In The Supreme Court of Bermuda

CIVIL JURISDICTION

COMMERCIAL COURT

2008: No. 217

IN THE MATTER OF LEHMAN RE, LTD

AND IN THE MATTER OF THE COMPANIES ACT 1981

AND IN THE MATTER OF THE INSURANCE ACT 1978

RULING

(In Chambers)

Date of Hearing: August 23- 24, 2011
Date of Ruling: September 20, 2011

Mr. John Riihiluoma and Mr. John Wasty, Appleby, for Pulsar Re Ltd
Mr. Kim White and Ms. Sarah-Jane Hurrion, Cox Hallett Wilkinson, for
Lehman Brothers Holdings Inc. ("LBHI") and Lehman Commercial Paper Inc. ("LCPI")
Mr. Delroy Duncan and Mr. Henry Tucker, Trott & Duncan, for the Joint Provisional Liquidators

Introductory

1. The present application raises, seemingly for the first time under Bermudian law, the question of when a party who has received documents subject to an implied duty of confidentiality may be released from such undertaking so as to deploy the relevant material in proceedings overseas. By its Summons dated April 29, 2011, Pulsar Re

Limited ("Pulsar Re"), a general business creditor of Lehman Re Limited-in Provisional Liquidation ("Lehman Re" or "the Company") seeks an Order that:

> "*1. Pulsar Re Limited be released from its implied confidentiality undertaking in these proceedings so it can use the discovery obtained herein from the Joint Provisional Liquidators in proceedings that Pulsar Re Limited has brought in New York in the United States Bankruptcy Court in the Southern District of New York against Lehman Brothers Holdings Inc. and Lehman Commercial Paper Inc.*"

2. This relief is not sought in the ordinary commercial litigation context. On September 23, 2008, the Company entered provisional liquidation on the Order of the Chief Justice. The Company had reinsured risks on a segregated basis with Long Term Creditors, as well as reinsuring its General Creditors. On February 19, 2009, the Joint Provisional Liquidators ("JPLs") issued a Summons seeking "*directions about the treatment of the Congress Life asset in the books and records of the Company*". They were unable to decide whether the Congress Life asset should properly be treated as a Long Term asset or a General Asset. On March 25, 2009, directions were ordered for the filing of factual and expert evidence by the JPLs, Pulsar Re and the Long Term Creditors. The JPLs have from the outset maintained a neutral position in respect of this question which has arisen in the course of the liquidation, on the basis that the relevant stakeholders will themselves advance the necessary arguments to enable this commercial dispute to be adjudicated.

3. The present application arises from discovery ordered by this Court in the process of preparing for the final determination of this issue. On November 10, 2010, I made the following further directions:

> "*(iv) On application by Counsel for Pulsar Re Ltd by summons issued dated 23rd September 2010,*
>
> *(a) The Joint Provisional Liquidators shall within 28 days give specific discovery of the documents, correspondence and records identified at paragraphs 19(i) to 19(xviii) of the First Affidavit of John Symon Wasty…;*
> *(b) The Joint Provisional Liquidators shall have liberty to apply for directions including an extension of time, with respect to paragraph (a);*
> *(c) Pulsar Re Ltd. shall, within 3 months of receipt of the documents identified in paragraph (a), or such longer period as may be agreed by*

all parties, notify all parties as to whether it intends to pursue its proprietary claim;

(d) *Pulsar Re has liberty to apply with respect to further document requests and extensions of time in respect of paragraph (iv).*"

4. The proprietary claim Pulsar Re might bring, and referred to in the November 10, 2010 Order, was a claim against the Company. Pulsar Re had not at this juncture commenced an Adversary Proceeding against LBHI and LCPI in the jointly administered Chapter 11 proceedings filed by LBHI and others (case No. 08-13555) in the United States Bankruptcy Court for the Southern District of New York (Hon. James M. Peck). The documents disclosed to Pulsar Re by the Company in Bermuda were obtained by the JPLs under a Data Sharing Agreement dated March 2, 2010 between the Company and LBHI (the "DSA").

