



COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

Cause No: FSD 394 of 2023 (MRHCJ)

BETWEEN

WHITE CRYSTALS LTD

PLAINTIFF

- and -

IGCF GENERAL PARTNER LIMITED

DEFENDANT

Appearances	Mr Ian Quirk KC along with Ms. Laura Hatfield and Mr. Jonathan Stroud of Bedell Cristin for the Plaintiff Mr Graham Chapman KC along with Mr Conal Keane and Mr Niall Dodd of Dillon Eustace for the Defendant
Hearing Date	2 February 2024
Draft Circulated	15 February 2024
Final Judgment	2 April 2024

JUDGMENT

Introduction

1. The Plaintiff, White Crystal Limited (“WCL”) applied on 19 December 2023 for leave to enforce an arbitral award (“**the Award**”) made by the London Court of International Arbitration (“**the Tribunal**”) against IGCF General Partner Limited (“**the GP**”) pursuant to section 5 of the **Foreign Arbitral Awards Enforcement Act (1997 Revision)** (“**the FAAEA**”). The application, made *ex parte* without notice as permitted by Grand Court Rules Order 73, was granted by this Court on 5 January 2023 on the papers.

2. The issue in the arbitration was the entitlement of WCL, a limited partner of an exempted limited liability partnership called The Infrastructure and Growth Capital Fund LP ("**the Fund**") registered in the Cayman Islands under the **Exempted Limited Partnership Act ("the Act")**, to have access to the books and records of the partnership and to receive from the GP information concerning the business and affairs of the partnership.
3. As recorded in the decision of the Tribunal, the partnership was formed in 2006 and is governed by an Amended and Restated Deed of Limited Partnership dated 17 November 2006 ("**LP Deed**"). WCL claimed in the arbitration that its right of access to the books and records of the Fund under a term of the LP Deed had been wrongfully denied to it by the GP (referred to by the Tribunal as the Contractual Claim). WCL also claimed that various rights to access the records of the Partnership and to receive information concerning its business and affairs, conferred on limited partners by sections 22, 29, 30 and 31 of the Act, were wrongfully denied to it by the GP ("**the Statutory Claims**").
4. In the Minute of Order granting WCL leave to enforce the Award, I noted that,

*The issues were determined in WCL's favour and the Award ordered GP to specifically perform its obligations under the LP Deed, by granting WCL access to its books and records and to comply with its obligations under ss 22, 29 and 31 of the Act within 5 days. GP has since paid the costs related to the arbitration but has not complied with the orders to provide the documents and information to WCL. In the correspondence between the parties exhibited to Mr. Parry's affidavit, the jurisdiction of the Tribunal to make the award has not been challenged by the GP nor has it raised any other ground that would throw the enforceability of the award into doubt. To the contrary, GP confirms that it has created a data room containing information and documents in compliance with the award and is ready to comply with the award by giving WCL access to that data room. **It has, however, refused to do so because WCL has refused to give certain "confirmations and undertakings" sought by GP in correspondence. These "confirmations and understandings" are not provided for in the Award.***

The award is a Convention award. Section 7 of the FAAEA provides that:

- "7. (1) Enforcement of a Convention award shall not be refused except in the cases mentioned in subsections (2) and (3).*
- (2) Enforcement of a Convention award may be refused if the person against whom it is invoked proves —*
- (a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity;*
- (b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made;*

- (c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;*
- (d) subject to subsection (4), that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration;*
- (e) that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country where the arbitration took place; or*
- (f) that the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.*
- 3) Enforcement of a Convention award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award...”*

In the circumstances where GP has raised no objections to the Award and it is not apparent on the face of the Award that that [sic.] there are any grounds for refusing to enforce it, WCL is prima facie entitled to the Order it seeks.”

5. The GP subsequently made an application by summons seeking the following relief:

“(i) An order discharging the Order of the Court dated 5 January 2024 and filed on 8 January 2024 (“the Enforcement Order”).

