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:	Thursday 1 July 2021
Date of Ruling:	Tuesday 6 July 2021
Counsel for the Plaintiff:	Mr. Ben McCosker (Walkers Bermuda Limited)
Counsel for the First and Third Defendants:	Mr. Mark Diel and Ms. Katie Tornari (Marshall Diel & Myers Limited)
Counsel for the Second Defendant:	Mr. Lewis Preston (Kennedys Chudleigh Limited)

RSC Order 24 Court's powers to order general and specific discovery
RSC Order 24/2(5) Court's powers to direct a special approach to general discovery
RSC Order 1A Case Management Duties and Powers of the Court Overriding Objective

RULING of Shade Subair Williams J

Introduction:

1. This Court is seized of competing discovery applications between the Plaintiff, Athene Holding Limited ("Athene" / "the Plaintiff"), on the one hand, and the 1st - 3rd Defendants on the other.

2. On a summons application filed on 14 May 2021, Athene invites this Court to issue directions for the hearing of its summons for directions seeking a phased approach to discovery in what it describes to be a document-heavy, difficult and complex example of commercial litigation. The Plaintiff's summons is supported by the same affidavit evidence it proposes to rely on in the event that I direct a further hearing of its summons.

3. The Defendants uniformly resist the Plaintiff's discovery proposals and ask this Court to issue the standard directions applicable to the general discovery process under Order 24 of the Rules of the Supreme Court 1985 ("RSC").

4. Having received oral and written submissions from Counsel for both sides, I reserved my decision and stated that I would provide these written reasons in short order.

Factual Background:

5. A brief summary of the factual background to this case was most recently provided in my ruling in *Athene Holding Ltd v Imran Siddiqui et al*. [2021] SC (Bda) 29 Com (15 April 2021) and has been further outlined in previous rulings of the Court. In my 15 April ruling I stated [3-8]:

"*3. Athene is a Bermuda exempt company and has been registered on the New York Stock Exchange since December 2016. Together with its consolidated US subsidiaries which are insurance and reinsurance companies, Athene provides retirement service products to fund retirement needs. The background evidence on Athene and its subsidiaries has been outlined in previous judgments of this jurisdiction of Court and from the Court of Appeal.*

4. Suffice to say, it has been said that Athene was once a private company owned in its majority by an affiliate of a company known as Apollo Global Management LLC ("Apollo"). Apollo and its affiliates ("the Apollo Group") control 45% of the total voting power of Athene and five out of twelve of Athene's directors are employees or consultants of Apollo, including its Chairman, Chief Executive Officer ("CEO") and Chief Investment Officer.

5. Mr. James Belardi is the CEO of Athene. In 2008 the 1st Defendant, Mr. Imran Siddiqui, was employed in the New York Office of Apollo until his resignation on or about 15 March 2017. In Mr. Siddiqui's eighth affidavit filed in support of his application before this Court he states that during his employment at Apollo he was involved in overseeing Apollo's investment in Athene. His evidence is that he was appointed as an Apollo-nominated director of Athene on or about 16 July 2009 through to his resignation. He further states in his evidence that he was never an employee of Athene[1].

6. Mr. Siddiqui and the 2nd Defendant, Mr. Stephen Cernich, founded Caldera Holdings Ltd ("Caldera"), the 3rd Defendant in these proceedings. Caldera was also incorporated as a Bermuda exempt company. In Athene Holding Ltd v Siddiqui et al [2018] Bda LR 68 Hellman J stated [14] that Mr. Cernich was employed by Athene and its affiliates from 2009 to June 2016 in various positions, including Chief Actuary and Executive Vice President. It was also said by Hellman J [16] that Mr. Cernich entered into a Separation Agreement and General Release ("the Release") dated 21 June 2016 with Athene and one of its indirect subsidiaries, Athene Asset Management LP ("AAM"). AAM has been described as Athene's investment manager. Hellman J noted that the Release referred to Mr. Cernich's grant or purchase of a number of shares in Athene under various share agreements. It was also said that the Release contained an acknowledgment that the Protective Covenants provided in the share agreements were necessary to protect, inter alia, Athene's confidential and proprietary information.

7. The Plaintiff now alleges in these proceedings commenced by a Specially Indorsed Writ that the 1st and 2nd Defendants wrongfully took and/or used the Plaintiff's trade secrets and other

[1] In *Athene Holding Ltd v Siddiqui et al* [2018] Bda LR 68 Hellman J stated [11] that Mr. Siddiqui "*was formerly a partner and employee of Apollo*…"

protected confidential, proprietary and/or other information for the benefit of the 3rd Defendant and for themselves, to the detriment of the Plaintiff. It is suggested on Mr. Siddiqui's evidence that the backstory and motive for these proceedings involves Caldera's pursuit of another insurance company ("Company A") in which Athene was purportedly interested. Mr. Siddiqui deposed that Apollo demanded that he and Caldera 'cease and desist' from pursuing the transaction. However, Caldera persisted in its business discussions with Company A.

8. This is but a glimpse into the background to the current application whereby Mr. Siddiqui claims that as an Apollo-nominated director of Athene, he is entitled to seek coverage of his legal expenses in relation to these proceedings under the provisions of Athene's Bye-laws on indemnities."

6. The Plaintiff's application for discovery is largely focused on the documents disclosed in two separate JAMS Arbitrations brought by Apollo Global Management LLC ("Apollo") and its affiliates ("the Apollo Group"). These arbitrations were consolidated for the purpose of a merits hearing on the claims against Mr. Siddiqui, Caldera Holdings Ltd ("Caldera") and Mr. Ming Dang, a former employee of Apollo. The JAMS Arbitration brought against Mr. Siddiqui began on 3 May 2018 and the proceedings against Mr. Siddiqui, Caldera and Mr. Ming Dang commenced on 28 November 2018. Athene was never party to any of the JAMS Arbitration proceedings.

