

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS

2 FINANCIAL SERVICES DIVISION

3 Before the Honourable Mr Justice Andrew J. Jones QC

4 In Chambers, 6<sup>th</sup> and 21<sup>st</sup> October 2014

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CAUSE NO: FSD 96 of 2014

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8 IN THE MATTER OF the Foreign Arbitral Awards Enforcement Law (1997 Revision)

9 AND IN THE MATTER OF an application for the enforcement of an ICDR Arbitral  
10 Award dated 27 June 2014 in Case No. 50-117-T-00924-12

11 BETWEEN:

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13 SASKEN COMMUNICATION TECHNOLOGIES LIMITED

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Plaintiff

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- and -

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SPREADTRUM COMMUNICATIONS INC.

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Defendant

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20 Ms Jane Hale-Smith of Appleby for the Plaintiff

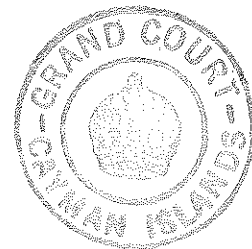
21 Ms Shelley White of Walkers for the Defendant

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REASONS

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1. This is an application for an order pursuant to GCR Order 63, rule 3(4) that an affidavit and skeleton argument filed on behalf of the Plaintiff be "closed and not open to inspection by any party or other person except with the prior leave of the Court" on the grounds that they contain information which is confidential as between the parties.

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1 Alternatively, the Court is asked to make an order that the parties be given 7 days' notice  
2 if any non-party makes an application under rule 3(5) for an order permitting inspection  
3 of this Court file.

4 2. To put the application into context, it is relevant to record that this is an action to enforce  
5 a foreign arbitral award pursuant to the Foreign Arbitral Awards Enforcements Law  
6 (1997 Revision) ("the Law") which gives effect to the New York Convention as part of  
7 the domestic law of the Cayman Islands. The action was commenced by an ex parte  
8 originating summons issued on 29<sup>th</sup> August 2014. The summons was supported by two  
9 affidavits sworn by Matthew R. Reed, a California qualified lawyer who has been  
10 responsible for conducting the arbitration on behalf of the Plaintiff. In order to comply  
11 with the requirements of section 6 of the Law, Mr Reed's affidavits exhibit certified  
12 copies of the contract (as amended) containing the arbitration agreement and the arbitral  
13 award, together with some other related material. The subject matter of this contract is  
14 subject to strict confidentiality provisions. The originating summons came on for hearing  
15 on 5<sup>th</sup> September 2014. It was apparent from Mr Reed's evidence that the validity of the  
16 award was not being challenged by the Defendant and I therefore made an ex parte order  
17 for the enforcement of the award, subject to the Defendant's right to apply (within 14  
18 days of the date of service) for the order to be set aside. No such application having been  
19 made, this action is now concluded.

20 3. At that point the Court file contained the following original documents – the Ex Parte  
21 Originating Summons issued on 29<sup>th</sup> August 2014, the 1<sup>st</sup> and 2<sup>nd</sup> Affidavits of Matthew  
22 R. Reed sworn on 28<sup>th</sup> August and 3<sup>rd</sup> September 2014, Counsel's Skeleton Argument  
23 dated 3<sup>rd</sup> September 2014 and the Order dated 5<sup>th</sup> September 2014. The exhibits to Mr  
24 Reed's affidavits are not on the Court file. The Rules require that all affidavits must be  
25 presented for filing with their exhibits. Both the affidavit and its exhibits are stamped  
26 with the Court seal and the date stamp, whereupon the affidavit is put on the Court file  
27 and the exhibits are returned to the party's attorneys who then have an obligation under  
28 GCR Order 41, rule 9(2) to preserve them for use by the Court. It follows that the  
29 exhibits to Mr Reed's affidavits (bundles of documents marked "MR-1" and "MR-2"  
30 respectively) are in the possession of the Plaintiff's attorneys. The Court file also contains  
31 the order reflecting that this matter has been assigned to me and printouts of some e-mail  
32 correspondence between my secretary and the Plaintiff's attorneys. The Originating  
33 Summons and the Order are a matter of public record. Duplicate originals of these  
34 documents have been placed on the *Register of Writs and Other Original Process* and the  
35 *Register of Judgments* and any member of the public can inspect them and, upon payment  
36 of the prescribed fee, obtain certified copies from the Clerk of the Court pursuant to GCR  
37 Order 63, rules 7(3) and 8(3). However, the Court file itself is not open to public  
38 inspection.



