IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

ON APPEAL FROM THE GRAND COURT

CIVIL APPEAL NO. 22 OF 2017

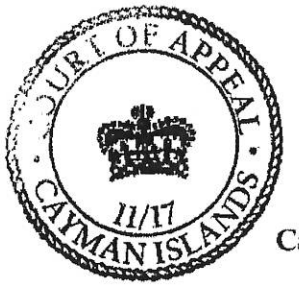
(GRAND COURT CAUSE NUMBER FSD 90 of 2017 (RPJ))

BETWEEN:

Select Vantage Inc.

Appellant

-and-



Cayman Islands Monetary Authority

Respondent

BEFORE:

THE HON SIR JOHN GOLDRING, PRESIDENT
THE HON SIR RICHARD FIELD, JA
THE HON SIR ALAN MOSES, JA

JUDGMENT

Appearances:

Mr Tom Lowe QC (instructed by Ogier) for the Appellant
Mr Neil Timms QC (instructed by the Cayman Islands Monetary Authority) for the Respondent

Hearing: 30 October 2017
Date of Judgment: 8 November 2017

Sir Richard Field, JA

Introduction

1. Select Vantage Inc ("SVI") appeals against the decision of Justice Raj Parker ("the judge") dated 12 July 2017, dismissing its application: (i) to set aside the *ex parte* order made by the judge on 16 May 2017 requiring SVI to comply within 5 days with a direction dated 7 March 2017 served on it on 9 March 2017 by the Cayman Islands Monetary Authority ("CIMA"); (ii) alternatively,

for the *ex parte* order to be stayed pending judicial review proceedings brought by SVI against the Australian Securities and Investments Commission ("ASIC") in the Federal Court of Australia; and (iii) for disclosure of the evidence, originating summons, all associated papers and the judge's notes that featured on CIMA's *ex parte* application and which the judge had ordered to be sealed and not produced for inspection without the leave of the Court obtained on notice to CIMA.

2. The direction served by CIMA on SVI was at the request of ASIC which was investigating whether there had been manipulation, false trading or market rigging, arising from trading in various securities by Merlito Securities Company Ltd ("Merlito") on markets operated by ASX Ltd and/or Chi-Australia Pty Ltd during the period 6 October 2014 to 21 November 2014.
3. In affidavits put before the judge in support of the application set out in paragraph 1 above, SVI's President and CEO, Mr Daniel Schlaepfer, deposed as follows. SVI has been registered in the Cayman Islands as an Exempt Company since 21 December 2015. Its business is electronic day-trading of securities, currencies and other asset classes on stock exchanges and other organised markets around the world. It is part of the Vantage Group of companies which includes two subsidiaries of SVI, True North Vantage Inc, incorporated in the BVI, Epic Vantage Inc, incorporated in Canada and SVI's parent company, Elite Vantage Placement Ltd ("EVL"), which is registered in Anguilla but is domiciled in Costa Rica and has its computer servers in the UK. Until it was de-registered in 2016, Merlito was a Hungerian company owned by Mr Schlaepfer which effected trades placed by traders employed by EVL. SVI has no physical presence in the Cayman Islands other than those mandated by law. Its sole purpose is to hold stock trading capital. The traders who place the group's trades are employed by EVL. Mr Schlaepfer is the Senior Executive Officer and director of all the companies in the Vantage Group and is either the owner of, or is a discretionary beneficiary of, the family trust that is the owner of the Vantage Group entities.
4. The functions and powers of CIMA are set out in the Monetary Authority Law (2016 Revision) ("the MAL"). In addition to the function of regulating and supervising financial services business carried on in or from the Cayman Islands (s. 6 (1) (b) (i) of MAL), by s. 6 (c) CIMA has the function of providing assistance to overseas regulatory authorities in accordance with the MAL, in particular, s. 34 (9) and s. 50 (3). Section 34 (9) empowers CIMA, in response to a request from an overseas regulatory authority, to issue a written direction to, *inter alios*, persons regulated under the regulatory laws, to provide specified information and specified documents. Under section 50 (3), if CIMA is satisfied that such a request should be granted, it is empowered to disclose information necessary to enable the overseas authority to exercise its regulatory functions [para (a)] and to apply to a judge of the Grand Court in Chambers in accordance with rules of court for an order to authorise action in

accordance with a request from an overseas authority pursuant to, and in accordance with, the terms of a memorandum of understanding entered into between CIMA and the overseas authority [para (d)].

