In The Supreme Court of Bermuda

COMMERCIAL JURISDICTION
2018 No: 149

BETWEEN:

ATHENE HOLDING LTD

Plaintiff

And

(1) IMRAN SIDDIQUI
(2) STEPHEN CERNICH
(3) CALDERA HOLDINGS LTD

Defendants

RULING

Dates of Hearing:	14-15 June 2023 and 6 September 2023
Date of Ruling:	9 October 2023
Counsel for the Plaintiff:	Mr. Kevin Taylor, Mr. Nicholas Howard (Walkers (Bermuda) Limited)
Counsel for the First and Third Defendants:	Ms. Christina Herrero (Marshall Diel & Myers Limited)
Counsel for the Second Defendant:	Ms. Laura Williamson, Mr. Michele Gavin-Rizzuto (Kennedys Chudleigh Limited)

RSC Order 24 application for specific discovery
Relevant legal principles

RULING of Shade Subair Williams J

Introduction:

1. This is an interlocutory ruling on an application by the Plaintiff for specific discovery of two classes of documents.

2. By summons dated 30 January 2023 Athene Holding Limited ("Athene" / "the Plaintiff") seeks an order of this Court compelling the Defendants to produce the documents they obtained (i) from Mr. Ming Dang in the Second JAMS Arbitration commenced on 3 May 2018 and (ii) the documents the Second Defendant obtained from Mr Huan Tseng in the ongoing Court proceedings between *Apollo Asset Management, Inc., & Ors v Stephen Cernich and Huan Tseng* before the New York Supreme Court ("the New York Proceedings"). The documents of interest from the Second JAMS Arbitration have been termed "the Dang Documents". The sought-after documents from the New York Proceedings have been referred to as "the Tseng Documents". Collectively, these are "the Withheld Documents".

3. Additionally, in respect of the Dang Documents, the Plaintiff invites this Court to direct the Defendants to provide it with an un-redacted copy of the transcript of Mr. Dang's oral evidence given in the Second JAMS Arbitration together with any exhibits or other documents he referred to in the course of his evidence.

4. The Plaintiff's summons is supported by affidavit evidence from Mr. Nicholas Howard, an attorney employed by Walkers (Bermuda) Limited representing the Plaintiff. The Defendants, who all oppose the application, filed affidavit evidence in furtherance of their objections. Evidence sworn by Mr. Mark Chudleigh was filed on behalf of the 2nd Defendant and Ms. Christina Herrero's evidence was filed on behalf of the 1st and 3rd Defendants.

5. With the benefit of the thoroughly and skillfully made oral and written arguments from Counsel, for which I am grateful, I now provide these written reasons.

Background:

6. An outline of the uncontroversial background facts and the disputed issues have been provided in previous rulings of this Court and the Court of Appeal. For the purpose of this Ruling, I aim to restrict my narrative to the key points which form part of the pleaded facts or evidence filed in the application before me.

7. Established in 2009, **Athene** is an exempt company registered and domiciled in Bermuda. In December 2016, it became a publicly traded corporation registered on the New York Stock Exchange. Its primary subsidiaries are insurance and reinsurance companies operating out of Delaware, Iowa and New York, offering retirement savings products for its clientele.

8. **Apollo Global Management LLC,** now **Apollo Global Management Inc** is a public corporate entity registered in Delaware with a population of subsidiaries and affiliates (collectively "Apollo"). **Apollo** is said to have accumulated assets to the tune of $280 billion worth. One of those corporate assets is a subsidiary of Athene, namely, Athene Asset Management, over which Apollo has indirect ownership. Apollo also has 10% of Athene's shares and the majority of its voting power.

9. The **1st Defendant**, **Mr. Imran Siddiqui**, was a high-level employee working out of an Apollo New York office between 2008 and 2017. In affidavit evidence filed by Mr. Siddiqui at an earlier stage of these proceedings, he stated that during his employment at Apollo he was involved in overseeing Apollo's investment in Athene. His evidence was that he was appointed as an Apollo-nominated director of Athene, emphasizing that he was never employed by Athene.

