IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 227 OF 2018 (IKJ)

BETWEEN:

FORTUNATE DRIFT LIMITED

Plaintiff

AND

CANTERBURY SECURITIES, LTD.

Defendant

IN CHAMBERS

Appearances:

Mr Christopher Levers and Mr Harry Rasmussen, Mourant Ozannes, for the Plaintiff ("FDL")

Mr Jalil Asif QC and Ms Pamela Mitchell, Kobre & Kim (Cayman), on behalf of the Defendant ("Canterbury")

Before:	**The Hon. Justice Kawaley**
Heard:	**6th August 2019**
Draft Judgment Circulated:	**10 September 2019**
Judgment Delivered:	**16 September 2019**

HEADNOTE

Proceeds of Crime Law (2015 Revision)-Anti-Money Laundering Regulations (2018 Revision)-impact of statutory regime on financial service providers whose clients fail to respond to KYC requests-Defendant holding Plaintiff's shares and proceeds of sale pursuant to undertakings given pursuant to Court Order-whether Court has inherent jurisdiction to order production of KYC information

RULING ON DEFENDANT'S SUMMONS FOR DIRECTIONS

Introductory

1. The Plaintiff seeks to establish in this litigation that it validly terminated a brokerage agreement with the Defendant dated May 9, 2019 (the "Account Agreement") and that the Defendant is required to, inter alia, return to the Plaintiff certain shares in Yangtze River Development Corp ("YRIV") (the "Shares") and the proceeds of sale of some of the Shares. This claim is vigorously contested by the Defendant which asserts a substantial Counterclaim.

2. After hearing the Plaintiff's Ex Parte Summons December 7, 2018, I granted an Ex Parte Injunction restraining the Defendant from liquidating any Shares it held for the benefit of the Plaintiff pursuant to the Account Agreement. Some Shares were sold by the Defendant before the Injunction was served, so the Injunction 'bit' on the remaining Shares and proceeds of sale still held by the Defendant. On December 13, 2018, the Return Date of the Ex Parte Injunction, I declined to discharge the Interim Injunction altogether. Instead, I discharged it on the basis of the following undertakings offered by the parties when I indicated that I had decided that the Interim Injunction should be continued but that the Plaintiff should be required to give the additional undertaking sought by the Defendant. It was ultimately ordered:

> "***UPON*** *the Defendant giving the following undertakings:*
>
> *i. that it will hold any of shares transferred out of the Plaintiff's account with the Defendant into the Defendant's account (the "**Transferred Shares**") that have not been sold pending further order of the Court or the Plaintiff's agreement;*

ii. *that it will hold the proceeds of sale of those Transferred Shares which have been sold, insofar as those proceeds remain in the Defendant's control (the "**Proceeds**"), pending further order of the Court or the Plaintiff's agreement. For the avoidance of doubt, the Proceeds amount to US$14,959,352.20; and*

iii. *that, save as otherwise allowed by any later order, or by agreement with the Plaintiff, the Defendant will not transfer or sell any further shares held by it for the Plaintiff (the "**Shares**") in satisfaction of the Plaintiff's alleged obligations to the Defendant.*

***AND UPON** the Plaintiff giving the following undertakings:*

iv. *that, if the Court later finds that this order, or the Order dated 7 December 2018 in these proceedings (the "**Order**"), has caused loss to the Defendant or any third parties, and decides that the Defendant and/or such third parties should be compensated for that loss, the Plaintiff will comply with any order the Court may make;*

v. *that it will make no attempt to, withdraw or transfer from the Defendant any shares in Yangtze River Port and Logistics Ltd held for it by the Defendant pending further order of the Court or agreement by the Defendant; and*

vi. *that insofar as any third party is, or has been, provided with the Order or this order, by or on behalf of the Plaintiff, such third parties will be told expressly by or on behalf of the Plaintiff that the Order and/or this order do not freeze the assets of the Defendant or otherwise interfere with its business dealings, including its bank accounts, custody accounts or brokerage accounts. The Order relates only to the Transferred Shares, the Shares and the Proceeds as set out above.*

IT IS ORDERED THAT:

1. *Paragraph 1 of the Order is discharged;*

GRAND COURT CIV-03 CAYMAN ISLANDS

2. *Costs reserved; and*

3. *The parties shall have liberty to apply.*" (the "December 13, 2018 Order")

3. Some weeks after Canterbury gave those undertakings to this Court, it learned that there had been a change in FDL's beneficial ownership and sought updated Know Your Customer ("KYC") particulars in relation to FDL. A dispute having arisen as to whether FDL was required to give those particulars in the circumstances, Canterbury applied by Summons for Directions dated April 4, 2019 for an Order that:

> "*1. The Plaintiff do provide the documents and information set out in the Defendant's letter to the Plaintiff with enclosures dated 20 March 2019 and attached to this summons at Appendix 'A', to enable the Defendant to satisfy itself that it is compliant with the Anti-Money Laundering Regulations 2018 ("AML Regulations')...*"

4. Mr Levers beguilingly characterised FDL's position on this Summons for Directions as entirely neutral and designed to assist the Court to give guidance on the correct legal position. He invited the Court to treat the application as analogous to a trustee seeking directions under the *Public Trustee-v-Cooper*[1] jurisdiction. It is true that the Plaintiff's formal position was framed in a neutral way. But irrespective of the way in which submissions were advanced at the effective hearing of Canterbury's Summons, the application was only made and pursued because FDL declined to provide the information sought. The position adopted by FDL made the hearing feel very much like a contested one. That said:

(a) the legal issues raised appeared to be entirely novel and the legal questions which arose could not be answered by reference to any decided cases nor based on a simple and superficial reading of the relevant legislation; and

(b) FDL's counsel did in the course of argument narrow significantly the categories of information sought with respect to which the initial objections to production would be maintained. This was consistent with his client's avowed position that any information the Court found was properly required to be supplied would be furnished on a voluntary basis.

[1] [2001]W.T.L.R 901.

