

In The Supreme Court of Bermuda

CIVIL JURISDICTION

2019: No. 163

BETWEEN:

MJM LIMITED

PLAINTIFF

-and-

APEX FUND SERVICES LTD

DEFENDANT

Before: **Hon. Chief Justice Hargun**

Appearances: **Mr Ben Adamson, Conyers Dill & Pearman Limited, for the Plaintiff**

Mr Alexander Potts QC and Laura Williamson, Kennedys Chudleigh Ltd, for the Defendant

Dates of Hearing: **28 November 2019**

Date of Ruling **12 March 2020**

REASONS FOR RULING

(Anonymisation of Judgment)

1. On 28 November 2019, the Court delivered a Judgment in relation to these proceedings commenced by MJM Limited (the “Plaintiff” or “MJM”) against Apex Fund Services Ltd (the “Defendant” or “Apex”) by Originating Summons dated 1 May 2019 seeking a declaration that MJM was not prevented, by reason of its prior representation of Apex in

relation to a subpoena duces tecum issued in a previous action between two unrelated parties (“the Previous Action”), from acting for Matthew Clingerman in his capacity as receiver of the Silk Road M3 Fund in proceedings against Apex in Civil Action 2019 No. 64 (the “M3 Fund action”). The Court made a declaration that MJM was not prevented, by reason of its prior representation of Apex in the Previous Action, from acting for Matthew Clingerman in the M3 Fund action.

2. On 29 January 2020, the Court heard arguments, on behalf of Apex, as to whether the Judgment should be published and if so under what conditions. Counsel for the Defendant submitted that the Court should either not publish the Judgment at all (beyond publication to the parties themselves), or the Court should only publish the judgment subject to anonymisation of the name and identity of the Defendant, and (at the least) very substantial redactions to the text of the Judgment so far as it relates to a privileged and confidential information belonging to the Defendant. Mr Potts QC submitted that, in relation to privileged information, the Defendant’s objection related to the subject matter of the Previous Action and in particular the information they received from the Defendant. Mr Potts suggested that the privileged material could, with some delicate drafting, be shifted into a Confidential Appendix.
3. Counsel for MJM agreed that the Judgment should be redacted so as to remove any reference to privileged material, but any anonymisation should be approached by reference to established principles.
4. At the conclusion of that hearing I advised Counsel that I will either hand down a written Ruling or, if I take the view that any reference to the legally privileged information should be removed, I would approach counsel for suggested redactions.

Relevant legal principles

5. In *Director for Public Prosecutions v Cindy Clarke* (Civil Appeal No. 5 of 2019) the Court of Appeal for Bermuda approved the “*general principles*” relating to anonymisation and redaction of judgments laid down by the English Court of Appeal in *Willford v Financial Services Authority* [2013] EWCA Civ 674. In *Willford* Moore-Bick LJ made the following statements of principle:

“5. In my view, the starting point is the principle of open justice, that is, the principle that proceedings are to be conducted and determined in public. One aspect of that principle is that judgments should be published in full without concealing the identity of the parties or others involved, whether by anonymisation or redaction. However, the principle is not absolute and must give way to the requirements of justice and other countervailing considerations of public interest. For example, judgments in criminal proceedings are frequently anonymised in order to protect the identities of children. In civil cases between adult parties, however, the public interest in open justice will usually outweigh other considerations, except where publication would significantly undermine the effectiveness of any relief the court might grant.

8...Anonymisation and the redaction of judgments both represent derogations from that principle which must be justified, on the basis of cogent evidence, as strictly necessary in order to secure the proper administration of justice.”

6. To the same effect is the judgment of Birss J in *Unwired Planet International Ltd v Huawei Technologies Co. Ltd* [2017] EWHC 3083 (Pat)”

“Principles

7. That justice should be done in public is a vital aspect of the rule of law. In R (Willford) v Financial Services Authority [2013] EWCA Civ 674 the Court of Appeal held at paragraph 9 (Moore-Bick LJ) that the principles of open justice require that a judgment should be published in full unless there are overriding

grounds for not doing so. Also in R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2) [2011] QB 218 at paragraph 41 (Lord Judge CJ) and 176 (Lord Neuberger MR), the Court of Appeal emphasised that redactions from judgments should be "rare indeed" and that all parts should be public unless there are "powerful reasons to the contrary".

7. The above authorities make it clear that the judgments should be published in full and it is only in rare and exceptional cases that the Court would be prepared to redact or anonymise a judgment. The Court would only redact or anonymise a judgment if there are powerful reasons for doing so. Such powerful reasons may exist, for example, where the safety of beneficiaries maybe an issue if their identity is disclosed.
8. Having regard to these principles, I considered that any legally privileged information belonging to the Defendant should be redacted and I requested that Counsel suggest appropriate redactions on that account. I accepted the redactions suggested by Counsel which now appear in a Confidential Appendix to the Judgment.
9. I did not consider that there were any powerful reasons that the references to the Defendant or its employees should be anonymised. I accept that the very fact that the Defendant had instructed MJM in the Previous Action is likely to be confidential. However, the claim to confidentiality, as opposed to legally privileged information, is not sufficiently powerful to override the principles of open justice which require that judgments should be published in full. For this reason I did not accept Counsel's submission that throughout the Judgment any references to the Defendant or its employees should be anonymised.

Dated this 12 March 2020

NARINDER K HARGUN
CHIEF JUSTICE