

**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT**

**CIVIL APPEAL NO. 22 OF 2017
(GRAND COURT CAUSE NUMBER FSD 90 of 2017 (RPJ))**

BETWEEN:

Select Vantage Inc.

Proposed Appellant

AND:

Cayman Islands Monetary Authority

Proposed Respondent

CERTIFICATE OF THE ORDER OF THE COURT

- 1) The application for leave to appeal by SVI from the judgment of Raj Parker J dated 12 July 2017 is granted in respect of the proposed grounds of appeal set out at paragraphs 3-7 of the draft Memorandum of Grounds of Appeal dated and filed 11 September 2017. Leave to appeal in respect of all of the other proposed grounds is refused.
- 2) Stay of execution of the orders of Raj Parker J dated 17 May 2017 and 12 July 2017 granted until the hearing of the appeal or further order.
- 3) Liberty to apply to both parties generally.
- 4) Costs to be costs in the appeal.

Given under my hand and the seal of the Court this 21 day of September, 2017.

Registrar of the Court of Appeal

SCHEDULE OF REASONS

1. The applicant (SVI) applies for leave to appeal from the judgment of Raj Parker J ('the judge') dated 12 July 2017. SVI also seeks a stay of execution of the obligations imposed on it by the judgment. Both applications, which I will refer to as the leave application and the stay application respectively, were previously heard and refused by the judge on 8 September 2017.
2. In support of the leave application, SVI has filed a draft notice and memorandum of grounds of appeal, a copy of the judge's judgment and a brief skeleton argument in support of the application.¹
3. In support of the stay application, SVI has filed the Second Affidavit of Shaun Joseph Maloney, sworn to on 14 September 2017 and a brief skeleton argument. In opposition to the stay application, the respondent (CIMA) has filed the First Affidavit of Jennifer Hydes, sworn to on 15 September 2017.
4. CIMA has also lodged with the court a bundle of other documents, containing skeleton arguments and other materials which were before the judge. However, having regard to what the rules require at this stage, I have confined consideration of the leave application to the document referred to in paragraph 2.
5. By his judgment dated 12 July 2017, the judge refused SVI's application for an order discharging his previous order made ex parte on 16 May 2017 (the ex parte order).

¹ The application was therefore substantially in compliance with the requirements set out in rule 21A of the Court of Appeal Rules (2014 Revision), save for a copy of the judge's order from which it is sought to appeal, which was not yet available when the application was filed.

6. The ex parte order required SVI to comply fully with a direction to provide information (the direction) given to it by CIMA on 7 March 2017. The direction, which was issued following on from a request for assistance from the Australian Securities and Investments Commission (ASIC), was purportedly given under powers given to CIMA by section 34(9) of the Monetary Authority Law (MLA), to give directions to, among others, "a person reasonably believed to have information relevant to enquiries to which the request relates".
7. As part of the ex parte order, the judge also (i) gave SVI liberty to apply to vary or discharge it within five days (which it did); and (ii) ordered that all papers relating to the ex parte application (the ex parte material) should be sealed and not be open for inspection on the court file without the leave of the court having been obtained on notice to CIMA.
8. However, in advance of the inter partes hearing, the judge directed that a redacted summary of the skeleton argument relied on by CIMA at the ex parte hearing should be disclosed to SVI, and this was done (although SVI's counsel complained that the resultant redactions were so extensive as to deny SVI proper disclosure).
9. Before the judge at the inter partes hearing, SVI sought the discharge of the ex parte order, as the judge records it (at para 14), on the following grounds:
 - (i) SVI is unable to comply with the ex parte order, because SVI is not the entity which has custody of the records containing the relevant information.

