IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO FSD 7 OF 2013 ASCJ

IN THE MATTER OF CONFIDENTIAL RELATIONSHIPS (PRESERVATIONS) LAW ("CR(P)L") (2009) REVISION

AND

IN THE MATTER OF A NORWICH PHARMACAL APPLICATION

IN CHAMBERS
THE 21ST FEBRUARY 2013, 15TH MARCH 2013, 7TH JUNE 2013 AND 7TH FEBRUARY 2017
BEFORE THE HON. CHIEF JUSTICE

Appearances: Mr. Jeremy Walton of Appleby for the Applicant NML (with him Ms. Anna Gilbert of Appleby)

Mr. Lawrence Cohen QC appearing on instructions of Appleby for further arguments on 7th June 2013.

Mr. Douglas Schofield, Assistant Solicitor General for the Crown

JUDGMENT

1. This is an application under section 4 of the Confidential Relationships (Preservations) Law (2009) Revision (the "CR(P)L") for directions permitting the use of certain confidential information in evidence in subsequent civil proceedings in this jurisdiction.

2. The evidence would comprise information about a banking account held in this jurisdiction with the Bank of America Merrill Lynch ("the Bank") in the names of

Mr. A.B., a public officer of the Republic of Argentina and his wife, Mrs. A.B.; as joint account holders.

3. The applicant NML Capital seeks to use the information to enforce a very large judgment debt in the amount of USD1.68 billion that it obtained in New York against the Republic of Argentina. The judgment debt arises from bonds issued by the Republic of Argentina and sued upon by NML following non-payment in keeping with their terms.

4. NML seeks to enforce its judgments worldwide in any jurisdiction where assets of Argentina might be found and attached. The bank account involved here is shown to contain USD602,000, money which NML asserts should be regarded as the property of Argentina and so available for the enforcement of its judgment.

5. This is contended for by NML on the supposition that the amounts in the bank account are inexplicably large if regarded as derived from the known income of the account holders (in particular Mr. A.B. as a public servant) and so must in reality belong to Argentina.

6. In support NML points to a similar action it had raised in Switzerland. There NML argued that bank accounts held by Argentina with UBS Zurich contained money that was being used to fund operations of Argentina abroad. Thus, in effect, that there is evidence of a *modus operandi* by which Argentina seeks to evade its creditors by the use of bank accounts abroad to fund its public services, using funds that should otherwise be available to satisfy its debts. The fact that NML was unsuccessful in that contention in its action against UBS Zurich has given no pause to its similar contention here, citing in addition what NML

describes as Argentina's "*notoriously dishonourable track record*" as a sovereign debtor.

7. I note that no firm evidence to support that accusation was presented. Instead, my attention was brought to the following passage from the judgment of the United States Court of Appeal, Second Circuit, given in ***NML Capital Ltd. and EM Ltd. v Banco Central De La Republica Argentina 652 F. 3d 172*** at page 25:

> "*In the particular circumstances presented here there is no doubt as the District Court recognised, that while the Republic provided explicit assurances in its bonds that plaintiffs would have recourse to hold it to its promises, what the bonds do not say is that the law of this jurisdiction – the Foreign Sovereign Immunities Act – imposes severe restrictions upon the ability of a creditor of the Republic to obtain an attachment or execution.... We share the District Court's understandable irritation at the Republic's "wilful defiance of [its]obligations to honour the judgments of a federal court."*
>
> *....Indeed, as we have had occasion to observe before, "we understand the frustration of the plaintiffs who are attempting to recover on judgments they have secured. Nevertheless, we must respect the...strict limitation on attaching and executing upon assets of a foreign state."*

8. That remains but a singular expression of a judicial finding of deliberate default on the part of the Republic. It does not relate to a general pattern of evasiveness but to the non-payment of the very same debt that NML seeks to enforce here.

9. Whatever justification there may otherwise be for NML's accusations, they are here raised, it seems to me, in reality merely in moral counterpoise to the obvious concerns of breach of Cayman public policy and public interest presented by NML's application itself and to which I will turn below.

10. Before so doing, I must emphasize that a number of issues raised by NML are not engaged necessarily for resolution by me now on this section 4 application.

