

Can confidential information be disclosed to litigation funders in the BVI?

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In a judgment delivered on 20 October 2022, [1] the Court of Appeal of the Eastern Caribbean Supreme Court affirmed the BVI Commercial Court's order permitting the respondent to share with its third-party litigation funder certain aspects of the appellant's confidential information. This information was disclosed to the respondent in compliance with the terms of an asset disclosure order.

This judgment contains a welcome analysis of the tests for determining the permissible use of documents disclosed in civil proceedings under the Civil Procedure Rules 2000 of the East Caribbean Supreme Court and the common law, respectively.

Background

Green Elite Limited (in liquidation) (**Respondent**), a company incorporated in the BVI, is equally owned by two shareholders, HWH Holdings Limited (**HWH**) and Delco Participation BV (**Delco**). The Respondent's only asset is its shareholding in Chiho-Tiande Group Limited (**CT**). Fang Ankong (**Appellant**) was one of the Respondent's four directors.

The dispute stemmed from the alleged unauthorised sale of the Respondent's shares in CT and the transfer of the proceeds to three of the Respondent's directors (excluding the Appellant). Upon an application by Delco, the Respondent was appointed joint liquidators. In turn, the Respondent issued proceedings against all four of their directors and HWH to seek the return of the sale proceeds. The joint liquidators were funded by Delco, with the funding arrangement sanctioned by the Court.

The trial judge found all four directors to be jointly and severally liable to account for the monies paid out of the Respondent in relation to the unauthorised sale of the CT shares. The trial judgment is now under appeal, with judgment reserved.

Pending the appeal before the Court of Appeal, the Respondent applied for post-judgment injunctive relief against HWH and the directors, which among other things, resulted in the grant of a freezing injunction and an asset disclosure order against the Appellant (**Disclosure Order**). In compliance with the Disclosure Order, the Appellant disclosed details of his assets in the form of a letter, a witness statement, and a sworn affidavit.

In its application for the Disclosure Order, the Respondent had given an undertaking that it would not, without the Court's permission, use such information in any proceedings "other than this claim". However, the Respondent wished to share the information with its litigation funder, Delco, so that Delco could "properly consider the proportionality and appropriateness of further litigation expenses in these proceedings in accordance with the terms of the Funding Agreement and in its capacity as Funder". The Respondent, therefore, applied to the Court for permission to share with Delco the information disclosed by the Appellant pursuant to the Disclosure Order. The Court subsequently granted this application, but the Appellant made an application to appeal the decision.

Analysis by the Court of Appeal

The Court of Appeal began its analysis by citing the applicable rules for determining the issue of whether confidential information disclosed to one party under the compulsion of a court order can be shared by the receiving party with a third-party funder, namely Rules 28.17 ("Subsequent use of disclosed documents") and 29.12 ("Use of witness statement for other purposes") of the Civil Procedure Rules 2000 of the East Caribbean Supreme Court (**Civil Procedure Rules**).

Rule 28.17(1) of the Civil Procedure Rules provides that "[a] party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed".

And Rule 29.12(1) provides that "a witness statement may be used only for the purpose of the proceedings in which it is served".

The Court noted that Rules 28.17 and 29.12 were equivalent to the English Civil Procedure Rules 31.22 and 32.12, which have been analysed by the English High Court in *Caldero Trading Limited v Beppler & Jacobson Limited and Others* [2012] EWHC 1609 (Ch) as follows:

- a. English Civil Procedure Rules 31.22 and 32.12 are a complete code for the disclosure of documents, regardless of whether the documents are obtained by compulsion or produced voluntarily
- b. the old test at common law was whether the documents were being used for the purpose of their disclosure or for some ulterior or collateral purpose, which is also commonly known as the "implied undertaking test". Under the codified English Civil Procedure Rules, the new test is whether the use is "for the purpose of the proceedings"

- c. the phrase "for the purpose of the proceedings in which it is disclosed" means that any use within the purpose of the proceedings is permitted, while any use outside of this has to be approved by the Court

The Court of Appeal in the present case adopted both the reasoning and the conclusion of the English High Court in *Caldero*; that the use of the information by litigation funders is ultimately within or for the purposes of the proceedings. The Appellant's disclosure letter and witness statement on the facts would, therefore, fall squarely within Rules 28.17 and 29.12 and be disclosable to Delco in its capacity as the Respondent's litigation funder.

The Court also considered the position under the implied undertaking test at common law. For this, the Court had to determine whether Delco's intended purpose (namely, to review the proportionality and appropriateness of further litigation expenses in these proceedings) could be properly construed as ancillary to that for which the disclosure order was made, specifically to police or ensure the efficacy of the relevant freezing injunction. Or was it for an ulterior purpose?

On the facts, the Court had no difficulty in resolving the issue in favour of Delco. In particular, the Court was struck by the fact there was no guarantee the Respondent would be able to trace the sale proceeds paid to its other three directors. As such, the funder would naturally wish to assess the extent to which it should commit further resources. That assessment would logically involve considering the value of the assets disclosed by the Appellant that could be available to offset litigation expenses should the Respondent be ultimately successful. Delco's development of a rational strategy for enforcing the judgment against the Appellant would therefore be ancillary to the purpose of the Disclosure Order, namely to police the Mareva injunction so as not to frustrate a potential judgment in favour of the Respondent. It is worth noting that the Court referred to the English Court of Appeal's statement in *Excalibur Ventures LLC v Texas Keystone Inc* [2016] EWCA Civ 1144 – that litigation funding "is an accepted and judicially sanctioned activity perceived to be in the public interest".

In reaching the above conclusion, the Court of Appeal rejected the Appellant's contention that the first instance judge had erred in law in failing to properly balance between the Appellant's right of privacy to his confidential information against any interests of the third-party funder in the disclosure of such information. An order for disclosure of such nature should only be granted if extenuating circumstances require it. The Court noted that this test was set out in the BVI High Court's decision of *Ansol Limited v Ellersay Management Limited & Hamer Investing Limited* BCIHCV2007/0316 (delivered 15 and 26 February 2008, unreported). However, *Ansol* involved an application for permission to disclose certain confidential documents in collateral proceedings in a foreign jurisdiction and is therefore distinguishable from the present case.

Key Takeaways

Litigation funders, and their clients, involved in ongoing or potential BVI proceedings will welcome this judgment. It confirms a party's ability to share documents disclosed by the other party during the discovery process (or other court processes) with its litigation funder to evaluate the financial viability of the funding. Furthermore, it provides greater transparency of the court proceedings to the third party funders, allowing them to assess the claims they are funding more thoroughly and enhancing the overall efficiency of the court proceedings.

However, it's important to note that this relatively generous rule only applies to BVI proceedings and not any other foreign proceedings. (In foreign proceedings, the more restrictive test in *Anso* will apply.) This is true even if the BVI and foreign proceedings arise out of the same facts or course of transaction. Indeed, in this case, both the first instance judge and the Court of Appeal emphasised that the disclosed information could not be relied upon in the parallel proceedings occurring in Hong Kong.

[1] In the case: *Fang Ankong v Green Elite Limited (in liquidation)* BVIHCMAP2022/0048 (20 October 2022)

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