- (ii) The relevant entity is in fact Elite Vantage, the parent company of SVI, which is an Anguillan registered company physically based in Costa Rica.
- (iii) The ex parte originating summons procedure used by CIMA was irregular and the judge ought not to have made the order ex parte, that procedure having denied SVI the opportunity to properly defend itself, in circumstances in which it still does not know the case against it.
- (iv) SVI has now challenged the basis of the information sought by ASIC in judicial review proceedings in Australia and compliance with the direction may render those proceedings nugatory.
- (v) SVI should in any event be given access to the documents which were sealed by the court as a matter of fairness and natural justice, so as to enable it to consider the case against it and to assess its options.
- (vi) In keeping with section 6 of the MAL, "CIMA is obliged to use its resources in the most efficient and economical way having regard to its engagements with SVI, the burden placed on SVI to comply with the Direction, and the need for transparency and fairness".

10. The judge's findings against SVI on all grounds were based on a detailed analysis of the affidavit evidence relied on by each party, the Grand Court Rules and various provisions of the MAL.

11. Evidence was given on behalf of SVI on affidavit by Mr Daniel Schlaepfer (DS), the President and Chief Executive Officer of SVI. DS is also the self-

described “controller” of the Vantage Group, a group of companies comprising Elite Vantage, SVI and others.

12. Among other things, DS said that SVI is not the entity within the group which has or has ever had the information and documents covered by the direction, in that any and all such information is held by Elite Vantage. However, again among other things, DS also said that, “[a]s the effective controller of the Vantage Group, I have the power (subject to my legal obligations and fiduciary responsibilities) to cause members of the Vantage Group to share information with one another for the purpose of business activities in the ordinary course”.² DS also said that he had “a corresponding power (again, subject to my legal obligations and fiduciary responsibilities) to cause members of the Vantage Group to provide information to the regulatory authorities for the purpose of complying with inquiries”.³
13. On the issue of SVI’s ability to comply with the ex parte order, the judge found DS’ affidavit evidence “less than convincing”, commenting that the points taken by DS were “at best technical and ... on the whole unmeritorious”.⁴ In the light of DS’ evidence, the judge found that “the information and documents are in the control of SV, in that DS could procure them to be provided in the form requested”.⁵ The judge accepted that while DS, as President and CEO of SVI and Elite Vantage, might need to consider his separate legal and fiduciary duties to each company, taking legal advice

² See para 22 of the judgment

³ See para 23

⁴ Para 31

⁵ Para 33

where necessary, that did not mean “that it is not within his power ... and so SVI’s power to procure that the material be obtained and be provided”.⁶

14. On the other hand, the judge accepted fully the affidavit evidence relied on by CIMA⁷, which showed that SVI had initially taken no point that the information and documentation sought in the direction was not in SVI’s possession or control. Indeed, so the evidence went, SVI’s correspondence with CIMA proceeded on the basis that SVI had information, relevant to the direction, which could be provided.⁸

15. On the question of the appropriateness of the ex parte procedure, the judge observed⁹ that, as the judge who had heard the ex parte application, he had “the advantage of seeing material which [counsel] has not had an opportunity to see, including all the evidence relied on by CIMA”. He went on to explain¹⁰ that he “was persuaded that ... the giving of notice, would have resulted in a defeat of the application by reason of further delay, or it may have precipitated action which the application was designed to prevent, that is to say the potential disappearance of the material”.

16. As regards the question of prejudice to SVI, the judge considered¹¹ that any such prejudice (which he found to be “minimal”) had been adequately mitigated by the provision to it of CIMA’s redacted skeleton argument (“which has allowed it to properly understand the legal basis of the case against it, whilst preserving the obligations of confidentiality CIMA has assumed”); and

⁶ At para 39

⁷ Third affidavit of Audrey Roe of CIMA, sworn to on 5 June 2017

⁸ At para 36

⁹ At para 55 (page 9)

¹⁰ At para 56 (page 9)

¹¹ At para 57 (page 10)

the extensive correspondence between the parties which “makes it clear to me that SVI understands a great deal more about the case against it than [it] now contends”.