10. By all accounts, the **2nd Defendant**, **Mr. Stephen Cernich**, was an American national and resident employed by Athene and its affiliates from 2009 to 2016. During his tenure, Mr. Cernich held various posts, including Chief Actuary and Executive Vice President.

11. **Mr. Ming Dang** is a former employee of Apollo. **Mr. Tseng** is said to have collaborated with Mr. Dang in assisting Mr. Siddiqui and Mr. Cernich's alleged corporate breaches of duty.

12. The Plaintiff's pleaded case is that Mr. Siddiqui and Mr. Cernich were officers of Athene and in that capacity they committed breaches of a fiduciary duty and/or breaches of a duty of confidence. The Plaintiff claims that these two Defendants wrongfully took and/or used Athene's trade secrets and its protected confidential information for the benefit of their newly incorporated Bermuda exempt company, **Caldera Holdings Limited** ("Caldera"), the 3rd Defendant. In doing so, according to the Plaintiff, Caldera was to compete directly with Athene for the acquisition of **Company A**, another insurance business said to be similar to Athene in terms of its product makeup.

13. In January 2018, Apollo commenced the **First JAMS Arbitration** against Mr. Siddiqui and Caldera alleging that Mr. Siddiqui breached his post-employment restrictive covenants, his fiduciary duties and other duties owed. Caldera was the target of a claim for tortious contractual interference. In February 2018 Apollo released Mr. Siddiqui from all of the claims against him

in accordance with a Settlement Agreement and Mutual Release (the "**Settlement Agreement**").

14. The **Second JAMS Arbitration** commenced in May 2018, arising out of allegations made by the Apollo claimants that Mr. Siddiqui was in violation of the Settlement Agreement by his use and disclosure of Apollo's confidential information. At least part of that confidential information is said to have been comprised of Athene's confidential information.

15. In June 2018, Apollo and Siddiqui, as the parties to the Second JAMS Arbitration, entered into a Stipulation Regarding Confidential Information and **[Proposed] Confidentiality Order**, exercising their right to designate any of the documents filed in the arbitration as "*For Attorneys' Eyes*" only "*provided they contain trade secret or competitively sensitive business information*." While the parties treated these terms as the governing position, that document was never formalized as a signed Order of the Arbitrator, Mr. Mark E Segall [See page 2 of the Final Arbitration Award].

16. By late November 2018 another arbitration proceeding had been commenced by the Apollo parties against Mr. Siddiqui, Caldera and Mr. Ming Dang. On the Amended Statement of Claim in this new proceeding, multiple claims of tortious interference and the like were made against Mr. Siddiqui and Caldera. Apollo also accused Mr. Dang of violating his contractual and fiduciary duties by his association with and assistance to Mr. Siddiqui and other Caldera colleagues who were said to have not only shared Apollo's confidential information but also usurped its corporate opportunities. With the consent of the parties, this **new November 2018 arbitration** was **consolidated with the Second JAMS Arbitration** proceedings for the purpose of the final merits hearing.

17. Athene was never party to any of the JAMS Arbitration proceedings nor to the earlier Settlement Agreement. However, in the **Final Arbitration Award**, dated 26 April 2019 ("the Final Award"), Arbitrator Mr. Segall stated in his summary of the facts that Apollo, Athene, Caldera and Company A were the four principal corporate entities involved in the arbitration. Describing the relationship between Apollo and Athene Mr. Segall stated as follows [B p.6]:

"*Business with Athene is a particularly important component of Apollo's insurance business. Apollo participated in its formation back in 2009. Athene is now one of the world's largest providers of fixed annuity products. Athene contracts with Apollo for investment management advisory services and is a lucrative source of fee income for Apollo, paying Apollo hundreds of millions of dollars a year for managing the billions of dollars in insurance-related assets that are controlled by Athene. Athene Asset Management LLC is a subsidiary of Apollo that provides Athene with investment management advisory services. Apollo took Athene public in*