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4. Access to Court files is limited. GCR Order 63, rule 3 provides as follows :-

“(3) Subject paragraphs (4) and (5), the Court file relating to any proceeding shall be open to inspection only by the parties to that proceeding.

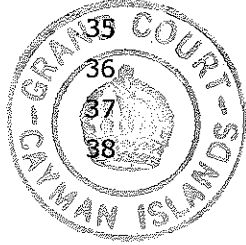
(4) The Court may order that the Court file relating to any proceeding or any specific document therein be closed and not open to inspection by any party or other person except with the prior leave of the Court.

(5) The Court may give leave [*in special circumstances*] on application to any person not a party to the proceedings to inspect the Court file or to take a copy of any document on the Court file relating to those proceedings”.

It is important to note that paragraph (5) was amended with effect from 1 February 2013 by the Grand Court (Amendment No.3) Rules 2012. The requirement to establish “special circumstances” in order to justify an order for a non-party to be given access to a Court file has been abolished. For the sake of completeness, I should record that these rules do not apply to probate proceedings, company liquidation proceedings and personal bankruptcy proceedings. The rights of stakeholders to access Court files relating to such proceedings are governed by separate rules.

5. On 24<sup>th</sup> September 2014 the Plaintiff issued a summons supported by a third affidavit sworn by Matthew R. Reed in which he explains that the summons was issued at the request of the Defendant because some of the information on the Court file is subject to the confidentiality provisions contained in the contract between the parties. The summons originally sought an order pursuant to rule 3(4) that all three of Mr Reed’s affidavits and the exhibits MR-1 and MR-2 be “closed and not open to inspection by any party or other person except with the prior leave of the court”. However, the application is now limited to Mr Reed’s first affidavit and counsel’s skeleton argument because it is recognised that his other affidavits do not contain confidential information and that the exhibits are not (and will never be) placed on the Court file. Prior to listing the summons for hearing, I indicated to the Plaintiff’s attorneys my initial view that such an order would serve no useful purpose and therefore ought not to be made. As a result of this indication, the Defendant decided to instruct its own attorneys and Ms White appeared and made the argument as if the summons had been issued by her client. Unfortunately, the original hearing of this summons proceeded on a false basis because I did not then appreciate that rule 3(5) had been amended. Having discovered my error, I invited Ms White to make further submissions which she has done, both in writing and at a hearing today.

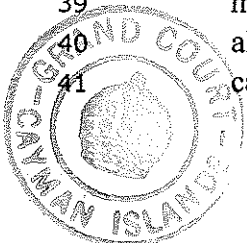
6. Prior to 1995 the Grand Court (Civil Procedure) Rules 1976 did not contain any provision relating to the manner in which Court files should be maintained or the circumstances in which the contents of those files might be made available either to parties or non-parties. The practice was that Court files were open to inspection only by the parties. The only document open to public inspection was the *Cause Book* established pursuant to rule 5(2) of the 1976 Rules. It constituted a chronological record of each proceeding commenced



1 in the Grand Court by reference to its title, commencement date and cause number, but it  
2 did not contain copies of the writs or other documents by which proceedings are  
3 commenced. As a matter of practice the general public was given access to the *Cause*  
4 *Book*. GCR Order 63 was enacted in 1995 as part of a comprehensive review of the rules  
5 and practice applicable to all civil proceedings commenced in the Grand Court. The  
6 *Cause Book* was abolished and replaced by the *Register of Writs and Other Originating*  
7 *Process* which contains an office copy of every writ, originating summons, originating  
8 motion and petition issued on or after 1<sup>st</sup> June 1995. By rule 8(2) and (3) any member of  
9 the public may inspect and obtain a copy of any document on the *Register of Writs* upon  
10 payment of the prescribed fee. GCR Order 63 also provided for the establishment of a  
11 *Register of Judgments* which contains an office copy of every final judgment or order  
12 (including default judgments) made on or after 1<sup>st</sup> June 1995. It does not contain  
13 interlocutory orders made in chambers unless the judge specifically directs that such an  
14 order be treated as if is a final order made in open court. By rules 7(2) and (3), the  
15 *Register of Judgments* is open to public inspection and copies may be obtained upon  
16 payment of a fee. Subject to the creating a right of access to the new *Register of Writs*  
17 and *Register of Judgments*, it may be said that GCR Order 63, rule 3(3) codifies the pre-  
18 existing practice that the content of Court files (as defined) is open to inspection only by  
19 the parties, subject to the exceptions contained in paragraphs (4) and (5). The issue I have  
20 to decide in this case turns upon the way in which the Court should properly exercise its  
21 power to close (or seal) documents and its power to allow non-parties access to Court  
22 files.