5. The direction, dated 7 March 2017 and served by CIMA on SVI on 9 March 2017 ("the direction"), required SVI to produce documents in its possession or control listed in a Schedule and to provide the information listed in the Schedule within 10 business days. The information and/or documentation specified in the Schedule was the identity of, and further particulars relating to, each trader who had placed orders on the Merlito account held with Macquarie Securities Australia Limited that were entered onto the ASX and Chi-X Australia markets between 6 October 2014 to 21 November 2014.
6. The direction served by CIMA came as no surprise to Mr Schlaepfer. He had been aware since late 2014 that ASIC was reviewing SVI's trading activity and on his instructions Australian legal counsel on behalf of EVL and SVI provided information voluntarily to ASIC regarding the Vantage Group and its operations. Later in February 2016, Mr Schlaepfer had a face-to-face meeting with officers of ASIC in Sydney and in early October 2016, ASIC asked SVI to provide particulars of each trader employed by SVI who had entered the orders that were under investigation. However, SVI declined to provide this information on a number of grounds including a concern that if the information were provided it might be disclosed to offshore regulators with a view to having subpoenas issued against SVI's traders requiring them to give evidence about trading patterns of which they did not have full knowledge. ASIC's response was to warn SVI it was considering seeking assistance from CIMA.
7. Following the service of the direction on SVI there was correspondence in the period 16 March to 5 May 2017 between SVI's solicitors, Ogier, and CIMA, in which Ogier sought confirmation that CIMA had complied with MAL and the Handbook. A seven day extension was granted and Ogier expressed concern that ASIC's request for assistance had been made for an improper purpose. Then by letter dated 11 May, Ogier gave notice to CIMA that they had been instructed by SVI to issue judicial review proceedings and that in the absence of a satisfactory response by 5.00 pm on 17 May 2017, steps would be taken to protect SVI's interest including injunctive relief if necessary.
8. On 16 May 2017, CIMA applied to the judge *ex parte* under s. 34 (10) of MAL, which empowers CIMA to apply to the court for an order requiring a person who has been served with a direction to comply with the same, if that person has failed to comply with the direction within 3 days of the direction's date. The judge's order made on that application ordered SVI to comply fully with the direction by producing the documents and the information listed in the Schedule in a legible, intelligible and easily accessible form, and to deliver the same to CIMA no later than 5 days from the date of service of the order. SVI was given liberty to apply to the Court to vary or discharge the order.

9. As recorded above, the judge also ordered that the evidence, originating summons, all associated papers and his notes that featured on CIMA's *ex parte* application were to be sealed and not produced for inspection without the leave of the Court obtained on notice to CIMA.
10. Pursuant to the liberty to apply, SVI moved the application identified in paragraph 1 above at an *inter partes* hearing held on 6 June 2017 for which SVI was provided with a redacted summary of the written skeleton argument relied on by CIMA at the *ex parte* hearing. One of the principal submissions advanced on behalf of SVI was that it was impossible for SVI to comply with the *ex parte* order because the documents and information sought were not in its possession or control. This point had not been taken in any of the correspondence passing between Ogier and CIMA prior to the making of the *ex parte* order.

The relevant parts of the judge's judgment

11. Having set the scene by way of an Introduction, a description of the background and a summary of SVI's case, the judge proceeded under the heading ANALYSIS first to deal with SVI's contention that it was unable to comply with the order. In paragraphs 16 to 30 of his judgment, he reviewed the evidence on this topic and then, under the sub-heading *"Findings,"* he set out his conclusions on this part of the case in paragraphs 31 to 40.
12. In paragraphs 31, 32 and 33 the judge said:

> 31. I find the evidence of DS [Mr Schlaepfer] to be less than convincing. The points taken are at best technical and I find them to be on the whole unmeritorious. They are not points that would be taken by the effective controller, senior executive officer and owner of, or discretionary beneficiary of the family trust that is the owner of, the entities of the Vantage Group, who was seeking to be cooperative and compliant with CIMA's Direction.
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> 32. He accepts that he could procure that the information and documents be provided. I find that he has simply chosen not to do so for his own reasons, which seems to me to relate to his concerns more fully set out in the judicial review proceedings and the correspondence between Ogier and CIMA.
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> 33. I find that the information and documents are in the control of SV [SVI], in that DS could procure them to be provided in the form requested.

