IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 118 OF 2021 (RPJ)

IN THE MATTER OF THE CONFIDENTIAL INFORMATION DISCLOSURE ACT, 2016

AND IN THE MATTER OF THE KUWAIT PORTS AUTHORITY

IN CHAMBERS

Appearances:	Ms Rachael Reynolds QC, Ms Jennifer Fox, Mr Oliver Green and Mr Harry Clark of Ogier on behalf of the Plaintiff
	Ms Clare Stanley QC, Mr Peter Tyers-Smith, and Mr Thomas Wright of Kobre & Kim on behalf of Port Link GP Ltd
	Mr Alex Potts QC, Mr Jonathon Milne and Mr Spencer Vickers of Conyers on behalf of the State of Kuwait
	Mr Alain Choo Choy QC, Mr Simon Dickson and Ms Ella van der Schans of Mourant on behalf of Maria Lazareva
Before:	**The Hon. Justice Parker**
Heard:	**1-2 February 2022**
Draft Judgment Circulated:	**1 March 2022**
Judgment Delivered:	**8 March 2022**

HEADNOTE

Sections 3 and 4 Confidential Information Disclosure Act (CIDA) -confidential information intended to be passed on to a party to foreign arbitral proceedings-Court's approach -jurisdiction-statutory interpretation-Cayman Bill of Rights -compatibility with CIDA-Data Protection Act section 25-discretion

JUDGMENT

Introduction

1. This is the decision following a hearing of the *ex parte* Originating Summons dated 10 May 2021 issued by the Kuwait Ports Authority (the "KPA"). A number of interested persons have been served and given permission to appear and make submissions, as set out below. A hearing took place on 1-2 February 2022 following which written submissions were also filed with the Court's permission.

2. The KPA applies for an Order that it:

> "*is permitted to share the Confidential Information with the State of Kuwait for use in the arbitration proceedings brought by Maria Lazareva against the State of Kuwait under the 1976 UNCITRAL Arbitration Rules pursuant to the Agreement between the Russian Federation and the State of Kuwait for the Promotion and Reciprocal Protection of Investments under ICSID Case No. UNCT/19/1*".

3. The KPA applies pursuant to Section 4 of the Confidential Information Disclosure Act, 2016 (the "Act" or "CIDA"). The Confidential Information is constituted by the documentation disclosed by The Port Fund L.P. (the "Fund") and Port Link GP Ltd ("Port Link") as General Partner of the Fund to KPA (and other limited partners) pursuant to an Order of the Court filed on 28 August 2020 and a Consent Order filed on 3 November 2020 (the "Section 22 Orders"). By the Section 22 Orders, KPA was granted access to information regarding the state of business and financial condition of the Fund.

4. Between November 2020 and February 2021, the KPA apparently received approximately 1,000 documents from Port Link and the Fund (the "Section 22 Documents"). The KPA has not reviewed the Section 22 Documents but its lawyers have.

5. In summary, the KPA applies for sanction by the Court to pass on a reduced amount of confidential material that it has obtained pursuant to Orders of this Court to the State of Kuwait for the purposes of potential use by the State of Kuwait in proceedings (an ICSID arbitration) to which the KPA is not a party. As such it seeks release from its obligations of confidentiality

owed to other parties. This has given rise to a number of disputes and objections with which this decision deals.

Background

6. The KPA is a state-owned entity although it is apparently authorised to act independently of the State of Kuwait ("Kuwait"). It can be characterised as an emanation of the State of Kuwait.

7. The KPA is a Limited Partner in the Fund, which is an exempted limited partnership registered in the Cayman Islands. Port Link is an exempted limited company also incorporated in the Cayman Islands and is the General Partner of the Fund.

8. The KPA and Port Link currently have and have had numerous disputes before this Court including the dispute which gave rise to the Section 22 Orders granting the KPA access to the Section 22 Documents.

9. Port Link and each of the Limited Partners in the Fund, including the KPA, are also parties to a restated and amended Limited Partnership Agreement in respect of the Fund dated 14 July 2008 (the "LPA") which is governed by Cayman Islands law.

10. The disclosure ordered pursuant to the Section 22 Orders, which related to the confidential affairs of the Fund, was made expressly subject to "*those conditions and/or restrictions contained in clause 7.3 of the Amended and Restated Limited Partnership Agreement dated 14 July 2008"* ("Clause 7.3").

11. Clause 7.3 expressly binds each of the Partners, including the KPA, who have access to Confidential Information, to keep it confidential and not to disclose it without the express consent (in the case of Confidential Information acquired from the Fund) of the Fund. Clause 7.3 also protects the confidentiality of confidential information provided by a Partner by requiring it to be kept confidential and not to be disclosed without the consent of that Partner.

12. Neither the Fund nor Port Link as the General Partner has been willing to consent to the disclosure of the Section 22 Documents by KPA to Kuwait.

13. For the purposes of the application, the KPA accepts that the Section 22 Documents are subject to confidentiality restrictions.

The litigation

14. On 14 October 2020, the KPA and the Public Institution for Social Security (another Limited Partner in the Fund, also a Kuwaiti state owned entity authorised to act independently of the State of Kuwait) commenced proceedings against Port Link in respect of alleged large-scale fraud and misconduct involving the Fund (the "Proceedings"). The Proceedings are substantial and complex and have added a number of defendants.

15. In light of the disclosure of the Section 22 Documents, the claim in the Proceedings was amended on 12 February 2021 (Amended Statement of Claim ("ASOC")), to include other parties connected with the Fund. The KPA says that the Section 22 Documents provide evidence of relevant fraud and misconduct.[1] Among other matters the ASOC alleges an unlawful means conspiracy between Port Link and other defendants. The claim was subsequently re-amended on 13 December 2021.

The arbitration

16. Kuwait is the defendant to arbitration proceedings brought against it in Kuwait by Maria (Marsha) Lazareva ("ML") (the "Arbitration" or "Arbitration Proceedings")[2]. ML was a former director of Port Link between 8 March 2007 and 24 May 2018. ML claims against Kuwait under a bilateral treaty arrangement that she is entitled to substantial compensation as a result of the actions of Kuwait.

17. Although the existence of the Arbitration Proceedings is a matter of public record, the KPA is not a party to the Arbitration and is not privy to the details. Certain aspects of the Arbitration Proceedings are conducted in private and the hearing and award in those proceedings would remain confidential to the parties.

[1] *See section D, Al Sabah 1 ,5 May 2021*

[2] *Under the 1976 UNCITRAL Arbitration Rules (pursuant to a Russia-Kuwait BIT)*

The request from Kuwait to the KPA

18. Following a number of requests (according to Mr Al Sabah[3]) by Kuwait for the KPA to share the Section 22 Documents with Kuwait for use in its defence in the Arbitration Proceedings, Kuwait's legal department, the Department for Legal Advice and Legislation, on behalf of Kuwait, wrote to the KPA on 25 April 2021 formally to record Kuwait's request for disclosure of the Section 22 Documents.

