In The Supreme Court Of Bermuda

CIVIL JURISDICTION

COMMERCIAL COURT

2022: 19

BETWEEN

(1) LONE STAR R. E. MANAGEMENT CO. II, LTD
(AS GENERAL PARTNER OF LONE STAR REAL ESTATE PARTNERS II, L.P.)
(2) LONE STAR R.E. MANAGEMENT CO. III, LTD.
(AS GENERAL PARTNER OF LONE STAR REAL ESTATE PARTNERS III, L.P.)
(3) LONE STAR R.E. MANAGEMENT CO. IV, LTD.
(AS GENERAL PARTNER OF LONE STAR REAL ESTATE PARTNERS IV, L.P.)

Plaintiffs

-and-

HUGH J. WARD. III

Defendant

Before: The Hon. Chief Justice

Appearances: Mr Rhys Williams and Ms Ariana Caines of Conyers Dill & Pearman for the Plaintiffs

Mr Dantae Williams of Marshall Diel & Myers for the Defendant

Date of Hearing: 28 November 2022

Date of Judgment: 12 January 2023

JUDGMENT

HARGUN CJ

Introduction

1. These proceedings were commenced by the Plaintiffs by Generally Endorsed Writ of Summons dated 27 January 2022 claiming injunctive relief and/or permanent injunction and/or damages by reason of the Defendant's (1) breach of the express terms of confidentiality contained in the Amended and Restated Limited Partnership Agreements between the Plaintiffs and the Defendant dated 1 October 2010, 1 November 2013, and 1 May 2015; (2) breach of duty of confidence owed to the Plaintiffs in respect of all confidential information of the Plaintiffs; (3) breach of the implied term of good faith and fidelity to the Plaintiffs; and (4) breach of this implied term as to the duty not to misuse any information confidential to the Plaintiffs.

2. By an *ex parte* Order dated 28 January 2022 the Court ordered that unless given prior written permission by the Plaintiffs or permitted to do so by a further order of the Court, the Defendant must not use, copy, disseminate, sell or otherwise disclose to any third party any Confidential Information (as defined in paragraph 1.2 of the Order) acquired directly or indirectly by the Defendant. The Court also ordered that the Defendant must preserve and must not otherwise alter or dispose of the Confidential Information in its possession without the express permission of the Plaintiffs.

3. On 28 November 2022 the Court heard an application on behalf of the Plaintiffs seeking an order pursuant to RSC Order 24 rule 3 and/or rule 7 that the Defendant provide discovery by list within 21 days stating whether any document falling within the following categories of documents is, or has at any time been, in his possession, custody or power, and if not then when he parted with it and what has become of it:

(a) All documents containing Confidential Information (as defined in the Order dated 28 January 2022).

(b) All correspondence by which Defendant disclosed Confidential Information to any third party, private or governmental.

(c) All non-privileged correspondence in which Defendant discussed or referred to the Confidential Information, or otherwise relating to the Confidential Information.

(d) All non-privileged documentation of meetings or phone calls in which Defendant disclosed Confidential Information to any third party, private or governmental.

(e) All documents (whether or not containing confidential information) belonging to the Plaintiffs.

(f) All documents received by the Defendant in his capacity as an employee of Hudson Americas, LLC ("**Hudson**"), Lone Star U.S. Acquisitions, LLC, and Lone Star North America Acquisitions (NY), LLC, or in his capacity as a limited partner and which remain in his possession, custody or power.

4. The Court also notes that the there are three additional applications pending, namely, an application by the Plaintiffs requesting further and better particulars of the Defence; an application by the Defendant requesting further and better particulars of the Statement of Claim; and an application by the Defendant that the Statement of Claim be struck out and/or summarily dismissed principally on the ground that the claims asserted by the Plaintiffs against the Defendant disclose no reasonable cause of action. It is agreed by Counsel that the applications for further and better particulars should await the outcome of the present discovery application.