13. In paragraphs 34 to 37, the judge observes that the contention that it was impossible for SVI to comply with the direction was first made only at the *inter partes* hearing and in paragraph 38, having noted that concern as to the

purpose of ASIC seeking the information and its subsequent use is a thread that runs through the correspondence between Ogier and CIMA, he concluded that this was the real reason the material specified in the direction had not been produced, rather than any inability to produce it.

14. In paragraphs 41 to 62, the judge deals with SVI's contention that the *ex parte* procedure used by CIMA was irregular and unlawful and the order should not have been made on an *ex parte* basis. In paragraphs 41 - 48 he summarised the parties' submissions on this issue and under the further sub-heading *"Findings"* he then set out his conclusions on this issue. In paragraphs 55, 60 and 61 he said:

> 55. I also have of course had the advantage of seeing material which Mr Murphy has not had an opportunity to see, including all the evidence relied on by CIMA. I am satisfied that the procedure was appropriate and that the order obtained was justified on the grounds of urgency. The principal (sic) of open justice is an important one, but it may be departed from procedurally for good or exceptional reasons.
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> 60. I find 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. There has been no breach of [SVI's] fundamental right to natural justice ...
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> 61. I also find that Section 50 (1) of MAL affords MAL a complete answer to the disclosure of material sealed by this Court, to a party subject to a regulatory investigation by an overseas regulator. Certain information passed to it in confidence by ASIC pursuant to agreements and understandings between CIMA and ASIC and under the MMOU regime. It should not be disclosed to [SVI].

SVI's case on appeal

15. It was argued by Mr Lowe QC for SVI that the impression a fair-minded objective observer would have on reading the judgment, particularly paragraphs 31 and 55, was that the judge had formed an adverse view of Mr Schlaepfer and his credibility, in part at least, from the material he had seen at the *ex parte* hearing, and had taken this into account when deciding the issue whether it was impossible for SVI to comply with the direction. In the submission of Mr Lowe, the non-disclosure of that material to SVI rendered the *inter partes* hearing fundamentally unfair and contrary to the rules of natural justice.
16. Mr Lowe cited passages from judgments of high authority that included the following:

"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". [Sir John Donaldson MR in *WEA Records Ltd v Visions Channel 4 Ltd* [1983] 1 WLR 721 at 724.]

"If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them." [Lord Denning in *Kanda v Govt of Malaya* [1962] AC 322] at 337].

"In our view, the principle that a litigant should be able to see and hear all the evidence which is seen and heard by a court determining his case is so fundamental, so embedded in the common law, that, in the absence of parliamentary authority, no judge should override it, at any rate in relation to an ordinary civil claim, unless (perhaps) all parties to the claim agree otherwise. At least so far as the common law is concerned, we would accept the submission that this principle represents an irreducible minimum requirement of an ordinary civil trial. Unlike principles such as open justice, or the right to disclosure of relevant documents, a litigant's right to know the case against him and to know the reasons why he has lost or won is fundamental to the notion of a fair trial...." [Lord Neuberger MR in *Al Rawi v Security Service* [2012] 1 AC 531 at para 30]

89...The right to be informed of the case made against you is not merely a feature of the adversarial system of trial, it is an elementary and essential principal of fairness. Without it, as Upjohn LJ put it...a trial between opposing parties cannot lay claim to the marque of judicial proceedings.

90 And so the key nature of this right and utter indispensability to the fairness of proceedings must occupy centre stage in the debate as to whether it may be compromised to serve the interests which the defendants claim require to be served and which are said to justify a departure from it." [Lord Kerr in *Al Rawi v Security Service* op cit]

17. Mr Lowe also criticised the reliance of the judge on s.50 (1) of MAL for justifying sealing the Court file. That provision makes it an offence for a person who is a director, officer, employee, agent or adviser of CIMA to disclose information relating to various matters including information shared by or with an overseas regulatory authority or any communication related thereto. If producing affidavits to SVI pursuant to a Court direction amounted to "disclosure", then CIMA had already disclosed the information when it

deployed the material in Court (subject to the defence in s. 50 (2)); and in any event, there had been prior disclosure of the affidavits when they had been sworn and filed. Further, it was not open to CIMA to justify the sealing of the file on grounds of Public Interest Immunity ("PII") since the judge had not applied that doctrine.