(ii) An order prohibiting the Plaintiff from dealing with any confidential information or documentation provided to it by the GP pursuant to the Award in a manner which breaches clause 11.12 of the LP Deed or in any manner which damages the Fund, including, expressly:

(a). A prohibition on sharing the confidential information with any Affiliates (as defined in the LP Deed) unless those Affiliates are subject to equivalent confidentiality obligations to the Fund as those set out in clause 11.12 of the LP Deed.

(b). A prohibition on sharing the confidential information with any professional adviser unless that adviser firm has in place an appropriate and effective information barrier preventing the information leaking to any advisor representing the Original Shareholders or Mr Ashary or Mr Naqvi.

(iii) In the alternative, a variation of the Enforcement Order so that enforcement of the Award be on terms of the injunctive relief sought at paragraph 2 above, or alternatively that enforcement of the Award be conditional upon the provision of undertakings by the

Plaintiff in the terms set out at paragraph 2 above (with the words ‘A prohibition on sharing’ replaced by the words ‘The Plaintiff undertakes that it shall not share’).”

6. I dismissed the GP’s application for reasons which I promised to later give in writing. This I do now.

The Submissions by the GP

7. Mr. Chapman KC submitted on behalf of the GP that WCL’s application in the Tribunal was not made *bona fide* for any proper purpose but made solely to obtain confidential information and documentation about the Fund so it can be provided to persons with interests adverse to the Fund, including persons who have sued and are presently suing diverse special purpose vehicles (“SPVs”) belonging to the Fund, and to the founder of the Abraaj Group who is said to have defrauded the Group of investment funds of which the Fund once formed part. He asserted that there was every reason to suspect that confidential information pertaining to the Fund would, if given to WCL, be passed to third parties who would then seek to use it against the Fund in pursuit of their own interests.
8. He suggested that it was ‘eccentric’ for WCL, who had only a minor shareholding in the Fund, worth perhaps just over \$200,000 to spend over a million dollars trying to obtain documents and confidential information and that the only plausible explanation is that they were being used by these other persons for their own purposes: WCL was a mere cipher, in his words.
9. He submitted that WCL’s refusal to give the undertakings that have been sought supported the inference he was inviting the Court to draw. If it were that WCL intended to abide by their confidentiality obligations arising under the LP Deed, then the provision of the undertakings and confirmations would be straightforward. Their refusal to do so supported the inference that they intend to breach their duty of confidentiality and misuse the information.
10. The GP’s overarching submission is that it would be unjust - and therefore contrary to public policy - to require the GP to comply with the Order granting WCL leave to enforce the Award without affording it the protections sought in its application. Put another way, to permit the Award to be enforced leaving the GP to apply separately for injunctive relief would inevitably deprive the GP of the benefit of any such relief because the information would be provided under the Award and disseminated without the protections being in place. Mr. Chapman contends that to do so would not only be unjust but would effectively oust the jurisdiction of this Court to grant effective relief restraining the improper use of confidential information provided under the Award.
11. Mr. Chapman asserted that the injunctive relief is sought as part of the GP’s application to set aside the Order granting leave and, if the relief sought by the GP were granted, the Order should be discharged in the circumstances where the GP has always made clear that it will comply with the “remaining” terms of the Award.