19. As an emanation of the State and as a wholly-owned entity, the KPA is understandably inclined to comply, if it can, with the request. The KPA puts its case, aligned with Kuwait, on the basis that some of the Section 22 Documents are likely to be relevant to the Arbitration Proceedings, although it is not itself privy to the detail of the proceedings.

20. The KPA is also aligned with Kuwait's intention that the contents of those documents should be sought to be used in the Arbitration Proceedings, if the arbitral tribunal is willing to receive them, in the interests of justice and to avoid a potential miscarriage of justice.

21. The potential miscarriage of justice (expanded upon below) arises because Kuwait is concerned that the arbitral tribunal will not have had sight of material which is both relevant and likely to undermine ML's case[4].

The law

Purpose of CIDA

22. In the matter of the *Cayman Securities Clearing and Trading Ltd SEZC (unreported) 14 October 2014* the Court (Smellie CJ) held that:

> "*Section 4 of the law is intended to be a gateway for the release of confidential information,* ***not primarily for the sake of any partisan interests, but in recognition of the public interest both local and abroad in the due administration of justice. It is a provision which deals only with the circumstances under which confidential information might be given in evidence. I am cognisant that its purpose is not intended to meet the discovery***

[3] *First affidavit dated 5 May 2021 §13*
[4] *Al Sabah 1 § 14*

obligations of parties in litigation.' (*my emphasis****)***

23. In *Safeguard* [5] the matter was described in this way, comparing the evolution of the law:

> *'The primary purpose of CIDL was to remove the criminal sanctions which pertained to the previous law if confidential information was disclosed, to allow for disclosure in an increased number of circumstances, and to dispel the misconception that the Cayman Islands was a jurisdiction which promoted secrecy.'*

The relevant provisions of CIDA

Section 3(2) Wrongdoing statutory defence.

24. Section 3(2) of the Act provides a statutory defence to an action for breach of confidence.

25. It states that:

> *"A person who discloses confidential information* ***on wrongdoing****, or in relation to a serious threat to the life, health, safety of a person or in relation to a serious threat to the environment****, shall have a defence to an action for breach of the duty of confidence****, as long as the person acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing****, of a serious threat to the life, health, safety of a person or of a serious threat to the environment." (my emphasis)*

Section 3(1)(a) Gateway and Directions Application

26. It is also a statutory defence to an action for breach of confidence that the disclosure of confidential information is permitted by one of the gateways in Section 3(1) of the Act. One of these gateways is that the disclosure of confidential information was made in compliance with the direction of the Court pursuant to Section 4 of the Act (see Section 3(1)(a) of the Act).

27. Section 4(2) of the Act provides that:

> ***"If a person intends to or is required to give evidence in or in connection with any proceeding*** *being tried, inquired into or determined by any court, tribunal or other authority, whether within or without the Islands and the evidence*

[5] *Unreported 27 September 2017 Parker J at§ 18*

> *consists of or contains any confidential information within the meaning of this Law,* ***the person shall apply for directions in accordance with this section before giving that evidence, unless the person has been provided with the express consent of the principal".*** *(my emphasis)*

28. *In Discover Investment Company [2018 (2) CILR 424] Kawaley J,* in considering the interaction of sections 3 and 4 of the CIDA, made clear that section 3 of the law, developed in an incremental way over the years, is to avoid the consequences which would flow from having to make section 4 applications whenever the need to use confidential information without the consent of the person to whom confidence is owed arises[6].

29. Kawaley J went on to say, in keeping with the evolution of the law identified in *Safeguard*:

> *"The exemption categories have expanded over the years,* ***reflecting a public policy shift towards greater transparency, moving from criminal and regulatory investigations to most recently embrace the exemptions found in section 3(1)J[7] and 3(2). These are, of course, not blanket exemptions. Where the availability of the 'defences' created by Section 3 is in doubt, it may be desirable and indeed necessary for the parties at risk of being sued for breach of confidence to seek directions under section 4(2), which will usually involve declaratory relief in some form or the other****"(my emphasis).*

Who may apply?

30. Directions may be applied for by persons who *intend to* give confidential information in evidence in proceedings or in connection with proceedings, and persons who are being *required* to do so in such proceedings: *Discover Investment*, at §§ 64 and 67.[8]

Definitions

31. The Act includes the following definitions at s.4(1) which provides that in section 4 :

> ***"Confidential Information"*** **includes** information, arising in or brought into the Islands, concerning any property of a principal, **to whom a duty of confidence is owed by the recipient of the information;**

[6] *[2018] (2) CILR 424* §81
[7] S.3(1) (j):*"In accordance with, or pursuant to, a right or duty created by any other law or regulation'.*
[8] At §67, Kawaley J acknowledged that in an earlier *ex parte* decision he had *"expressed what [he] now consider[ed] to the mistaken view that only the person being compelled to produce the confidential information had standing to apply under s.4 of CIDA for directions".*

> ***"give in evidence"*** **means to make a statement, produce a document by way of discovery, answer an interrogatory or testify during or for the purposes of any proceeding;**[9] and
>
> ***"proceeding"*** means any court proceeding, civil or criminal, and includes a preliminary or interlocutory matter leading to or arising out of a proceeding". (my emphasis)

32. It is agreed between the parties that "*proceeding*" covers arbitral proceedings. The term "*court*" is defined in section 2 of the Act to have the meaning assigned to it in the Evidence Law (2011 Revision), section 2 of which defines a court to include "*every tribunal where civil proceedings are conducted and includes the judge or person presiding over or constituting such tribunal and includes also an arbitrator and an umpire*".

33. The definition of '*give in evidence'* however has given rise to significant controversy in this case. In this regard, it is to be noted that Section 4(2) says "*give evidence in'* which is not a phrase used in the definitions or indeed elsewhere.[10] It is also to be noted that S.4 of the statute preceding CIDA, the Confidential Relationships (Preservation) Law ("CRPL") previously defined "*give in evidence*" as follows:

> "***give in evidence****" and its cognates means make a statement, answer an interrogatory or testify during or for the purposes of any proceeding.*"
>
> I note that '*produce a document by way of discovery'* was not a phrase previously used.

34. The first line of CRPL section 4(1) (the predecessor of section 4(2) of the Act) also reads '*…give in evidence in, or in connection with …*' It seems possible that an extra "in" was dropped from the new section 4(2), but retained in the definitions, which may explain the mismatch.