December 2016, but it still owns approximately 10 % of the common equity of Athene, controls 45% of its voting shares, and appoints six of the fifteen Athene Board members. Rowan [Mr. Marc Rowan, an Apollo Senior Managing Director] holds one of the Board seats. Apollo continues to exercise considerable control over the affairs of Athene. As a public insurance company, Athene has considerable disclosure and reporting obligations concerning how it conducts its affairs…"

18. In the Final Award Mr. Segall concluded that Mr. Siddiqui, while a director for Athene, competed with both Apollo and Athene for company acquisitions. Mr. Dang was found to be liable for aiding Mr. Siddiqui in wrongfully collecting and transmitting both Apollo's and Athene's confidential information and soliciting investors to invest in Caldera rather than Apollo or Athene.

19. On his findings against Mr. Siddiqui, Mr. Segall found that Mr. Siddiqui had breached the requirement in the Settlement Agreement for him to return or destroy Apollo's confidential information. More so, the arbitrator found that Mr. Siddiqui executed a false attestation under oath and penalty of perjury that he had indeed complied with the Settlement Agreement.

20. By way of an Amended Complaint dated 24 May 2022, Apollo made its claims against Mr. Cernich and Mr. Tseng in the **New York Proceedings** alleging that these Defendants had a critical role in assisting Mr. Siddiqui and Mr. Dang in their alleged breaches of duty and fraudulent conduct against Apollo.

The Relevant Law and Legal Principles

21. As a matter of legal procedure, discovery obligations in writ actions attach only to documents which are or have been in the "possession, custody or power" (otherwise termed "PCP") of a party insofar as those documents "relate to the matters in question". That is to say, so long as such PCP documents are relevant to the disputed issues, there may be an obligation to make them discoverable. I say '*may*' as the Court would also have to undergo an exercise of judicial discretion before making an order for discovery, once the PCP threshold and the relevance test has been met.

22. The starting point is RSC Order 24/1(1), which provides:

"***24/1 Mutual discovery of documents***

1 (1) After the close of pleadings in an action begun by writ there shall, subject to and in accordance with the provisions of this Order, be discovery by the parties to the action of the documents which are or have been in their possession, custody or power relating to matters in question in the action."

23. As is recognized in the 1999 White Book [24/2/8], discovery applies to the following classes of documents which are relevant to the issues in question:

    (i) Documents that are or have been in the party's **possession**;
    (ii) Documents that are or have been in the party's **custody**;
    (iii) Documents that are or have been in the party's **power**;

24. Discovery of these classes of documents does not exclude cases where a party's possession, custody or power is jointly attributable to an agent or servant of another person. That being the case, there is no legal obligation for a party to undertake any effort, reasonable or otherwise, to obtain possession, custody or power over documents which are and were never within his or her possession, custody or power.

Meaning of 'Possession'

25. In criminal law, 'knowledge' and 'control' are the crucial elements comprising 'possession'. The meaning of possession in the discovery stage of civil proceedings is not much different in that the presence of 'knowledge' and 'control' is key. Conceptually, possession goes beyond mere custody and would apply to documents which have been entrusted to a party's control in his/her personal capacity or in the capacity in which the party is being sued.

26. As may be seen from the English Court of Appeal's decision in *North Shore Ventures Ltd v Anstead Holdings Inc* (2012) WL 14648, the question of "control" is not only ascertainable by regard to the legal relationship between the relevant party and a third party who has the sought-after documents in their keeping. It may instead be the case that there are particular facts which provide more colour to the reality of the relationship, thereby resolving the question of factual control as opposed to mere legal control. In that case, the appellants, Mr. Formichev and Mr. Peganov, appealed against Floyd J's Order compelling them to produce documents to North Shore Ventures Limited ("North Shore"). Underlying that Order were the judgment debt proceedings in which the appellants were indebted to North Shore for some US$35,000,000.00.