18. I do not accept Mr Lowe's submission that on reading the judgment, particularly paragraphs 31 and 55, a fair minded objective observer would conclude that the judge had taken into account material disclosed at the *ex parte* hearing when rejecting the contention that it was impossible for SVI to comply with the direction. In my opinion, it would be a fundamental misreading of the judgment to link paragraph 55 to paragraph 31, since those paragraphs relate to quite separate and different issues, on the one hand the issue of whether it was possible for SVI to comply with the direction (para 31), and on the other hand the issue whether the *ex parte* procedure had been irregular.
19. In my opinion, the judge would have been well aware of the importance of deciding the issue he was addressing only on the evidence before the Court on the *inter partes* hearing and I can see nothing to support the suggestion that he took into account material that had been sealed. His conclusion that the evidence of Mr Schlaepfer was less than convincing and that the points Mr Schlaepfner had taken were at best technical and on the whole unmeritorious, were well open to him on the evidence adduced at the *inter partes* hearing.
20. I am also of the view that Mr Lowe's reliance on the authorities cited above involves a mischaracterisation of the nature of the proceedings in this case. *WEA Records* and *Al Rawi* were adversarial civil proceedings for damages and/or other relief for alleged private wrongs and *Kanda* involved a challenge to the appellant's dismissal as a police officer following disciplinary proceedings that were in breach of the rules of natural justice. The instant proceedings are of an entirely different character involving, as they do, the exercise of important regulatory powers conferred on a public body which enable it to render assistance under s. 34 (9) MAL to an overseas regulator by directing a regulated entity to provide specified documents and/or specified information. Such assistance as between overseas financial regulators is the subject of the OICU-IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information ("the MOU") to which CIMA and AISC are both parties. Paragraph 11 (a) of the MOU provides that each Requesting Authority will keep confidential requests made under the MOU, the contents of such requests, and any matters arising under the MOU, including consultations between or among the Authorities and, only after consultation with the Requesting Authority, may the Requested Authority disclose the request if such disclosure is required to carry out the request.

21. It is beyond contrary argument that, save where justice requires disclosure, there is a strong public interest in protecting the confidentiality of authorised dealings between overseas regulators, for otherwise their regulatory powers will be seriously undermined and regulators may be reluctant to extend to, or request assistance from, each other. It is this public interest arising from s. 6 (c) and s.34 (9) MAL and the MOU which is the justification for the sealing of the Court file, rather than s. 50 (1) MAL as held by the judge.
22. I conclude therefore that the judge was well entitled to seal the Court File. The question whether the direction should be enforced was fairly determinable without disclosure of the closed material. SVI through its lawyers and Mr Schlaepfer knew perfectly what were the concerns of AISC and the matters that were in issue at the *inter partes* hearing. There are therefore no grounds for setting aside the order made by the judge ordering that SVI provide the scheduled information and/or documents within 5 days.
23. Whether or not it was appropriate for CIMA to apply *ex parte* to enforce the direction is not an issue going to the fairness of the *inter partes* hearing. The reasons given by the judge in paragraph 56 for concluding that an *ex parte* application was appropriate were that the delay involved in an *inter partes* application meant that such a proceeding might be defeated and/or the material sought might disappear before an order was made. Speaking for myself, I find these to be unconvincing reasons. SVI and Mr Schlaepfer had known what material was being sought since the 9 March 2017, some 9 weeks prior to the *ex parte* application.
24. In my judgment, an *ex parte* application by CIMA for orders sought pursuant to its regulatory powers will only be appropriate where there are clear and strong grounds for such a proceeding. The fact that CIMA may wish to put confidential material before a judge which is not to be disclosed to a respondent is not of itself a sufficient reason for an *ex parte* hearing. Such material can be read by the judge for an *inter partes* hearing without it being disclosed if the public interest so requires. Everything will depend on the circumstances of each case and I respectfully suggest that CIMA might be well advised to keep in mind the half-way house of an *ex parte* application on notice.

Conclusion

25. For the reasons given above, I would dismiss this appeal with costs and, bearing in mind that the stay granted by Morrison JA was granted over a month after judgment below was handed down, I would direct that SVI should serve on CIMA the documents and information the subject of the judge's order within one working day of the date of this judgment.

Sir John Goldring, President

I agree.

Sir Alan Moses, JA

I also agree.

26. I also agree