The Evidence in Support

12. The GP's stated concern arises in respect of the Fund's interest in K-Electric Limited ("**KEL**"), a large electricity supplier in Pakistan. The agreed facts are that the Fund holds an interest in KEL through IGCF SPV 26 Limited ("**SPV 26**") (of which it holds 100%) which in turn holds at least 70.6% in IGCF SPV 21 Limited ("**SPV 21**"). SPV 21 holds 53.8% of the shares in KES Power Limited ("**KESP**"). KESP holds a 66.4% interest in KEL.
13. The other shareholders in KESP are Al Jomaih Power Limited ("**AJP**") (27.7%) and Denham Investment Ltd ("**Denham**") to which Mr. Chapman refers, for the purposes of his submissions, as "the **Original Shareholders**." AJP is, like WCL, also part of the Al Jomaih Group. At the top of the pyramid of ownership of the Original Shareholders in the schematic exhibited by the GP was Abraaj Holdings (In Liquidation) which was once controlled by Mr. Arif Naqvi.
14. In August 2022, Sage Venture Group Limited ("**Sage**") agreed to purchase from Abraaj Investment Management Limited (in Official Liquidation) ("**AIML**") the sole voting share in SPV 21 together with a 75.5% shareholding in the GP ("**the Transaction**"). As AIML is in Official Liquidation, sanction of the Grand Court to complete the transaction was sought and granted by Segal J. on 14 October 2022. Sage has also acquired the remaining 24.5% shareholding in the GP and various partnership stakes in the Fund from a number of limited partners.
15. The Original Shareholders also made an offer for SPV 21's interest in KESP which was not accepted.
16. It is said that the Original Shareholders expressed their dissatisfaction with the Transaction and have taken a number of steps to seek to frustrate it. These steps included the bringing of a number of proceedings in Pakistan and the Cayman Islands including against SPV21, KESP and KEL.
17. The GP believed that WCL made, what Mr. Chapman described as, wide-ranging requests for confidential information and documentation relating to the Fund as part of a strategy devised by the Original Shareholders to frustrate the Transaction and that WCL would share the information received with the Original Shareholders to the detriment of the Fund and in breach of the confidentiality provision in the LP Deed. The evidence supporting this belief is given by Mr. Mark Skelton, a specialist in corporate advisory work including restructuring and crisis stabilization, who was appointed by the Fund to assist it in managing its affairs, including acting as Director for the GP. He sets out at some length a chronology of all the various proceedings issued and actions taken by the Original Shareholders to not only frustrate the transaction but to prevent KESP from operating effectively particularly as regards its investment in KEL, but I do not propose to rehearse them here.
18. On any view of Mr. Skelton's evidence, the sum total of it was that (i) the timing of WCL's arbitration claim, (ii) the fact that WCL is related to AJP, the lack of what Mr. Skelton considers to be the

absence of any “*plausible economic rationale*”¹ for WCL to incur such large costs in the arbitration relative to its minor stake in the Fund, and (iii) WCL’s request in the arbitration that the documents disclosed not bear any watermarks, all lead to the necessary inference that WCL is being used as a proxy by its beneficial owners and that WCL would breach the obligation of confidentiality in the Deed if they were not restrained. The GP’s concern is heightened by the fact that the lawyers who act for the Original Shareholders, Mr. Naqvi and for WCL are the same.

19. Mr. Skelton also relied on aspects of WCL’s conduct to support the inference he was inviting the Court to draw. He drew the Court’s attention to an alleged breach by WCL of its confidentiality obligations during the Arbitration, being the unauthorized disclosure of a confidential document to the Federal Investigation of Pakistan to support an allegation of wrongdoing it made against the GP. He also gave evidence of a threatened breach of confidentiality by WCL post-Award. His evidence was that WCL told the GP that they believed the Award ought to be communicated to the limited partners of the Fund as a matter of urgency, on the basis that the Award forms part of the books and records of the Fund and had stated further that WCL would circulate the Award to all the limited partners if the GP did not. Mr. Skelton also drew the Court’s attention to the efforts of WCL’s attorneys to get the GP to provide a copy of the Award to the English Commercial Court which was seised of proceedings brought against KESP by the GP to recover a debt. Mr. Skelton deponed to his belief that the threat to provide a copy of the Award to the Court in the English proceedings was so that the confidentiality of the Award would be lost.

20. It was in this context that the GP sought the following confirmations:

"i. An express confirmation that any information and documentation provided pursuant to the Award will be kept confidential, not disclosed to any third parties and will not be used for any purpose other than that strictly related to WCL's investment as a limited partner in the Fund.

ii. An express confirmation that WCL will not provide the information or documentation provided pursuant to the Award to Al-Jomaih Power Limited or Denham Investment Limited ("the Original Shareholders") who, through their various actions in multiple jurisdictions, continue to take steps to damage the economic wellbeing of the Fund.

iii. An express confirmation that WCL will not provide the information or documentation provided pursuant to the Award to Mr Arif Naqvi.

iv. Without prejudice to request 2 above, confirmation as to whether the Original Shareholders have, in relation to the information or documentation provided pursuant to the Award, expressly agreed to be bound by equivalent confidentiality obligations as are contained in clause 11.12 of the LP Deed.

¹ See paragraph 58 of the First Affidavit of Mark Skelton sworn on 11 January 2024.

v. Confirmation that Steptoe and Bedell Cristin will provide undertakings to Dillon Eustace that they will keep the information or documentation provided pursuant to the Award strictly confidential and not share same with attorneys who are acting for the Original Shareholders or Mr Arif Naqvi."

21. Mr. Skelton states further that WCL rejected the GP's right to impose conditions on their compliance with the Award. WCL also maintained their position that the Award should be provided to all limited partners of the Fund while also confirming that it did not intend to breach its confidentiality obligation although it contended that the GP had already waived confidentiality in any event.

WCL's Response

22. In response to the submissions made by Mr. Chapman, Mr. Quirk KC made the following points: Firstly, that the question of injunctive relief is separate from the question of whether the Award should be enforced and that there was no exception to the enforcement of arbitration award contained within the FAAEA which allows the loser in an arbitration to commence fresh proceedings for new injunctive relief and to resist enforcement of a separate arbitration award until those new proceedings are concluded. If this were the case, then it would be open to any party in any arbitration to resist enforcement of an arbitration award on the basis that they have commenced new proceedings for injunctive relief arising out of the same contract. There is no authority in any jurisdiction for this argument and the Court should reject it here.
23. Further, the authorities make it clear that grounds for refusing enforcement should be construed very narrowly, as illustrated by the following extract from Dicey, Morris & Collins on the Conflict of Laws, 16th edn (2023) at 16-114 and 115:

"In Deutsche Schachtbau v Shell International Petroleum Co Ltd it was held that it was not contrary to English public policy to enforce a Swiss award... Sir John Donaldson M.R. emphasised that public policy could never be exhaustively defined, and that it should be approached with extreme caution: for an argument based on public policy to succeed it has to be shown that there is some element of illegality or that recognition or enforcement of the award would be clearly injurious to the public good, or, possibly, that recognition or enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the State are exercised..."

"English law recognises an important public policy in the enforcement of arbitral awards, and the courts will only refuse to do so ... in a clear case."

24. The Court has no power to add conditions or qualifications to the Award.

25. The GP's application for injunctive relief should be rejected in the circumstances where the GP is seeking to re-argue matters which were fully argued before and determined by the Tribunal. Those matters fell within the competence of the Tribunal and were properly determined by it, and the GP is not entitled to seek a second bite of the cherry before this Court.
26. The Defendant is precluded by issue estoppel from pursuing its application for an injunction. In support of this submission, Mr. Quirk relied on the leading authority on issue estoppel in the Cayman Islands which is the decision of the Privy Council in *Gol Linhas v Matlin Patterson* [2022] UKPC 21. The Court stated that there were three requirements for an issue estoppel to arise: (i) the judgment must be entitled to recognition in accordance with the domestic rules on the recognition of foreign judgments; (ii) the parties in the two actions must be the same; and (iii) the issue decided by the foreign court must be the same as the issue in the domestic proceedings.
27. The principle applies to arbitration as it does to litigation: see *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630, 643C *"Issue estoppel applies to arbitration as it does to litigation. The parties having chosen the tribunal to determine the disputes between them as to their legal rights and duties are bound by the determination by that tribunal of any issue which is relevant to the decision of any dispute referred to that tribunal."*
28. Mr. Quirk submitted that all the requirements were made out.
29. He submitted, in particular, that, in order to obtain an injunction, the GP would have to show that that there was an imminent danger of very substantial damage or further damage, e.g. by showing that the threatened act was *"attended with extreme probability of irreparable injury..."*: see Snell's Equity at 18-029. In other words, the GP was required to prove *"a strong probability that, unless restrained by injunction... [the Plaintiff] will act in breach of... [the Defendant's] rights"*: ibid at 18-209.
30. The GP had been unable to meet the requisite standard in the arbitration proceedings, and the Tribunal expressly rejected the submissions which were in the same terms as the submissions in front of me.
31. Rejecting the very inference which I was invited to draw the Tribunal stated at [65] that,

"...the Tribunal does not regard WCL's investment as so insignificant that the Tribunal would be entitled to make the inference (that WCL is acting as a mere cipher for the Original Shareholders) ... WCL's original investment, which must have been made in 2007, was \$10 million - a not insignificant sum by some standards. It has received back distributions from the sale of assets of just under \$6.4 million and its investment is now said by the GP to be worth no more than about \$270,000. So it is nursing a significant loss on its investment and is surely justified in exercising its rights as a Limited Partner to seek to find out more information as to why this has arisen."

32. The Tribunal held, *inter alia*, that,
- (i) there was no basis on which to draw the inference that WCL sought access to the books and records of the Partnership for an improper purpose and not for a purpose reasonably related to WCL's interest as a Limited Partner;
 - (ii) it was not inevitable or even very likely that the information gleaned by WCL from the books and records of the Fund was going to be shared with the Original Shareholders;
 - (iii) it was not prepared to infer that the purpose of the request for access to the books and records of the Fund was to share that information with the Original Shareholders so that it could be used to damage the interests of the Fund, and
 - (vi) WCL was entitled to share information with "*Affiliates*" (on the basis that they keep the information confidential) and with their professional advisors so far as necessary to enable them to perform their duties.
33. Mr. Quirk submitted that the GP was precluded from making any argument inconsistent with these findings.
34. Further and in any event, the GP's request for an injunction to restrain an alleged impending breach of confidentiality clause contained in the LP Deed falls within the arbitration clause. It followed that its application to this Court was in breach of the parties' arbitration agreement and should not be entertained by the Court.

Discussion

35. I accepted Mr. Chapman's proposition that the public policy referred to in these statutory provisions is the public policy "*in maintaining the fair and orderly administration of justice*" and that the classic formulation where enforcement of an award would be contrary to public policy is usually expressed as "*contrary to the fundamental conceptions of morality and justice*" of the forum, the formulations being taken from the case of *Payward Inc v. Chechetkin* on which he relied at [101].
36. It is not controversial, however, that given the strong public policy in the enforcement of tribunal awards in the FAAEA, which provides very limited bases on which the enforcement of an award may be refused, the scope of the public policy basis for refusing to enforce an award should be construed very narrowly.
37. *Payward Inc v. Chechetkin* on which Mr. Chapman relied was a rare instance where the Court refused to enforce an award on the grounds of public policy. The facts of this case are a mile

apart from the case at Bar and really illustrates the exceptionality of the circumstances in which an award will not be enforced.