7. As stated in the Final Arbitration Award dated 26 April 2019 ("the Final Award"), Apollo alleged in its Statement of Claim that Mr. Siddiqui had "*engaged in wrongful use and disclosure of Apollo's "Confidential Information" in violation of the Settlement Agreement and Mutual Release ("the Settlement Agreement") entered into with Apollo on February 21, 2018*". Underlying the Settlement Agreement, Apollo alleged that Mr. Siddiqui was a former principal and senior partner of certain Apollo entities who had been in breach of his post-employment restrictive covenants.

8. In relation to the arbitration claims involving Mr. Dang, it was alleged that Mr. Dang was in breach of his duties to Apollo and that Mr. Siddiqui and Caldera had tortiously interfered with

Mr. Dang's contractual relations with Apollo. Additionally, Apollo claimed that Mr. Siddiqui and Caldera had aided and abetted Mr. Dang's breaches of fiduciary duty owed to Apollo.

9. In the substantive Bermuda proceedings commenced by Specially Indorsed Writ, Athene alleges that Mr. Siddiqui and Mr. Cernich wrongfully took and/or used the Plaintiff's trade secrets and other protected confidential, property and/or other information for the benefit of Caldera and for themselves, to the detriment of the Plaintiff. Mr. Siddiqui has stated in his evidence filed earlier in these proceedings that during his employment at Apollo he was involved in overseeing Apollo's investment in Athene and that he was appointed as an Apollo-nominated director of Athene on or about 16 July 2009 through to his resignation.

10. In assessing Apollo's damages claim arising out of allegations that Mr. Siddiqui and Caldera used its Confidential Information in the bid for Company A, the Arbitrator found that there was no evidence that Apollo suffered any damages from its failure to acquire Company A. In seeking directions for a mutual exchange of documents, the Defendants point to this compartment of facts as an example of the discovery it would not only be interested in but also to which they would be entitled.

Procedural Background:

11. Pleadings have closed and the parties now seek directions on discovery pursuant to RSC Order 24.

12. By a Consent Order (filed in draft on 8 April 2021) and made by this Court on 14 May 2021 ("the Consent Order") the parties agreed to directions for the filing of evidence outlining their respective proposals for discovery. The directions under the Consent Order were as follows:

"*1. The Plaintiff shall file and serve evidence setting out its proposals for discovery in these proceedings within 14 days of the date of this Order.*

2. The Defendants shall file and serve evidence in reply within 14 days thereafter, such evidence to include the Defendants' proposals for discovery in these proceedings and evidence

on the Joint Letter to the relevant parties to the New York JAMS Arbitration Proceedings which concluded in an Arbitration Award dated 26 April 2019 and the Confidentiality Order (if not agreed between the parties prior to this time).

3. The Plaintiff shall have leave to file reply evidence within 7 calendar days thereafter.

4. A half day hearing shall be fixed at the convenience of Counsel and the Court in the week of 24 or 31 May 2021, or as soon thereafter as is available, and the parties shall submit to the Court their mutually agreed dates within 7 calendar days of the date of this Order.

5. Skeleton arguments shall be exchanged and filed with the Court not less than three business days prior to the hearing of the discovery application.

6. The Parties shall have liberty to apply.

7. Costs reserved."

13. While Mr. McCosker initially suggested that the Plaintiff's compliance with paragraph 1 of the Consent Order was belated, it was settled in his oral submissions that the Plaintiff had not in fact filed evidence as directed under the Consent Order. The Court was made to understand that between 8 April 2021 and 13 May 2021 attempts were made between the parties to reach an agreement or joint proposal on how the parties would effect discovery. Without unnecessarily engaging in the detail of those negotiations, it is sufficient to say that no such agreement was reached. As such, the Defendants' stated position is that it was open to the parties to invoke paragraph 5 of the Consent Order where I granted liberty to apply.

14. On 14 May 2021, the Plaintiff filed a summons application for directions as to discovery. In that summons, the Plaintiff seeks the Court's approval of a sequential exchange of documents by a phased approach to discovery. This summons application is supported by the Fifth Affidavit of Mr. James Belardi, the Chief Executive Officer of Athene.

15. The Plaintiff's 14 May summons application provoked the following procedural objections from Ms. Katie Tornari for the 1st and 3rd Defendants which were communicated to the Court by letter dated 17 May 2021:

"…

We refer to our letter of 8 April 2021 filing the Consent Order (attached) and the delist form relating to the above matter.

The Defendants have in good faith sought to agree matters relating to discovery with the Plaintiff in accordance with the Overriding Objective. Regrettably the Plaintiff has failed to engage sensibly in these discussions, and has refused over a period of six weeks to deviate from its original one-sided discovery proposal (which proposal the Plaintiff delayed in putting forward to the Defendants by many months). Further, the Plaintiff has failed to comply with paragraph 1 of the Consent Order and instead has recently filed on 14 May 2021 a premature application for specific discovery…

We therefore now write under paragraph 6 of the Consent Order to request that a directions hearing in this matter be listed at the same time as the Plaintiff's specific discovery application is listed for mention, at which hearing the First and Third Defendants will seek a standard disclosure order that the parties shall in accordance with Order 24 rule 1 of the Rules of the Supreme Court 1981 mutually exchange Lists of Documents which are or have been in their possession, custody or power relating to the matters in issue in the action within 120 days of the date of the Order…"

16. This letter to the Court was followed by a further letter from Ms. Tornari seeking for the matter to be mentioned before the Court in relation to what she described as the Plaintiff's 'specific discovery application' and in furtherance of the liberty to apply provision granted under the Consent Order.

17. On 1 July 2021, bringing me to the present stage of these proceedings, the parties appeared before me, maintaining their opposing views as to how the Court should direct them in relation to discovery.

The Plaintiff's Application for Discovery

18. The Plaintiff firmly contended that its 14 May summons application was for directions on general discovery and ought not to be characterised as a one-sided application for specific discovery. The terms of the Order sought by the Plaintiff's 14 May summons are as follows:

"*1. The First and Third Defendants shall, within 7 days of the date of this Order, seek the consent of Apollo Global Management, Inc. ("Apollo"), Ming Dang ("Dang") and any other parties who disclosed documents as part of the JAMS employment arbitration proceedings with reference no. 1425026462 (the "Arbitration") to seek those parties' consent to disclosure of the Arbitration Materials (as defined in Belardi 5) in these proceedings.*

2. The parties shall, within 7 days of the date of this Order, agree a confidentiality protocol to govern the treatment of all documents discovered in these proceedings in substantially the form as appears at pages 7 to 21 of Exhibit JB-4.

3. The First and Third Defendants shall, within 14 days of the date of this Order, give discovery of all the (a) exhibits, testimony and transcripts from depositions, hearings and the trial in the Arbitration; (b) all pleadings and discovery requests and objections; and (c) all decisions and rulings by the arbitrator during the course of the Arbitration.

4. The Plaintiff shall, within 14 days of the date of this Order, give discovery of all of the documents that it, as a non-party, tendered in the Arbitration without conducting any relevance review.

5. The First and Third Defendants shall, within 49 days of the date of this Order, give discovery of all of the documents that they disclosed in the Arbitration, along with all the documents

produced by Apollo, Dang and any other parties whose consent is obtained in accordance with paragraph 1 above, subject to the First and Third Defendants having an opportunity during those 49 days to review those documents to determine their relevance to these proceedings (with the Plaintiff having liberty to apply with respect to such relevance determination).

6. The parties shall, within 14 days of the discovery in paragraph 5 above having been given, exchange their proposed categories for phase 2 of the discovery process.

7. Costs in the cause."

19. In support of the Plaintiff's application, Mr. Belardi deposed, *inter alia* [footnotes not quoted]:

"7. In the course of extensive negotiations between the parties (some in open correspondence and some in the context of without prejudice discussions), I am advised that some progress has been made towards reaching a consensual position with respect to how discovery will be addressed. Amongst other matters, the parties have agreed that a 'phased'/staged approach to discovery is appropriate, that at least certain of the Arbitration Materials are relevant to the matters in question between the parties in these proceedings, and that a discovery protocol/confidentiality regime should be agreed and ordered to set out the treatment of the parties' discovery by their attorneys. I am further advised and understand that an electronic database, using the Relativity e-discovery platform, has been established to host the parties' discovery and permit the review of those documents by designated attorneys.

8. I understand that the Arbitration Materials consist of a finite set of documents that have already been compiled and disclosed in the Arbitration. Siddiqui was a party to the Arbitration and therefore has access to the full set of Arbitration Materials. Athene was not a party to the Arbitration and therefore only has access to the materials that its subsidiary produced in the Arbitration. It is Athene's proposal that the parties produce as the first phase of discovery certain of the Arbitration Materials, which are readily available to the parties and can be disclosed expeditiously and efficiently. The Arbitration Materials are relevant to these proceedings as the Arbitration involved similar subject matter as these proceedings. Athene

proposes then proceeding to further phases of discovery (of relevant documents not included within the Arbitration Materials) once initial disclosures of the Arbitration Materials are made.

9. Unfortunately, although some progress has been made, the parties now find themselves at an impasse which does not appear to be navigable by consent. The issue appears to arise from a fixation by Siddiqui and Caldera that the:

> *"... [P]hased approach should ensure that both the Plaintiff and the Defendants simultaneously produce* ***reasonably similar numbers of documents*** *in order to streamline the process and avoid unnecessary costs and delay" (emphasis added).*

In this regard, Siddiqui and Caldera complain that "Athene was not a party to the Arbitration Proceedings and the scope of its discovery obligations in those proceedings was limited. Athene[‘s subsidiary] disclosed only 20,600 pages in the Arbitration Proceedings". In contrast, they note that "Mr Siddiqui and Mr Cernich produced to Apollo in the Arbitration Proceedings more than 84,000 pages of material".

10. In these circumstances, each of the Defendants has refused to agree to give discovery of any of the Arbitration Materials unless Athene, at the same time, undertakes a comprehensive discovery process of documents which were not disclosed as part of the Arbitration. I am advised by Athene's counsel that the Defendants are not willing to undertake the same process themselves. The Defendants suggest that such comprehensive disclosures by Athene are the only means by which the perceived "unfairness" could be addressed. The complaint as to the numerical imbalance in the documents to be exchanged in the first phase is particularly difficult to understand. It cannot be reasonably argued that Athene's proposal is unfair or one-sided as Siddiqui and Caldera (and possibly Cernich as well) are already privy to the entire collection of Arbitration Materials and have been since the time of the Arbitration. Athene's proposal simply levels the playing field between the parties, and sets the stage for the second phase of the discovery process to proceed.

11. The Defendants' reluctance to disclose the Arbitration Materials is, frankly, perplexing and difficult to understand. The Arbitration Materials are a pre-assembled, discrete set of documents which could be produced rapidly and with nominal cost or burden. And, it is not surprising that Athene's subsidiary produced fewer pages of documents than the Defendants in the Arbitration, because Athene was not a party to the Arbitration. To capriciously require Athene (and only Athene) to conduct a full discovery process before the Arbitration Materials are exchanged defeats all of the time and costs savings that are achieved by proceeding in a phased manner.

12. By this application, Athene seeks orders requiring the parties to undertake a process by which certain of the Arbitration Materials shall be produced in these proceedings as phase one of a multi-stage discovery process. The Arbitration Materials are relevant to the matters in question between the parties in these proceedings. There is also an additional body of material that was not disclosed in the Arbitration that is relevant to these proceedings. Discovery of those documents will have to be given by each of the parties as part of subsequent phases of the discovery process. Athene is hopeful that these subsequent phases will be achieved by way of the agreement by the parties to categories of discovery. The intention of this application is not to limit in any way the parties' discovery obligations, but rather to achieve the immediate discovery of a body of relevant documents which I understand are already compiled, digitised, electronically coded and ready for immediate production. Such approach, I believe, is logical, fair and will enable the balance of the parties' discovery obligations to be discharged in a more cost-efficient fashion without delay."

20. In an effort to demonstrate the extent of the factual overlap between the present proceedings and the JAMS Arbitration, Mr. Belardi pointed to the judgment of the Court of Appeal in *Siddiqui et al v Athene Holding Limited* [2019] Bda LR 74. Clarke P, in considering an appeal dismissing Mr. Siddiqui's strike-out application, turned his attention to the merits hearing in the JAMS Arbitration and the final award of 26 April 2019, stating [170-171]; [178]; [185]; [190-191]:

"*170. The arbitrator recorded [6] that there were "serious credibility issues" with respect to both Mr Dang and Mr Siddiqui. His award records [8] that, beginning in mid-2016, Mr Siddiqui and Mr Dang began to engage in conduct that violated both the letter and the spirit of the Apollo Code of Ethics. Starting in July 2016 and continuing thereafter Mr Siddiqui, while an Apollo employee began sending internal Apollo reports, decks and analyses from his personal Gmail account to the email accounts of Messrs Cernich, Daula (the Chief Risk Officer of Athene) and Dang. Information from these documents was incorporated into decks and models that Caldera used to solicit potential investors in itself. Many active steps were taken by Siddiqui and Dang to hide their involvement. After his resignation and in breach of various post-employment restrictions Siddiqui continued [9] to solicit investors and Caldera began its first active attempts to purchase Company A. Caldera made certain offers for Company A in late 2017; but no transaction was consummated at that time.*

171. The arbitrator found [9] that the attestation completed by Mr Siddiqui (given under oath and penalty of perjury) that he had returned or destroyed all Apollo documents or other Confidential Information in his possession was false. Discovery in the arbitration established that "voluminous" quantities of such information, dating back to 2016, remained under his possession, custody and control.

178. Mr Dang had a liability for aiding and abetting Mr Siddiqui's breach of fiduciary duty (in collecting and transmitting Apollo and Athene's Confidential Information and soliciting investors to invest in Caldera rather than Apollo or Athene) through 2016 and until at least March 2017. Further Mr Dang was in breach of his fiduciary duty from July 27 2016 to 26 October 2018, when he resigned, in spending time on Caldera's day to day operations and soliciting Apollo and Athene investors to invest in Caldera to the detriment of Apollo and Athene. Mr Siddiqui and Caldera were relieved of any liability for aiding and abetting by the Settlement Agreement but were liable in respect of the period from February 22 2018 (the day after the Settlement Agreement) until Mr Dang's October resignation.

185. First, the Second JAMS Arbitration is an arbitration to which Athene was not a party; and Apollo cannot realistically be said to have been its agent in bringing the arbitration.

Athene is not bound by any findings (or the lack of them) in an award in an arbitration to which it was not a party, and at which it made no case (although it did produce documents and two of its executives gave evidence). It is entitled to have the opportunity to make its own case in Bermuda, with disclosure from all three defendants. The relief claimed by Athene in the Bermuda action (damages for itself and an injunction) is different. The arbitrator made a preliminary ruling to the effect that he did not have jurisdiction to grant Apollo an injunction barring Mr Siddiqui and Caldera from "pursuing or acquiring" Company A because of the terms of the Settlement Agreement, whilst recognizing that he might decide to impose an injunction with respect to, inter alia, the use of confidential information. He plainly could not grant Athene one. Moreover, Athene has not, we were told, been permitted to review the evidence adduced in the arbitration so that it is not aware as to exactly what Athene Confidential Information is in the possession of Mr Siddiqui and his associates.

190. Fourth, it is apparent from the Award that Mr Siddiqui had been squirreling away and transmitting Apollo and Athene's confidential information and has made false statements under oath. That does not encourage a conclusion that Athene's complaint of the misuse of its confidential information is ill founded. And it renders less compelling any claim that there has been inadequate particularisation. Mr Siddiqui must know what he took (and what the Arbitrator was referring to).

191. As the arbitrator put it [14]:

> *"There is considerable evidence that [throughout 2016 and at least until March of 2017], [Siddiqui] collected and transmitted Apollo's and Athene's Confidential Information, that he solicited investors in an attempt to persuade them to invest in Caldera rather than Apollo or Athene, that he competed with Apollo and Athene for acquisition targets, and that he remained on Athene's Board of Directors for the purpose of protecting his own personal interests"*

197. Many of these issues have been covered above. Suffice it to say that I do not accept that either Hellman J or the Chief Justice should have found that Athene was abusing the process

of the Supreme Court or that we should do so either; let alone that such abuse is obvious. Athene is not jointly entitled with Apollo so as to be obliged to join Apollo to the Bermuda action. The fact that Apollo had legitimate access to Athene's confidential information does not mean that Athene has no separate entitlement in respect of its confidential information. Athene does not control Apollo so as to be able to compel it to join as a plaintiff; the relief sought in Bermuda and by Apollo in New York is not against identical parties and is, in any event, different; Athene is not party to any relevant arbitration agreement and could not join the JAMS 1 arbitration; the fact that the Bermuda action was begun on the same day is not abusive. The limited extent of the particulars does not amount to abuse; nor was it incumbent on Athene to seek interlocutory relief in the absence of any indication that Caldera was poised to make another offer. The fact that after due diligence, the April 2018 offer was regarded as unmaintainable is not determinative. Failure to seek leave to amend against two defendants and the withdrawal of one head of claim are not indicia of abuse. Nor is Athene's unsuccessful application to be released from an obligation of confidentiality."

21. Hammering on its request for the Court to target the arbitration documents in its initial directions for discovery, Mr. Belardi deposed [16-19] [footnotes not quoted]:

"*16. The subject matter of the Arbitration and of these proceedings overlap to an extent, in that the Arbitration was concerned with some of the same Documents and Information which are the subject of these proceedings. Apollo had access to Documents and Information belonging to Athene pursuant to confidentiality arrangements between those parties. However, the Arbitration concerned different parties and different duties governed by a different law and owed over a different period of time. It is my understanding that those differences are why the Supreme Court declined to stay these proceedings in favour of the Arbitration, why the Court of Appeal upheld that decision, and why the Court of Appeal refused the Defendants' application for leave to appeal to the Privy Council.*

17. Nevertheless, it is also noteworthy that each of the Defendants claim that these proceedings should be barred on the basis of the Arbitration. Therefore, in the view of the Plaintiff, all of the Arbitration Materials are necessarily relevant.

18. Because Athene was not a party to the Arbitration, it cannot state with certainty the precise volume of documents that were disclosed in the Arbitration, although I am advised by Athene's counsel that the Defendants have confirmed that in excess of 100,000 pages of material was disclosed by Athene's subsidiary, Siddiqui and Cernich. Apollo would likely have produced a similar amount of material. To date, the Defendants have refused to consent to the production of this material, and have refused to seek the consent of Apollo and Ming Dang to the production of the material that those parties disclosed in the Arbitration.

19. The Arbitration Materials are germane to the issues in these proceedings, including the Defendants' wrongful taking and wrongful use of Athene's Documents and Information, and it is sensible that they be produced now as phase one of the discovery process in these proceedings. That being said, as a compromise, I am advised that Athene is only seeking a subset of the Arbitration Materials in phase one, while reserving its rights to seek the balance of the Arbitration Materials at a future date."

The Statutory Framework on the Procedural Requirements of Discovery

'General Discovery'

22. RSC Order 24 governs the procedural law on discovery in civil and commercial proceedings. O.24/1(1) provides for the mutual exchange of documents as a general starting point:

"***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. Under subsection (2), the parties to an action are given liberty to dispense with or limit the discovery of the required documents by agreement. Absent an agreed position between the

parties, the parties are bound to make mutual discovery in accordance with the provisions under Rules 2-17 insofar as they apply.

24. Barring the need to determine any particular issue prior to discovery, RSC O.24/2(1) requires the parties to simultaneously exchange a list of documents within a 14 day period after the pleadings stage has closed. Each party's list must identify all of the documents "*which are or have been in his possession, custody or power relating to any matter in question between them in the action*".

25. Where any party files a summons application before the close of the period within which discovery is required, RSC O.24/2(5)(a) (as read with subsection (6)) empowers the Court to order discovery of classes of documents only. Subsections (5) and (6) provide as follows:

"*(5) On the application of any party required by this rule to make discovery of documents, the Court may—*

(a) order that the parties to the action or any of them shall make discovery under paragraph (1) of such documents or classes of documents only, or as to such only of the matters in question, as may be specified in the order, or

(b) if satisfied that discovery by all or any of the parties is not necessary, or not necessary at that stage of the action, order that there shall be no discovery of documents by any or all of the parties either at all or at that stage;

and the Court shall make such an order if and so far as it is of opinion that discovery is not necessary either for disposing fairly of the action or for saving costs.

(6) An application for an order under paragraph (5) must be by summons, and the summons must be taken out before the expiration of the period within which by virtue of this rule discovery of documents in the action is required to be made."

26. Where the Court has ordered discovery of classes of documents under subsection (5)(a) of Rule 2, any party in the action may avail themselves of RSC O.24/2(7) prior to the filing of a summons for directions by serving a notice for the other side to serve an affidavit verifying its list of documents. Subsection (7) accordingly provides:

> "*(7) Any party to whom discovery of documents is required to be made under this rule may, at any time before the summons for directions in the action is taken out, serve on the party required to make such discovery a notice requiring him to make an affidavit verifying the list he is required to make under paragraph (1), and the party on whom such a notice is served must, within fourteen days after service of the notice, make and file an affidavit in compliance with the notice and serve a copy of the affidavit on the party by whom the notice was served.*"

27. The Court may otherwise direct a party to serve a list of documents and a verifying affidavit in respect of some or all of the documents in question under Rule 3(1).

'Special Discovery'

28. The provision which applies to what is often termed 'special discovery' is made under RSC O.24/7 which applies to an order for discovery of particular documents. Where it is shown necessary to do so in order to fairly dispose of the cause or matter (in accordance with Rule 8), the Court may make an order on a summons application supported by affidavit evidence requiring any other party to state on an affidavit whether any particular document or class of documents are or have at any time been in that party's possession, custody or power.

29. Rules 7 and 8 state:

> "***24/7 Order for discovery of particular documents***

7 (1) Subject to rule 8, the Court may at any time, on the application of any party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any document specified or described in the application or any class of document so specified or described is, or has at any time been in his possession, custody or power, and if not then in his possession, custody or power when he parted with it and what has become of it.

(2) An order may be made against a party under this rule not withstanding that he may already have made or been required to make a list of documents or affidavit under rule 2 or rule 3.

(3) An application for an order under this rule must be supported by an affidavit stating the belief of the deponent that the party from whom discovery is sought under this rule has, or at some time had, in his possession, custody or power the document, or class of document specified or described in the application and that it relates to one or more of the matters in question in the cause or matter.

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 opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs."

30. Rules 9-14 apply to the stage at which documents may be inspected and required to be produced.

Failure to Comply with Discovery Obligations

31. The Court will make such order as it thinks fit, which may include an order to dismiss the action or committal to prison where any party fails or refuses to make discovery or produce documents as required under Order 24. Rule 16 reads:

"24/16 Failure to comply with requirement for discovery, etc.

(1) If any party who is required by any of the foregoing rules, or by any order made thereunder, to make discovery of documents or to produce any documents for the purpose of inspection or any other purpose fails to comply with any provision of that rule or with that order, as the case may be, then, without prejudice, in the case of a failure to comply with any such provision, to rules 3(2) and 11(1), the Court may make such order as it thinks just including, in particular, an order that the action be dismissed or, as the case may be, order that the defence be struck out and judgment entered accordingly.

(2) If any party against whom an order for discovery or production of documents is made fails to comply with it, then, without prejudice to paragraph (1), he shall be liable to committal.

(3) Service on a party's attorney of an order for discovery or production of documents made against that party shall be sufficient service to found an application for committal of the party disobeying the order, but the party may show in answer to the application that he had no notice or knowledge of the order.

(4) An attorney on whom such an order made against his client is served and who fails without reasonable excuse to give notice thereof to his client shall be liable to committal."

Analysis and Decision

32. The Plaintiff seeks for this Court to make preparatory directions for the hearing of its summons for directions on discovery. Effectively, the Plaintiff is inviting this Court to direct the parties to file and exchange further evidence and further skeleton arguments for a substantive hearing on what directions are to be made on discovery. This is evident from the opening paragraph of the Plaintiff's skeleton argument filed in aid of the 1 July 2021 'mention' before me. The Plaintiff submitted [1] and [7]:

> "*SKELETON ARGUMENT OF THE PLAINTIFF*
>
> *For mention before the Honourable Justice Subair Williams at 9:30am on Friday, 25 June 2021*
>
> *1. This matter has been listed for mention. The purpose of the mention is to make procedural orders as to the timing of the exchange of evidence and skeleton arguments, and the fixture for substantive hearing, of the Plaintiff's application by way of Summons dated 14 May 2021 (the "Discovery Application").*"
>
> …
>
> *7. The only matter properly before the Court at the mention is the procedural orders to be made for the hearing of the Directions Application. If the Defendants wish to have an order made for 'general discovery', they are at liberty to make those arguments at the substantive hearing. They were already permitted to make such arguments, by reason of the Consent Order. But to allow such an order to be made today would not only be dangerously premature, but would endorse the Defendants' hijacking of the mention, which is improper and should not go without sanction.*"

33. It is noteworthy that the 1 July hearing before me was forcibly adjourned from the 25 June 2021 hearing which was listed for a 25 minute fixture. Unexpectedly, the Court received skeleton arguments from each of the parties on or close to the eve of the hearing. (Here, the Plaintiff's Counsel would keenly point out that the Defendants' service of skeleton arguments after-hours on 23 June "… *came not only as a complete surprise but was also entirely inappropriate and unhelpful*…" [para 6 of the Plaintiff's written submissions]. It was thus apparent to the Court on 25 June 2021 that the hearing which was described by the Plaintiff to

be a 'mention' required a longer fixture in order to ventilate the arguments of all parties on the subject of discovery. The matter was therefore adjourned to 1 July 2021.

34. Although continually described by the Plaintiff as a mention, the 1 July 2021 hearing cannot fairly be characterized as a mention, given that it lasted approximately 56 minutes as all parties were heard on their respective arguments. Having heard Mr. McCosker's arguments which included an outline of Mr. Belardi's evidence and exhibits, the grounds on which the Plaintiff seeks a phased and document-class approach to discovery became plainly visible. The Plaintiff's proposal arguably qualifies under subsection (5) under Rule 2 of O.24 which provides for a customized approach to general discovery. During the 1 July 2021 hearing I also had the benefit of oral and written submissions from both Mr. Diel and Mr. Preston who each explained their basis for pursuing a direction for the mutual exchange of documents under Rule 2(1).

35. The Court is duty-bound to exercise its case management powers and duties in accordance with the Overriding Objective so that cases are dealt with expeditiously and fairly and in a manner which is proportionate to, *inter alia*, the complexity of the issues. The Court must also be conscious of its responsibility to allot an appropriate share of its resources to any particular matter while considering the needs of other cases. This compels the Court to actively manage cases before it and the parties who appear are required to assist the Court in that regard.

36. RSC Order 1A provides:

> ***"1A/1 The Overriding Objective***
> *(1) These Rules shall have the overriding objective of enabling the court to deal with cases justly.*
>
> *(2) Dealing with a case justly includes, so far as is practicable-*
> *(a) ensuring that the parties are on equal footing;*
> *(b) saving expense;*
> *(c) dealing with the case in ways which are proportionate-*

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv)to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases

1A/2 Application by the Court of the Overriding Objective

2 The court must seek to give effect to the overriding objective when it-

(a) exercises any power given to it by the Rules; or

(b) interprets any rule.

1A/3 Duty of the Parties

3 The parties are required to help the court further the overriding objective.

1A/4 Court's Duty to Manage Cases

4 (1) The court must further the overriding objective by actively managing cases.

(2) Active case management includes-

a) encouraging the parties to co-operate with each other in the conduct of the proceedings;

b) identifying the issues at an early stage;

c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;

d) deciding the order in which issues are to be resolved;

e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;

f) helping the parties to settle the whole or part of the case;

g) fixing timetables or otherwise controlling the progress of the case;

h) considering whether the likely benefits of taking a particular step justify the cost of taking it;

i) dealing with as many aspects of the case as it can on the same occasion;

j) dealing with the case without the parties needing to attend at court;

k) making use of technology; and

l) giving directions to ensure that the trial of a case proceeds quickly and efficiently."

37. Of course, I must also decide whether the Court's discretion would be properly exercised by issuing further directions for the hearing of the Plaintiff's proposals on discovery. In doing so, it would be appropriate for me to have regard to the position which followed the Consent Order. To this the Plaintiff boldly submitted in its written arguments [4-5]:

"4. *Critically, the parties agreed by Consent Order dated 8 April 2021 that the Plaintiff make its Discovery Application. The Plaintiff duly did so. The Defendants agreed to file responsive evidence. They have failed to do so, in breach of the Consent Order. They now appear to be making an application by letter (with no Summons having been filed) to vary and/or set aside the Consent Order*.

5. <u>If the Court wishes to review any single document prior to Friday's mention, it should be the Consent Order</u>. The Court should look at what the parties agreed, look at what the parties did, [footnote 4: "*As a matter of fair presentation, the Plaintiff confirms that the Discovery Application was to be filed on 22 April. It was not filed until 14 May 2021. This in the context of a WP inter-counsel conference and subsequent continuing negotiations. See paragraphs 30 to 39 of Belardi 5*"] *and consider carefully the Defendants' motivations in doing so. The only reason the parties are before the Court today is because the Defendants have breached the terms of the Consent Order, and then refused to agree a timetable for the filing of their evidence in response thereto (the Plaintiff set out a proposed timetable by letter dated 7 June 2021 and email dated 10 June 2021, no response to which was ever received)*."

38. Subsequently, during the course of Mr. McCosker's oral submissions he sensibly retracted the Plaintiff's finger-pointing tone and accepted that the Plaintiff had not complied with the Consent Order given its failure to file '*evidence*' within the 14 day period directed under

paragraph 1 of the Consent Order. Mr. McCosker explained that after the making of the Consent Order the parties made much progress in their efforts to reach an agreed position. However, by 13 May 2021 it was evident that an agreement would not be reached which led the Plaintiff to file its summons application on the following day.

39. Notwithstanding, the Plaintiff has not been deprived of the opportunity to file evidence with the Court as it did so under the 14 May summons which could only be treated as an application made in exercise of the liberty to apply provision under the Consent Order. The Plaintiff's intention to rely only on the Fifth Affidavit of Mr. Belardi during a 'substantive' hearing was confirmed by Mr. McCosker in his oral submissions and is further evidenced by the Plaintiff's written submissions [8]:

"*While the Plaintiff appreciates that the Court will not yet have had time to review Belardi 5 (**and would not be expected to do so until the Discovery Application comes on for substantive hearing**)* [my emphasis]*, the Defendants' conduct in seeking to sidestep the Consent Order and seek substantive orders at a mention hearing are unfortunately not without precedent in these proceedings*."

40. In this case, it is the Defendants who are saying that they need not file any evidence of their own as they simply wish to proceed in accordance with O. 24/1(1). So, no concern of prejudice to the Defendants can arise by a decision to determine directions on discovery without a further hearing. Additionally, I am mindful that the Court also has the benefit of each party's oral and written submissions.

41. For all of these reasons and in exercise of the Court's various case management powers and duties under RSC Order 1A and in exercise of my judicial discretion, I find that it would be wrong for this Court to provide a platform on which the same evidence and arguments already before the Court would be repeated and belaboured. Accordingly, I decline to direct the filing of further evidence or submissions or the listing of a further hearing of the Plaintiff's 14 May 2021 summons.

42. All that remains is for me to determine the appropriate directions under RSC Order 24. Firstly, I cannot accept Mr. Diel's submission that the Court lacks jurisdiction to order directions on discovery in a manner outside of the mutual exchange of documents contemplated by Rule 2(1). RSC O.24/2(5)(a)-(b) expressly allows the Court to order any party to make discovery of specified documents or classes of documents only or even no documents at all. Alternatively, 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 of the factors listed under RSC O.1A. So the question for resolution is not whether the Court has sufficient jurisdiction but more so whether it would be a proper exercise of the Court's discretion to approve of the Plaintiff's proposals for a phased and sequential approach to discovery.

43. On the written submissions of Counsel for the Plaintiff, I was referred to the following outline on the law:

"*Such a 'phased' approach is a hallmark of complex commercial litigation of this nature. As Paul Matthews and Hodge Malek, QC note in their leading text 'Discovery', state:*

> *"In some cases a staged approach may be appropriate, with disclosure initially being given of limited categories of documents. The categories may be subsequently extended or limited depending upon the results initially obtained. In one case the court ordered a staged approach, with an order for an initial search of electronic data of four main witnesses by way of a keyword search".[Foot note 6: 5th edition, paragraph 7.17]*

In the very recent decision of Ryder Ltd v MAN SE, the United Kingdom Competition Tribunal had occasion to consider the benefits of a phased/staged approach to discovery. The Tribunal made the following relevant comment: [Foot note 7: [2020] CAT 3 [46]]

> *"Further disclosure will proceed by stages and not all at once. That does not mean that the Tribunal sets stages now and orders what will be in stage 2, what will be in stage 3 and so on. It means that after each stage, the party receiving disclosure should assess those documents and data, with assistance as appropriate from its economic expert, and then*

frame a subsequent request in the light of, and informed by, the analysis of that material. The benefits of a staged approach to disclosure were described by the Tribunal in Peugeot S.A. and Others v NSK Ltd and Others [2017] CAT 2 (" Peugeot") at [7]:

> *"In the light of the results of the first stage exercise the parties (and the Tribunal if called upon) will then be far better placed to know whether it is proportionate to proceed to a second and more extensive disclosure stage and, if it would be proportionate to proceed, what further searches might yield relevant documents."*

Another relevant example of the phased/staged approach appears in the pre-CPR insolvency context, in the High Court's ruling in Bank of Credit and Commerce International SA (in liquidation) (No. 12), Re: [Foot note 8: [1997] BCC 531]

> *"In the present case, however, the immensity of the task of sorting through literally millions of sheets of apparently unsorted records…would be likely to produce highly inconvenient results, for both sides, if I were to set a single date for production of everything. Fairness would require that date to be set quite far into the future, if millions of sheets of paper (mostly totally irrelevant) have to be checked and the relevant material collated.* ***In the meantime the liquidators would be frustrated in that they would be unable to start investigating the most obviously relevant documents*** *(which may, for all the liquidators know, already be collated and indexed at the BOA group's legal department at San Francisco)" (emphasis added).*"

44. Summarising its substantive points, the Plaintiff concluded their written arguments as follows 9-11]:

"9. In reality, the chief issue in this case is whether the First and Second Defendants breached their respective fiduciary duties and duties of confidence to the Plaintiff when, while a director and senior officer of the Plaintiff respectively, they planned to steal and misuse, and did steal and misuse, the Plaintiff's confidential and proprietary information to compete with the Plaintiff. Only the Defendants know the full story of what they did, what they stole, how they

did it and how they used the stolen information, and they seek to continue to hide these critically important facts from this Court and the Plaintiff. Breach of confidence cases present unique evidentiary and forensic challenges. That is why the Plaintiff's Discovery Application is so important. And that is why the discovery process in these proceedings must be dealt with properly, at a substantive hearing, rather than through the backdoor at a mention hearing where the Defendants have filed no affidavit evidence.