5. The main legal issue was whether the Court possessed the jurisdictional competence to compel FDL to produce the information sought to protect Canterbury from contravening its statutory obligations under, principally, the AML Regulations. The subsidiary factual controversy was, assuming that FDL could be compelled to produce the information sought, what scope of information FDL could properly be required to produce.

The factual matrix

Late evidence

6. The Third Affidavit of Dominic Sin was filed late. As Canterbury was able to file responsive evidence before the hearing (Seventh Affidavit of Holly Morrison), I decided to extend the time required for filing all late evidence.

The initial request

7. By letter dated March 20, 2019, Canterbury formulated the basis of their information requests as follows:

> *"As you are aware Canterbury Securities is registered with the Cayman Islands Monetary Authority ('Regulator or CIMA'). In accordance with laws, rules, and regulations clients must supply corporate and personal documentation when changes are made to accounts held at any Cayman Island Broker Dealer, including Canterbury Securities. The Regulator's expectation is that all CIMA registered companies shall comply with all of its obligations as provided under the Anti-Money Laundering ('AML') Regulations (2018 Revision) ('Regulations'). Through our continued AML reviews, we have become aware through the public filings from YRIV filed on EDGAR that there has been an undisclosed material change in the ownership structure of Fortunate Drift Ltd. In January 2019, the beneficial owner of Fortunate Drift Ltd was changed to Jielin He.*
>
> *Canterbury therefore requests all necessary/required documentation to be submitted in order to comply with the regulations. In turn, you (as the client) have an obligation to supply the documentation as per CIMA AML Regulations by Monday the 25 March 2019 by close of business. Additionally, clients that do not supply the requested documentation to their broker dealer may face regulatory and/or governmental scrutiny…"*

8. Fifteen items of information were then sought in an alphabetical list. In the course of argument, it became clear that items (a) (provided a new application form did not have to be signed, which it did not), (b), (e), (i), (k), (l) and (m) were not opposed in principle. Basic corporate documentation had already been supplied. Items (d), (f), (g), (h), (j), (n) and (o) were objected to on the grounds that they went too far or that their relevance had not been satisfactorily explained.

The context in which the AML requests were made

9. The Sixth Affidavit of Holly Morrison, Canterbury's Chief Operating Officer, provided important background evidence which was not (and could not credibly be) disputed by FDL. Firstly, the information requests were not litigation driven but were triggered by Canterbury's genuine compliance concerns. Ms Morrison deposed:

> *"11. On 27 March 2019 Canterbury sent a further email to FDL as FDL failed to respond to the March 2019 Letter and giving FDL until 29 March 2019 to respond to it... The deadline of 29 March 2019 was imposed by Canterbury because during its recent CIMA audit, FDL was one of the clients CIMA's auditor randomly selected to review to prepare his audit report and that was the deadline imposed by CIMA's auditor for providing the KYC and AML documentation for FDL to CIMA's auditor."*

10. Secondly, there were objectively credible and serious grounds for Canterbury to be concerned about the adequacy of the information FDL provided. Canterbury had to chase FDL for a substantive response to their information requests and their attorneys provided only limited documentation on May 24, 2019. This documentation was both incomplete and the new registers of directors and members were inconsistent with the initial corporate records. Most notably, although FDL had originally valued itself at $100 million, the new beneficial owner was shown to have paid only nominal consideration ($1) for FDL's sole share. The Sixth Morrison Affidavit concluded by setting out the following concerns arising from FDL's admitted status as a shareholder of YRIV:

> *"24. I refer to paragraphs 17 to 22 of my fifth affidavit where I set out details of the FINRA investigation and NASDAQ delisting of YRIV, which is based upon YRIV's Form 8 K filed with the U.S. SEC on 4 June 2019. This raises some very serious allegations against YRIV and its shareholders and so supports the need for FDL to provide the KYC documents and information requested in the March Letter to Canterbury to ensure Canterbury can properly identify and verify who Mr. Jielin is and understand if there have been any changes in the underlying*

business of FDL and understand the transfer of the sole issued share... given the circumstances surrounding that transfer set out above."

11. The Third Affidavit of FDL director Dominic Sin avers that FDL is uncertain as to whether it is required to supply the requested information to Canterbury as a former client and had therefore written to CIMA requesting clarification of the position. (CIMA, unsurprisingly in my view, declined to offer a view on this legal argument.) The deponent proposed a "*Possible Alternative Outcome*" of transferring the assets to a third party (which Canterbury contended would not relieve it of the same obligations it had while retaining the assets). Mr Sin also averred that FDL considered the requests for further information beyond that supplied on May 24, 2019 (with a view to avoiding litigation) were too wide. In particular, certain requests (which he identified) included "*commercially sensitive and/or irrelevant information*" (paragraph 35). The concerns expressed by Ms Morrison about the information actually supplied by FDL were swept aside with the following assertions:

(a) "*In circumstances where there is a question as to whether Canterbury has an obligation to request the documents in any event, her concern is not understood*" (paragraph 37); and

(b) "*As such, FDL does not propose to address those concerns as they may ultimately be unfounded and unnecessary once CIMA has provided its guidance. However, I can confirm that FDL has at all times acted honestly and with the intention of providing Canterbury with accurate information*" (paragraph 38).

12. I had no hesitation in accepting that Canterbury was not merely genuinely but justifiably concerned about the adequacy of KYC information FDL had provided in relation to the January 2019 change in its beneficial ownership. These concerns were prompted initially by the fact that its account with FDL was being audited by CIMA and that it had discovered an unreported change in beneficial ownership. Thereafter, and more substantively, the concerns were based in part on the questions raised by the information FDL had provided and the wider concerns about FDL's connections with YRIV, which was under a regulatory cloud in the United States.

13. I also accepted that FDL's less clearly defined concerns that Canterbury might be able without detection to use information about, e.g., its asset position to its advantage in the litigation between the parties were both (a) genuine, and (b) objectively credible. There is also bitterly contested litigation between FDL and a party related to Canterbury

("PFS"[2]) afoot in Nevada. The existence of a contractual confidentiality clause in the Account Agreement arguably protects FDL from Canterbury formally relying upon AML material in either proceeding, as Mr Asif QC fairly argued. However, I also accept the riposte of Mr Levers that covert tactical use of information gleaned about assets would be impossible to police.