27. The documents in question were trust documents which were, as a matter of law, the property of the trustees as opposed to the appellants who had previously been beneficiaries of that trust. Bypassing a lengthier narrative on the detail, it suffices to say that there was reason for strong suspicion in relation to the appointment and behavior of the trustees and there was also reason to suspect that the trustees were being puppet-controlled by the appellants, even in the removal of the appellants as beneficiaries. More to the point, the persuasive evidence before the Court

was that the trustees and the appellants were engaged in a venture to shelter the trust assets from the judgment debt proceedings.

28. Against that background the Court of Appeal unanimously agreed with the following passage from Lord Toulson's leading judgment [40]:

> [40] "*If that was the true relationship between the appellants and the trustees, the judge was entitled in my view to regard documents in the physical possession of the trustees relating to the administration of the trust as documents in the Appellants' control within the meaning of CPR 31.8. In determining whether documents in the physical possession of a third party are in a litigant's control for the purposes of CPR 31.8, the court must have regard to the true nature of the relationship between the third party and the litigant. The concept of "right to possession" in CPR 31.8(2)(b) covers a situation where a third party is in possession of documents as agent for a litigant. [...] But even if there were on a strict legal view no "right to possession", for example, because the parties to the arrangement caused the documents to be held in a jurisdiction whose laws would preclude the physical possessor from handing them over to the party at whose behest he was truly acting, it would be open to the English court in such circumstances to find that as a matter of fact the documents were nevertheless within the control of that party within the meaning of CPR 31.8(1). CPR 31.8(2) states that for the purpose of CPR 31.8(1) a party has or has had a document in his control if the case falls within paras (a) to (c). It does not state that a party has or has had a document in his control if but only if the case falls within one of those paragraphs*."

Meaning of 'Custody'

29. 'Custody' would apply to documents which are merely being held under the direction of another. So, by way of an example, where a clerk is employed to manage the company file room, it may be said that those documents are within his/her custody.

Meaning of 'Power'

30. The 1999 White Book [24/2/8] offers a clear generic definition of 'power' in this sense: "*These include all documents which, though they are not in his possession or custody, he has a right to obtain from the person who has them- e.g. where he is the owner and has not parted with the right to possession*…"

31. The commonality between "possession" and "power" is the existence (not possibility) of "control". A party's control over documents, whether arising out of possession or power, is in no way dependent on the consent of any other person or entity.

32. "Possession" denotes the exercise of control over the documents in question whereas "power" refers to circumstances where the party has an existing legal right which *is* enforceable (as opposed to *may be* enforceable), or a non-legal arrangement or understanding which gives way to the party's practical control over the documents in question.

33. Ms. Williamson invited this Court to consider the concept of "power" with the assistance of the Hon. Chief Justice Mr. Narinder Hargun's decision in *In the Matter of Jardine Strategic Holdings Limited* [2023] SC (Bda) 8 Civ. In that case, Hargun CJ was faced with the question as to whether documents which were held by subsidiary companies were within the power and control of the parent holding company.

34. In that case Hargun CJ recognized that it is not the mere fact of the parent-subsidiary relationship that gives rise to a holding company's "power" to possess the documents, even if consent from a wholly owned subsidiary is likely. The learned Chief Justice also accepted that there can be no legal obligation imposed on a parent company to seek the consent of the subsidiary in obtaining documents in the possession of the subsidiary company. With this, I am unreservedly agreed.

35. Fundamentally, if a party's power over sought-after documents is to be established, it must be shown that any legal right to obtain the documents in question from the possessors or custodians of the documents is a *presently* enforceable legal right in respect of which consent is neither required nor needed. Of equal force, the presence of power may also be proven by demonstrating an existing agreement or arrangement establishing the relevant party's factual or practical control, notwithstanding the absence of a legal right to assume control over the documents. As is the position in cases where there is a *presently* enforceable legal right, the Court must be satisfied in matters involving an existing agreement or arrangement that consent is *not* a necessary step for the obtaining of the documents.