5. The background to these proceedings is set out in the first affidavit of Rebecca Williams Smith, the Senior Managing Director of Lone Star Global Acquisitions, LLC, dated 27 January 2022. Ms Williams Smith states that the Plaintiffs, incorporated in Bermuda, are the general partners of their respective Bermuda Limited partnerships, and together they and their affiliated entities and individuals are engaged in private equity investments (together the "**LS Group**"). Lone Star was founded by Mr John Grayken in 1995. Lone Star has organised over twenty funds ("**the Funds**") with aggregate capital commitments totalling over $85 billion. The Funds' capital largely comes from sophisticated institutional investors, such as corporate and public pension funds, sovereign wealth funds, university endowments, foundations, and high net worth individuals.

6. Lone Star Global Acquisitions, Ltd, ("**LSGA**") is another Bermuda exempted company registered as an investment adviser with the United States Securities and Exchange Commission and has been engaged to provide investment services to the Funds.

7. In addition to the investment services provided by LSGA and its subsidiaries, the Funds have also engaged Hudson to provide complimentary investment services, such as due diligence, analysis, and asset management, along with ancillary administrative services such as legal, compliance, accounting, cash management, tax, information systems, human resources, and operating company oversight. Hudson is engaged through a services agreement with each Fund and is paid a fee for these services.

8. The Defendant's professional relationship with Lone Star and Hudson began in 2010, during which time he had numerous roles and acted in a variety of capacities, both as an employee of one or more Hudson and Lone Star entities, and as a limited partner of the Plaintiffs.

9. The Defendant began his employment as Senior Vice President of Underwriting, Real Estate-Americas for a Hudson predecessor entity. As part of this position, the Defendant was

responsible for the analysis and structuring of the economic feasibility of short and medium-term distressed real estate investments, and he was expected to analyse and structure new transactions and make recommendations to Lone Star senior executives.

10. In early 2013, the Defendant's employment was transferred to Lone Star U.S. Acquisitions, which at the time was a subsidiary of LSGA, and thereafter he became a high-ranking employee and officer within the LS Group and continued to provide investment services to the Funds, including to their respective Partners-GP, the Plaintiffs in these proceedings. In mid-2016, the Defendant's employment was again transferred to Lone Star North America Acquisitions (NY), LLC, now known as Lone Star Americas Acquisitions, Inc, a subsidiary of LSGA.

11. The Defendant was ultimately elevated to Co-Head of North American Commercial Real Estate before the end of his tenure in 2018. The Defendant was responsible for originating investments and overseeing such investments during the life of the Funds that he was involved with. The Defendant's employment with the LS Group ended with its termination on 1 March 2018.

12. The claims brought in these proceedings are brought by the entities with whom the Defendant had a limited partnership agreement and whose confidential information, it is claimed, is in the possession of the Defendant.

13. It appears that in early 2018, the Defendant came to the view that fees being paid by the Funds to Hudson were too high. Shortly after the Defendant's departure, Lone Star North America began receiving enquiries from various regulatory bodies regarding the Defendant's belief that the Funds were paying inflated fees to Hudson.

14. On 29 October 2020, the Defendant filed a Complaint in the Illinois courts along with 12 exhibits of over 300 pages, which the Plaintiffs claim contain highly confidential and commercially sensitive information. It appears that initially, the Complaint was filed under seal pursuant to the requirements of the Illinois False Claims Act, the statute under which the claims were brought. In the Illinois proceedings the Defendant claims damages in an amount equal to three times the amount of damages the Government Plaintiffs sustained as a result of the unlawful conduct of the defendants. The Defendant also seeks an order awarding him the maximum award allowed under the False Claims Act. If the Defendant is successful in the Illinois proceedings, he is seeking, according to Counsel for the Plaintiffs in these proceedings, a sum in the region of US $25 million.