11. Whether or not Argentina is a notoriously bad debtor is really by itself not a germaine issue. Whether Mr. A.B. and his wife are holding the bank account in question as mere ciphers for his Government or not, while a relevant underlying concern, is not itself an issue to be resolved now. If the directions sought by NML were given that would be an issue to be considered and ultimately resolved in the subsequent proceedings. As, indeed, would any issue of sovereign immunity arising in respect of the funds in the bank account.

12. What is germaine to the present application is the question of the provenance of the confidential information for which directions are now sought for its deployment in the subsequent proceedings proposed to be taken by NML.

13. The information in question is in two forms. The first is a "screenshot" image of the kind one sees when a bank account is accessed online through the Internet. The second is a summary of the bank account presented on a document bearing what appears to be the Bank's letterhead and logo.

14. The vice-president of NML Mr. Jay Newman, exhibits the two forms of information to his affidavit filed in support of this application, seeking directions that NML may use it in the subsequent proceedings. These would first be in *Norwich Pharmacal* proceedings ([1994] 2 All. E. R. 943]) to get orders freezing the bank account and compelling disclosure to NML of all information held by the Bank in relation to the account and account holders. This, on the well known principle settled in that case, would be that the account holders had supposedly become "mixed up" in the wrongdoing of the Republic.

15. The objective would then be to use the information to prove the putative relationship between Mr. A.B. and the Republic as its cipher; thus also hopefully proving that the proceeds of the account should go towards satisfaction of NML's judgment.

16. NML's present difficulty is that while relying on the information for the directions now sought, Mr. Newman states that he is not in a position to testify as to the provenance of the information or in any way as to how it was actually obtained. His account is taken from his 1st Affidavit as follows:

> "*4. As part of NML's ongoing attempts to recover sums due from Argentina under the (New York) Judgment, NML has retained investigators with a broad-ranging brief to assist in the location of Argentina's assets worldwide.*
>
> *5. In August 2012, the investigators sent to me details of a joint bank account held in the Cayman Islands with the Bank of America Trust and Banking Corporation (Cayman)*

Limited ("the Bank") by two account holders resident outside the Cayman Islands who are husband and wife (the "Account"). The investigators sent to me the following documents:

(i) A document setting out details of the Account (including the balance of the account as at 22 August 2012);

(ii) A document which appears to be a screenshot of an online Account Summary as at 22 August 2012.

6. I am advised by Appleby ([NML's Cayman lawyers]) (without waiver of privilege) that these documents contain confidential information within the meaning of the Confidential Relations (Preservation) Law (2009 Revision);

7. I asked the investigators where they obtained the information and documentation but the investigators have declined to provide any details, in order to protect their sources of information from retaliation by the subjects of their investigation. In my experience this is a common characteristic of investigators in this field."

17. As Appleby are there reported as having advised Mr. Newman and as Mr. Walton conceded before me, this bank account information is confidential information

within the meaning of the CR(P)L. The definition of "confidential information" appears from sections 2 and 3(1) of the CR(P)L which respectively provides:

> ""*confidential information" includes information concerning any property which the recipient thereof is not, otherwise than in the normal course of business, authorised by the principal to divulge."*
>
> *"principal" means a person who has imparted to another confidential information in the course of the transaction of business of a professional nature."*

18. And in section 3(1):

> "*Subject to subsection (2), the law has application to all confidential information with respect to business of a professional nature which arises in or is brought into the Islands and to all persons coming into possession of such information at any time thereafter whether they be within the jurisdiction or there-out."*

[(Subsection (2) identifies the so-called "gateway provisions", which include section 4 itself, and by way of which the disclosure of confidential information can be allowed or compelled)].

19. By virtue of section 2, information such as that presently in issue generated in the course of banking business and relating to a bank account of customers who are also "principals" within the meaning of section 2, is clearly information to which the CR(P)L applies.

20. In respect of all such information, section 3(1) confirms that the duty of confidentiality continues to be attached, irrespective of whether the information

was obtained within the Islands or brought into the Islands and is binding upon all persons coming into possession of such information at any time thereafter, ewhether they be within or outside the jurisdiction of the Islands.

21. It must be inferred from Mr. Newman's evidence that the information in question was neither obtained with the consent of the principals nor otherwise by due process of law.

22. This circumstance gives rise to obvious concerns as to whether this Court could properly direct the divulgence and use of confidential information so obtained.