23 7. The Court will only order that documents on a Court file will be closed (or sealed) for  
24 some proper purpose. A document may be closed to inspection by a party, who would  
25 ordinarily have an unrestricted right of access to all the documents on the Court file, if  
26 the Court is satisfied that it is necessary to do so for the purpose of doing justice as  
27 between the parties. (*Algozaibi -v- Saad Investments Co Ltd* [2011(1)] CILR 326.) No  
28 such consideration arises in this case. Both parties already have copies of all the  
29 documents on the Court file and the litigation between them has been finally concluded.  
30 If an application is made to close the Court file or specified documents as against non-  
31 parties who have no *right* of access anyway, it seems to me that it is necessary to identify  
32 the person or class of persons who would otherwise have some expectation of being able  
33 to obtain the Court's permission to inspect the file.

34 8. In the present case the Court is being asked to make a pre-emptive order to close Mr  
35 Reed's first affidavit and the skeleton argument as a means of protecting against the  
36 *possibility* that the Court could make an order under rule 3(5) allowing *someone* to  
37 inspect the Court file for *some* reason. Counsel argues that the amendment of rule 3(5) by  
38 removing the need to establish "special circumstances" makes it all the more important to  
39 make a pre-emptive order to protect against the risk that the Court might be persuaded to  
40 allow someone to inspect this Court file. In my view this argument is misconceived. I  
41 cannot properly close (or seal) these documents simply as a means of curtailing the



1 effect of an order for inspection under rule 3(5) when there is no basis for thinking that  
2 anyone would ever have any arguable grounds for obtaining such an order. There must be  
3 some specific reason for making an order. It must be directed against an identifiable  
4 person or class of persons who would have arguable grounds for obtaining permission to  
5 inspect the Court file. In the circumstances of this case it would serve no useful purpose  
6 to close (or seal) these documents, because it has not been possible to identify any class  
7 of persons who would have any grounds for obtaining permission to inspect this Court  
8 file. The only issue raised in this proceeding was the enforceability of an arbitral award as  
9 between the plaintiff and defendant. In the event the defendant did not contest it. It has  
10 not been suggested that any non-party could expect to be able to inspect the Court file on  
11 the ground that it is affected by the Court's order. Nor could anyone expect to obtain  
12 copies of the documents in question on the basis that they were read out or referred to in  
13 open court. These documents have never been used in open court. The proceeding took  
14 place in chambers. Nor will they ever be used in open court at any time in the future. The  
15 proceeding has been finally concluded.

16 9. Ms White's alternative application is that I should make a direction that no application  
17 under rule 3(5) will be entertained by the Court without giving 7 days' prior notice to her  
18 client. In this context "the Court" means a judge or, in the case of a proceeding pending  
19 in the Financial Services Division, the particular judge to whom it is or was assigned. In  
20 effect, I am being asked to direct myself not to make an *ex parte* order in the event that an  
21 application is ever made under rule 3(5), irrespective of the grounds upon which the  
22 application is made. I do not think that it is appropriate to fetter the exercise of the  
23 Court's discretionary jurisdiction in this way.

24 10. In conclusion, I accept that Mr Reed's first affidavit and the plaintiff's skeleton argument  
25 do contain information which is required to be kept confidential by the parties pursuant to  
26 their contract but this is not, by itself, a reason for closing (or sealing) these documents.  
27 The Court file is not open to public inspection and counsel has not identified any person  
28 or class or persons who might have arguable grounds for obtaining an order for  
29 inspection under rule 3(5). Counsel has been unable to identify any cogent reason for  
30 making any order to close (or seal) these documents save to say that the parties agree that  
31 they contain information which should be kept confidential. The order sought would  
32 serve no purpose. For these reasons, this application is dismissed.

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34 DATED this 30<sup>th</sup> day of October 2014

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38 **The Hon Justice Andrew J. Jones, QC**  
39 **JUDGE OF THE GRAND COURT**

