies to the confidentiality of communication between solicitor or a non-professional agent or a third party directly or through an agent. See para. 31.3.12 and 31.3.13 UK Civil Procedure 1998 –

> "The general principle is that documents embodying communications with (including reports to or from) a non-professional servant, agent or third party are privileged if, and only if, coming into existence for the purpose of obtaining legal advice in existing or anticipated proceedings. …
>
> As to a document which is produced or brought into existence where the dominant purpose of its author or of the person or authority under whose direction (whether particular or general) it is produced or brought into existence, is the use of the document or its contents in order to obtain legal advise or to conduct or aid in the conduct of litigation in reasonable prospect at the time of its production is

privileged and excluded from inspection. **Waugh v British Railways Board [1979] 2 All ER 1169"**

[31] It is noted that to attract privilege as between third parties one must show that in respect of any document for which privilege is claimed the dominant purpose for which that document was brought into existence at its creation was for obtaining legal advice or for use in the conduct of pending or contemplated litigation.

[32] When one considers the remit of the Official Receiver there can be no doubt that under the terms of the first order the Official Receiver's main duty was to investigate what action should be taken **in Hamer's best interests in relation to the English proceedings and its receivables and payables including any debt owed to it by TadAZ**. On the face of it, the Official Receiver was primarily concerned with the proposed conduct of existing and contemplated litigation by Hamer. And, it must not be overlooked that he was acting for Hamer because Hamer's shareholders (Ansol and Elleray) were deadlocked so the reports generated by the Official Receiver are in a real sense Hamer's documents. Accordingly, I find that the claim to legal professional privilege is well founded.

[33] The correspondence between the Official Receiver and the solicitors would also be the subject of legal professional privilege as these communications concerned the Official Receiver's remit under the order.

[34] Counsel for Ansol also sought to persuade this court that it ought to grant the order for disclosure as the Official Receiver himself provided the reports to the Court and to the parties on the express understanding that the court would have a discretion to permit disclosure for purposes other than the BVI proceedings. This argument to my mind does not assist as it merely serves to recognize the court's authority to grant leave for collateral purposes under CPR 27.18. Neither does it operate as a waiver of privilege.

[35] In my judgment, it is beyond cavil that the documents Ansol is seeking to use are protected by legal professional privilege therefore Ansol's application must fail on this ground as well and the court has no discretion to permit their use. The case of **R v Derby Magistrates' Court exp B [1995] 4 All ER 526** is instructive as it was recognized that where legal professional privilege exists and is not waived it is paramount and absolute and not subject to the balancing exercise of weighing competing public interests against each other as in the field of public interest immunity.

[36] Accordingly, for the reasons given Ansol's application is dismissed. Ansol is to pay the costs of the application to the respondents to be assessed upon application under CPR 65.11 within 21 days if not agreed.

Rita Joseph-Olivetti
High Court Judge
British Virgin Islands