10. This Court has already made interlocutory findings, and other Courts and Tribunals in the United States have already made final findings, that clearly demonstrate some of the Defendants' breaches of employment and other duties of confidence, and the fact that they stole thousands of pages of the Plaintiff's confidential and proprietary information. It is a truism that people do not steal something that they believe does not have value for them. The Defendants are desperate to avoid having to give discovery of the documents underlying those findings, and do not wish for them to come before the Court. Rather than agree to an initial production consisting of a set of documents and filings that has already been fully vetted and produced in connection with an arbitration that the Defendants claim these proceedings duplicate, which the Defendants have had the benefit of for years, and which the Defendants had substantively agreed to in correspondence, [footnote 6: *"See paragraphs 33 to 38 of Belardi 5"*] *the Defendants have instead chosen to derail the discovery process by hijacking the mention hearing on 25 June 2021.*

11. None of these substantive issues are for determination by the Court this morning, but they are referenced for context. The Plaintiff respectfully seeks an order in the form as enclosed herewith."

45. However, both Mr. Diel and Mr. Preston argued that the timeline proposed by the Plaintiff would unreasonably protract the entire discovery process, so much so that the initial phase by which the Defendants would make discovery to the Plaintiff would not be completed until October/November 2021 and the second phase of exchange would take this matter into January/February 2022 before the Defendants could have any hope of receiving discovery of documents in the control, power and custody of the Plaintiff. Mr. Preston also pointed out that

procedural fairness called for a mutual exchange of documents as the Defendants, too, are keen to receive discovery of documents which would be relevant to their defence.

46. It seems to me that the Plaintiff's application is principally motivated by the following two factors:

    (i) Its pursuit of access to the confidential documents disclosed in the JAMS Arbitration given the commonality of the issues for adjudication and the fact that the Plaintiff was not party to those proceedings; and

    (ii) Its expressed concerns that only the Defendants hold the knowledge of the full gambit of documents in respect of which they are obliged to make discovery and that the Defendants continue to hide the fullness of this information from the Plaintiff and the Court.

47. Mr. McCosker also submitted that the volume of the documentation involved in the arbitration was significant and as an example informed the Court that Mr. Siddiqui had disclosed up to approximately 84,000 pages of documents to Apollo. Mr. McCosker also reminded the Court of the fact that this is a complex breach of confidence case which would bring these proceedings within the exception to the general procedural rule on discovery.

48. However, in my judgment the Plaintiff's concerns may be adequately addressed through the standard and mutual exchange of documents procedure outlined under RSC O.24 Rules 1 and 2. In directing each party to provide a list of documents, the Defendants will be required to identify all of the documents "*which are or have been in their possession, custody or power relating to matters in question in the action.*" These documents will likely overlap with the documents disclosed in the JAMS Arbitration in any event. To that extent, I find that the proposals raised in paragraphs 1 and 2 of the Plaintiff's draft order are not, on its face, unreasonable.

49. That being said, it is open to the Court to direct the parties to file affidavit evidence verifying their respective lists of documents under Rule 3(1). Of course, it is also fathomable that the Plaintiff may thereafter wish to build and establish a case justifying its right of access to a wider scope of *disclosure of the Arbitration Materials* once it has reviewed the Defendants' lists of documents under Rule 1(1). Any such further application could be made to the Court as an application for special discovery under Rule 7.

50. In my judgment, a mutual exchange of documents in the first instance is more consistent with the Court's case-management duties to dispose of matters efficiently in this case. Indeed, there may be cases where a more tailored approach to discovery will be suitable, particularly where the parties are in agreement. However, in this instance, I find that it would be unfair to compel the Defendants to forego a simultaneous exchange of documents against their will, especially since the Defendants would not stand to be on the receiving end of the discovery for many months to come.

51. For all of these reasons, I refuse the Plaintiff's application in so far as it bypasses the initial process requiring a mutual exchange of documents.

Conclusion

52. The Plaintiff's 14 May 2021 summons is dismissed save that in the absence of an agreed position between the parties, I will hear the parties further on the Plaintiff's application for:

    (i) the Defendants to seek the consent of the relevant parties who disclosed documents in the JAMS Arbitration proceedings for the purpose of disclosing the Arbitration Materials which are also relevant to these proceedings.

    (ii) the parties to agree a confidentiality protocol to govern the treatment of all documents discovered in these proceedings.

53. The parties are directed to simultaneously exchange their lists of documents in accordance with RSC O.24/2(1), save that under RSC O.3/5(1) I extend the period within which they shall do

so to 120 days from the date of this Ruling as such a time frame does not exceed the accumulative period envisaged under the Consent Order for discovery to be effected. As is required by RSC O.24/2(1), each party's list must identify all of the documents "*which are or have been in his possession, custody or power relating to any matter in question between them in the action*".

54. Each of the parties are further directed to file and serve affidavit evidence verifying their lists of documents within 120 days of this Ruling in accordance with RSC O.24/3(1).

55. Unless any party files a Form 31D to be heard on costs, costs shall be in the cause.

Dated this 6th day of July 2021

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