35. In *Thune*[11] the Grand Court held that an order for discovery on oath and by list was the "*making of a statement*", and therefore within the definition of "*give in evidence*" under CRPL section 3 Hull J said:

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[9] *The expression "give in evidence" was differently defined in the Confidential Relationships (Preservation) Law ("CRPL") which preceded CIDA.*
[10] *See Discover §58*
[11] *[1986-87 CILR 359] per Hull J*

> *"Section 3(a) [which is now s.4] is not limited to the disclosure of information in proceedings as such. It **also applies to disclosure in connection with proceedings**. Although to testify means to give viva voce evidence and so cannot include affidavits, it is beyond argument that by swearing an affidavit for use in any proceedings, a person would be giving evidence within the meaning of 3(a). In its ordinary meaning, a statement certainly includes the representation or declaration of fact in writing so it must include any affidavit."*[12] *[emphasis added]*

The Court's approach under section 4 (2) CIDA

36. In *Discover* Kawaley J held that:

> ***"the object and purpose of s.4(2)….is to support freestanding applications for disclosure** in circumstances where either (a) s.3 provides no exculpation or defence, **or (b) the applicant in circumstances of doubt wishes the protection of a court order declaring that the proposed disclosure is indeed protected by s.3"***
>
> *"... **Where the availability of the "defences" created by s.3 is in doubt, it may be desirable and indeed necessary for the parties at risk of being sued for breach of confidence to seek directions under s.4(2), which will usually involve declaratory relief in some form or the other"**. (emphasis added)*

37. In considering what order to make under section 4(2) of the Act, section 4(9) of the Act requires the Court to have regard to:

1) whether the order would operate as a denial of the rights of any person in the enforcement of a claim;

2) any offer of compensation or indemnity made to any person desiring to enforce a claim by any person having an interest in the preservation of confidentiality; and

3) in any criminal case, the requirements of the interests of justice.

38. The approach to an application under section 4(2) of the Act was also addressed in *Safeguard*[13]. It was held that:

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[13] *[2017] 2 CILR 1(Parker J).*

> *"When determining an application, the court must weigh the competing interests and decide, in the exercise of its discretion, whether, and if so how, to direct disclosure having regard to the administration of justice in the proceedings to which the application relates*: *see (In re Cayman Secs. Clearing & Trading Ltd SEZC (2) (at para 6, per Williams J)*"

39. The Court in *Safeguard* also referred to the decisions of *Re Ansbacher (Cayman) Limited [2001] CILR 214* and *Corporacion Nacionale Del Cobra De Chile (CODELCO) [1999] CILR 42*.

40. In *Re Ansbacher (Cayman) Ltd*, the Court (Smellie CJ) accepted that before an applicant may obtain directions under section 4(2) of the Act, it was required to show that the intended disclosure would protect a legitimate interest.

41. The Chief Justice noted :

> "*There must be shown to be some interest which the Law would regard as important and defensible before this court may, in the exercise of its discretion, allow the duties of the confidence owed to clients to be set aside."* [14]

42. Further, at § 90, the Chief Justice went on to make the following statement:

> *"The whole purpose of s.4 is to provide a framework in which the court can decide in the exercise of its discretion, and having regard to all the circumstances including the competing interests and rights, whether or not to direct disclosure, by the giving of evidence. If directions are given for disclosure, the interests or rights of the principal who objects will inevitably be affected. This may be in deference to the conflicting interests or rights of the fiduciary who applies or it may be, as it often is, in deference to the wider interests of the administration of justice."*

43. Having regard to the administration of justice in proceedings to which the application relates will include considering whether the information may be obtained through alternative means.[15]

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[14] §32

[15] *CODELCO, at headnote § 3 and p.50, and Safeguard Management, at §9.*

Submissions of parties

KPA

44. Ms Rachel Reynolds QC for KPA relies on the 'wrongdoing gateway' set out in Section 3(2) of the Act, but also seeks directions pursuant to Section 4(2) of the Act and the protection of a Court order declaring that the proposed disclosure of the Section 22 Documents to Kuwait may be made.

45. She referred the Court to the provisos or 'carve outs' in Clause 7.3 of the LPA which she said would apply if the Court made an order under Section 4 on this application:

> "*unless (a) such disclosure shall be required by applicable law…. court order….*
>
> and *(b) such disclosure is reasonably required in connection with any litigation against or* ***involving the partnership*** *or any partner..." (emphasis added)* which she said could arguably apply to the Arbitration that ML had brought.

46. She submitted that although there are strong arguments concerning section 3(2) and other arguments concerning the 'carve outs', given the hostile position taken by Port Link to this application, KPA would like the protection of a Court order before it hands over any documents.

Section 3(2) defence

47. The position, she submitted, is strong under this gateway because many of the Section 22 Documents indicate serious wrongdoing[16] by those connected to the Fund (including potentially ML). Following Port Link and the Fund's disclosure of the Section 22 Documents pursuant to the Section 22 Orders, and the KPA's attorneys' review of the same, the claims were amended and additional defendants were joined, namely Mark Eric Williams, Wellspring Capital Group, Inc and KGL Investment Company Asia.

[16] *In the definitions of CIDA, 'wrongdoing' has the meaning assigned to it by S.50 (2) (d) of the Freedom of Information Act (2015 Revision) (FOI) which says wrongdoing includes, but is not limited to, corruption, dishonesty, or serious maladministration. Breach of fiduciary duty is also alleged by the KPA which may also amount to 'wrongdoing'-see Discover § 83 per Kawaley J.*

48. Ms Reynolds QC submitted that the Court could simply make an Order pursuant to section 3(2) which would protect the KPA from liability for breach of confidence and there would be no need for directions under section 4 and no need for an exercise of discretion under section 4.

49. She submitted that conditions could easily be imposed to meet any particular concerns with regard to privilege and data protection in respect of personal information.

Jurisdiction

50. Ms Reynolds QC submitted that the arguments that the Fund, Port Link and ML make that the proposed disclosure of the Section 22 Documents does not fall within the definition of "*give in evidence*" as the KPA are not producing documents "*by way of discovery*" are incorrect.

51. She highlighted the comments by Kawaley J in *Discover*[17] that the definition given to "*give in evidence'* in section 4(1) is very broad and the ambit of section 4(2) is '*quite wide'.* She relied in oral submissions on the wording "*If a person intends to or is required to give evidence in or in connection with any Proceeding…"* as support for the KPA's ability to provide a written statement exhibiting the documents intended to be handed over to Kuwait. She submitted that '*or in connection with'* must be given meaning and relied on the decision in *Thune.*

52. She also relied on the fact that Smellie CJ has already ruled that the KPA has *locus standi* to make the application.[18] The KPA recognises, as it made clear to Smellie CJ that the words "*by way of discovery*" are not defined by the Act nor have they been judicially considered. Nevertheless the KPA submitted that sharing the Section 22 Documents with Kuwait, at its request, for use in the Arbitration Proceedings is capable of amounting to producing documents "*by way of discovery"* such that what the KPA is intending to do falls within the definition of "*giving in evidence*" for the purposes of Section 4(2) of the Act.