23. The Court is bound to observe that the CR(P)L itself not only prohibits but also sanctions by way of criminal penalty, the unauthorised abuse of information which it regards as confidential. In this regard, section 5 provides.

> *"(1) ...whoever –*
>
> *(a) Being in possession of confidential information however obtained –*
> *(i) divulges it; or*
> *(ii) attempts, or offers or threatens to divulge it; or*
>
> *(b) willfully obtains or attempts to obtain confidential information,*
>
> *is guilty of an offence and liable on summary conviction to a fine of five thousand dollars and to imprisonment for two years.*
>
> *(2) ....*
>
> *(3) Whoever, being in possession of confidential information, clandestinely, or without the consent of the principal, makes use thereof for the benefit of himself or another, is guilty of an offence and liable on summary conviction to the penalty prescribed in subsection (2), and for that purpose any profit accruing to any person out of any relevant transaction shall be regarded as a reward."*

24. Absent approval of this Court NML would be in breach of those provisions by seeking "without the consent of the principal(s)" to make use of their information which it admits has come into its possession without their consent and implicitly otherwise than by due process of law.

25. No doubt, being so advised, NML was aware of this difficulty to be met by its application. Thus, at the initial stage of this application, I was told by Mr. Walton that the Director of Public Prosecutions ("DPP") had been asked and had given her assurance that the divulgence of the information would not be regarded by her as a breach of section 5 of the CR(P)L, if done only for the purpose of the making of this section 4 application.

26. The DPP has, however, given no assurance that any apparent earlier breach of the CR(P)L would otherwise be immune from prosecution.

27. Nor, as Mr. Schofield explained, was the DPP's assurance intended to address the wider public policy and public interest concerns which obviously arise from the implicit proposition of NML's application; which is that this Court should condone or approve of what must be regarded as breaches of the CR(P)L and of the rights of the principals to the preservation of their confidential information.

28. In anticipation of such concerns being raised by me, Mr Walton cited and relied upon certain dicta from the earlier judgments of this Court given in ***Re Ansbacher (Cayman) Limited***.

29. The first passage comes from the report of that case at ***1998 CILR 169***, at 175:

> *"The (CR(P)L) was amended in 1979 to insert s.3A (now s.4 in the latest Revision) to achieve two main objectives by the intervention of the courts.*

The first is to ensure that the public and private interests in the protection of the confidential affairs of those who conduct lawful business in the Cayman Islands are duly observed.

The second – also a matter of great public interest – is to ensure that where appropriate, information which might otherwise be protected can be divulged to assist the administration of justice in the Cayman Islands or, as the case might be, in the courts of foreign countries to which the obligations of comity are owed."

30. And in the further report of the case at ***2001 CILR 44***, the import of section 4 itself of the CR(P)L was summarized:

> "*The whole purpose of s.4 is to provide a framework in which the court can decide in the exercise of its discretion, and having regard to all the circumstances including the competing interests and rights, whether or not to direct disclosure, by the giving of evidence. If directions are given for disclosure, the interests or rights of the principal who objects will inevitably be affected. This may be in deference to the conflicting interests or rights of the fiduciary who applies or it may be, as it often is, in deference to the wider interests of the administration of justice.*"

31. These passages confirm that in the ordinary case, the discretion to be exercised by me now is one that would have regard to all the circumstances, including the competing interests and rights of those involved. This would ordinarily include

the stated purpose – here NML's pursuit of its judgment debt – for which permission to disclose confidential information is requested.

32. And while great emphasis is laid upon the intent of the CR(P)L that the interests of justice should be served, the passages just cited also emphasize that the context in which disclosure is sought must be examined. This will include any concerns about fairness to the principals of the confidential information, implicit also in concerns which may arise about the public interest.

33. And so it is worth citing further from the Ansbacher case (at ***1998 CILR 177***):

> "*A modern statement of the duty of the court in deciding upon an application properly brought under s.4 appears in the report of* ***In Re I*** *(**1994-95 CILR at N-9**) in the following terms:*
>
> > *"In seeking to ensure that the directions for the disclosure of confidential information do not improperly defeat or frustrate a just cause of action, as it is required to do by the Confidential Relationships (Preservation) Law, s.3A (6)(b) [now s.4 (6)(b)], the court should examine the background, merits and shortcomings of the action for which the information is sought, in the light of any public policy issues raised by the Attorney General and the legal and beneficial interests of innocent third parties likely to be affected by the directions."*

That statement of the duty of the court implies the existence of an actual intention or requirement to give evidence in a proceeding the just outcome of which might be affected if the evidence is not provided."

34. Thus, it is clear that among the competing interests and issues to be considered, the public interests in the due and proper observance of the CR(P)L itself must be taken into account.

35. Such public policy issues can themselves be quite contextual. As also recognised in ***Ansbacher 2001 CILR 214 at 234***, it is part and parcel of the policy of the CR(P)L to protect the confidentiality of a client's legitimate affairs by the court not lending its assistance to enable unparticularized requests to enable "fishing expeditions". Moreover, as explained at p.237; the Law itself is not premised upon any presumption of wrongdoing: "*There must at least be specific and provable allegations of civil liability or criminal wrongdoing against a person before information about his affairs may be divulged without his consent by someone owing him a duty of confidentiality*".

36. Here, as has been shown, things are already beyond the stage of enjoining a breach by someone owing the principals a duty of confidentiality. The information has already been obtained or disclosed to NML's investigators (and by them to NML) in breach of confidentiality and apparently in breach of the CR(P)L; although by whom and under what circumstances remain unknown.

37. Mr. Walton's argument is therefore to the effect that the horse has already bolted the gates and so the Court is not really concerned with addressing the public

policy concerns of the CR(P)L by seeking to maintain the conventional balance recognised and addressed in the passages cited above from the ***Ansbacher*** case.

38. Here, says Mr. Walton, the court is simply addressing the age old question of the admissibility of evidence that might indeed have been illegally obtained and the Court's responsibility in that regard is beyond the remit of the CR(P)L and is settled at common law. Citing the well known Privy Council case of ***Kuruma v R [1955] A.C. 197***, Mr. Walton relies on the principle stated there that:

> *"The test to be applied, both in civil and in criminal cases, on considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how it is obtained."*

39. On that basis, I would have no discretion to exclude the evidence nor, more precisely, to refuse to direct its being given into evidence in the subsequent proceedings. The evidence is shown to be relevant both to this application under section 4 of the CR(P)L as it will be to NML's proposed Norwich Pharmacal and recovery actions which would follow. Thus, the argument goes, to the extent section 4 of the CR(P)L vests me with a discretion whether or not to direct the use in evidence of this information which is confidential within the meaning of the CR(P)PL, the discretion can be exercised only in one way: by the grant of such directions.

40. To bolster this argument, Mr. Walton also pointed to the fact that until statutory reforms were introduced by way of Part 32 of the Civil Procedure Rules there, the English courts were bound by the same common law principle recognised in

Kuruma v R. It is a principle, moreover, which has been applied consistently in the Cayman Islands; perhaps the most notable instance in civil proceedings being in ***T.I.W. v CVC Opportunity Equity Partners LP 2001 CILR 444.*** In that case, this Court held that a letter, which appeared to have been stolen, could be used nonetheless in evidence, as it was relevant to the issues to be tried and was not protected by privilege.

41. Earnestly presented though this argument was by Mr. Walton, it would ignore the acknowledged fact that the evidence sought to be adduced here comprises confidential information that appears to have been obtained in criminal breach of the CR(P)L itself, the very statute being relied upon for directions for its disclosure.[1]

42. What, in effect, NML therefore seeks, are directions from this Court that would involve the Court not only condoning the breach of the CR(P)L but compounding it, by directing the disclosure of information obtained by way of its breach.

43. The public policy concerns arising from such a proposition are stark and obvious.

44. Having been told about the DPP's stance and that similarly then taken by the Attorney General no doubt on the more limited information then available to them, I referred the matter again through Mr. Schofield to them by way of written directions identifying the concerns.