36. These principles have been condensed into what is now widely referred to as "The Lonrho Test", emanating from Lord Diplock's judgment for the House of Lords in *Lonrho Ltd v Shell Petroleum Co Ltd and another* [1980] 1WLR 627. (Hargun CJ described *Lonrho Ltd v Shell Petroleum* as the leading authority on the issue of "control", having referred to Hollander on Documentary Evidence (14th Edition) [para 9-20]).

Meaning of 'Relevance'

37. Relevance in the context of discovery proceedings specifically and expressly refers to documents "*relating to matters in question in the action*" under RSC Order 24/1(1).

Illustrating the crucial distinction to be made, the 1999 White Book cites Lindley J in *Philipps v Philipps* (1879) 40 L.T. 815 at 821 where the "*matter in question*" in an action for possession of land referred to the title and not the land.

The Court's Discretionary Function

38. RSC O.24/7 empowers the Court to make an order for specific discovery, so long as it complies with the requirement under Rule 8 that the Court must be satisfied that the order for specific discovery is "…*necessary either for disposing fairly of the cause or matter or for saving costs*".

39. RSC O.24/8 provides:

24/8 Discovery to be ordered only if necessary
8 On the hearing of an application for an order under rule 3 or 7 the Court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or, as the case may be, adjourn the application and shall in any case refuse to make such an order if and so far as it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs."

40. Rule 8 calls for the Court to decide whether the requested order for specific discovery is:

(i) necessary for disposing fairly of the cause or matter; or
(ii) necessary for saving costs.

The Burden of Proof

41. It is the applicant who bears the burden of proof as he/she who asserts must also prove. This means that any factual grounds relied on must be established by the applicant. As Hargun CJ pointed out in *Jardine Strategic Holdings* [paras 60(10)-(11)], in interlocutory matters such as discovery proceedings, the applicant must persuade the Court that:

"…
10. …the relevant findings can be safely made without a full factual inquiry and that the applicant has discharged the evidential and persuasive burden. In evaluating the evidence, it is important to distinguish material which affords grounds for suspicion from material which affords grounds for factual findings, whether as a matter of inference or otherwise: Abudawood at [20] and [38].

11. The Court will reject affidavit evidence which has not been tested in cross examination only where it is manifestly incredible, either because it is inherently so, or because it is shown to be so by other facts that are admitted or by reliable documents: Coyne v DRD Distribution at [58]."

Analysis of the Evidence and Decision

Whether the Withheld Documents are or have been in the Defendants' Possession, Power or Control

The Dang Documents

42. On 8 April 2019, JAMS Arbitrator Mr. Segall issued an admonishment by way of email communication to the parties, namely Apollo, Mr. Siddiqui, Mr. Dang and Caldera. He noted that while the proposed Confidentiality Order had never been submitted for signature, the parties had operated under the assumption that it had indeed been signed and formally ordered. He further noted the following:

"…

(1) It would appear that counsel for Siddiqui and counsel for Apollo have shared information that was designated as "confidential" with the New York State Court. Whether that information is genuinely "confidential" is another issue.

(2) Counsel for the parties are admonished not to disclose information that has been designated as "confidential" or "confidential – attorneys' eyes only" without an agreement with counsel or an order from me or the New York Court.

(3) …

(4) The request to allow Apollo to share the full transcript and documents referenced therein with counsel for Athene is denied.

(5) …"

43. Mr. Taylor pointed to open-letter correspondence passed between the parties. By letter dated 28 April 2021, Walkers (Bermuda) Limited ("Walkers") wrote to Marshall Diel & Myers Limited ("MDM") and Kennedys Chudleigh Limited ("Kennedys") re-asserting the Plaintiff's entitlement to discovery of all the documents filed and referred to in JAMS Arbitration

proceedings. Mr. Taylor explained that at this point in time, the Plaintiff was particularly interested in discovery of the Dang Documents.