[17] *§58*

[18] *On 27 May 2021 the Hon. Chief Justice granted an application on the papers that KPA had standing to make the application and that Kuwait and Port Link were to be served with the application papers and had a right to be heard.*

53. She argued that the interpretation of the term producing documents "*by way of discovery"* in this way is consistent with the objectives of the Act, as outlined in *In re Ansbacher (Cayman) Ltd [1998 CILR 169]* in respect of CRPL, the predecessor to CIDA:

> *"The Law was amended in 1979 to insert s.3A (now s.4 in the latest Revision) to achieve two main objectives by the intervention of the courts. The first was to ensure that the public and private interests in the protection of the confidential affairs of those who conduct lawful business in the Cayman Islands are duly observed. The second—also a matter of great public interest—* ***is to ensure that where appropriate, information which might otherwise be protected can be divulged to assist the administration of justice in the Cayman Islands or, as the case might be, in the courts of foreign countries to which the obligations of judicial comity are owed."***[19] ***[emphasis added]***

54. She argued that there is nothing to indicate that "*by way of discovery*" must be construed as being limited to discovery according to a Cayman Islands procedural law definition. On the contrary, it appears the legislative draftsperson left the term undefined intentionally, consistent with the purpose of section 4 to provide a framework for the exercise of the Court's discretion.

Discretion

55. She submitted that the Court's discretion must be exercised having regard to all the circumstances, which would include the obligations arising in a foreign jurisdiction to hand over documents upon request by Kuwait.

56. The fact that permission to disclose under section 4 is often given in the context of an obligation arising under a foreign law to hand over documents for use in foreign proceedings makes it all the more unlikely the phrase "*by way of discovery"* was intended to be limited to refer to discovery under the Grand Court Law or other common law jurisdiction disclosure process.

57. Discovery is an undefined term and the clear intention of s.4 was to give the court discretion to order disclosure *"to assist the administration of justice in the Cayman Islands or, as the case might be, in the courts of foreign countries to which the obligations of judicial comity are owed".*

[19] The applicant intended to provide affidavit evidence to inspectors appointed by the Irish High Court in proceedings.

Competing Interests

58. She submitted that in weighing up the various competing interests, the Court should, in the exercise of its discretion, make an order pursuant to section 4(2) of the Act, to direct disclosure of the Section 22 Documents. The request by Kuwait for the KPA to disclose the Section 22 Documents to Kuwait for use in the Arbitration Proceedings falls squarely within the object and purpose of section 4 of the Act, which is intended to be a gateway for the release of confidential information in recognition of the public interest in the due administration of justice. She referred to the intended process as Kuwait attempting to '*set the record straight'* in the Arbitration Proceedings.

59. She emphasised that the Fund is no longer trading and is in wind down. Carefully redacted partnership information should not expose it to any loss or claims. The Arbitration Proceedings itself is confidential to Kuwait and ML. She relied on some material having already been provided to ML at her request by Port Link after the arbitration tribunal had made an order for discovery.[20] There was also an Order by consent allowing access to the Court record by Walkers who were also facing claims by the Plaintiffs.

Relevance of Section 22 Documents

60. The KPA's lawyers have reviewed the Section 22 Documents with reference to certain non-exhaustive categories of documents which are said in the first affidavit of Mr Buderi of 29 October 2021 to be relevant to the Arbitration Proceedings and consider that 158 items contained within the Section 22 Documents are relevant to the following four issues:

a) whether the Fund was highly successful and ML would have formed three follow-on funds which would have enabled her to continue a successful career;

b) whether there was a fraud against the Fund's limited partners as detailed in the ASOC dated 12 February 2021;

[20] *Procedural Order of 16 October 2020*

b) whether those involved arrived at the purchase price of the Clark Asset (as defined in the Re-Amended Writ of Summons);

d) whether Fund monies were used for lobbying activities in favour of ML and/or used to fund her defence in the Arbitration Proceedings or in proceedings in Kuwait.

61. The Court has reviewed the first affidavit of Anna Storer[21] on the basis that Ms Stanley QC (for Port Link) indicated that her client had no difficulty in the Court reading it *de bene esse*. However, in doing so was it was noted that Ms Stanley QC's position is that this is an extremely late affidavit for which no permission was sought, no directions were given, and it consists of Ms Storer's opinion which is inadmissible.

62. Ms Storer is an associate at Baker McKenzie, the KPA's UK lawyers. In §11 she states that having reviewed Mr Buderi's first affidavit dated 29 October 2021 she conducted a review of the Section 22 Documents against those four categories in order to ascertain how many documents potentially came within the categories sought by Kuwait. After deduplication her review yielded 158, amounting to c.2600 pages.

63. She accepts that her knowledge of the Arbitration Proceedings is based on limited information and it is entirely possible that those with more intimate knowledge of those proceedings and the issues would be able to identify more responsive documents than she has.

Kuwait

64. Mr Alex Potts QC for Kuwait submitted that his client continues to support KPA's application for directions and orders under section 4(2) permitting KPA to share the Section 22 Documents with Kuwait and the ICSID Arbitration Tribunal.

65. In summary, Kuwait submits that the Court has jurisdiction to grant the relief sought by KPA; and the Court should, in the exercise of its discretion, grant the relief sought by KPA.

[21] *Anna Storer 1 and schedule in ACHS-1.*

66. Mr Potts QC submitted that the Court has jurisdiction because the statute (CIDA) is to be construed broadly so that the Court can act as a filter as to whether or not the relief should be granted. He submitted that it would be a very odd situation if the Court having ordered disclosure of the Section 22 Documents and there having been orders made pursuant to that judgment, consequent amendments of pleadings, as well as access by third parties (Walkers in relation to the claim against them)[22], if the Court came to the view that it had no jurisdiction on this application to allow the KPA to provide documents to Kuwait for the Arbitration Proceedings.

67. On discretion he argued that the Court is performing the function of a discretionary filter to mitigate any potential harm of disclosing confidential information and balancing one party's right to use that information for a proper purpose and in the public interest with another party's asserted right that the information is confidential, which he submitted was not an absolute concept but qualified. Given the accepted state of the Fund in wind down he questioned the compelling justification for preserving confidence in any of the documents against the interests of his client. He submitted that it was doubtful that the documents were commercially sensitive or potentially prejudicial to ML or Port Link if they were released in a controlled way.

68. In addition he asserted that given that the documents are already referred to in public court material it will only be a matter of time before the material will be fully in the public domain and accessible.

69. As to competing interests, he argued that the Court should place a greater weight on the public interest in favour or permitting disclosure for use in legal proceedings so as to discover the truth and prevent potential injustice. He referred to the analogy which could be drawn in this context from the case law relating to applications for release from implied obligations attaching to documents discovered under compulsion in adversarial litigation.[23]

70. He submitted that it is irrelevant to argue that Kuwait should have made applications to a French court to secure a letter of request directed to the Cayman Islands Court to gather evidence under compulsion of Cayman Islands law concerning documents which are in fact on a data platform in London.