45. In return, I received a helpful letter in response from the Attorney General with which the DPP agrees.

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[1] On a resumed hearing of this matter, Mr. Lawrence Cohen QC brought to the Court's attention the case of ***Imerman v Tchenguiz [2010] EWCA Civ 908***, which confirms that in England and Wales the court has the discretion to exclude illegally obtained evidence in civil cases and to that extent that ***Karuna v R*** is no

46. Among the observations shared in that letter is the following from paragraph 3:

> *"...on reflection, the Attorney is inclined to the view that it is potentially unhelpful for the Court to lend its process to disclosure where everything seems to suggest that the documents in question were obtained by subterfuge. As (the Court) has pointed out, the Court might well, in those circumstances, be seen to be sanitizing illegal conduct. The Court could therefore not be faulted for considering this to be an important public policy consideration, and asking itself, "where will this end?"*

47. The answer is immediately apparent.

48. NML seeks to benefit from the apparent breach of the CR(P)L by its investigators and of the duty of confidentiality owed to others. If granted, the directions NML seeks could therefore readily be regarded as a charter to all who would seek to gain from the commission of such breaches of the lawful duty of confidentiality which the CR(P)L seeks to preserve and protect.

49. This application is itself a glaring example of the real mischief at play as it must be assumed that the investigators employed by NML ply their craft for gain. It is therefore difficult to imagine a mischief more potentially detrimental to the public interests of a jurisdiction that depends upon the integrity of its financial systems, than its Court condoning and facilitating the abuse of confidential information obtained in circumstances like the present. To my mind, neither the due administration of justice nor the standards of transparency now-a-days

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longer good law in that jurisdiction. The reasoning in that case while not binding on this court, is highly persuasive and compelling.

required by good regulatory oversight would require permitting such a state of affairs.

50. The public interest in the protection of the legitimate affairs of persons who transact banking business in this jurisdiction is in no sense unique. The confidential information which has been obtained in prima facie breach of the CR(P)L and of the banker/customer relationship and sought to be deployed here, is information that would be entitled to protection in any country that shares the Islands' common law heritage.

51. As this Court observed in ***In Re ABC Ltd. 1984 CILR 130,*** per Summerfield CJ, the protective policy of the CR(P)L –

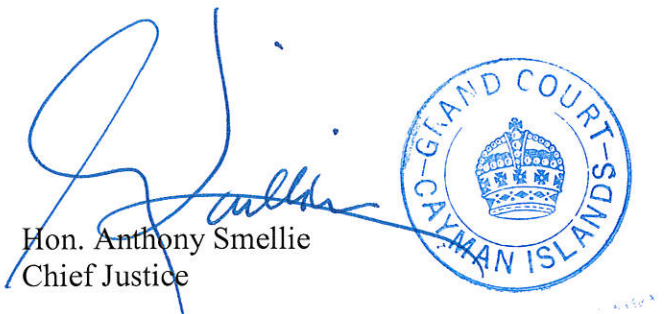
> *"...is not only important to this country where that law exists but would be equally important to many other common law countries which respect the principle in* ***Tournier v. National Provincial and Union Bank of England****. ([1924] 1 K.B. 461) governing the duty of a bank to maintain secrecy (see Paget's Law of Banking 8th Ed; at 166-174 (1974)).*"

52. "Secrecy" in that sense in today's language might perhaps more felicitously be expressed as "the right to confidentiality". It is nothing more nor less than the right and duty of confidence that the common law has for centuries regarded as an essential aspect of all fiduciary relationships. In the absence of any suggestion of criminal misconduct on the part of the principal, the abrogation of that well settled common law (and here statutory) right and duty can only ever be justified in the clearest and most deserving of circumstances.

53. By contrast in this case, the inference upon which NML relies in seeking to abrogate that right and duty and even to defeat the public policy of the CRP)L itself, is transparently thin. It is nothing more than a supposition based upon the relationship of Mr. A.B. with his country and the notion that as such, he and his wife ought not to be expected to have acquired in their own right monies which the Bank is shown to hold on account for them.

54. Mere supposition of that sort will not suffice and certainly may not justify the Court disregarding the public policy of the CR(P)L which would be doubtlessly undermined by the directions sought by NML. Such directions would "sanitize" information which must at least inferentially be regarded as having been obtained by subterfuge and in breach of the CR(P)L, as well as in breach of the well respected banker/customer confidentiality.

55. Directions for the use in evidence of the material are refused.



Hon. Anthony Smellie
Chief Justice

15th March, 2013

Redacted after further submissions on behalf of NML taken on 7th June 2013 and finally released after embargo on 7th February 2017.