44. Grasping on to the Plaintiff's claim that the Defendants have possession, power and/or control over the Dang Documents, Mr. Taylor directed this Court to MDM's reply letter of 12 September 2022 where it was stated that Mr. Siddiqui was unable to obtain Mr. Dang's consent to release the Dang Documents. Mr. Taylor further pointed to MDM's written statement [9c]:

"*Save for the transcript of the testimony by Mr. Ming Dang…our clients' production to date includes all transcripts from the JAMS Arbitration in our clients' possession, custody or control*."

45. From this passage, Mr. Taylor invited me to find that MDM did not deny Mr. Siddiqui's possession, power and/or control over the Dang Documents. Notwithstanding, MDM maintained, barring Mr. Dang's consent, that Mr. Siddiqui is otherwise bound by the confidentiality terms of the JAMS Arbitration. Mr. Taylor, in an attempt to strip away any merit in the Defendants' confidentiality grounds, highlighted that those same documents made their way into the New York Proceedings.

46. However, Ms. Williamson forcefully contended that Athene failed to produce any cogent or persuasive evidence from which control resulting from any arrangement or understanding could reasonably be inferred. Ms. Herrero flagged Mr. Dang's refusal to consent to the disclosure of the Dang Documents in these proceedings as a clear indication that Mr. Siddiqui has no practical control over the documents.

47. Mr. Dang's refusal to consent to the release of the Dang Documents was also confirmed in writing by way of a letter dated 24 March 2023 to the First and Third Defendants' Bermuda attorneys, MDM.

48. Counsel for the Defendants characterised Mr. Dang's refusal to consent as evidence refuting any suggestion from the Plaintiff that there is either a currently enforceable legal right to the Dang Documents or any arrangement or understanding that empowers the Defendants to take possession or custody over the Dang Documents.

49. Having been refused its request for access to the Dang Documents, Athene applied directly to the Southern District Court of New York for leave to take discovery of the said material for use in these proceedings pursuant to 28 U.S.C. § 1782 (the "1782 Application"). In the 21 August 2023 Opinion & Order of Magistrate Jude Sarah L. Cave, she directed:

"…

1. *Athene is entitled to production of the Dang Materials to the extent they are relevant to its claims in the Bermuda Action.*

2. *By September 1, 2023, the parties shall meet and confer to discuss and determine what categories of documents and/or testimony within the Dang Materials are relevant to Athene's claims in the Bermuda Action.*

3. *By October 2, 2023, Mr. Dang shall review the Dang Materials and produce responsive documents to Athene.*

4. *If the parties reach an impasse with respect to the above, either party may file a letter on the docket seeking a discovery conference with the Court, which will be briefed pursuant to the Court's Individual Practices, Rule II (C).*

5. *A telephone status conference is scheduled for Wednesday, October 11, 2023 at 10:00 a.m., on the Court's conference line. The parties are directed to call: … … at the scheduled time. At the conference, the parties shall be prepared to discuss the status of the production and whether Mr. Dang is entitled to contribution from Athene for costs and fees incurred in connection with the production."*

50. As a matter of law, I have found that there is no legal obligation for a party to undertake any effort, reasonable or otherwise, to obtain possession, custody or power over documents which are and were never within his or her possession, custody or power. Perhaps a more complex analysis is required for an answer to the question as to whether there is a legal obligation to make reasonable efforts to obtain documents which were once i.e. "have been" in the possession, custody and/or power of a party, but are no longer within that party's possession, custody or power. As I see it, the law could not reasonably require a party to hunt for documents which are currently outside of that party's possession, custody or power, even if those documents were indeed once upon a time within that party's possession, custody and/or power.

51. In any event and on the facts of this case, it is evident that the Defendants have no real or legal entitlement to access the Dang Documents (including the transcript of the arbitration proceedings) without the permission of the JAMS arbitrator and/or without the permission of Mr. Dang himself and/or a New York Court. The effect of the decision on the 1782 application is that the Plaintiff now has a legal entitlement under New York law to access the Dang Documents subject to the conditions outlined by the Magistrate Judge. That legal entitlement of access was not conferred on the Defendants. For those reasons, it cannot be correctly said that the Dang Documents are within the actual or practical control of either Mr. Siddiqui or Mr. Cernich.

52. I am therefore bound to find that the Plaintiff has failed to discharge its civil burden of proving that the Dang Documents are in the possession, custody or power of the Defendants. Thus it follows that the Dang Documents fall outside of the scope of discoverable documents according to the test set by RSC Order 24.

The Tseng Documents

53. Turning to the Tseng Documents, Mr. Taylor invited this Court to find that that MDM were wrong in stating in their 12 September 2022 letter that Mr. Cernich, as a party to the New York Proceedings, was bound by a confidentiality order expressly prohibiting the production of any documents in these proceedings where such documents were received by a counter-party and designated by that counter-party as confidential. MDM wrote that in such a case, release would be unlawful without that counter-party's prior consent or without an order from the Court permitting such production.

54. Ms. Williamson directed my attention to a letter of 15 March 2023 from Arkin Solbakken LLP, the US attorneys representing Mr. Tseng in the New York proceedings. In that letter, Mr. Tseng's refusal to consent is confirmed by Ms. Lisa C. Solbakken:

"*…We write in response to your letter dated March 8, 2023…which asks whether Mr. Tseng will: (i) consent to a production of the documents he produced in the New York Proceeding; (ii) for use by Athene Holding Ltd…in connection with separate litigation pending in the Supreme Court of Bermuda…to which Mr. Tseng is not a party…For the reasons that follow, Mr. Tseng respectfully confirms that he does not consent to such production… …*"

55. As it relates to the Tseng Documents, I find that the Defendants have not been shown to possess a legal entitlement to access. As is the position with the Dang Documents, there is no evidence before this Court that the Defendants are otherwise empowered to take control over these documents. Consequently, the Plaintiff has failed to establish that Mr. Cernich has actual or practical control over these documents. The same is so in respect of Mr. Siddiqui and Caldera, neither of whom are party to the New York Proceedings. So in my judgment, the Tseng Documents also fall outside of the scope of discoverable documents according to the test set by RSC Order 24.

Whether the Withheld Documents relate to any issue in question in these proceedings

56. Although I have determined that the Defendants do not have possession, custody or power over the Withheld Documents, I have nevertheless addressed my mind to the legitimacy of the

Defendants' objections on the remaining grounds, the first of which being the subject of relevance.

57. Mr. Taylor argued that the Dang Documents are relevant as they relate to the misuse of both Apollo's and Athene's confidential information. Armed with extracts from the judgment of the Court of Appeal in *Siddiqui and Ors v Athene Holding Limited* [2019] Bda LR 74, Mr. Taylor invited this Court to be aligned with certain factual observations made by the Court of Appeal. For one, he spotlighted the Court of Appeal's assessment of the Second JAMS Arbitration award, particularly where the President of the Court of Appeal recognised that Mr. Siddiqui played a part in the wrongful transmission of Athene's confidential information. Mr. Taylor also distilled from the judgment that Athene's prospects were high in respect of its claim to access its own confidential information, even while it lay in the hands of other parties.