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[22] *Pursuant to open justice principle Walkers were permitted to inspect the Court file.*

[23] see *PJSC National Bank Trust v Mints Bryan J at §§10 -14 [2020] EWHC 3253*

71. He argued that it would be an affront to natural justice, the public interest and the administration of justice if these documents which are available to the Cayman Islands Court and to other parties were not made available to Kuwait (of which the KPA is an emanation) and which might otherwise suffer a miscarriage of justice in the Arbitration Proceedings.

72. Kuwait is willing for the Court's directions and orders to be confined to those specific documents identified by KPA's solicitors for present purposes (while reserving its rights more generally), having regard to the Court's powers under section 4(6).

73. Kuwait would also be willing for the Court to make such directions as may be appropriate to prevent any further collateral use of such documents (i.e. any use other than in the Arbitration), and/or to preserve any residual confidentiality rights that might attach to those documents (as to which Kuwait's rights continue to be reserved), under sections 4(6)(c) and 4(7).

74. He relied on the first affidavit of Mr Buderi which in section C outlines the relevance of the Section 22 Documents to the Arbitration Proceedings.

75. Mr Buderi accepts that Kuwait finds itself in the unusual position of arguing the relevance of documents to which it has not yet had sight but notes that a number of them or their contents are referenced in the KPA's ASOC dated 12 February 2021.

76. He gives important evidence at §13 that a number of the Section 22 Documents have direct relevance and contradict claims asserted by ML or otherwise serve to undermine the credibility and truthfulness of her oral and written testimony. He says that Kuwait further believes that they are likely to be highly relevant to the more general issues in dispute including the alleged performance and success of the Fund which is at the centre of the dispute and ML's claim for damages.

77. Mr Potts QC confirmed that the Court could proceed on the basis that the application relates to the 158 documents which Baker McKenzie have reviewed and identified which are relevant and responsive to the four categories in Mr Buderi's affidavit. That was on the basis that in due course upon further investigation his client would have the right to return to say that more documents are relevant or responsive.

Maria (Marsha) Lazareva ("ML")

78. Mr Alan Choo Choy QC for ML submitted that on the proper construction of section 4, the KPA is not a person who intends to or is required to "*give evidence*" in or in connection with any proceeding within the proper meaning of the section.

79. Rather, it is a person who is intending to pass confidential information to another person, Kuwait, who does not itself (presently) owe any duty of confidence to the relevant principals (i.e. the Fund and non-consenting limited partners) and who, in turn, intends to attempt to deploy the information in the Arbitration (having not yet been given permission nor been assured it will be given permission by the arbitral tribunal to do so).

80. This he submits is a threshold question which goes to the KPA's very standing to seek (and to the Court's power to give) directions under section 4.

81. Moreover the KPA (which is a legal entity distinct from and authorised to act independently of Kuwait), has no legitimate interest to protect in seeking to disclose the Section 22 Documents to Kuwait.

82. Furthermore even if the Court's power to give directions under section 4 were engaged, in the exercise of its discretion, Mr Choo Choy QC submitted that the Court ought to refuse to give the directions sought or permit disclosure of the Section 22 Documents to Kuwait, for a number of reasons. It is sufficient to summarise them from his written argument as follows:

a) KPA is under no compulsion to provide such disclosure; KPA has no legitimate interest of its own in providing such disclosure and will suffer no prejudice as a result of not providing it; the Fund and Port Link strongly object to the proposed disclosure; there is no evidence that limited partners other than KPA (out of a total of 11 limited partners) have consented to the proposed disclosure;

b) alternative established means for Kuwait to seek access to the Section 22 Documents exist (namely, through cross-border requests for judicial assistance), which Kuwait could and should have resorted to; the precise nature and extent of the alleged relevance of the Section 22 Documents to the issues in the Arbitration are unclear and uncertain;

c) the arbitral tribunal (the "Tribunal") ruled as long ago as December 2020, with full knowledge of the documents and categories of documents comprised within the Section 22 Documents (as listed in the schedules to the Section 22 Orders), that Kuwait's arguments of relevance were insufficient to justify the postponement of the main hearing of the Arbitration; for over a year, Kuwait has deliberately refrained from renewing its application to the Tribunal to stay the proceedings in the Arbitration and failed to cause KPA to seek directions under section 4 with sufficient urgency; the proceedings in the Arbitration are nearly closed, the main hearing having taken place between 4 and 7 January 2021, post-hearing closing submissions having been filed on 12 April 2021, a final hearing to address the Tribunal's questions having taken place on 27 April 2021, costs submissions having been filed on 16 June 2021, and an award being imminently awaited from the Tribunal;

d) the application has been made extremely late and could have been made many months earlier; and Kuwait's deployment of the Section 22 Documents (or a selection thereof) in the Arbitration at this very late stage would cause substantial disruption, delay and unfairness to ML in the Arbitration, none of which would be conducive to the due administration of justice within the Arbitration.

The General Partner- Port Link

83. Ms Clare Stanley QC and Mr Tyers-Smith appeared for the General Partner, Port Link.

84. Ms Stanley QC adopted Mr Choo Choy QC's submissions on jurisdiction and discretion. She submitted that the Court has no jurisdiction to make the order sought. The appropriate way in which to seek disclosure of documents of the Fund for the Arbitration was for Kuwait to obtain a letter of request issued to the Cayman Islands Court seeking judicial assistance for the obtaining of evidence. No such letter of request has (apparently) been sought nor exists.

85. The disclosure to Kuwait is not simply a question of s. 4 CIDA, but requires a wider consideration because of the statutory restrictions under the Data Protection Act.

86. The effect of the Order sought would be to expose the Fund, and therefore derivatively the other limited partners, to possible indemnity claims by ML, with no ability in the GP to pass that liability on to the KPA.

87. Ms Stanley QC argued that in circumstances where the KPA has no legitimate interest in the application (because it will suffer no prejudice if an order is refused), the balance of prejudice favours an order that the application be dismissed.

88. Further, she submitted that section 3(1)(a) of CIDA is inconsistent with the Cayman Islands Constitution.

89. She submits that the duties of confidence are owed by the KPA to all of the limited partners, not just the GP. Those other limited partners' rights to enforce the duty of confidence must be "fully considered" by the Court.[24] Those limited partners have not been given notice of this application, and were not even mentioned by KPA when the 'on the papers' application was made to the Chief Justice.

90. As to discretion she submitted that during the course of the three years the Arbitration has been ongoing the Tribunal has made no order for discovery of the Section 22 Documents. The Tribunal has not made any request for the Section 22 Documents. No letter of request has been issued to this Court from the Paris court seeking production of the Section 22 Documents. Indeed, far from wanting to see the Section 22 Documents, the Tribunal has said that it does not want any further documents to be filed in the Arbitration- see procedural order of the Tribunal of 27 July 2021:

> *"absent compelling reasons, the Tribunal is disinclined to admit further documents*".

91. Moreover she pointed out that when Kuwait asked for a stay of the Arbitration so that it could obtain the Section 22 Documents the Tribunal refused this request.