14. The litigation context was of course common ground. FDL contends that the client relationship has been terminated and Canterbury contends that it subsists. That controversy cannot be resolved at this stage. However, it is common ground that Canterbury is holding assets deposited with it by FDL under the Account Agreement and that the ex parte injunction which FDL initially obtained restraining Canterbury from disposing of those assets was replaced by the undertakings given by Canterbury and incorporated in the recitals to the December 13, 2018 Order. The default position being that Canterbury will be compelled to retain the assets until the conclusion of the present litigation, however the parties are pursuing the possibility of consensually transferring the assets to a third party custodian. This was seemingly raised by FDL as an answer to Canterbury's concerns. It is somewhat unclear whether that agreement would involve continuing or modifying the terms of the December 13, 2018 Order or discharging it altogether.

15. How the factual matrix impacts on the legal position will be considered after the legal position has been addressed below.

Canterbury's submissions

16. In the Defendant's Skeleton Argument, it was submitted by way of overview of the relevant legislative scheme as follows:

> "*10. As summarised in the introduction to the CIMA Guidance, the purpose of the AML regime is to ensure that the Cayman Islands meets international standards of supervision and cooperation in the fight against financial crime:*
>
> > *'[CIMA] is particularly aware of the global nature of the fight against money laundering, terrorist financing and other financial crime, and the consequent need for all jurisdictions to operate their Anti-Money Laundering and Countering the Financing of Terrorism ... and regulatory regimes cooperatively and compatibly with each other. This is both to limit opportunities*

[2] See *Fortunate Drift Limited-v-Canterbury Securities Ltd.*, FSD 227 of 2018 (IKJ), Judgment dated July 12, 2019 (unreported).

for "regulatory arbitrage" by criminals and to promote an internationally level playing field for legitimate businesses.'"

17. The Skeleton Argument then addressed legislative provisions which it was submitted Canterbury was obviously required to avoid infringing. The primary legislation was the Proceeds of Crime Law (2019 Revision) ("POCL") and the subsidiary legislation was the Anti-Money Laundering Regulations (2018 Revision), which were amended by the Anti-Money Laundering Regulations 2019 and the Anti-Money Laundering (Amendment) (No. 2) Regulations 2019 (together the "AML Regulations").

18. There was no challenge to the submission that Canterbury was a "*relevant financial business*" under section 2 and Schedule 6 of POCL and also fell within the "*regulated sector*" (Schedule 4). Mr Asif QC centrally argued that it was not as simple as Mr Sin contended for Canterbury to sidestep its AML obligations by simply transferring the assets to a third party. Transferring property which Canterbury knew or suspected was "criminal property" was itself prohibited by POCL and the available defences were unlikely to apply to the circumstances of the present case. The purpose of the information sought from FDL was to eliminate the basis for any suspicions.

19. The policy underpinnings of the AML Regulations and their key requirements were lucidly summarised as follows:

> *"21. Rather than being prescriptive as to particular steps required to be taken, the AML Regs promulgate a risk-based approach, that focusses on the entity in question making its own assessment of the risk associated with carrying on its particular business and associated with the particular counterparties with whom it deals. This is just not a 'box-ticking' exercise. Failure to comply creates another exposure to criminal liability for both the corporate entity and its directors and officers, with a potential sentence of a fine of $500,000 or imprisonment for up to two years.*
>
> *22. In particular, compliance with the AML Regs requires CS to carry out customer due diligence measures ('CDD') in a number of relevant circumstances, namely when:*
>
> *a) establishing a business relationship;*
>
> *b) carrying out a one-off transaction valued in excess of fifteen thousand dollars, including a transaction carried out in a single operation or in several operations of smaller value that appear to be linked;*

c) carrying out a one-off transaction that is a wire transfer;

d) there is a suspicion of money laundering or terrorist financing; or

e) the person has doubts about the veracity or adequacy of previously obtained customer identification data."

20. Because FDL suggested that CDD measures were only required in relation to customers, Mr Asif QC in oral argument relied heavily on the fact that a "*one-off transaction*" was also engaged by the legislative scheme.

21. It was also submitted that: "*The AML Regs identify the outcomes to be achieved, but not the route to doing so ...The scheme of the AML Regs is such that the nature of evidence CS requires to satisfy itself that it has complied with its obligations under the AML Regs is a matter for it to decide...*" (Skeleton Argument, paragraphs 23, 25). This point was further supported by reference to the '*Guidance Notes on the Prevention and Detection of Money Laundering and Terrorist Financing*' ("Guidance Notes"):

> "*26. The Guidance Notes support the AML Regs. Notably, the Guidance Notes reinforce the idea that entities must adopt a risk-based approach and develop their own procedures to identify, assess, monitor, manage and mitigate money laundering and terrorist financing risks.*"

22. After addressing the facts, Canterbury's Skeleton Argument concluded as follows:

> "*47. Neither party requests that CS is released from its undertaking (which would not solve the POCL / AML compliance issue in any event). However, as part of its power to control and police the undertakings the Court can, and should, order FDL to provide full and proper responses to CS's request for updated CDD documents and information, as set out in CS's letter of 20/03/19. Further, given the time already elapsed, the paucity of FDL's reasons for objecting and FDL's obvious delaying tactics, the Court should order compliance by FDL within a very short timeframe, no more than 7 days, and a stay of the proceedings in default of compliance...*"

23. In his oral submissions, Mr Asif QC argued that the Court clearly possessed the inherent jurisdiction to compel FDL to produce the information sought in light of the fact that Canterbury held the relevant assets pursuant to a Court Order having regard to the engagement of what some might regard as draconian provisions of statutory law. The

proposition that these statutory provisions were indeed engaged was not accepted by FDL.