5. The DSA contemplated that, although the JPLs had requested only information and data in LBHI's possession which belonged to the Company, such data "*is or may be commingled with information and data owned by or relating to LBHI or another entity*". Accordingly the Company agreed not disclose any such information which was confidential without the prior consent of LBHI or other relevant entity, save as required by applicable law. LBHI and LCPI responded to Pulsar Re's application for leave to use the material obtained by Pulsar Re from the Company in the following way.

6. By an Amended Summons dated May 31, 2011, the US Debtors to Pulsar Re's US proprietary claim sought the following principal relief, namely an Order that:

> "*1. LBHI and LCPI be added as parties to this matter limited only to issues arising out of or related to Pulsar Re Limited's Summons dated 29th April 2011 for an order that it be released from its implied confidentiality undertaking…;*
>
> *2. Pulsar Re Limited do provide a list of the documents in respect of which it seeks a release from its implied confidentiality undertaking by 16th June 2011….*"

7. The parties having agreed that Pulsar Re need not file its Amended Complaint in New York until 14 days after this Court's adjudication of its application for a release in these proceedings, LBHI and LCPI invited the Court to decline to consider Pulsar Re's application on its merits until it had specified what documents it proposed to rely upon so that any objections could be properly formulated. The two applications were heard

together. On the second day of the hearing, Pulsar Re's counsel served a copy of the documents upon which it proposed to rely. I gave LBHI and LCPI 14 days to file supplementary submissions, if so advised, to deal with this new material. However, at first blush it appeared impossible to credibly suggest that the documents in question contained data which belonged to the US Debtors. In the event, '*Further Submissions on behalf of LBHI and LCPI*' were filed.

Factual findings: the documentary scope of Pulsar Re's application

8. Pulsar Re's Summons was initially supported by the Second Wasty Affidavit sworn on June 28, 2011. Pulsar Re's claim against the Company is based on the core assertion that Lehman Re failed to segregate and misappropriated $450 million posted by Pulsar Re as collateral for its obligations as Lehman Re's reinsurer under a Quota Share Agreement pursuant to which Pulsar Re assumed approximately $1 billion worth of risk. Pulsar Re's Adversary Complaint dated January 26, 2011 in the US proceedings alleges that all of this collateral was transferred by Lehman Re to LBHI or LCPI under a repurchase agreement which did not reflect arms-length terms. It is said to be appropriate to lift the undertaking to enable Pulsar Re to recover its misappropriated collateral, wherever it may be found.

9. The Pulsar Re Summons was also supported by the First Affidavit of Dorothy McNaughton Cory-Wright, sworn on June 28, 2011. The Sidley Austin LLP partner deposed that, *inter alia,* (a) she believed that all documents disclosed by the JPLs were having regard to the terms of the specific discovery Order "*Lehman Re documents*" (paragraph 27); (b) as the US Debtors' opposition was purely speculative (they had not objected to the production made by the JPLs when afforded an opportunity to do so (paragraph 27), it was vexatious and oppressive for them to require Pulsar Re to provide discovery by list. Moreover it would be unfair to restrict Pulsar Re to using only those documents it wished to rely upon in formulating its Amended Complaint (paragraph 28).

10. The application for Pulsar Re to produce a list of the documents to which their release application related was initially supported by the First Affidavit of Sarah-Jane Hurrion dated June 1, 2011.The deponent complained that the documents had not been identified making it impossible for the US Debtors to determine their substantive position on Pulsar Re's application. (This position was echoed by the JPLs). Its attorneys' request that LBHI and LCPI particularize the documents believed to belong to LBHI was impossible to comply with. LBHI and LCPI also relied upon the First Affidavit of Richard Lawrence Levine dated July 27, 2011. The Weil Gotschal & Manges LLP Partner deposed, *inter alia*, that (a) the documents Pulsar Re sought to rely upon might not be available under

US discovery procedures, which Pulsar Re should not be permitted to avoid (paragraph 5(a), (c)); (b) Pulsar Re's attempt to obtain such discovery prematurely from the US bankruptcy Court had been rejected by Judge Peck on July 20, 2011 (paragraph 5(e)). The exhibited transcript of this hearing served to illustrate, as Mr. White pointed out, a breach of the implied undertaking through Pulsar Re's US counsel deploying the relevant documents in preparing a draft of the Amended Complaint ; (c) the fact that the JPLs had asked LBHI if it objected to disclosure of the relevant documents made it inherently likely that the material supplied to Pulsar Re included confidential data belonging to LBHI or other entities (paragraph 20); and (d) Pulsar Re's offer to share all documents received from the JPLs on terms which would limit use by LBHI and LCPI was unreasonable (paragraph 34). The attempt to obtain a general release beyond the limited scope of documents required for use in preparing the Amended Complaint was also challenged (paragraph 37).