[24] *In the Matter of Ansbacher(Cayman) Limited [2001 CILR 214] at § 53*

92. Ms Stanley QC put the jurisdiction point in this way: There is no legal compulsion on the KPA by the Tribunal to disclose the Section 22 Documents; an applicant only produces a document "*by way of discovery*", if that person is subject to a discovery obligation; i.e. if the applicant is a party to the proceeding in question where an order for discovery is made; therefore the KPA does not intend to produce a document by way of discovery in a proceeding.

93. She submitted that a section 4 CIDA application is only possible when the applicant in question seeks to give evidence in the proceeding, that is to say it intends or is required formally to participate in the judicial process of those proceedings. In this case, the KPA is not a person who intends or is required to participate formally in the Arbitration. Indeed, KPA does not envisage participating in the Arbitration at all. KPA does not seek to file and serve a list of documents on ML and with the Tribunal. Rather, KPA seeks just to hand them over to Kuwait so that Kuwait can itself decide which documents it wants to give discovery of. There is no evidence of any other legal obligation of KPA to disclose the documents to Kuwait.

94. She submitted that the KPA is not seeking to establish any right of its own but rather to use s.4(2) to assist its parent, Kuwait, which itself has a self-made partisan interest in obtaining the Section 22 Documents because it wants to attempt to introduce them into the Arbitration. There is no legitimate partisan right and there is no public interest in the KPA's attempted use of s.4(2) for these purposes.

95. She further submitted that the order of the Chief Justice to the effect that the KPA had standing should be discharged for a failure to present the application fully and frankly; as explained in the first affidavit of Richard Lewis at § 12 onwards.

96. She argued further that this is not a *Norwich Pharmacal* application (as in *Discover*), but an application under s. 4(2) so the s. 3(2) gateway is not engaged. This is because the constituent elements of the cause of action under s. 4(2) do not include wrongdoing. The constituent elements of the cause of action which need to be pleaded under s. 4(2) are that the applicant seeks to deploy the confidential information to "give in evidence". Section 3(2) is not relevant unless a cause of action is pleaded alleging wrongdoing; where it does so it can seek a declaration under s. 3(2) if it is in doubt.

97. If the KPA has *locus* and thus the Court does have jurisdiction, she submitted that it should not make the Order sought by the KPA in the exercise of its discretion. In the exercise of its discretion the Court must take into account the interests of the other limited partners whose confidentiality rights are affected by the Order. The Court must be satisfied that if permission is not given, the applicant (here the KPA) will suffer real and substantial prejudice. The cases have described this requirement as that the applicant itself must have a "legitimate interest" in giving the evidence.

98. The applicant has a pre-existing duty of confidence, and whereas here there is a contractual duty that contractual promise must be obeyed. The applicant has freely entered into that contractual promise, and the starting point is that it must comply with that contractual promise. If the applicant cannot show a legitimate interest in the sense described, namely real and substantial prejudice to it if it is not permitted to disclose the confidential information, the application should be dismissed.

99. The Court should also consider whether there is another route by which the materials could be obtained for the proceeding, otherwise than by 'legalizing' a breach of confidence.[25]

100. If the Court is minded to make an order, she submitted that the appropriate order should be one limited to relevant documents, i.e. specific (and non-privileged) documents identified by the KPA in accordance with the approach mandated in letter of request cases.[26]

Decision

Preliminary observations

101. The application by the KPA under CIDA properly seeks the reassurance and protection of a court order against adverse positions taken by parties affected by the intended disclosure of documents containing confidential information. I echo the observations of Kawaley J in *Discover* that this is a case where it may be desirable and indeed necessary for the party at risk

[25] *Safeguard ibid Parker J at §9 citing CODELCO [1999] CILR § 42 Smellie CJ*
[26] *by para. 2(4)(b) of Sch. 1 to the Evidence (Proceedings in other Jurisdictions) (Cayman Islands) Order 1978 ("Evidence Order")*

of being sued for breach of confidence to seek directions. This seems to me to be precisely the circumstances which section 4 CIDA contemplates.

102. I reject Ms Stanley QC's argument that the Court should disregard Ms Storer's affidavit as inadmissible opinion evidence, produced too late. Indeed the evidence of Ms Storer has assisted the Court and narrowed the scope of disclosure at issue, at least in the first instance.

103. Her evidence and Mr Buderi's evidence taken together make a plausible case that the documents now at issue[27] are relevant to the Arbitration and might, if admitted by the Tribunal, materially affect its findings.

104. I accept that the KPA is an independent legal entity and not under any legal obligation or compulsion to share the documents with Kuwait. It has been requested to share them by the State, understandably wishes to comply if it can lawfully do so, and intends to share them for the purposes of section 4 CIDA.

105. It is not necessary for the Court to reach a finding as to the proper construction of LPA clause 7.3 (a) or (b) (the so called 'carve outs'). I note that the KPA presented its case through its evidence[28] and written argument[29] on the basis that they did not apply, although Ms Reynolds QC did make some oral submissions about how they might apply.

106. Notwithstanding Mr Choo Choy QC's arguments to the contrary, the Court accepts the submissions made by Ms Reynolds QC that the Court may entertain arguments that:

a) under section 3(2) CIDA the KPA acting in good faith and with a reasonable belief that the information is substantially true and discloses evidence of wrongdoing, properly asks the Court for relief to this effect; and

b) as a practical matter the KPA could make a statement in connection with the Arbitration Proceedings and come within the ambit of s.4 CIDA.

[27] *158 documents ,albeit running to 2600 pages*
[28] *Al Sabah 1 §20*
[29] *1 November 2021*

107. As to a) I do not accept Mr Choo Choy QC's argument that a separate Originating Summons supported by specific evidence of wrongdoing seeking declaratory relief under s.3(2) is necessary because the KPA did not rely on section 3(2) at the *ex parte* stage before the Chief Justice. As Kawaley J held in *Discover*[30] an application may be made under s.4 and declaratory relief under s.3(2) may be granted without any separate application, providing that the requirements of s.3(2) are fulfilled. The fact that *Discover* involved, unlike this application, Norwich Pharmacal relief does not seem to me to matter. I do not accept that ML or Port Link have not had a fair opportunity to deal with this argument and the evidence of wrongdoing relied upon nor that there has been any procedural irregularity.

108. As to b) it may be the case that Ms Reynolds QC only developed this in oral submissions, but that is no reason to shut out the argument, absent some serious procedural irregularity or resulting unfairness to ML and/or Port Link. I cannot identify any.

109. I reject Ms Stanley QC's (and Mr Choo Choy QC's) argument that the interpretive obligation of the Constitution is engaged so that the Court needs to construe CIDA in accordance with the Bill of Rights.[31] CIDA is not unclear or ambiguous in its compatibility with the Bill of Rights. Section 4 is not in my view anti-constitutional. Moreover it provides an in-built discretionary filter for the Court to balance competing rights and interests in the exercise of its discretion.

110. I reject Port Link's arguments on the Data Protection Act 2021 ("DPA") which were orally advanced by Mr Tyers-Smith with commendable brevity. He fairly argued the DPA points were principally relevant to discretion.

111. Putting aside whether or not the DPA has application to the Section 22 Documents on the basis they contain personal data which needs to be protected, there are a number of exceptions which are likely to apply. I do not need to decide these points now one way or the other. I have assessed them on the basis of arguability.

112. Section 25(1) permits disclosure if required by or under any enactment, by any law or by order of the Court. Any CIDA order would arguably fall within that exception.

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[30] *§§78 and 80*

[31] *Cayman Bill of Rights ,Freedoms and Responsibilities.*

113. Section 25(2)(a) and (c) provide exceptions where the disclosure is necessary for the purpose of, or in connection with, or in contemplation of, quasi-judicial or legal proceedings for the purpose of establishing, exercising or defending a legal right. Kuwait has a plausible case that disclosure is necessary for one or more of those purposes. As a practical matter any non-relevant personal data can be redacted.

114. Having made those preliminary observations I turn to the 'meat' of the application which, as can be seen from my summary of the arguments made, has been 'root and branch' opposed by Port Link and ML.

Jurisdiction

115. This issue raises the question of the scope and effect of section 4(2) of CIDA in the particular circumstances of this case. Whilst it is fact specific to that extent, it is necessary for the Court to ascertain the intent of the legislature, which is of course an objective exercise.

116. The Court ascertains the intention of the legislature from the words used in a statutory provision read in their proper context, and also in light of any material which shows what mischief was sought to be addressed.[32]

117. The jurisprudence in this Court to which I have referred above makes clear that Section 4 CIDA provides a gateway for the release of confidential information in recognition of the public interest both in the Cayman Islands and abroad in the due administration of justice. It also makes clear that Section 4 CIDA is to be construed broadly in order that the Court can consider whether it is in the interests of justice to grant the relief sought considering all the relevant competing interests, including the administration of justice. Of course, in this exercise the impact of any order made on the rights and interests of those adversely affected by the release of confidential information needs to be carefully considered.

118. In construing Section 4 CIDA the Court will naturally strive to avoid an interpretation which results in an absurd, illogical, anomalous or unreasonable outcome. If such a result was reached it would suggest the legislative intent was otherwise.

[32] *Shanda [2020] UKPC 2 §27 per Lady Arden*

119. Section 4(2) provides:

> ***"If a person intends to or is required to give evidence in or in connection with any proceeding*** *being tried, inquired into or determined by any court, tribunal or other authority, whether within or without the Islands and the evidence consists of or contains any confidential information within the meaning of this Law,* ***the person shall apply for directions in accordance with this section before giving that evidence, unless the person has been provided with the express consent of the principal".*** *(my emphasis)*

120. In my view the broad legislative intent is clear from the meaning of the words used. Someone wishing to provide evidential material in connection with proceedings (which includes arbitration) may apply to the Court for directions. If one accepts Mr Choo Choy QC's threshold argument it would lead to an anomalous outcome. That is to say that if the KPA is intending simply to share the documents with Kuwait for use in the Arbitration Proceedings it cannot avail itself of section 4 because it is not giving evidence.

121. The operative section's meaning should in my view be consistent with the interpretation that this Court has consistently arrived at. I have considered the previous consistent approach of this Court to section 4(2) applications,[33] and have given the words of section 4(2) meaning in this case to render it an effective and flexible gateway for the Court to consider the competing interests concerning the disclosure of confidential information for the purposes of proceedings to further the administration of justice.

122. It seems to me that one should not constrain the meaning of the words used to limit the application to those parties who intend to give evidence themselves and in the specific technical ways of doing so in particular proceedings covered by the Grand Court Rules. The relevant foreign proceedings may themselves have ways of receiving evidence which differ from the discovery regime under the Grand Court Rules for example.

123. Applications should not be limited in my view to only parties to the proceedings or persons who intend to or are required to give evidence in the proceedings themselves. They should not be limited to the conventional ways for a party who intends to, or is compelled to, itself give evidence in proceedings. The words "*or in connection with*" imply a wide variety of circumstances where evidence can be provided. The phrase needs to be given meaning beyond

[33] *See Discover §§ 58-59 81 per Kawaley J*

simply what forms of evidence limited and defined by the definitions in section 4(1) can be given in, or within, proceedings.

124. In my view reading CIDA as a whole one should construe s.4(2) to give the Court a wide jurisdiction to hear an application by a person such as the KPA in this case, intending to provide evidential material, in this case to another person, for use in proceedings to which it is not a party.

125. I do not consider that the definitions in section 4(1) should be applied so as to define exhaustively the particular types of evidential material intended to be provided to Kuwait in connection with a separate proceeding involving Kuwait. As a consequence, I accept Ms Reynolds QC's submission that a written statement exhibiting the documents intended to be handed over to Kuwait may well fall within the ambit of section 4(2).[34]

126. I also note that Smellie CJ has ruled (albeit on the papers and without argument) that the KPA has *locus standi* to make the application. I do not accept Port Link's argument that there was a failure to present the application fully and frankly. [35] It seems to me that a fair presentation was made. As a consequence I do not accept the submission that the Chief Justice's ruling, whilst not determinative, should have little or no weight as a result not having heard full argument on the matter. I have simply noted it and have reached the view after argument that I agree with it.

127. As to the arguments, from its own procedural rulings, that the Tribunal seems disinclined to admit further evidence, whether and to what extent Kuwait is able to use the documents in the Arbitration is not a matter which should affect this Court's jurisdiction to consider making an order and directions in an appropriate case. The point may only go to discretion, as to which see below.

128. As to the arguments that the KPA has no legitimate interest on this application, it seems to me that the KPA clearly has a legitimate interest within the parameters outlined by the Chief Justice[36] to ask the Court to exercise its discretion. This interest is to allow the duties of confidence it owes to be set aside on a controlled basis having been asked by Kuwait, of which

[34] *See Thune*
[35] *Lewis 1 at §§ 12 -26*
[36] *Ansbacher § 32*

it is an emanation, to provide the documents for use by Kuwait in an existing arbitration to assist in the administration of justice. That is an important and defensible interest. If the material is not provided it seems to me that both the KPA and more particularly Kuwait would suffer prejudice.

Discretion

129. Numerous competing interests have been argued on this application. In weighing the interests of certain parties on the one hand to keep confidential the information contained in the 158 documents, and on the other hand of the KPA to obtain permission to pass them to Kuwait, which considers them to be relevant to the Arbitration it is engaged in with ML, is a difficult balancing exercise, especially in circumstances where the Court has not itself reviewed the documents and is not familiar with the intricacies of the Arbitration Proceedings. Also to be weighed in the balance are the points that Mr Choo Choy QC forcefully makes as to specific unfairness and prejudice to ML as claimant in the Arbitration Proceedings.

130. Weighing carefully these competing interests I have come to the view that I should exercise my discretion to give permission to the KPA to pass 158 documents to Kuwait upon certain conditions.

131. Having carefully considered the able and extensive submissions (both oral and in writing) of Mr Choo Choy QC and Ms Stanley QC on behalf of their clients I have reached the conclusion that there is no good reason for denying the KPA permission to do so. There is a legitimate interest for the KPA to do so and the administration of justice is to be served by allowing them to do so. The KPA should have permission to pass them to Kuwait for potential use in the Arbitration so that, at the very least, the possibility of inconsistent outcomes between the Cayman Islands Court in the litigation I have referred to and the Tribunal is minimised and the overall administration of justice is furthered.

132. As to the point that the Tribunal seems disinclined to admit 'further documents', the Tribunal is well able to consider any documents which Kuwait seek to use and to decide whether, how, or if at all the material may be considered. It is well able to assess the justice of the position as between ML and Kuwait, the stage the proceedings have reached, the UNCITRAL Rules and

its own procedure. It seems to me that if there is a possibility that it will receive further documents that option should be kept open for the reasons given by Mr Buderi.

133. When weighing up the competing interests for the purposes of assisting in the due administration of justice, it is important that the wrongdoing alleged in the ASOC in the Proceedings based on the Section 22 Documents is, according to Kuwait, highly relevant to the case of ML as the other party to the Arbitration. In this regard I note at §13 of Mr Buderi's affidavit that a number of the Section 22 Documents have direct relevance and contradict claims asserted by ML or otherwise serve to undermine the credibility and truthfulness of her oral and written testimony. He says that Kuwait further believes that they are likely to be highly relevant to the more general issues in dispute including the alleged performance and success of the Fund which is at the centre of the dispute and ML's claim for damages and should be disclosed so that these documents may be properly considered. It seems to me he has made out a plausible case for this assessment.

134. The documents which respond to Mr Buderi's categories have been identified and are contained within the schedule to Ms Storer's affidavit. The first affidavit of Mr Al Sabah at §§ 35 and 36 set out the basis of the various claims based on the contents of the Section 22 Documents. The Court is familiar with the ASOC in the Proceedings, which in my view sets out sufficient evidence of alleged wrongdoing.[37] The allegations include dishonesty, misfeasance, and mismanagement of the Fund by its former directors and officers. They have been pleaded by senior lawyers with professional obligations to assess the evidential basis for such serious allegations. The information sought clearly concerns wrongdoing. I do not accept Ms Stanley QC's submission that section 3(2) is not engaged.

135. As to the argument that that the other limited partners' interests need to be protected from disclosure, I note that there is no evidence from any of them on this application. By contrast the KPA is by far the largest investor in the Fund by value and it seeks disclosure. The Fund is no longer trading and is in wind down. Commercial sensitivity in the documents is likely to be considerably reduced from the dates they were created.

[37] *See ASOC §§ 29,87A,96A,129,137(d),138-141,171-173 and 203.*

136. As to concerns about liability the Fund may be exposed to, carefully redacted partnership information should mitigate against exposure to loss or claims. The Arbitration itself is confidential to Kuwait and ML and conditions may be imposed on the basis upon which Kuwait may receive the documents.

137. ML advanced numerous arguments as to disruption, delay and unfairness to her case which would arise if permission was given. As to this, if ML's evidence in the Arbitration has been accurate, then one assumes the 158 documents will bear that out, or at the very least be neutral, in which case there would be no obvious exposure to the Fund or problem for ML. If they support her account, or are consistent with her account, one would think she would wish to see them herself.

138. Moreover, if Kuwait decides, having reviewed the documents, that they are not relevant and/or do not advance its case or undermine her account, it may be that no use will be made of them. There would be no disruption to the arbitration process. Likewise if the Tribunal decides not to admit the documents. It is by no means certain that they will entertain an application to do so before rendering an award.

139. However, on the other hand, if Kuwait does decide to attempt to make use of the 158 Documents in the Arbitration and the Tribunal does decide to admit them and they are relevant to the Tribunal's determination of the relevant issues, then the due administration of justice by the Tribunal will have been furthered from the exercise of this Court's discretion to permit disclosure to Kuwait for that limited purpose.

140. By granting this application the Court keeps open that possibility in circumstances where the Tribunal has not ruled that further evidence will not be admitted[38] and in circumstances where Mr Potts QC submits that new evidence may be relied on even after the award is issued.[39] I accept Mr Potts QC's submission that there is a prospect of the litigation in the Cayman Islands Court referring to the Section 22 Documents publicly, and that would risk undermining the Arbitration award, which is apparently due imminently, if there were to be a material inconsistency between the outcomes.

[38] *See Buderi 2 §§18-21*

[39] *See Buderi 1 §§23 and 24*

141. Finally, I do not regard it as a significant factor in the exercise of my discretion that it was open to Kuwait in the Arbitration to seek as many documents relating to the management of the Fund as it considered to be material to the issues in the Arbitration and that it on occasion did so. Neither do I place much weight on the alternative routes (namely, through cross-border requests for judicial assistance), available to Kuwait to have obtained documents by other means. I do not consider that Kuwait has acted so unreasonably in failing to pursue these other avenues that the Court's discretion should not be exercised to allow the KPA to share the 158 documents with it.

Conclusion

Section 3 (2) order

142. I am prepared to make an Order under section 3(2) of CIDA. It is clear that the KPA acts in good faith and has a reasonable belief that the information is substantially true and contains evidence of wrongdoing (within the definition of the FOI section 50.)

Section 4 (2) order

143. In weighing up the various competing interests, I am satisfied that in the exercise of its discretion, the Court should make an order pursuant to section 4(2) of the Act, to direct disclosure of the 158 Section 22 Documents. The request falls within the objective and purpose of the Act, and section 4(2) which is intended to be a gateway for the release of confidential information in recognition of the public interest in the due administration of justice. It would not be fair or just to prevent disclosure of the documents to Kuwait in all the circumstances. The potential prejudice to Port Link and to ML or the other limited partners is not so great as to warrant a refusal of the relief sought by the KPA which has legitimate interest to make the application.

144. Port Link should review the 158 documents identified by Ms Storer for any legal privilege or data protection issues and propose any necessary redactions.

145. The parties should seek to agree appropriate orders and directions reflecting this decision and if necessary restrict disclosure to certain persons, prevent collateral use, and/or to preserve any residual asserted confidentiality rights, and/or by way of redaction to protect other rights.

146. If necessary the Court will decide following written submissions, on the nature and scope of any orders, if they cannot be agreed.

147. As to the costs of this application, the Court is inclined to order that the KPA is awarded the costs of its application to be paid by Port Link and ML equally. If an order as to costs cannot be agreed between the parties or if any party wishes to make submissions as to costs, they may do so by way of short written submission.

THE HON. JUSTICE PARKER
JUDGE OF THE GRAND COURT