FDL's submissions

24. The introductory portion of the Plaintiff's Skeleton Argument concluded with the following submission:

> *"3. It is FDL's position that guidance is required to determine the scope of both parties' obligations under the prevailing statutory regime. As noted below, FDL had sought that guidance from CIMA which has now confirmed that it is not in a position to do so.*
>
> *4. Accordingly, FDL considers it appropriate for the matter to be addressed by this Court."*

25. As regards the basis on which Canterbury held the Shares and proceeds of sale, FDL submitted:

> *"15. It is by virtue of these undertakings, as opposed to any ongoing contractual or other relationship between Canterbury and FDL that Canterbury continues to hold assets for FDL. Indeed it is FDL's case that Canterbury should return the entirety of its assets on the basis that the Brokerage Contract has ended and FDL no longer wishes to conduct business with it."*

26. The main legal controversy accordingly was helpfully framed by the heading to Section C of the Plaintiff's Skeleton Argument: "*IS CANTERBURY REQUIRED TO OBTAIN THE REQUESTED KYC?*" FDL submitted, in answer to Canterbury positing an affirmative answer to this question, "*it is far from clear whether this is correct*" (Skeleton, paragraph 26). Two key submissions were then made:

(a) FDL did not fall within the statutory definition of a customer because there was no subsisting business relationship; and

(b) "*it cannot be contended that FDL or Canterbury are conducting a one-off transaction . FDL has not requested that Canterbury conduct any*

transaction on its behalf. To the contrary, FDL has expressly terminated any relationship with Canterbury and has requested that Canterbury return its assets" (Skeleton Argument, paragraph 31 (ii)).

27. Whether or not FDL had validly terminated the contractual relationship between the parties is one of the issues in controversy in the present action and it seems obvious that it cannot be summarily determined on Canterbury's Summons for Directions. There was obvious force in the proposition that if one viewed the basis on which the assets were being held by Canterbury as governed by its undertakings to the Court, it was difficult to equate this to a "one-off" business transaction. Canterbury's 'counter-narrative' was that the critical analysis should focus on its potential liability if it was required to transfer the assets to a third party, an eventuality which it was common ground was a live issue.

28. As I observed in the course of argument, the proposition that once a contractual relationship between service provider and customer was at an end any monies could be freely transferred without engaging the AML regime would seem to be wholly inconsistent with the public policy imperatives of the statutory scheme.

29. However Mr Levers raised a final legal question which was more bedevilling. This was summarised in the Plaintiff's Skeleton Argument as follows:

> "*37. The statutory framework in place does not provide any requirement on FDL to provide this information nor does it provide Canterbury with any legal right to compel its production....*
>
> *39. This would appear to be Canterbury's relief: to refuse to conduct business with a customer whom it believes has not provided, to its satisfaction, documentation and information regarding its identity and relevant business dealings. Neither the Regulations[3], nor the Guidance Notes published by CIMA as to its operation, indicate any power to compel disclosure....*
>
> *41. Canterbury appears to be saying that it requires this information to comply with the Undertakings. However, this cannot be a proper basis for compulsion of documents from FDL.*"

[3] Reference was made to Regulation 18, which is set out later in this judgment below.

30. Issue is joined with Canterbury's assertion that it is obvious that the Court's inherent jurisdiction to police the Undertakings it has given in place of the Interim Injunction FDL sought embraces the power to compel FDL to produce the AML material sought.

Legal findings: the statutory scheme and the Court's power to compel FDL to produce the information sought

31. Two issues require determination in terms of the statutory scheme under POCL and the AML Regulations, namely:

(a) is compelling FDL to supply the AML information sought by Canterbury inconsistent with the statutory scheme? and

(b) will Canterbury be in contravention of its obligations under the statutory scheme unless an Order is made compelling FDL to supply the AML information sought by Canterbury?

32. The POCL, *inter alia*, creates a statutory body responsible for overseeing combatting money laundering (the Financial Reporting Authority), creates a regime for supervising certain financial businesses, creates primary or substantive money laundering offences and creates ancillary or secondary offences for financial service providers who fail to adhere to the Law's onerous provisions. It also creates a framework for civil forfeiture of the proceeds of crime. The main functions imposed on the Court include making confiscation orders and restraint orders, imposing fines and appointing receivers.

33. It is not disputed that Canterbury is regulated under the POCL. Section 2 defines "*relevant financial business*" as including "*(g) any of the activities set out in Schedule 6, other than an activity falling within paragraphs (a) to (f) of this definition*". Schedule 6 includes trading in transferable securities (paragraph 7(d)) and safekeeping cash and securities on behalf of other persons (paragraph 12).

34. Mr Asif QC rightly identified potential liability for contravening the POCL as flowing from the following provisions. Section 133(1)(d) makes it an offence to transfer "*criminal property*". Under section 144(3), "*criminal property*" is defined as property which (a) represents in whole or part a benefit derived from criminal conduct and (b) "*the alleged offender knows or suspects that it constitutes such a benefit*". Section 133(2)(a) creates a defence where a report is made to the Financial Reporting Authority

("FRA"). Section 134(2)(a) creates a similar defence to the following offence which potentially applies to one-off transactions outside established client relationships:

> "*(1) A person commits an offence if he enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person.*"

35. Mr Levers responded that section 133(2)(a) (and, by extension, section 134(2)(a) as well) provides a defence if the transferor makes disclosure to the FRA, implying that Canterbury could simply transfer the assets, notify the FRA and abandon its requests for updated KYC information. As I indicated in the course of the hearing, it is unrealistic to exclude the possibility that if the FRA was notified that Canterbury has an outstanding KYC request but wishes to transfer the assets it holds to a third party that the FRA would not request Canterbury to retain the assets until it carries out its own investigations. Moreover, the policy of the Law is precautionary in nature. The Law is clearly not designed to encourage regulated entities to merely go through the motions of compliance and, in effect, to do 'whatever they can get away with doing'.

36. Although it is understandable that Canterbury pitched its case as high as it did, in my judgment the relevant question is not whether Canterbury will be exposed to criminal liability if it makes a transfer. The question is whether in circumstances where Canterbury is holding assets pursuant to a Court Order made in favour of its former client, it would be inconsistent with the statutory scheme for this Court to require FDL to supply the information sought? This question is complicated by the fact that it calls for an assessment not simply of the obligations of a regulated entity but also the obligations of this Court. And the position is not simplified by the fact that FDL's reluctance to supply what includes routine information itself raises concern about the Court simply requiring Canterbury to retain the assets or to transfer them to a third party without FDL providing some or all of the information sought.

37. In my judgment, assuming that the Court possesses the inherent jurisdiction to do so, it would not be inconsistent with the POCL to require FDL to assist Canterbury to fulfil its regulatory obligations. Those obligations are statutorily defined in the AML Regulations. As Canterbury correctly contended, the Regulations require the regulated entity to use its judgment as to what information it requires depending on the circumstances. Some circumstances may require more rigorous checks than others. For instance, regulation 8(2) provides:

"(2) *A person carrying out relevant financial business shall -*

(a) document the assessments of risk of the person;
(b) consider all the relevant risk factors before determining what is the level of overall risk and the appropriate level and type of mitigation to be applied;
(c) keep the assessments of risk of the person current
(d) maintain appropriate mechanisms to provide assessment of risk information to competent authorities and self-regulatory bodies;
(e) implement policies, controls and procedures which are approved by senior management, to enable the person to manage and mitigate the risks that have been identified by the country or by the relevant financial business;
(f) identify and assess the money laundering or terrorist financing risks that may arise in relation to the development of new products and new business practices, including new delivery mechanisms and the use of new or developing technologies for both new and pre-existing products;
(g) monitor the implementation of the controls referred to in paragraph (e) and enhance the controls where necessary; and
(h) *take enhanced customer due diligence to manage and mitigate the risks where higher risks are identified.*" [Emphasis added]

38. Regulation 11 provides:

"*11. A person carrying out relevant financial business shall undertake customer due diligence measures when -*

(a) establishing a business relationship;
(b) carrying out a one-off transaction valued in excess of fifteen thousand dollars, including a transaction carried out in a single operation or in several operations of smaller value that appear to be linked;
(c) carrying out a one-off transaction that is a wire transfer;
(d) there is a suspicion of money laundering or terrorist financing; or
(e) the person has doubts about the veracity or adequacy of previously obtained customer identification data." [Emphasis added]

39. Regulation 17A provides:

"*17A. A person carrying out relevant financial business shall apply customer due diligence requirements to existing customers on the basis of materiality and risk, and conduct due diligence on such existing relationships at appropriate times, taking into account whether and when customer due*

diligence measures have been previously undertaken and the adequacy of the data obtained."

40. Regulation 56 makes it an offence to contravene the Regulations and exposes a body corporate to a fine of up to $500,000 on summary conviction and an unlimited fine on conviction on indictment. Directors and managers are liable to criminal prosecution and to the same fines as well as a sentence of 2 years imprisonment if convicted on indictment (regulation 57). Regulation 56 (3) provides:

> "*(3) In proceedings against a person for an offence under these Regulations, it shall be a defence for the person to show that that person took all reasonable steps and exercised all due diligence to avoid committing the offence.*"

41. The limited scope of the defence available to a charge of contravening the AML Regulations appears designed to encourage regulated entities to err on the side of being 'too' diligent when discharging their responsibilities under the Regulations. Perhaps it is better to say that the Regulations require the persons bound by them to adopt a precautionary approach designed to minimize the risk that they may be facilitating money laundering even where there is no positive evidence of wrongdoing. In my judgment there is nothing in the AML Regulations which suggests that their provisions or its legislative purposes would be undermined by this Court, assuming it possessed the inherent jurisdiction to do so, ordered FDL to supply the KYC/CDD information Canterbury seeks.

42. FDL was obviously right to point out that the AML Regulations do not provide express power for this Court, on the application of a person such as Canterbury or otherwise, to compel the production of information sought. Mr Levers aptly placed reliance on Regulation 18 as confirming this position and potentially imposing limits on the relief Canterbury could properly seek:

> "*18. Where a person carrying out relevant financial business is unable to obtain information required by these Regulations to satisfy relevant customer due diligence measures -*
>
> *(a) the person shall -*
>
> *(i) not open the account, commence business relations or perform the transaction; or*
>
> *(ii) terminate the business relationship; and*
>
> *(b) the person shall consider making a suspicious activity report in relation to the customer.*"

43. Regulation 18 suggests that the only options available to Canterbury, in circumstances where it has already formed a client relationship and received assets from the client and is unable to obtain KYC information or to effectively carry out customer due diligence ("CDD") measures which it considers are required to comply with its obligations under the Regulations, are to either:

(a) terminate the relationship or refuse to carry out a contemplated one-off transaction; and

(b) consider making a suspicious transaction report.

44. The implication is that it is permissible to transfer assets about which KYC/CDD information has been sought and not obtained as long as one considers making a suspicious transaction report. This would be consistent with the POCL sections 133(2)(a) and 134(2)(a). Mr Levers further supported this conclusion by reference to the CIMA '*Guidance Notes on the Prevention and Detection of Money Laundering and Terrorist Financing in the Cayman Islands*' provided to assist financial service providers ("FSPs"). Section 3 E provides:

> "*1. Where an FSP is unable to complete and comply with CDD requirements as specified in the AMLRs, it shall not open the account, commence a business relationship, or perform a transaction. If the business relationship has already been established, the FSP shall terminate the relationship. Additionally, the FSP shall consider making a SAR to the FRA.*"

45. This essentially confirms the position under the AML Regulations. I am bound to accept that the AML Regulations do not contemplate that a regulated entity would, in the ordinary course of business, be able to come to Court and seek an order compelling its actual or prospective client to produce the information sought before any funds received should be returned. Depending on the level of risk the relevant FSP had identified, it might well be appropriate to return any assets received before or after making a suspicious activity report. If it was felt possible that CIMA or the FRA might wish to take action to preserve the assets in its own right, the responsible service provider would doubtless afford the regulatory authorities an opportunity to freeze the assets. However, having regard to the obvious policy imperatives underpinning the AML Regulations regime, it still does not follow from these conclusions that any compulsory production of KYC and/or CDD information under any inherent jurisdiction of this Court would necessarily be inconsistent with the statutory regime.

46. It is next necessary to consider the second question of statutory interpretation. Is it necessary to compel FDL to produce the information Canterbury seeks in order to prevent Canterbury being in breach of its statutory obligations? The main aim of the statutory regime, and particularly the AML Regulations and CIMA Guidelines, is to

create a business environment in which FSPs will only be able to do business lawfully if they police their own clients through obtaining the requisite information about the source of their clients' funds. The statutory regime operates directly against the FSPs and only indirectly against their clients: anyone wishing to conduct business in the Cayman Islands will only be able to access financial services here if they supply the KYC and CDD information the service providers require. It is reasonable to assume that in the vast majority of cases the information sought will be voluntarily supplied by the client where the business relationship subsists and/or where it is at an end. This will facilitate the unfettered flow of business activity and expedite the return of the clients' property when the relationship is at an end.

47. In a general sense, the statutory scheme contemplates that respectable businessmen will voluntarily support the public policy objectives of the scheme but does so with a commercial carrot rather than a legal stick. Counsel did not identify any statutory provisions imposing a positive duty on FSPs' clients to supply information required nor even creating an offence of obstruction penalizing failing to comply with information requests. However, it is by now surely well known by business entities engaging financial service providers in reputable financial centres that complying with KYC requirements is simply a necessary part of modern legitimate international commerce. Express contractual arrangements apart, there is very arguably an emerging (if not established) trade custom that clients must supply whatever KYC information is reasonably required by the financial service providers whom they hire. It flows from this that there will inevitably be a risk for the client that if it becomes involved in litigation with a financial service provider it has hired, the KYC information it has supplied may overtly or covertly be used to some extent to advance the financial service provider's litigation interests.

48. Having regard to the unusual circumstances of the present case, I find that Canterbury's submission to the effect that it requires the information sought from FDL in order to protect itself from criminal liability under the Act overstates the position. In my judgment the position under the AML Regulations is ultimately no different, albeit that the analysis is somewhat different. Canterbury has positive duties to update the information it initially obtained, its handling of the FDL account is being audited by CIMA and the only defence to any charge depends on an objective test: did Canterbury take reasonable steps to comply with its statutory duties in all the circumstances? It was exposed to potential criminal liability under the AML Regulations. It was not obvious that the usual remedies of ending the relationship and making a suspicious activity report would suffice.

49. Nonetheless there is still no proper basis for concluding that unless the Court compels FDL to produce the KYC information sought, Canterbury is at risk of criminal liability under the AML Regulations. Because its retention of the relevant assets is governed by a Court Order, Canterbury has surely done all that it can to fulfil its statutory obligations by very appropriately seeking directions from the Court as to the basis on which it should either retain or transfer the relevant assets. It is therefore necessary to consider whether the Court should, in light of the current circumstances, modify the terms of the December 13, 2018 Order by requiring FDL to produce the KYC/CDD information Canterbury seeks against the statutory background considered above.

50. It follows from my findings to the effect that the legislative scheme requires an FSP to terminate a commercial relationship or transaction where information sought is not obtained, that I reject Canterbury's submission that it cannot transfer the assets to a third party without first obtaining the requisite information. Its duty would be limited to filing a suspicious transaction report, and affording the authorities an opportunity to intervene before effecting the contemplated transfer.

Findings: should the Court compel FDL to produce the KYC information Canterbury seeks in the exercise of its inherent jurisdiction to police the undertakings contained in the December 13, 2018 Order?

51. The apparent absence of any express statutory power to compel clients to produce information about their assets justifies a cautious approach to the application for such an intrusive Order under the Court's inherent jurisdiction. The appropriate approach is not illumined by any judicial authority and requires the Court to have regard to basic principles against the background of the statutory regime which provides the legal foundation for the information being sought.

52. Canterbury's case for an Order compelling the production of the information it sought was based on the following core submission:

> "*46. The effect of the undertakings is that CS is obliged to retain assets in circumstances where it is subject to the obligations imposed by the POCL and the AML Regs. These require that it obtains updated CDD in respect of FDL, or risk contravention of POCL and the AML Regs, with consequent criminal exposure...*
>
> *47. Neither party requests that CS is released from its undertaking (which would not solve the POCL / AML compliance issue in any event). However, as part of its power to control and police the undertakings the Court can, and should, order FDL to provide full and proper responses to CS's request for updated CDD documents and information, as set out in CS's letter of 20/03/19.*"

53. Argument focussed on whether or not Canterbury would be exposed to criminal liability if it did not obtain the information it sought. I resolved that dispute to some extent in favour of FDL's legal analysis. The statutory scheme only requires service providers to use their best endeavours to obtain KYC/CDD information they consider is appropriate. Where they fail, their obligation is to terminate the client relationship, or decline to complete a requested one-off transaction. As Canterbury has sought directions from the Court in circumstances where the statutory exit route is unavailable because of the present proceedings, I have found that no credible risk of criminal liability now exists.

54. The precise nature of the jurisdiction the Court is being invited to exercise requires some clarification. Canterbury described it as a "*power to control and police the undertakings*". My own researches suggest that "[i]*t is not the function of this court, or at any rate of the Chancery Division, to police undertakings given to it except perhaps in the limited field of the welfare of infants. It is for the litigant to bring to the attention of the court, if he so wishes but not otherwise, any activity which he considers a breach of an undertaking given to the court*": Rix LJ in *Secretary of State for Enterprise and Regulatory Reform-v-Amway (UK) Limited* [2009] EWCA Civ 32 at paragraph 9 (quoting Brightman J in *Re Bamford*[4]). In substance the Court is being asked not so much as to control or police the undertakings but, more substantively, to:

(a) decide whether or not it is appropriate to continue to accept the undertakings offered by Canterbury in light of FDL's refusal to comply with its KYC/CDD information requests without, in effect, requiring FDL to provide additional undertakings of its own; and/or

(b) decide whether or not it is a proper use of this Court's processes for FDL to receive the benefit of what in substance is interim injunctive relief while declining to assist Canterbury to discharge its obligations under the AML Regulations.

55. Mr Asif QC in his oral submissions correctly placed broad reliance on the inherent jurisdiction of the Court to grant relief under the liberty to apply provisions of the December 13, 2018 Order. This Court undoubtedly possesses the inherent jurisdiction to both ensure the efficacy of its Orders and to review the appropriateness of the terms of an interim Order from time to time. Paragraph 3 of the December 13, 2018 Order expressly gave the parties liberty to apply, and Canterbury's Summons for Directions was filed on that basis.

56. Understandably, neither counsel fully addressed how the Court should exercise its undoubted inherent jurisdiction to review the status of the December 13, 2018 Order, in the event that the Court found that its present Summons for Directions effectively resolved any serious suggestion that it was non-compliant with its obligations under POCL and/or the AML Regulations. Neither counsel nor the Court anticipated at the hearing that I would reach this legal conclusion in relation to a point of construction which was not considered by any identified previous judicial authority. Canterbury effectively assumed that it was obvious that the Court should assist it to comply with its statutory obligations which would be infringed if the information was not produced. FDL adopted no formal position on the directions the Court should make, purporting to assist the Court to construe the legislative scheme correctly. Nonetheless, it is important to record that it was implicit in FDL's submissions and general position that if the Court found that it was required to provide the information sought, it would do so. However, FDL's 'neutral' arguments appeared to encourage the Court to assume that it was obvious that the Order sought should be refused if the Court found that:

[4] Unreported, June 2, 1977.

(a) the statutory scheme did not expose Canterbury to criminal liability if it was unable to obtain the information it sought; and

(b) the statutory scheme did not provide for the clients of FSPs to be compelled to produce KYC/CDD information where they failed to supply it, for good cause or not.

57. The resolution of these points of construction in FDL's favour does not dispose of the broader aspect of Canterbury's case. This was the submission that the Court should exercise its inherent jurisdiction to supervise its Orders to resolve an unsatisfactory scenario in which Canterbury was required to retain custody of assets without the protection of the KYC/CDD compliance measures that it would ordinarily be able to rely upon. The following questions thus arise. Should the Court simply allow FDL to have the benefit of the undertakings given legal force by the December 13, 2018 Order while effectively permitting FDL to thumb its nose at Canterbury's *bona fide* KYC/CDD information requests? Or should the Court compel FDL to provide the information to Canterbury as the price for requiring Canterbury to continue to provide the undertakings embodied in the December 13, 2018 Court Order? Ascertaining the appropriate directions to give, if any, in my judgment requires answering the following preliminary questions:

(1) more broadly, what is the main function of (a) the Court's inherent jurisdiction and (b) the Court's jurisdiction to review the appropriateness of the terms upon which interim injunctive relief has been granted?

(2) more narrowly, what course of action would advance, rather than undermine, the policy of the legislative scheme?

58. The main function of a superior court of record's inherent jurisdiction is to prevent the processes of the Court from being abused. How this jurisdiction is exercised takes many forms. The application of this jurisdiction in relation to undertakings is well recognised in Cayman Islands law. Over 10 years ago in *Phoenix Meridien Equity Limited-v-Lyxor Asset Management and Another* [2009 CILR 153], Smellie CJ opined :

"13 It is settled law in England, and elsewhere in the Commonwealth, that the courts have an inherent jurisdiction to protect litigants against the risk of abuse of the discovery process by requiring further express undertakings. The leading case is Warner-Lambert Co. v. Glaxo Labs. Ltd. It has been followed in subsequent cases, including in the landmark English Court of Appeal decision in Church of Scientology of California v. D.H.S.S. (1), and, according to

textbooks, in similar decisions in other jurisdictions of the Commonwealth (see generally, Matthews & Malek, Disclosure, 3rd ed., at ch. 11 (2007))."

59. Clearly the Court in general terms may in the exercise of its inherent jurisdiction give directions ancillary to the December 13, 2018 Order designed to enhance the efficacy of that Order and to prevent its processes being abused or misused. Whether continuing that Order and the undertakings Canterbury has given to the Court in place of an interim injunction in circumstances where FDL is refusing to supply requested KYC/CDD would be an abuse of process requires analysis of the POCL and AML Regulations scheme. For the reasons set out above, I have found that the statutory scheme envisages that an FSP in Canterbury's position would ordinarily terminate the client relationship and transfer the client's assets, possibly after first filing a suspicious activity report with the relevant authorities. The legislative policy is that FSPs should only retain assets they can satisfy themselves come from legitimate sources. The statutory scheme does not impose any positive duties on FDL as a current or former client nor does it confer any express statutory power to compel a party such as FDL to produce the information which is sought. Viewing the present conundrum through the lens of abuse of process alone does not seem to me to be a very helpful approach.

60. The better analysis is to focus on the fact that the December 13, 2018 Order was essentially based on this Court's *inter partes* determination that FDL was entitled to interim injunctive relief. Canterbury was understandably keen to avoid the record showing that it had to be compelled by the Court not to dissipate assets claimed to belong to a client. The undertakings it gave were based on this Court's finding that FDL was entitled to corresponding injunctive relief. At this point the change in FDL's beneficial ownership had not occurred and no supplementary KYC requests had been made and refused. The ultimate question is whether the terms of the December 13, 2018 Order should be varied because if FDL were not to supply the information sought this would amount to conduct justifying the refusal of discretionary injunctive relief.

61. In light of the conclusions I have reached on the legal effect of the statutory scheme under the POCL and the AML Regulations, it is necessary to carefully assess whether, in circumstances where Canterbury has done all that it legally can to comply with its statutory obligations, either (1) requiring FDL to produce the information or (2) requiring Canterbury to retain the assets until trial or further Order would be more consistent with upholding the integrity of the statutory scheme. Bearing in mind that FDL has indicated that it will voluntarily produce any information it is legally required to produce, the question is whether the Court has the power to compel the production of the information sought, not whether a production order should actually be made.

62. Because of the present dispute, both parties have a mutual commercial interest in having the assets covered by the undertakings preserved until the litigation concludes. The Court has a duty to adjudicate the dispute placed before it for resolution. The anti-money laundering statutory scheme, perhaps unsurprisingly, does not expressly deal with the question of Canterbury's obligations in circumstances such as these, but I have found that Canterbury has used its best endeavours to comply with its obligations and

cannot realistically be accused of contravening the Act by retaining the assets pursuant to a Court Order while its KYC/CDD requests are outstanding. The most obviously relevant arguments as to why refusing to grant the directions Canterbury seeks may be said to be more likely to uphold the legislative scheme are the following:

(a) whether or not FDL is still a client is disputed;

(b) the legislative scheme imposes no express duty on FDL to comply with information requests;

(c) the legislative scheme confers no express power on the Court to produce information requested by an FSP; and

(d) Canterbury's only potential outstanding statutory obligation is to make a suspicious transaction report.

63. The most obviously relevant arguments as to why granting the directions Canterbury seeks (in some form or the other) would be more consistent with upholding the statutory anti-money laundering scheme are the following:

(a) although whether or not FDL is still a client is disputed, FDL is in a *de facto* continuing commercial relationship with Canterbury in any event;

(b) even if Canterbury has legally done all it is strictly required to do under the statutory regime, the Court has considerable flexibility to consider whether it is just to grant interim injunctive relief and, if so, on what terms. This Court has the jurisdiction "*(whether interlocutory or final)* [to] *grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so*"[5]. GCR Order 29 rule 2(4) empowers the Court to preserve specific property on an interim basis "*on such terms, if any, as the Court thinks just*";

(c) the statutory anti-money laundering scheme expressly contemplates that FSPs will not deal with clients who fail to comply with their KYC/CDD requests. The scheme implicitly envisages that non-compliant clients will have to take their business elsewhere and that assets continuing under the control of Caymanian FSPs will only be those whose legitimate provenance the custodians have been able to verify. The

[5] Senior Courts Act 1981 section 37 as read with section 11(1) of the Grand Court Law (2015 Revision).

scheme implicitly enables reputable FSPs to avoid the reputational damage of being involved with undesirable clients;

(d) if the Court grants discretionary interim injunctive relief to a non-compliant client or former client of an FSP which results in the FSP retaining custody of assets while bona fide KYC/CDD requests made to the applicant remain outstanding, the Court is tacitly signifying that the relevant non-compliance is not inappropriate conduct;

(e) the broad objectives of the statutory anti-money laundering scheme are clearly undermined if an FSP who would in the ordinary course of duty be required to terminate a client relationship and return client funds is required in order to adjudicate a dispute about the entitlement to those assets to retain control of client assets while being deprived of the usual protections of having KYC/CDD queries answered; and

(f) despite the absence of any express duties of disclosure being imposed on clients by the statutory regime, it is or ought to be obvious that it is inconsistent with modern standards of commercial morality for a client to seek to subvert the objects of the POCL and AML regulations scheme. The risk that the information FDL supplies might be deployed to confer some litigation advantage on Canterbury in the dispute that has arisen is not a cognizable ground of complaint and is simply an inherent risk when conducting business with FSPs in reputable jurisdictions.

64. I find that the arguments in favour of requiring the production are quite clearly more consistent with upholding the policy of the legislative scheme. In my judgment it is accordingly ultimately clear that were FDL to refuse to supply the KYC/CDD information that Canterbury seeks, without prejudice to its right to argue that certain information is not reasonably required, such refusal would constitute sufficient grounds for refusing interim injunctive relief. I would wish to hear further argument before deciding which of the disputed items set out in Canterbury's March 20, 2019 letter (see paragraph 8 of this Ruling, above) should be produced absent agreement. In all the circumstances of the present case, I find that this Court could, in the exercise of its inherent jurisdiction and as a condition for continuing the December 13, 2018 Order, require FDL to supply the information sought. The most logical way to exercise this jurisdiction, if required, would be a modification of the recitals to the December 13, 2018 Order to include additional undertakings given by the Plaintiff, FDL, substantially in the following terms:

"vii. *Unless otherwise agreed or directed by the Court, the Plaintiff shall provide the documents and information set out in the Defendant's letter to the Plaintiff with enclosures dated 20 March 2019 to enable the Defendant to satisfy itself that it is compliant with the Anti-Money Laundering Regulations 2018.*"

65. This undertaking would be required as a condition for this Court continuing the injunctive relief reflected in the December 13, 2018 Order. Should FDL not wish to supply the relevant information (which seems unlikely as FDL has indicated that it would, subject to receipt and consideration of the present Ruling, supply such documents as were legally required), that Order will be liable to be discharged. For the avoidance of doubt, these findings do not preclude the parties reaching a consensual agreement for a third party custodian abroad to receive the relevant assets having regard to the legal findings recorded in paragraph 50 of this Ruling (above).

Conclusion

66. The POCL and AML Regulations do not positively require Canterbury to continue to seek nor oblige FDL to produce KYC/CDD information. Compelling FDL to produce the information is not required to immunize Canterbury from potential criminal liability in circumstances where (a) the service provider/client relationship has broken down and is subject to litigation before this Court; (b) Canterbury's continuing custody of the assets is pursuant to a Court Order; and (c) Canterbury has sought directions from the Court.

67. However, the December 13, 2018 Order, which in substance grants discretionary injunctive relief, cannot properly be continued until trial unless FDL additionally undertakes to comply with the valid information requests. Failure to do so would undermine the important public policy objects of the legislative scheme and would not be a course of conduct that should be rewarded by a Court of equity which has been asked to grant discretionary interim relief. It bears repeating, however, that FDL gave every indication in the course of argument that it would be willing to supply whatever information this Court determined it was or could be legally required to produce.

68. I will hear counsel if required on the appropriate form of directions to be given on Canterbury's Summons for Directions and as to costs.

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT

GRAND COURT CIV-03 CAYMAN ISLANDS