11. Pulsar Re sought leave to rely on the First Affidavit of Mark McKane, the Kirkland & Ellis partner who unsuccessfully sought to obtain leave to utilize the documents from Judge Peck (while admitting having already used them in drafting the amended pleading) in the US Bankruptcy Court. Such evidence was not contemplated by the directions and I refuse leave for it to be relied upon.

The specific documents intended for use in the Amended Complaint

12. Shortly before the conclusion of Mr. Riihiluoma's submissions in reply, he served on his opponents and handed in to the Court a small bundle of documents upon which Pulsar Re sought to rely in preparing its Amended Complaint. The bundle ran to less than 30 pages. On a quick review the documents appeared quite obviously to contain information solely relating to or belonging to Lehman Re. It was difficult to see why the relevant documents could not have been particularised by way of List or simply supplied to the US Debtors, even though this would have left the dispute about whether or not Pulsar Re should be at liberty to use other unspecified documents as and when it saw fit in the US litigation. After all, the burden lay on Pulsar Re to demonstrate that it ought to be released from its implied undertaking.

13. In their Further Submissions, LBHI and LCPI contend that "*regardless of whose documents these are, the majority contains confidential LBHI, LCPI and/or related entities' information*" (paragraph 6). The Submissions append by way of example "*a chain of emails reflecting the LBHI-side details of LBHI transactions with Lehman Re*" (paragraph 6). Three emails are appended, the first and most significant of which (from Amy Fong) (a) explains how the Lehman Re collateral is dealt with-"*rolled into an*

existing reverse repo Lehman Re had with LCPI', and (b) explains what charges are being levied in respect of this transaction, partially from what appears very arguably to be an LBHI perspective.

14. The subject heading of the email is "*Carry credit for Lehman Re*", which is consistent with the fact that Amy Fong was acting at all material times as an agent of Lehman Re. Although the contents of the emails appear to discuss what income can be generated out of the Lehman Re collateral proceeds by other Lehman entities, the information appears on its face to be of a character which Amy Fong, in her capacity as an agent of Lehman Re, would be entitled to receive. This is because in her email she explains that a colleague "*will be booking an entry today to correct the carry charge for 2008 ytd, and beginning March month end-we will include this entry as part of our monthly carry interest allocation for Aetna and Scor*". The dominant function of the email chain-just over one out of the 28 pages-appears to be to explain charges levied in connection with collateral received from Lehman Re "*in connection with reinsurance contracts assumed*".

15. For present purposes I am prepared to assume that the reference to the accounting treatment to be given to the equivalent charge in relation to the other two insurers mentioned is information which Lehman Re would have been entitled to receive because it arose out of a wider transaction in which Lehman Re was involved. I do not accept the submission that it matters not whether the documents in question belong to Lehman Re, if confidential information relating to LBHI is contained therein. The crucial question is whether Lehman Re was entitled to receive the relevant information, not simply whether or not the information was confidential or concerned LBHI. If the document was a Lehman Re document containing confidential information about other entities, the starting assumption must be that Lehman Re was entitled to have the relevant information.

16. For the purposes of an application of the present type, the Court cannot reasonably be expected to carry out a full investigation with a view to making final factual determinations on each and every factor relevant to the exercise of the Court's discretion to release Pulsar Re from the implied undertaking that it will only use material disclosed in the present proceedings within these proceedings. Mindful that a fuller investigation of the character of the emails to which the US Debtors refer might yield a different conclusion, I find that on balance these documents appear to (a) belong to Lehman Re; or (b) contain information to which Lehman Re was in any event entitled, either in law or in equity.