38. As shortly as I can take those facts without rendering the case unintelligible, Mr. Chechetkin lost money trading cryptocurrency on Payward's trading platform. He then sought to recover his losses by suing Payward in the English Courts on the basis that Payward had engaged in regulated activity in breach of the **Financial Services and Markets Act**. Payward commenced arbitration proceedings before a US Tribunal as provided for in their agreement. The Tribunal determined *inter alia*, that Mr. Chechetkin's suit was a breach of the parties' agreement to arbitrate, that only the laws of California were applicable and that he was prohibited from filing or prosecuting a claim against Payward in the English courts.
39. Payward sought to enforce the award in England. If enforced, Mr. Chechetkin would have been prohibited from pursuing claims available to him in the UK under statute. Mr. Chechetkin argued that the award was unenforceable as the **Consumer Rights Act ("the CRA")** rendered the imposition of arbitration in California unfair on him as a consumer. On that issue, the Court held that consumer protection rules dealing with the fairness of contractual terms were "*rules of public policy*" at [105], that the **CRA** expressed the "*policy of the UK as a whole*" at [108], that it would not be consistent with the fair and orderly administration of justice, and fundamental conceptions of justice, if consumer protections such as were enacted in the **CRA** could be outflanked merely by the choice of a different system of law at [113] and that enforcing the award would be contrary to public policy given that the **CRA** provided that consumer rights issues falling under the scope of the CRA should be dealt with under the UK statute, rather than any foreign law at [125].
40. The Court also held that enforcing the award would be contrary to public policy as it would also have stifled Mr. Chechetkin's claim that the contract was in breach of the **Financial Service and Markets Act** and unenforceable at [155].
41. The case did not assist Mr. Chapman as it was readily distinguishable from the case at Bar which concerns an award made to vindicate WCL's entitlement, both under contract and under statute, to certain information and documents which the GP had withheld.
42. I was not persuaded that it would be contrary to any public policy or any mandatory rule (*viz* a statutory mandate to resolve consumer protection issues under English law) to enforce such an award without imposing the conditions requested, on the (speculative) basis that the recipient would deploy the information contrary to the parties' agreement.
43. Mr. Chapman sought to argue that it would be 'unjust' and therefore contrary to the public policy requisite of "*maintaining the fair and orderly administration of justice,*" to require the GP to comply with the Award without giving it the protections it sought against a prospective breach of confidentiality by WCL. The submission, however, did not go any distance in showing how enforcing the Award without the protections that the GP sought would be injurious to the public

good, to adopt the formulation used by Donaldson MR in *Deutsche Schachtbau* in defining the public policy limitation on enforcing arbitral awards.

44. To the contrary, public policy favored the enforcement of an award which was made in defence of a statutory entitlement which had been dishonored and to enforce a clear contractual obligation.
45. This was particularly so where the question of whether WCL should have the information, given the GP's concerns that it would breach the confidentiality clause in the LP Deed and deploy the information against the interest of the Fund, had been canvassed before the Tribunal and rejected. The Tribunal undoubtedly had the power to impose terms and conditions on the award of specific performance if it thought it necessary to do so. It did not, and very plainly held that it was "*not very likely*" that there would be any unauthorized use of the information to the detriment of the Fund.
46. It was not open to the GP to run the same arguments before this Court and seek to relitigate a matter which had already been decided by the Tribunal which the parties had elected to resolve their disputes, and it was not open to me to revisit the issue.
47. In any event, this Court does not have jurisdiction to add a rider or addendum to an award which was essentially what the GP was asking the Court to do. The Court's jurisdiction is limited to enforcing an award or refusing to enforce it where any of the grounds in section 7 of the FAAEA is established.
48. WCL was entitled to enforce the Award made in their favour against the GP as none of the grounds for refusing leave were made out. Accordingly, the *ex parte* order granting leave was made final.

Application to Hear the Matter in Private

49. I also refused an application made by the GP to hear the application in private. While recognizing the force of the English authorities to which Mr. Chapman referred me which illustrated the exercise of the Court's discretion to hear enforcement proceedings in private where the arbitral agreement mandated that the arbitration be confidential, I considered it was consistent with the principle of open justice and the statutory steer in the FAAEA that the hearing be conducted in public.

DATED 2ND APRIL 2024



The Hon. Justice Margaret Ramsay-Hale
CHIEF JUSTICE