



Open Secrets: New Cayman Case Law on the CIDL Regime

Service area / [Dispute Resolution and Litigation](#)

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As noted in our recent article '[Private Lives and Public Interest](#)', the Grand Court of the Cayman Islands (the "**Grand Court**") is often asked to give directions as to the protection of confidential information in the context of ongoing litigation. Most frequently, these requests are made in reliance on section 4 of the Confidential Information Disclosure Law 2016 ("**CIDL**"), a unique statute which is prescriptive as to the protection and disclosure of information arising or brought into the Cayman Islands and subject to a duty of confidence.

The regime established by CIDL has recently been engaged in a number of cases by parties who have found themselves the subject of a *Norwich Pharmacal Order* (an "**NP Order**"), a form of pre-action disclosure order designed to compel disclosure from third parties who have (typically innocently), become mixed up in the underlying wrongdoing which is being alleged in the pending proceedings. NP Orders are designed to assist a plaintiff to properly plead their claim or identify the appropriate defendant to the proceedings. However, difficulties have arisen when respondents served with an NP Order are unsure if they are able to disclose confidential information referred to in the NP Order in the absence of either: (i) client consent, or (ii) a confirmatory Court direction permitting them to do so under the CIDL regime. This is particularly so if the respondent is, for example, a registered office provider.

This issue has been before the Grand Court twice in recent months, but it is the judgment of the Honourable Justice Kawaley issued on 12 February 2019 in *In re XYZ Limited and Genesis Trust & Corporate Services Limited*¹ which will be of interest to litigants and practitioners alike. As explained further below, the net effect of the guidance set out in the judgment is that the circumstances in which a direction under CIDL is required before the responding to an order compelling disclosure of information will be much less frequent than practitioners may have hitherto assumed.

Dissecting the CIDL Regime

In late 2018, issues of confidentiality and disclosure were discussed in the case of *Discover Investment Company v Vietnam Holding Asset Management Limited & Anr.*² In that case, the applicant sought an NP Order requiring disclosure of documents relating to suspected undisclosed retrocessions which had been paid to one of its former directors, with a view to potentially commencing claims for breach of fiduciary duty in respect of secret profits. The respondents were investment managers who the applicant believed had made some of the relevant payments (though there was no allegation of wrongdoing against them).

The application was made on notice to the respondents, who both appeared and were represented by counsel at the hearing of the application. The former director did not appear, but had separately threatened legal action for breach of confidence if the respondents disclosed the information sought

¹ *Kawaley J, Unreported, Grand Court, 12 February 2019.*

² *Kawaley J, Unreported, Grand Court, 5 November 2018.*

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from them to the applicant. One of the respondents contended that to insulate them from the risk of such a claim it was necessary for the Court to make a direction under CIDL.

The Court determined that no direction under CIDL was required, basing its conclusions on:

- the presence of statutory defences to an action for breach of confidence under:
 - section 3(1)(j) which protects disclosures made “*in accordance with, or pursuant to, a right or duty created by any other Law or Regulation*”. Section 11(1) of the Grand Court Law 1995, which is the statutory basis of the Court’s jurisdiction to grant *Norwich Pharmacal* orders, was another Law, for the purposes of this section;
 - section 3(2) of CIDL, which protects disclosures made in circumstances where “*the person acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing*”. In circumstances where the Court had determined that there was sufficient evidence of wrongdoing to make an order requiring disclosure of documents relating to it, this test was also met where those documents provided evidence of the underlying wrongdoing in question; and
- the fact that all the parties who might seek a direction under CIDL were already before the Court, and had been afforded the opportunity to test the Court’s jurisdiction to grant the order sought.

This decision was a welcome removal of an unnecessary layer of procedural complexity, which a separate application for directions under CIDL would have constituted in the circumstances. However, it left a number of questions unanswered. Firstly, what if the information in respect of which disclosure had been ordered did not relate to wrongdoing *per se*? This situation will often arise in circumstances where the disclosure order requires production of documents identifying owners of assets, which is often sought in the post-judgment enforcement context. And, secondly, how should a respondent proceed if the initial disclosure order is sought on an *ex parte*, without notice basis? Would a CIDL direction invariably be required in such circumstances?

New guidance

These issues were addressed squarely by the Grand Court in the case of *In re XYZ Limited*, referred to above. In that case, an NP Order had been served on a corporate services provider, requiring disclosure of documents evidencing the beneficial ownership of certain companies (the “**Companies**”) for which it was the registered office. The registered office provider owed contractual duties of confidence to the Companies, which would be put in issue by production by it of the documents sought.

The key issues left unanswered by the Court in *Discover* were raised quite neatly. First, the disclosure order was obtained on an *ex parte*, without notice basis, and contained a gagging provision preventing the respondent from seeking consent from the Companies, or more generally from telling them about the existence of the order. Secondly, the “*wrongdoing*” which provided the basis for the order granted related to efforts by an individual to actively avoid enforcement of an arbitral award. The documents to be disclosed did not provide evidence, *per se*, of this wrongdoing. Rather, if the applicant’s suspicions as to the ownership of the Companies proved to be correct, then the documents produced might provide the catalyst for enforcement proceedings in respect of the arbitral award to be commenced in the Cayman Islands in respect of the Companies.

Accordingly, the respondent determined that it was necessary to make an application to Court for directions under CIDL, to ensure that it had adequate protection from any subsequent actions by the Companies against it for breach of confidence.

In a careful and detailed judgment, the Honourable Justice Kawaley made a CIDL direction in the terms sought, but provided guidance which has significantly narrowed the circumstances in which directions under CIDL will be required going forward. In doing so, His Lordship explained that:

- the presence of the statutory defence under section 3(1)(j) of CIDL, read with section 11(1) of the Grand Court Law, meant that the “*fundamental obligation of a respondent served with a Norwich Pharmacal order, and any other statute-based order purporting to require them to disclose information protected by CIDL, is to ensure that on the face of the order (and the supporting materials which are made available to them), the order was properly made.*”³ Provided that no grounds for setting the order aside were identified (which will almost inevitably require legal advice to be sought), the respondent would in most cases have the section 3(1)(j) CIDL defence available to it, which will protect it in the absence of consent to the disclosure being made being granted by the principal to whom a duty of confidence is owed;
- the need to seek directions under CIDL should arise only in “*exceptional circumstances*”⁴. A number of examples were provided, including circumstances where:
 - on the face of the order or other demand for the production of protected material, it appears that the order ought not to have been made;
 - having regard to the unusually sensitive nature of the relevant information, the respondent considers that special protective measures are required in relation to the way in which the information is deployed which the applicant is unwilling to agree; and

³ Paragraph 25

⁴ Paragraph 27

Continued

- where the respondent has properly sought consent to produce the confidential information from the person to whom the duty of confidence is owed, and that person has:
 - threatened an action for breach of confidence;
 - raised doubts as to whether the respondent is legally obliged to comply with the production request; or
 - failed to respond at all, resulting in doubt as to whether or not the respondent can rely on the principal having impliedly consented to the disclosure (which provides a self standing statutory defence under section 3(1)(b) of CIDL).

A streamlined process

This most recent judgment of the Grand Court has provided helpful guidance which will greatly assist those parties to litigation who are served with orders requiring them to produce confidential documents (and the practitioners who advise them). By clarifying the scope of the statutory defences which exist under section 3 of CIDL, the Court has provided comfort that applications for directions under CIDL will likely be unnecessary in a large number of cases.

This is good news for respondents, who can proceed promptly and with less costs exposure in responding to NP Orders where none of the “exceptional circumstances” identified above exist. Applicants may also breathe a sigh of relief in cases where a CIDL application is not required – in the *Norwich Pharmacal* context, applicants for NP Orders are typically required to undertake to meet the reasonable costs of respondents, including any applications which are required under CIDL. On the whole, it is hoped that the more streamlined process for disclosure of confidential material in the circumstances described in this judgment will increase procedural efficiency and cost-effectiveness. In this regard the considered reasons of the Honourable Justice Kawaley are warmly welcomed.

Carey Olsen acted for the Applicant in Discover Investment Company v Vietnam Holding Asset Management Limited & Anr, and for the Applicant In re XYZ Limited and Genesis Trust & Corporate Services Limited

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