17. Taking all factors into account, the judge considered¹² that “... SVI has had a fair hearing as to the determination of its rights and has had more than enough opportunity to know the gist of the case against it and to challenge it through this application”.¹³

18. However, the judge also found¹⁴ that section 50(1) of the MAL, which imposes criminal liability on any director, officer, agent and employee of CIMA who discloses information shared by an overseas regulatory authority that he has acquired in the course of his duties (section 50(1)(e)), “affords CIMA a complete answer to the disclosure of material sealed by this Court” (para 60).

19. The judge therefore concluded as follows:¹⁵

“In my judgment there are no grounds upon which to either discharge the ex parte order ... or to grant a stay of it in view of the Australian judicial review proceedings. This Court should not be used to delay the investigation by ASIC any further.”

20. In its proposed grounds of appeal, SVI seeks to contend that (i) the judge’s decision to grant the ex parte order under section 34(1) of the MAL was “wrong in law and/or on principle and/or constituted a serious procedural irregularity and/or breach of the principles of natural justice”; (ii) the judge was wrong in law or in principle to refuse disclosure of the ex parte material

¹² At para 60 (page 10)

¹³ The judge explicitly had in mind the judgment of Lord Sumption in Bank Mellat v HM Treasury (No 2) [2013] UKSC 39, para 30, although the passage quoted by the judge at para 59 is actually taken from the well-known speech of Lord Mustill in R v Secretary of State for the Home Department Ex p Doody [1994] 1 AC 531, 560.

¹⁴ At para 61 (page 11)

¹⁵ At para 64

and in particular to consider that section 50(1) of the MAL prohibited disclosure, given that section 50(2)(a) expressly exempts from criminal liability any disclosures made pursuant to an order of the court; (iii) the judge ought to have discharged the ex parte order and, in failing to do so, acted in breach of natural justice and SVI's right to a fair trial under section 7 of the Cayman Bill of Rights, Freedoms and Responsibilities by having regard to the undisclosed ex parte materials; and (iv) the judge ought to have found that as a matter of law SVI was unable to comply with the order to supply the information sought by CIMA in the direction.

21. In its skeleton argument, SVI submits that the judge ought not to have heard the matter ex parte in the first place; but that, having done so, he ought not to have relieved CIMA of any obligation to serve the ex parte material and a note of the hearing on SVI.
22. In this regard, SVI relies on a statement by Lord Donaldson MR in WEA Records Ltd v Visions Channel 4 Ltd¹⁶. That was a case in which an ex parte application for an Anton Piller order was considered to be so urgent that counsel was instructed to appear before a judge armed only with a draft writ and instructions as to the nature and results of the plaintiffs' inquiries. No affidavit evidence was produced, nor had counsel the advantage of being able to produce unsworn draft affidavits, but counsel revealed to the judge certain information which was said to be so confidential and sensitive that the plaintiffs considered that it could not properly be revealed to the

¹⁶ [1983] 1 WLR 721

defendants at a later stage. As to this approach, Lord Donaldson MR commented as follows¹⁷:

“I do not know what this information was, but I cannot at the moment visualise any circumstances in which it would be right to give a judge information in an *ex parte* application which cannot at a later stage be revealed to the party affected by the result of the application.”

23. SVI also refers to a strong statement by Lord Kerr in Al Rawi and others v The Security Service and others¹⁸, on the right of a party to civil litigation to be informed of the case made against it. Further, SVI questions the judge’s reliance on section 50(1) of the MAL as a basis for refusing to order disclosure of the *ex parte* material, pointing out that, had the judge made the order sought by SVI, CIMA’s disclosure of the *ex parte* material would have been fully protected by the provisions of section 50(2).
24. In all the circumstances, SVI submits¹⁹, the prejudice suffered by it as a result of the *ex parte* hearing was not remedied by the subsequent *inter partes* hearing, since “SVI remained unable to challenge the evidence that CIMA had relied on in support of the *Ex Parte* Order, or submissions that CIMA had made at the *ex parte* hearing ... [it] consequently remained on an unequal footing throughout and was deprived of the protections afforded by a full hearing, including the opportunity to make fully informed representations before the court”.

¹⁷ At page 724

¹⁸ [2012] AC 531, paras [89]-[90]

¹⁹ Skeleton Argument, para 26

25. It was also submitted that the judge was wrong to conclude that SVI was a person who had information relevant to CIMA's enquiries within the meaning of section 34(9), given the affidavit evidence relied on by SVI to demonstrate that it was not in possession of the relevant information. In this regard, SVI referred to the case of Re Hampshire Land²⁰, to make the point that there is no general principle that a company is affected by knowledge of another company simply because they share a common officer.
26. The general rule is that leave to appeal will be given only in the case of an appeal with a realistic (as distinct from a fanciful) prospect of success. In exceptional circumstances, leave may also be given if there is an issue which, in the public interest, should be examined by the Court of Appeal. Leave will generally not be given in the case of an appeal from a judge's exercise of a discretion (unless it can be shown to have been palpably wrong); nor will leave usually be given in the respect of a proposed appeal from a decision based on a judge's evaluation of oral evidence as to the primary facts.²¹
27. SVI's proposed appeal appears to give rise to three principal issues. First, whether the judge erred in hearing CIMA's originating application ex parte (issue (i)). Second, whether the judge's rejection of SVI's contention that it is incapable of complying with CIMA's direction was correct (issue (ii)). And third, whether the judge erred in ordering that the ex parte material should not be disclosed to SVI subsequent to the making of the ex parte order (issue (iii)).

²⁰ [1896] 2 Ch 743, per Vaughan Williams J at page 748

²¹ See generally Practice Direction (Court of Appeal: Leave to Appeal and Skeleton Arguments) [1999] 1 WLR 2

28. In my view, the proposed appeal has no realistic prospect of success on either issues (i) or (ii). As regards issue (i), section 34(10) is silent on whether the application which it empowers CIMA to make to the court requiring a person to whom a direction has been issued to comply with the direction is to be made on notice to that person or not. In these circumstances, as it seems to me, the decision whether to hear the application *ex parte* must therefore be one for the judge's discretion.²² In this case, the judge cited his apprehension that the giving of notice might result in a defeat of the application by reason of further delay, or might lead to the potential disappearance of the material, as a reason for his having decided to proceed *ex parte*. It appears to me that this was a consideration well within the range of factors which the judge was entitled to take into account in exercising his discretion. In any event, such prejudice as there might have been to SVI was appropriately mitigated by the judge's order that there should be liberty to apply.

29. In respect of issue (ii), it is true that the traditional deference of appellate courts to findings of fact is particularly applicable to findings arrived at after the hearing and consideration of oral testimony. It is from this exercise that the accepted advantage of the trial judge's having seen and heard the witnesses give their evidence derives. While this did not happen in this case, the judge referred to a significant amount material²³, some of which I have summarised above, which strongly suggested that SVI's current stance that it is not in possession or control of the information sought by CIMA is

²² National Commercial Bank Jamaica Ltd v Olint Corp. Ltd [2009] UKPC 16, per Lord Hoffmann at para 13

²³ At paras 18-40

something of an afterthought. That stance also appears to be in direct contradiction to evidence given by SVI's own witness, DS. In the light of this material, I can see no realistic prospect of success of an appeal from the judge's conclusion that it does lie within SVI's power to comply with the direction.

30. Issue (iii) is, I think, in a different category. In the first place, it may well be arguable that the judge's refusal to order disclosure of anything other than CIMA's redacted skeleton arguments on the ex parte application is out of line with the conventional approach underscored by Lord Donaldson MR's observation in WEA Records Ltd v Visions Channel 4 Ltd²⁴. (Though it might, of course, also be arguable that proceedings under section 34(10) of the MAL fall into a different category altogether and do not therefore attract the traditional considerations which prevailed in the context of an ordinary – albeit highly unusual – civil claim for damages in Al Rawi and others v The Security Service and others.)

31. But secondly, it may also be arguable whether section 50(1) of the MAL, which the judge considered to be "a complete answer" to SVI's request for disclosure of the ex parte material, has any bearing on the issue at all. On the face of it anyway, that section appears more to be concerned with enforcing adherence to the obligation of confidentiality on the part of directors, officers, employees, agents or advisers of CIMA. And, in any event, section 50(2)(a) appears to provide an exemption from criminal liability in the case of

²⁴ See para 18 above

disclosures that are “lawfully required or permitted by any court of competent jurisdiction within the Islands”.

32. If there is anything in either of these two points, then it might be open to question whether the judge exercised his undoubted discretion whether to grant disclosure of the ex parte material to SVI on correct principles. Taking these considerations into account, therefore, it seems to me that an appeal on issue (iii) may have a realistic prospect of success. I accordingly grant leave to appeal on this issue only. For the avoidance of doubt, I should indicate that this is the issue covered in paragraphs 3-7 of SVI’s draft Memorandum of Grounds of Appeal dated 11 September 2017.

33. This brings me then to the stay application, since, by virtue of the ex parte order, SVI is now required to comply fully with the direction. In reliance on the principles summarised in Heriot African Trade Finance Fund Limited v Deutsche Bank (Cayman) Ltd²⁵, SVI submits that there is good cause for a stay, within the meaning of section 19(3) of the Court of Appeal Law, in that it has a good, arguable appeal; a stay is needed to prevent its appeal being rendered nugatory; and that the balance of convenience favours the grant of a stay, in that SVI will suffer greater harm if the stay is refused, than will CIMA if it is granted.

34. Among the matters relied on by SVI on the balance of convenience point are that, if the information sought by CIMA is provided, then not only the appeal but the Australian judicial review proceedings will be rendered nugatory; and that the provision of the information sought by CIMA might involve DS in a

²⁵ [2011] (1) CILR 34 at [22]

breach of his fiduciary duty to Elite Vantage, while its non-provision will result in liability to SVI for contempt of court.

35. As might be expected, CIMA opposes a stay on the ground that no good cause has been shown for a stay, in that (i) there is no loss to SVI; (ii) the Australian proceedings provide no good grounds for stay; (iii) SVI can comply with the ex parte order, but has chosen not to do so; (iv) there is no need for clarification of SVI's legal position; and (v) there is a real question of urgency which requires SVI to comply with the direction.²⁶

36. I will say at once that I do not think that the case made out by SVI for a stay is a strong one, particularly in the light of the judge's clear finding that it is within its power to procure and supply the information sought by the direction. But, on the other hand, I cannot ignore the possibility that the court could ultimately find that the judge's refusal to order disclosure to SVI of the ex parte material breached the requirements of fairness in this case. In that event, absent a stay, SVI's appeal will have given it a victory in principle only.

37. As regards the matter of urgency, the judge observed²⁷ that "[t]he legislation clearly envisages a speedy resolution to an application for an order [under section 34(10)] ...", and CIMA now submits that the matter is urgent.

38. But as the chronology set out in the Second Affidavit of Shaun Joseph Maloney indicates²⁸, the ASIC investigation's focus is on trading activity which took place in late 2014, the request for assistance to CIMA was issued on 14 December 2016, CIMA's direction was issued on 9 March 2017 and the

²⁶ First affidavit of Jennifer Hydes, para 9

²⁷ At para 55 (page 10)

²⁸ At para 17

proceedings which led to the ex parte order were issued on 4 May 2017. Since that time, another four months have been consumed by the ex parte hearing, the inter partes hearing and the applications to the judge for leave to appeal and a stay.

39. In these circumstances, the rate of progress to date does not suggest that a stay for a couple months until SVI's appeal on the narrow point on which I have given leave can be heard is likely to cause substantial prejudice. I will therefore stay execution of the judge's orders dated 17 May 2017 and 12 July 2017 until the appeal is heard, or a further order is made. I make this order on the basis that the parties will do all that is necessary to ensure that the appeal can be ready for hearing, naturally subject to the court's convenience, during the November session of the Court of Appeal.

The Honourable C Dennis Morrison, Justice of Appeal