15. The present state of the pleadings in the Bermuda proceedings is that the Plaintiffs filed their Statement of Claim on 13 April 2022. The Defendant filed his Defence on 24 June 2022. Following the filing of the Defence, the Plaintiffs' attorneys wrote to the Defendant's attorneys expressing the view that the Defendant's blanket denials result in a complete denial that he has any confidential information whatsoever, although he also avers that he is embarrassed in his Defence due to the Plaintiffs' failure to properly particularise what confidential information they assert he has. The Plaintiffs' attorneys took the position that in the present circumstances it was necessary for the Defendant to fully disclose what documents he has in his possession at this stage of the proceedings, so that the Plaintiffs can fully particularise their claim as to what information they say that the Defendant has in its possession which is subject to a duty of confidentiality. The Plaintiffs' attorneys also stated that specific discovery at this stage would significantly narrow the issues in dispute between the parties and would also allow the parties to consider whether to amend their pleadings at this stage.

16. In response the attorneys for the Defendant pointed to the *ex parte* injunction hearing, where the Plaintiffs asserted that the Defendant had breached confidentiality by disclosing confidential information in the Complaint filed in the Illinois courts against the Plaintiffs in the Bermuda proceedings and other Lone Star entities. The Defendant argued that as the Plaintiffs have the Illinois Complaint and the exhibits, the Plaintiffs already have in their

possession documents which are sufficient for the purposes of adequately particularising the Statement of Claim.

17. In response the Plaintiffs' attorneys have asserted that the Defendant undoubtedly has additional documents in its possession, which are highly likely to be confidential, and the Plaintiffs cannot plead to those documents. The Plaintiffs contend that unless and until the Defendant provides the Plaintiffs with specific discovery:

    (a) The Plaintiffs cannot properly plead their case in full. They will have to amend the pleadings following discovery to address these additional documents. They argue that this is not a "*fishing expedition*", as asserted by the Defendant, the evidence is overwhelming that the Defendant has additional confidential documents.

    (b) The Court cannot determine the claims unless and until such discovery is given. It makes no sense, from a case management perspective, to delay discovery and doom the parties to delays and incurring additional costs.

    (c) The Court cannot determine the Defendant's purported defences (e.g., that the information is now "*stale*", is available from public sources, or that there is a public interest defence) without reference to the documents.

    (d) The Defendant's offer to give an undertaking is an empty gesture. The Plaintiffs (and the Court) cannot be expected to accept an undertaking from the Defendant not to disclose "*confidential information*" without knowing what information he has, and without some agreement between the parties or determination as to the confidentiality of that information.

18. The Defendant argues that as a matter of principle and the standard practice of the Court, discovery is not to be ordered before the close of pleadings, unless it is *necessary* for disposing fairly of the cause or matter or for saving costs. The Rules of the Supreme Court and case law

contemplate the standard approach providing for deviation only in exceptional cases. The Defendant argues that it is manifest that, in this case, the proposed approach to discovery is misconceived and will be expensive, slow and inefficient. In particular the Defendant argues that:

(a) Notwithstanding the Plaintiffs' acknowledgement that his pleading was not sufficiently particularised, the Plaintiffs waited four months to bring its specific discovery application. The application and the delays surrounding it, increased costs and led to the filing of several other applications to the Court.

(b) The relevant documents will necessarily be disclosed pursuant to standard discovery at the appropriate time.

(c) It is misconceived that the Defendant should be required to provide a list of documents received by him in his capacity as a limited partner given that the Defendant continues to be a limited partner in the Plaintiffs' limited partnerships and is entitled to possess the limited partnerships' confidential information by reason of his status as a limited partner.

(d) The specific discovery application also provides for the Defendant to disclose certain documents without conducting a relevance review.

(e) Insofar as the Plaintiffs seek disclosure of material that falls under the category of documents that the Defendant holds in his capacity as a limited partner in Hudson or as its former employee, it is not clear that the Court has jurisdiction to order the Defendant to do so (given that these agreements are governed by Delaware and Texas law respectively).

Discussion and analysis

19. Both Counsel (Mr Rhys Williams for the Plaintiffs and Mr Dantae Williams for the Defendant) accepted that the Court's power to order specific discovery is not confined to any particular

stage of the proceedings. The Court has the inherent jurisdiction and/or case management powers under its jurisdiction to advance the Overriding Objective pursuant to RSC order 1A, to order specific discovery at any time where the Court considers it is appropriate to do so having regard to the facts and issues raised in any particular proceedings. These jurisdictional bases were clearly recognised by Gloster JA in *Credit Suisse Life (Bermuda) Limited v Ivanishvili and others* [2020] Bda LR 62 at [31]:

> "*The clear purpose of Order 24 rule 7, and, indeed, Order 24 generally, is to enable one party to find out what specific, and relevant, documents the opposing party has, or has had, in its possession and what has become of them, if they have left such party's possession. In addition, of course, the discovery process leads to inspection of the relevant documents by the opposing party. In order to ensure that such an application, and indeed the whole discovery process, is robust and effective, it may well be necessary in circumstances, such as the present, for the types of order to be made as the judge made in this case.* ***Such orders are clearly ancillary to the discovery process and, in my judgment, a judge clearly has power, or jurisdiction, to make them, whether under the inherent jurisdiction or under the case management powers as contained in RSC 1A/4(2) to give directions to ensure that the trial of a case proceeds quickly and efficiently and that the parties are on an equal footing in accordance with the overriding objective.*** *In such circumstances, the fact that, in my view, the express provisions of Order 24 rule 7 do not of themselves authorise a judge to make the type of orders made by the Chief Justice in this case or cannot legitimately be construed as so doing (even with the aid of the overriding objective) is irrelevant. Accordingly, I have no doubt that the Chief Justice had power (or jurisdiction) to make such orders.*" (emphasis added).

20. At [38] of the judgment in *Credit Suisse* Gloster JA held that the appropriate test was not whether the specific discovery was "*necessary*" in the circumstances of the particular case whether it was "*appropriate*" to do so:

"...His basic point was that such orders could only be made if the judge concluded that it was "necessary" to make such orders, as per the requirement in RSC Order 24/8 in relation to discovery orders. I disagree that RSC Order 24/8 imposes such a constraint on the exercise of the discretion to make the type of orders made by the Chief Justice in this case, whether under Order 1A or the inherent jurisdiction; in my view it would be sufficient if the court thought that it was "appropriate" to do so..."

21. It was also recognised by Subair Williams J in *Athene Holdings Ltd v Siddiqui and others* [2021] Bda LR 58 at [42] that the Court does not lack jurisdiction to order directions on discovery in a manner outside of the mutual exchange of documents contemplated by RSC order 24. The learned judge held the Court may rely on its wide case management powers to make an order for a simultaneous and phased approach to discovery if it is appropriate to do so having regard to all the factors set out in RSC order 1A. This approach is consistent with the approach taken by the English courts under the CPR. Thus, in *BDW Trading Limited v Fitzpatrick and others* [2015] EWHC 3490 (Ch) Judge Behrens held at [24]:

"When the application was before Newey J no proceedings had been issued thus the application for disclosure was, in effect, an application for pre-action disclosure under CPR 31.16. Proceedings have, of course, now been issued and thus the application is for specific disclosure under CPR 31.12. The notes to CPR 31.12[1] in the 2015 White Book include:

> *The rationale for the discretion to order specific disclosure is that the overriding objective obliges the parties to give access to those documents which will assist the other's case: Commissioners of Inland Revenue v Exeter City AFC Ltd [2004] B.C.C. 519.* ***The court has a discretion as to whether it makes the order. It may make an order at any time, regardless of whether standard disclosure has already occurred; and it may make orders for specific disclosure against a claimant before the service of the defence where it would assist the defendant to plead a***

[1] At 31.12.2 p 1006

full defence rather than an initial bare denial: *Dayman v Canyon Holdings Ltd January 11, 2006, unrep., Ch.D, H.H. Judge Mackie Q.C"* (emphasis added)

22. The older authorities expressly recognise that where the defendant has means of knowing the facts in dispute and the plaintiff has not, the defendant is not entitled to particulars until after he has given discovery. The Plaintiffs assert that this is precisely the situation in the present case. Thus, in *Millar v Harper* (1888) 38 Ch. D. 110, the plaintiffs, who were the executors of a married woman, sued her husband to establish that a quantity of the furniture and other chattels comprised in an inventory which had been taken of the goods in the defendant's house, belonged to the separate estate of the wife. The husband applied for particulars of demand showing which chattels they claimed. Cotton LJ held at 111 that the provision of such particulars by the plaintiffs should be postponed until the husband had given discovery:

> "... *The Defendant must know of his own knowledge what furniture his wife had, the Plaintiffs, being only executors, cannot be supposed to have any such knowledge. The Plaintiffs put forward by the statement of claim a right to a certain class of articles but cannot identify them. It may be right that before trial they should give particulars, but I think that they are giving them ought to be postponed till the Defendant has given discovery. When the Plaintiffs are executors who do not know, and the Defendant a person who does know, it is right that discovery should come first.*"

23. To the same effect is the Hong Kong judgment of Deputy High Court Judge Le Pichon in *Luen Tat Band Manufacturer Ltd v Stephen Liu Yiu Keung David Yen Ching Wai* [2020] HKCFI 2610:

> *"[64] The Defendants are the only persons with the knowledge of what documents had been generated during their time in office which spanned over 7 years and in respect of which they have been handsomely remunerated.*

[65] It defies belief that they had the temerity to submit that "it would be incumbent upon the Plaintiff to identify the documents to which it claims to be entitled with some precision such that this Court can determine the issue in accordance with the evidence".

[66] That submission reflects badly on the Defendants who, as officeholders, should adhere to higher standards. In my view, they have conducted themselves disgracefully in the saga, and deserve sanction."

24. The authorities recognise that if a party is not in a position to prepare a proper pleading prior to discovery by the other party, or that in the absence of such discovery the pleading served is bound to be the subject of further amendments, the Court may order that discovery should be provided by the other party. Thus, in *Speyside Estate and Trust Co Ltd v Wraymond Freeman (Blenders) Ltd (in liquidation)* [1950] 1 Ch. 96 the plaintiff company's counsel contended that he was not in a position, before discovery, to deliver a satisfactory statement of claim. Wynn-Parry J held that he entertained no doubt that the true conclusion was that, if the order for discovery asked for by the plaintiff is not made, then, unless a miracle of speculation is achieved by the pleader of the statement of claim, most substantial amendments will have to be made. This was so because of the peculiar and unusual nature of the cause of action, and because of the circumstances, on the allegations of which the action was founded, that the defendant company were trustees of the money in question for the plaintiff company, and that the defendant company, and the defendant company alone, knew what dealings had taken place with that money. In the circumstances the court ordered the defendant company should give discovery prior to the delivery of the statement of claim.

25. The authorities reviewed above provide ample support for the proposition that the Court may order specific discovery from a party at any stage of the proceedings where the court considers that it is "*appropriate*" to do so. In the circumstances of this case the Court is persuaded that it is indeed *appropriate* that the Court should order that the Defendant be required to provide the discovery sought in terms of the Summons dated 18 August 2022 and that the Defendant file and serve an affidavit verifying the list referred to in paragraph of the Summons within 21

days. The Court further orders that the Defendant produce to the Plaintiffs the documents falling within the above categories which are in his possession, custody or power.

26. The Court is satisfied that in the circumstances of this case it is only the Defendant who knows precisely what confidential information and documents he has in his possession belonging to the Plaintiffs and the Funds and affiliates of the Plaintiffs and the Funds. In the circumstances, it is wholly unrealistic for the Defendant to seek further and better particulars in relation to these documents prior to the Defendant giving proper discovery.

27. The Court is further satisfied that in the absence of the specific discovery sought by the Plaintiffs, they are not in a position to file a proper Reply and/or amend the Statement of Claim (as envisaged by paragraph 45 of the existing Statement of Claim). The Court is persuaded that in the absence of specific discovery by the Defendant at this stage, there is a realistic prospect that the existing Statement of Claim and any Reply filed by the Plaintiffs are likely to be subject to major amendments once the discovery is given by the Defendant.

28. The Court does not accept that the present application for specific discovery is in the nature of a "*fishing expedition*". The Court is satisfied that there is a *prima facie* case that the information set out in the Complaint filed in the Illinois proceedings and the documents which were exhibited include confidential and commercially sensitive information and trade secrets, which the Defendant allowed to be publicly disclosed. Furthermore, the Defendant states at paragraph 138 of the Complaint that "*for the past two years*" he has been "*assisting other jurisdictions.*" The Defendant also appears to admit to sharing confidential information with the Plaintiffs' competitors (see paragraph 89 of the Complaint). In the circumstances, it is appropriate to require the Defendant to give discovery of other documents which may be subject to the obligation of confidence or may show a breach of that obligation. Such an order is commonly required in cases of alleged breaches of confidence in order to police the restraining orders already made by the court and in order to allow the plaintiff to properly plead his case against

the defendant (see paragraphs 30-32 of the judgment of Judge Behrens in *BDW Trading Limited v Fitzpatrick and others* [2015] EWHC 3490 (Ch)).

29. The Court considers that the scope of the specific discovery order is appropriate given the scope of the confidentiality obligations asserted by the Plaintiffs in the pleaded case. In the pleaded case, the Defendant is subject to a contractual duty of confidentiality, which is set out at paragraph 26 of the Statement of Claim and is admitted by the Defendant. The information which is subject to the contractual duty of confidentiality is not limited to information belonging to the Plaintiffs. It is the Plaintiffs' case that the Defendant is also subject to non-contractual duties of confidentiality, as set out at paragraphs 29 and 30 of the Statement of Claim. The Defendant denies that he is subject to such non-contractual duties of confidentiality. The Court notes that the legal basis for the duty of confidentiality is one of the issues in dispute in these proceedings and discovery must be given in relation to all disputed issues.

30. As noted earlier, Mr Dantae Williams submitted on behalf of the Defendant that the Court has no jurisdiction to order discovery of documents that the Defendant holds in his capacity as a limited partner in Hudson or as a former employee. It was said that this Court had no jurisdiction to order discovery "*given that these agreements are governed by Delaware and Texas law respectively*." The Court is unable to accept this submission made on behalf of the Defendant. The fact that these agreements are governed by Delaware and Texas law is clearly relevant to the issue of interpretation of these agreements and whether and, if so, to what extent they give rise to an obligation of confidence. However, the mere fact that these agreements are governed by Delaware and Texas law does not lead to the conclusion that this Court has no jurisdiction in relation to a claim alleging breach of an obligation of confidence arising out of these agreements or to order discovery in relation to issues related to these claims. In the Court's view, there is no relevant issue of jurisdiction given that the Defendant has clearly submitted to the jurisdiction of this Court by voluntarily participating in these proceedings.

Conclusion

31. The Court is satisfied that this is an appropriate case where the Court should order that the Defendant should give discovery in terms of the Summons dated 18 August 2022. The Court makes an order in terms of paragraphs 1, 2 and 3 of the said Summons.

32. The Court will hear the parties in relation to the issue of costs, if required.

Dated this 12th day of January 2023.

NARINDER K HARGUN
CHIEF JUSTICE

THE SUPREME COURT OF BERMUDA