17. The remaining documents do not on their face even arguably contain data confidential to LBHI or LCPI. They consist of:

(a) emails to and/or from, *inter alia*, Lehman Re employees in the US (principally Amy Liu (formerly Amy Fong), Lehman Re's Bermuda attorneys and Lehman Re's Bermuda-based corporate administrators; and
(b) Lehman Re bank statements (Bank of Bermuda, HSBC).

18. On balance I find, for the purposes of the present application (without intending to finally resolve this issue for all purposes), that none of the documents Pulsar Re wishes to deploy contain information confidential to LBHI and/or LCPI in the sense that it was information which Lehman Re neither owned nor was entitled to receive. In reaching this conclusion I take into account the background against which the documents in question came to be disclosed to Pulsar Re by the JPLs in unredacted form.

19. On June 4, 2010 when the first trial date was adjourned primarily to facilitate further disclosure, Mr. Duncan helpfully categorised the three classes of documents which had been identified by the JPLs. The present documents are extracted from the second category to which counsel referred at that hearing; those identified by Cadwalader in New York as relevant to the present proceedings, subject to the DSA and redacted because confidential information had been commingled. As explained in the First Wasty Affidavit dated September 17, 2010, the JPLs subsequently served documents on June 9, 18 and 26, 2010.

20. On August 6, 2010, Aetna Life Insurance Company issued a Summons seeking, inter alia, "*unredacted documents exhibited to the 7th and 8th Affidavits of D Geoffrey Hunter as exhibits DGH7 and DGH8*". This Summons was supported by the First Affidavit of Jeremy Garood. Although First Wasty was sworn in support of Pulsar Re's Summons for specific discovery issued on September 23, 2010, it reiterated the complaint that the redactions made were flawed. On the hearing of these Summonses on November 10, 2010, Mr. Riihiluoma and Mr. Garood made common cause in calling for the production unredacted documents so that the documents could be properly understood. I accepted these submissions. Mr. Duncan informed the Court that LBHI had been put on notice of the fact that an order might be made requiring the JPLs to disclose unredacted copies of documents covered by the DSA. Not only did LBHI not object; the JPLs took no position on the application.

21. While the exhibits to the 7th and 8th Hunter Affidavits run to several thousand pages, the redacted pages represented a far more digestible and discrete portion of the whole. It beggars belief to suggest that LBHI, afforded the opportunity to review a comparatively

discrete selection of documents which the JPLs' New York attorneys had redacted to protect the rights of LBHI and its affiliates under the DSA to object to their disclosure to potentially adverse parties, would have omitted to pursue such a narrow exercise either (a) to save costs; and/or (b) in reliance on a highly fluid common law implied undertaking that the documents would only be used in the present proceedings.

22. Further and in any event, even if prior to the November 10, 2010 Order the US Debtors had no reason to focus on Pulsar Re as a potentially adverse party, the Adversary Complaint was filed on January 26, 2011. LBHI and LCPI applied to intervene in the present proceedings on May 31, 2011. Yet when this matter was argued in the fourth week of August, 2011, counsel contended that unless Pulsar Re specified the particular documents upon which it wished to rely, LBHI and LCPI could not even commence a preliminary assessment of whether a breach of their confidentiality rights would be entailed.

23. Against this background the contentions made in the context of the present application that the documents Pulsar Re intends to use for its Amended Complaint generally, and the relevant emails in particular, contain confidential information belonging LBHI and/or LCPI which Lehman Re was not entitled to receive simply lacked credulity.

The unspecified documents Pulsar Re wishes to be free to use if required in the US proceedings without making a further application to this Court

24. Mr. Riihiluoma submitted on behalf of Pulsar Re that the objections to its application needed to be subjected to a "reality check". I agree that the suggestion that the material disclosed to Pulsar Re by the JPLs pursuant to the November 10, 2010 specific discovery order contains information confidential to LBHI or its affiliates has an air of unreality about it.

25. Firstly, the Order itself was directed at Lehman Re documentation. It is true that the JPLs afforded LBHI an opportunity to object, in accordance with the DSA, to the documents supplied. Such a precautionary approach, on the part of officers of the Court, can hardly support the inference that confidential information was in fact disclosed to Pulsar Re. As evidenced by Cadwalader's letter of January 31, 2011 on behalf of the JPLs to Alvarez & Marshall on behalf of LBHI, there was merely a concern that some of the "*Additional*" documents "*may contain*" commingled data as defined in the DSA. LBHI was invited to consent to unredacted copies being disclosed, an invitation which is inconsistent with the JPLs considering that material to which LBHI was likely to object was involved. Although this is not dispositive, as LBHI arguably at this juncture had no reason to be concerned about the use of the material by Pulsar Re in the Bermuda proceedings, it is

nevertheless noteworthy that LBHI did not object. As Pulsar Re had commenced proceedings against LBHI and LCPI by January 31, 2011, however, it would be surprising if the US Debtors both (a) believed there was a real risk of Pulsar Re obtaining sensitive material which could potentially be used in the US proceedings (or which exclusively belonged to those entities in any event) yet still (b) adopted a "laid back" approach to unredacted versions of the documents being deployed in the Bermuda proceedings.

26. Secondly, it is a matter of record that Pulsar Re's expert in the present proceedings has been criticised for preparing a report which does not consider the accounting or banking records of LBI, the main counterparty to the crucial transactions entered into by Lehman Re allegedly with Pulsar Re's collateral. It is these documents which are most pertinent to Pulsar Re's claim in the present proceedings; so it is wholly improbable that such documents are in Pulsar Re's possession but not referred to in its expert evidence already before the Court.

27. Thirdly, all the documents received came from LBHI in any event; it has not advanced any tangible grounds for believing that any specific categories of documents containing data belonging to LBHI or related entities may be included in the specific discovery documents supplied by the JPLs to Pulsar Re for the purposes of the present proceedings.

28. Fourthly and more significantly still, despite becoming aware of Pulsar Re's intention of seeking to use the documents in the US proceedings and being afforded access to all of the relevant material, LBHI and LCPI did not in the course of oral argument identify even a single example of its breach of confidentiality concerns. Notwithstanding their contention that they should not be compelled to incur the costs of undertake a comprehensive review of the documents received by Pulsar Re, the US Debtors were willing to incur the costs of instructing Bermuda counsel to oppose the present application[1]. It beggars belief that such a step would be taken without even some cursory review of the documents in question, if LBHI and LCPI had solid grounds for believing that commingled data had been disclosed.

29. Accordingly, I find that although the possibility that data belonging to LBHI and affiliates has been accidentally disclosed by the JPLs to Pulsar Re cannot be completely ruled out, the likelihood that this has occurred is insufficient in practical terms to justify requiring Pulsar Re to identify at this stage each and every document which it might wish to rely upon at some future stage of the US proceedings.

[1] Mr. Riihiluoma referred to a November 23, 2010 '*Financial Times*' article ('*Lehman's US bankruptcy costs top $1bn*') and poured scorn on the suggestion that the US Debtors were reluctant to incur costs.

Legal findings: principles applicable to applications for a release from implied confidentiality obligations for the purposes of deploying documents in foreign proceedings

The implied undertaking

30. Mr. Duncan and Mr. Tucker, in the Submissions of the Joint Provisional Liquidators aptly summarised the applicable principles as follows:

> "*4. In ordinary adversarial litigation, the usual starting point is that a party obtaining discovery from his adversary is obligated to use the documents disclosed to him only for the proper purposes of conducting his own case, subject to an implied undertaking not to use any documents provided by way of discovery for any collateral or ulterior purpose.*"

31. What constitutes a collateral or ulterior purpose appears clearly to be use of the documents[2] otherwise than in the proceedings in which discovery was given, without the consent of the party who gave discovery or to whom the documents belong. The rationale for the existence of the implied undertaking at common law is clearly to protect proprietary interests in documents which are compulsorily disclosed, as well to encourage full and frank discovery by ensuring the party required to give discovery does so understanding the limited scope within which the discovered material will likely be used against the disclosing party. The undertaking does not automatically attach to all documents disclosed, irrespective of their content or character. For instance, in *Alterskye-v-Scott* [1948] 1 All ER 469 at 471, where the Plaintiff was suspected of passing documents to the Ministry of Food and the Police, Jenkins J held in the course of making a further and better discovery order:

> "*….it will be open to the defendant, if so advised, to say, with respect to particular documents or a particular class of documents, that those documents are, for this or that reason, especially confidential and that he objects to producing them except on an undertaking by the plaintiff in whatever form the defendant conceives would be adequate for his protection.*"[3]

[2] The term 'documents' in the modern era clearly includes electronic data as well.
[3] Obviously what was in issue here was an express undertaking, not an implied undertaking. But the case illustrates the sort of interests the implied undertaking is designed to protect.