58. Mr. Taylor submitted that the Tseng Documents are also relevant as the allegations against Mr. Tseng are predicated on the misuse of Athene's confidential information. Making good the point, he turned to Mr. Cernich's Amended Defence where it states [4.6]:

"…

(i) *These proceedings are an abuse of process in that they substantially replicate allegations being made by or on behalf of the Plaintiff in the New York Proceedings and the Arbitration Proceedings and they should therefore be struck out.*

(ii) *…*

(iii) *Alternatively, the Plaintiff is barred from bringing these proceedings to recover any documents or information which were the subject of the Arbitration Award, as such a claim is redundant and/or duplicative.*"

59. In Ms Solbakken's 15 March 2023 letter she disputed the question of relevance as follows:

> "*First, it is unclear why documents produced by Mr. Tseng in connection with the New York Proceeding commenced against him by Apollo …are at all relevant to Athene's Bermuda Proceeding. The New York Proceeding turns on whether Mr. Tseng aided in the purported breach of duties allegedly owed to Apollo by certain former Apollo employees under New York law and/or Delaware law. The case does not consider whether Mr. Tseng or even these former employees owed Athene any obligation or duty at law or equity. In the absence of any suggestion as to why or how some or all of Mr. Tseng's documents are relevant to Athene's Bermuda Proceeding, Mr. Tseng is hard-pressed to understand the legitimate basis for this production request.*"

60. While the pivotal question in the case against Mr. Tseng in the New York Proceedings is hinged on his own liability to Apollo, it cannot be convincingly said that the underlying issues are unrelated to the alleged misuse of Athene's confidential information and the role that Mr. Siddiqui and Mr. Cernich are said to have played in those allegations of misuse. On my assessment of the documents before this Court, it is plainly so that a portion of the Withheld Documents must relate directly to the controversial issue of Mr. Siddiqui's and Mr. Cernich's alleged misuse of Athene's confidential information. That is a trial issue which underlines the questions of the breaches of duty alleged, particularly as it concerns the bid for Company A and perhaps Company B.

61. Applying this reasoning, I would reject the Defendants' contention that the Withheld Documents are altogether irrelevant to any of the issues in these proceedings.

Whether discovery of the Withheld Documents is necessary either for disposing fairly of the cause or matter or for saving costs

62. Where the Dang Documents are concerned, Mr. Taylor argued that there would be no real burden imposed on the Defendants to make these documents discoverable because the requested documents have already been compiled and collated from the Second JAMS Arbitration, requiring the Defendants to do little more than activating a *file-share* feature.

63. The Tseng Documents are also ready-made in that they have been assembled for use in Court proceedings.

64. Momentarily putting aside my rejection of the Plaintiff's application on the PCP grounds, I agree with Mr. Taylor. I see no reason as to why I would reject the Plaintiff's application on the grounds of fairness in disposing of this matter or on the grounds of costs. The allegations in this case involve assets of great value and the litigants are all represented by law firms armed with the resources and means to sift through voluminous documents. The fact that the Court might have eventually been engaged in protracted proceedings in oversight of that process is neither here nor there. In my judgment, the Court's case management powers and duties would be sufficient to manage any such process.

65. For those reasons, I would reject the Defendants' expressed concerns on these grounds.

Whether discovery should be granted or refused in exercise of the Court's discretion

66. But for the issue of PCP, I see no other reason why this Court would have refused the Plaintiff's request for discovery in exercise of its discretion.

Jurisdiction

67. The question as to whether this Court should cede its jurisdiction on the application for specific discovery in order to give way to the 1782 application arose at somewhat of a surface level. For the avoidance of doubt, I declined any invitation for this Court to allow the New York Court's 1782 application between the Plaintiff and Mr. Dang to govern the issues of discovery in these proceedings against these Defendants.

68. The issues resolved in these proceedings did not engage any question of comity. They were instead decided purely on questions of domestic law and legal procedure.

Conclusion

69. The Plaintiff's 30 January 2023 summons is dismissed notwithstanding my findings that it would have been otherwise successful but for the principal issue of PCP.

70. Unless any party files a Form 31D to be heard on costs, I award the Defendants their costs of this application.

Dated this 9th day of October 2023

THE SEAL OF THE SUPREME COURT OF BERMUDA

SIGNED

THE HON. MRS. JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT