



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE NO.: FSD 245 OF 2021 (DDJ)

IN THE MATTER OF AN APPLICATION FOR A DISCLOSURE ORDER

BETWEEN

CATHAY CAPITAL HOLDINGS III, L.P.

PLAINTIFF

AND

OSIRIS INTERNATIONAL CAYMAN LIMITED

DEFENDANT

Appearances: Mr Lachlan Greig and Ms Katie Pearson of Harney Westwood & Riegels
for the Plaintiff

Before: The Hon. Justice David Doyle

Heard: 24 August 2021

Date Ex Tempore

Judgment delivered: 24 August 2021

**Draft transcript
of Judgment
circulated:**

27 August 2021

Date transcript

of Judgment approved: 30 August 2021

HEADNOTE

The legal principles to consider when a court is asked to proceed ex parte/without notice to determine an application for Norwich Pharmacal disclosure orders

JUDGMENT



Introduction

1. In this case, Cathay Capital Holdings, III L.P. (the “Plaintiff”) seeks on an ex parte without notice basis an order against Osiris International Cayman Limited(the “Defendant”) a Cayman-registered company, that the Defendant discloses and delivers copies of documents which fall within any of the categories referred to in Schedule A of the draft Order.
2. The Plaintiff is seeking documents which provide details of any legal entity which is (a) a director or officer (b) registered shareholder (c) beneficial owner, or (d) agent of China Dadi Chemical Limited (the “Company”) stated to be a Cayman Islands registered company. The Plaintiff makes no allegation of wrongdoing against the Defendant. The Defendant is described as the registered office service provider to the Company. I am informed today by the attorneys who appear on behalf of the Plaintiff, namely Mr. Greig and Ms. Pearson, that the Defendant is regulated by the Cayman Islands Monetary Authority.

The share purchase

3. The Plaintiff says that in December 2014 it purchased 5 million ordinary shares in the Company (representing approximately a 3.89% interest) at a price of U.S. \$ 10 million. The share certificate was dated 15 December 2014.
4. A suite of documents was provided to the Plaintiff in connection with the purchase including (1) a Maples and Calder opinion (2) minutes of meetings and resolutions of the directors (3) a certificate of incumbency (4) a register of members and (5) a share certificate.
5. The Plaintiff says that at the time of the purchase of the Company was the 100% owner of Dadi Chemical Limited (“Dadi Chemical”), a Hong Kong incorporated company, which in turn was the 100% owner of a People’s Republic of China (“PRC”) incorporated company called Shandong Dadi Yanhua Group Company Ltd (“Dadi Yanhua”). The Plaintiff says that without its knowledge this shareholding has been significantly diluted (the “Dilution”).



The legal proceedings in the PRC

6. The Plaintiff commenced legal proceedings in the PRC against (1) Dadi Yanhua (2) Mr. Sun (3) Ms. Ren and (4) the Yiding Energy Co. Ltd (together the “PRC Defendants”) for relief in respect of the Dilution.
7. The PRC Defendants, to the surprise of the Plaintiff, challenged the standing of the Plaintiff to bring the proceedings on the basis that the Plaintiff is not a shareholder of the Company and that the authenticity of the documents provided by the Plaintiff could not be established.
8. The Plaintiff says that this is not “a genuine position” for Mr. Sun and Ms. Ren to take because they approved the transfer of shares to the Plaintiff in December 2014 and the Plaintiff adds that the documents (some signed by Mr. Sun and Ms. Ren) support this.
9. The first instance PRC court handed down a ruling on 4 May 2021 in favor of the PRC Defendants concluding that “...the court found that the evidence submitted by the Claimant could not prove that it was a shareholder of China Dadi. Even if it was indeed a shareholder of China Dadi, there was no evidence to prove that it had an interest in the capital reduction and capital increase of the defendant Dadi Yanhua. There is no factual or legal basis for litigation in this case.”
10. That extract from the judgment does not read in a very hopeful way as regards to the chances of success for the Plaintiff at first instance in China.
11. The Plaintiff has produced an affirmation dated 13 August 2021 from Liu Long, said to be a solicitor qualified to practice law in the PRC but not in Hong Kong, Macao or Taiwan. That evidence is not in the format of an expert's report. I have not been addressed on the provisions of the Grand Court Rules, or the Financial Services Division Guide in respect of expert evidence but Mr. Greig wisely conceded that the evidence of Liu Long was not independent expert evidence as Liu Long is the Plaintiff's lawyer in the PRC proceedings. Nevertheless, I take into account that in paragraph 17 it is stated, apparently contrary to the paragraph of the judgment I have just read from that “If Cathay Capital can establish it is a shareholder of the Company, then due to the Company's indirect interest in Dadi Yanhua, Cathay Capital has standing under PRC law to seek the relief sought in the PRC Proceedings.”



12. At paragraph 27 it is added that “If Cathay Capital can establish that it is a shareholder of the Company, then, in my opinion, it has good prospects of establishing its standing to seek the relief sought in the PRC Proceedings and to pursue its claims against the PRC Defendants in the civil appeal.” At paragraph 30, Liu Long adds that he does not think it is a viable option for the Plaintiff to seek to obtain the information needed by a request from the courts in the PRC to the Grand Court of the Cayman Islands for assistance. There is a process, but Liu Long is unaware of it being successfully used in Cayman Islands cases.
13. The Plaintiff has appealed the first instance PRC ruling and apparently the hearing of the appeal is imminent, although no date is specified in the evidence before me. The Plaintiff seeks the disclosure Order to bolster its case on appeal and to prove that it is a shareholder of China Dadi.

Is it appropriate to proceed on an ex parte/without notice basis?

14. The first issue to consider is whether it is appropriate for the court to proceed on an ex parte/ without notice basis.

General principles

15. It is a basic general principle of justice and fairness that an order should not normally be made against a party without giving such party an opportunity to be heard. As with all general principles there are exceptions including (1) where the genuine and exceptional urgency of the situation requires the matter to proceed immediately and without notice. These are very rare cases and (2) where it appears likely that if notice is given the defendant or others would take action which would defeat the purpose of the application before any order could be made and any damage, which may be compensated under the cross undertaking, or the risk of uncompensatable loss is outweighed by the risk of injustice to the plaintiff if the order is not made without notice.

The authorities

16. Counsel have brought to my attention a great number of authorities but no local Cayman Islands authorities on the ex parte/ without notice point. Counsel did not direct me to any relevant rule in the Grand Court Rules.



An authority from the Virgin Islands

17. One case in the Supplementary Bundle of authorities filed late yesterday was *A v R (A Registered Agent)*, Eastern Caribbean Supreme Court, Territory of the Virgin Islands, 30th July 2019, judgment of Justice Adderley. I note the judge in that case appeared, on largely pragmatic grounds, to be content to proceed ex parte/without notice.
18. Each case, of course, must depend on its own facts and circumstances.

A JCPC authority on appeal from the Court of Appeal of Jamaica

19. Lord Hoffmann in *National Commercial Bank Jamaica Limited and Olint Corp. Limited* [2009] UKPC 16 at paragraph 13 of the judgment delivered on 28 April 2009 could see no reason why in the circumstances of that case, the application for an injunction should have been made ex parte or at any rate without some notice to the bank. The fair opportunity to be heard principle is a salutary and important principle. Lord Hoffmann, giving the judgment of the Board of the Judicial Committee of the Privy Council, added "...a judge should not entertain an application of which no notice has been given unless either giving notice would enable the defendant to take steps to defeat the purpose of the injunction (as in the case of a *Mareva* or *Anton Piller* order) or there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act." Lord Hoffmann continues, "Their Lordships would expect cases in the latter category to be rare, because even in cases in which there is no time to give the period of notice required by the rules, there will usually be no reason why the applicant should not have given shorter notice or even made a telephone call. Any notice is better than none."
20. As I say each case must be dealt with on its own facts and circumstances but Lord Hoffmann sets out some important principles that should be followed. It would appear that Justice Adderley was not referred to this important Privy Council judgment (on appeal from the Court of Appeal from Jamaica).

The FSD Guide

21. Section B1.2(a) of the Financial Services Division Guide, under the heading "Ex parte interlocutory applications" provides:



“All applications should be made on notice to the other party/ parties (if any), even if that notice has for good reason to be short, unless

- (i) any Rule or PD provides that the application be made without notice; or
- (ii) there are good reasons for making the application without notice, for example, because giving notice would or might defeat the object of the application.”

22. Mr Greig says that the Plaintiff seeks to proceed under (ii).
23. B1.2 (d) emphasizes “the duty of the applicant and those representing him to make full and frank disclosure to the Court of all matters relevant to the application, whether favorable or unfavorable to the applicant.”
24. Generally speaking, hearing matters without notice is an exceptional and serious step to take. There is almost always the potential for serious injustice and unfairness when courts are invited to make orders without hearing all sides of the case. Applicants for without notice orders have a duty to make full and frank disclosure of all material matters. Frequently, however, the picture painted at the inter partes/with notice stage is a very different picture to that painted at the ex parte/ without notice stage. Applications should only be made without notice if absolutely necessary. Otherwise, a real risk of injustice and unfairness arises. Where such applications are made, the evidence in support of the application must state the reasons why notice is not being given.

The position under English law

25. The authority under divider 15 of the Plaintiff's bundle of authorities is an extract from *Gee on Commercial Injunctions*, 7th edition concisely setting out the position under English law at para 8-001, and it is worth reading certainly the first two paragraphs which read as follows:

“It is a basic principle of fairness that an order should not be made against a party without giving him an opportunity to be heard. Under CPR r25.3 (1) the court may grant an interim remedy on an application made without notice if it appears to the court that there are good reasons for not giving notice. This can be: (1) when there is a risk that were notice to be given this would defeat the purpose of the injunction; or (2) when there is no time to give prior notice. Under CPR r25.3 (3) if the applicant makes an application without giving notice, the evidence and support of the application must state the reasons why notice is not being given. In practice,



cases falling within the second category are rare; normally it is possible to give notice by email, text or telephone and to do so within minutes.

In the first category the exception applies when it appears likely that: (1) if notice of an application were to be given, the defendant or others would take action which would defeat its purpose before the order could be made; and (2) any damage which may be caused by the order could be compensated under the cross undertaking; or the risk of loss for which compensation would not be an adequate remedy is outweighed by the risk of injustice to the applicant if the order is not made without notice.”

26. Mr. Greig says that such extract represents the position under the law and procedure of the Cayman Islands.
27. I note that under section 11 (1) of the Grand Court Act (2015 Revision) that this court has the like jurisdiction of the High Court of England and Wales, and I also note the provisions in section 11A(1) which may be for another day.

The Plaintiff’s position in respect of proceeding ex parte/without notice

28. At paragraph D10 of the Plaintiff’s skeleton argument it is stated that the Plaintiff makes the application for disclosure “on an ex-parte without notice [basis] because of the risk that notice would defeat the purpose of the application.”
29. There is reference to Mr. Wolansky’s explanation of the Plaintiff’s concern at paragraph 59(h) of Wolansky 1, which strangely appears under the heading, “Full and Frank Disclosure.” I would have expected to see a section entitled, “Evidence in support of proceeding ex parte/ without notice,” but be that as it may, paragraph 59(h) reads as follows:

“If the application is made *inter-partes*, in the absence of a gagging order, there is a real risk that the Defendant, as the registered office provider of the Company, would alert the Company to the application and the relief sought. As the directors and/or parties in control of the Company include the wrongdoers, Mr. Ren and Ms. Sun [I think that is a slip of the pen or the fingers on the keyboard, it should read Mr. Sun and Ms. Ren] it is very likely that they will take steps to seek to frustrate the relief sought, by changing the registered office provider or otherwise, or to try to move the NP documents outside the jurisdiction of the Court.”