32. And the following dictum of Hobhouse J in *Prudential Assurance Co.-v-Fountain Page* [1991] 1 WLR 756 at 765 is cited in paragraph 23 of the Skeleton Argument on Behalf of LBHI and LCPI:

> "*The rational basis for the rule is that where one party compels another, either by the enforcement of a rule of court or a specific order of the court, to disclose documents or information whether that other wishes to or not, the party obtaining the disclosure is given this power because the invasion of the other party's rights has to give way to the need to do justice between those parties in the pending litigation between them; it follows from this that the results of such compulsion should likewise be limited to the purpose for which the order was made, namely, the purposes of that litigation then before the court between those parties and not for any other litigation or matter or any collateral purposes…*"

Principles applicable to obtaining a release from the undertaking in civil litigation

33. I consider it self-evident that the exercise of the Court's discretion to grant leave to a litigant to use discovered material in other proceedings must necessarily be informed by the circumstances of each case. The Court's discretionary power in this respect will only ordinarily be invoked where the party giving discovery does not consent: Matthews & Malek, '*Disclosure*', (Sweet & Maxwell: London, 2007), paragraph 15-35. For this reason, the cases in which the principles applicable to the grant of a release have been considered are ordinary adversarial litigation cases.

34. The cases relied upon by the US Debtors suggesting a restrictive approach to granting releases all involved material which was clearly confidential. Most of the cases were patent cases where the parties opposing the use of discovered material for purposes extraneous to the litigation in which disclosure was ordered asserted proprietary rights over the relevant material[4]. Others involved defamatory material, public interest immunity or privilege[5]. Nevertheless, Mr. White submitted that Pulsar Re's application should be refused in reliance on the *dictum* of Talbot J in a copyright injunction case, *Distillers Co. (Biochemicals) Ltd.-v- Times Newspapers Ltd.* [1974] 1Q.B. 613 at 625:

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[4] *Sybron Corpn –v-Barclays Bank* [1985] 1 Ch 299 (trade secrets); *Distillers Co. (Biochemicals) Ltd.-v- Times Newspapers Ltd.* [1974] 1Q.B. 613 and *Crest Homes Plc et al-v-Marks et al* [1987] 1A.C. 829 (copyright cases); *Dory et al-v- Richard Wolf GmbH et al* [1990] 1 Fleet Street Reports 266, *Halliburton Energy Services Inc.-v- Smith International (North Sea , Inc. et al*[2004]EWHC 2181 (Pat), *Smithkline Beecham plc-v-Generics (UK) Ltd* [2003]EWCA Civ, *Halcon International Inc.-v- The Shell Transport and Trading Co. et al* [1979] RPC 97, and *Bourns Inc-v-Raychem Corp et al* [1999] 3 All ER 154 (patent cases).

[5] E.g. *O'Connor-v-Mirror Group Newspapers*, Court of Appeal February 1, 1993 (unreported) (defamation); *Harman-v- Secretary of State for the Home Department* [1983] A.C. 280 (public interest immunity); *Marcel-v-Commissioner of Police* [1992] Ch. 225 (privilege/rights of owners of documents seized by the Police).

"*...the defendants have not persuaded me that such use as they propose to make of the documents which they possess is of greater advantage to the public than the public's interest in the need for the proper administration of justice, to protect the confidentiality of discovery of documents.*"

35. The latter case involved a post-action attempt by the claimant to sell information including documents covered by copyright to a newspaper, creating a tension between freedom of the press and confidentiality as an incident of the right to a fair trial. Here, there is a conflict between the third party US Debtors' alleged confidentiality rights and Pulsar Re's fair trial rights, with the integrity of the discovery process really playing second fiddle.

36. However I accept Mr. White's submission that use of the material covered by the implied undertaking for the purposes of preparing a draft of the proposed Amended Complaint would in law constitute a breach of the undertaking: *Dory et al-v- Richard Wolf GmbH et al* [1990] 1 Fleet Street Reports 266, *Halliburton Energy Services Inc.-v- Smith International (North Sea, Inc. et al* [2004] EWHC 2181 (Pat). This point was peripheral to the question of what principles apply to the present application.

37. I find that the Court possesses the discretion to release a litigant from an implied undertaking as to confidentiality so as to be able to deploy confidential material in other litigation, whether at home or abroad, and the exercise of this discretion, <u>in relation to confidential matter</u>, requires a balancing of competing interests. One interest is the litigant's right to pursue his claim; the other is the public interest in preserving confidentiality. Both of these competing interests arise under the fair hearing rights conferred on civil litigants by section 6(8) of the Bermuda Constitution.

38. Where the documents are not confidential and the main concern of the Court is to protect the integrity of the discovery process (also an incident of fundamental fair trial rights), "*the cases in this area reflect the court's concern to see justice done or avoid a miscarriage of justice*": Style & Hollander, '*Documentary Evidence*', Sixth Edition at page 280. As Mr. Riihiluoma submitted, in this context it may suffice if use of the documents in a separate action, although "*outside the scope of the implied undertaking given*" is nevertheless "*not inconsistent with the broad purpose for which that discovery was given*": *Sybron Corpn –v-Barclays Bank* [1985] 1 Ch 299 at 327, per Scott J.

Modification of principles applicable to granting releases from implied confidentiality undertakings in the context of a winding-up

39. The above principles ought not ordinarily to be departed from merely because the documents are obtained, as in the present case, by a creditor from a liquidator for primary use in the liquidator's application for directions in the winding-up, as opposed to being supplied by an adverse party in ordinary civil litigation. If the liquidator has disclosed confidential material under compulsion of a court order, there is no fundamental distinction between the competing public interests which come into play.

40. On the other hand, the liquidation context may be significant, as Mr. Riihiluoma submitted, in demonstrating that the documents obtained were either not confidential at all, were not disclosed under compulsion in the ordinary discovery sense and/or that the liquidator was under a positive duty to share with the creditors information about the records of the insolvent company: *In Re Contract Corporation (Gooch's Case)* (1871) 7 L.R. Ch. App. 207 at 210-211. Section 193 of the Companies Act 1981 provides as follows:

> "*(1) The Court may, at any time after making a winding-up order, make such order for inspection of the books and papers of the company by creditors and contributories as the Court thinks just, and any books and papers in the possession of the company may be inspected by creditors or contributories accordingly, but not further or otherwise.*"

Findings: should Pulsar Re be released from its implied undertaking?

Specific documents identified for use in preparing Amended Complaint

41. It is difficult to identify any objectively solid grounds for refusing to release Pulsar Re from its implied undertaking only to use the material for the purposes of the present proceedings. In the course of argument I made mention of the importance of this Court not undermining cooperation between Bermudian liquidators and US Debtors in Chapter 11 proceedings. In this case LBHI provided documentation it believed contained commingled data not belonging to Lehman Re, without taking the time and trouble to edit it, in order to assist the JPLs under the legal umbrella of the DSA. However, having considered the evidence, the JPLs have demonstrably bent over backwards to avoid any hint of any breach of their obligations under the DSA. And none of the specific material Pulsar Re seeks to utilize for the purposes of preparing an Amended Complaint appears on its face to be confidential information which has unwittingly been supplied to Lehman Re. On the contrary, the overwhelming majority of these documents are demonstrably Lehman Re documents, and the one email chain of which explicit complaint is made is

prima facie either (a) Lehman Re documentation; or (b) documentation containing information which Lehman Re's US-based service providers were obliged to share with Lehman Re.

42. The documents were not disclosed by the JPLs by way of traditional litigation discovery. The documents were disclosed for the purposes of enabling Pulsar Re and other creditors to resolve a dispute between two classes of creditors as to how a key liquidation asset should be distributed. In addition, Pulsar Re has a positive statutory right to inspect the books and records of the Company; the Court orders were only made (on notice to LBHI) to protect the JPLs from any complaint that they had breached the terms of the DSA. The documents were expressly sought by Pulsar Re to enable it to consider whether or not to assert a proprietary claim in the context of the present application. This was against the background of the Court having been earlier made aware that Pulsar Re was contemplating asserting a similar claim in the US Proceedings. In these circumstances it is far from clear that the implied undertaking only use the documents for the purposes for which they were discovered strictly arises at all. But assuming that the implied undertaking did come into play, it did so in a diluted form; Pulsar Re's proposed use of the documents in support of a similar and related proprietary claim in the US Proceedings is demonstrably "*not inconsistent with the broad purpose for which that discovery was given*": *Sybron Corpn –v-Barclays Bank* [1985] 1 Ch 299 at 327. Accordingly, Pulsar Re may properly be released from its implied undertaking.

43. The two countervailing interests are the US Debtors' fair trial rights as adversary proceeding defendants in the US Proceedings (seeking to strike out the Complaint drafted without the benefit of discovery in accordance with the usual procedural regime) and Pulsar Re's fair trial rights as adversary proceeding plaintiff (seeking to avoid having its initial Complaint struck-out altogether). Considering the nature of Pulsar Re's claim and the fact that successful deployment of the discovered material will merely afford it an opportunity to have its claim heard on its merits rather than, possibly, being stuck out at the interlocutory stage, the balance of justice lies clearly in favour of granting Pulsar Re's application. Moreover, unlike in the cases where collateral use of discovered material might be said to undermine the integrity of the discovery process, in the present case Pulsar Re did not obtain the relevant documents through discovery in adversarial litigation. Rather it obtained the documents, coincidentally by means of a Court order, in its capacity as a creditor of an insolvent company the books and records of which Pulsar Re had, *prima facie*, a statutory right to inspect.

Other unidentified documents

44. Although the other documents which Pulsar Re seeks the right to use without being required to seek further leave of this Court have not been reviewed, I am satisfied (based on a review of the specified documents which are intended for present use) that a similar approach should be followed. There is no practical or principled reason why this Court should be required to police at some uncertain future date the use by Pulsar Re in the US Proceedings of documents provided by the JPLs which may become relevant in the US Proceedings. LBHI and LCPI can avail themselves of whatever remedies are available under applicable US law should they consider that Pulsar Re's future reliance on presently unspecified documents contravenes their confidentiality or other rights.

Application for leave to appear

45. The right of LBHI and LCPI to obtain leave to appear in the present proceedings for the limited purpose of opposing Pulsar Re's Summons was neither formally conceded nor seriously contested. In their counsel's Skeleton Argument, it was submitted that the governing procedural rule was Order 15 rule 6(2) of the Rules of the Supreme Court 1985, by virtue of (in the absence of an applicable Winding-Up rule) rule 159 of the 1982 Winding-Up Rules. Reliance was also placed, for illustrative purposes, on the decision of Ground J (as he then was) in *Re Electric Mutual Liability Insurance Company Limited*, Supreme Court of Bermuda, Companies (Winding-Up) No. 436 of 1995, Judgment dated July 26, 1996[6], and the English case of *Gurtner-v-Circuit* [1968] 2 Q.B. 587. I agree that the Court is conferred a broad discretion to add parties for the purposes of deciding specific issues by the following provisions in Order 15 rule 6 of the Rules

> "*(2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application—*
>
> *(a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;*
>
> *(b) order any of the following persons to be added as a party, namely—*
>
> > *(i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or*

[6] Leave was actually given on April 16, 1996 by way of a Ruling which counsel was unable to obtain.

> *(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter*..." [emphasis added]

46. I find in the exercise of my discretion that it is just to add LBHI and LCPI to the present proceedings to enable them to contest Pulsar Re's application to be released from its implied undertaking in relation to documents in which the interveners asserted an interest.

Summary

47. For the above reasons, Pulsar Re is entitled to an Order substantially in terms of its April 29, 2011 Summons. LBHI and LCPI are entitled to an Order adding them as parties for the purposes of Pulsar Re's said Summons, but to no further relief under their own May 31, 2011 Amended Summons.

48. I will hear counsel as to costs.

Dated this 20th day of September, 2011 _____

KAWALEY J