30. The authors of the skeleton argument at paragraph D11 say that there are three points to be made in the interests of full and frank disclosure. In short summary: (1) the Plaintiff is not alleging fraud



against Mr. Sun and Ms. Ren and the Plaintiff's fear that it is very likely that they may take steps to frustrate the relief sought, may not be well-founded; (2) the precise roles of Mr. Sun and Ms. Ren are not ascertainable from the director search (which does not name them as directors) and it is unclear if they could now be able to cause the Company to take steps to frustrate the relief sought; and (3) it is likely (but not certain) that the Defendant (against whom there is no allegation of wrongdoing) will retain a copy of its file if the Company engages a new registered office service provider. Further, the Defendant is unlikely to destroy documents at the request of the Company.

31. I think that third factor concisely goes to the very core of this ex parte/ without notice issue.
32. It is right and proper that all these factors were expressly brought to the attention of the court and I thank the attorneys for that.

Is it appropriate to proceed on an ex parte/without notice basis in the circumstances of this case?

33. Even before reaching paragraphs D10 and D11 of the skeleton argument, I had point D11(3) firmly in mind. The Defendant is described as the registered office service provider of the Company. It should have no axe to grind and it would be very foolish to destroy or release documents without keeping copies. This initial thought is reinforced by the knowledge provided to the court at the hearing this morning that the Defendant is a regulated entity in this jurisdiction.
34. Having considered the position, I am not persuaded that it would be appropriate or proportionate to proceed with the hearing of the application for the disclosure Order on an ex parte/ without notice basis. I am not persuaded that there is any good reason to proceed ex parte in respect of the application for the disclosure Order. I am not persuaded that in proceeding with notice there would be a real risk that the purpose of the application would be defeated.
35. I am satisfied, however, that it is appropriate to grant on an ex parte/ without notice basis an Order that the Defendant must take steps to preserve the documents in relation to the Company set out in Schedule A of the draft Order insofar as the same are within its possession, power, or control (and with the amendments to the draft Order and Schedule specified during my exchanges with counsel earlier this morning), pending the determination of the application for the disclosure Order which should be heard at a with notice hearing.



36. In the particular circumstances of this case, I am persuaded that in order to secure the documents and to counteract any pressure from others in respect of the removal or destruction of the documents, I should make an order to ensure that they are preserved, at least until the application for the disclosure Order can be heard on notice and determined. This will reinforce what the Defendant should already be doing, namely preserving important company records and documentation. It should also allay any fears that others may attempt to remove the documents outside the jurisdiction of this court.
37. The limited preservation Order will underline the importance to the Defendant of preserving the documents and should deter any others who may seek to improperly interfere with the documents.
38. It is difficult to see what undue prejudice would result to the Defendant from the making of this Order, but the cross undertaking of the Plaintiff will be recorded in Schedule B to the Order and there will be liberty to apply to discharge or vary the limited Order I am making today.
39. Having made that Order, I am not satisfied that it is necessary, appropriate, or proportionate to grant a gagging Order, which in themselves should be exceptional.
40. Notice must be given to the Defendant of the hearing of the application for the disclosure Order. The documents filed with the court and the Order I have just made must be served on the Defendant forthwith as soon as reasonably practicable.
41. The return date and the hearing of the application for disclosure Order will take place at 10:00 a.m. on Thursday 16 September 2021. It may well be that once served, the Defendant will consent to or at least take a neutral stance in respect of the application for the disclosure Order. If it wishes to oppose the Orders made today or the application for the disclosure Order, any evidence in opposition and its skeleton arguments and authorities in opposition must be filed and served by 4:00 p.m. on 3 September 2021 and the Plaintiff is at liberty to file and serve any evidence and skeleton argument and authorities in reply by 4:00 p.m. on 9 September 2021.

Thanks to the attorneys and the interns

42. I wish to record my thanks to Mr. Greig and Ms. Pearson for their assistance to the court this morning. Faced with a barrage of questions from the court, especially on the issue as to whether

the application could proceed ex parte/without notice, they did the best they could to respond on the evidence available to them. I am grateful for their assistance and it was good to see in court Ms Jenae Whittaker and Zorie McBean (interns at Harneys). It has been a good learning experience for us all and thank you for your attendance today. That is my judgment in respect of this matter.

THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT

