

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No. FSD 90 of 2017 (RPJ)

IN THE MATTER OF AN APPLICATION UNDER SECTION 34 (10) OF THE MONETARY
AUTHORITY LAW (2016 REVISION)

AND IN THE MATTER OF A DIRECTION ISSUED UNDER SECTION 34 (9) OF THE
MONETARY AUTHORITY LAW (2016 REVISION)

AND IN THE MATTER OF SELECT VANTAGE INC.

IN CHAMBERS

Appearances: Mr Paul Murphy and Mr Ulrich Payne of Ogier on behalf of the
Company
Mr André Mon Désir, Mr Menelik Miller, Ms Audrey Roe and
Ms Jennifer Hydes on behalf of Cayman Islands Monetary
Authority

Before: The Hon Justice Raj Parker

Heard: 16th May 2017 and 6th June 2017

Draft Judgment
Circulated: 4th July 2017

Judgment Delivered: 12th July 2017



HEADNOTE

Financial regulation-Cayman Islands Monetary Authority (CIMA) - compliance with request from overseas regulator - ex parte order - Monetary Authority Law(2016 revision)(MAL) - application to discharge and stay - duties and obligations of CIMA - application for disclosure of confidential material - section 50(1) MAL - right to a fair hearing - natural justice.

INTRODUCTION

1. This is an application by the Respondent, Select Vantage Inc. ("SV"), to discharge the ex parte Order obtained by the Cayman Islands Monetary Authority ("CIMA") on 16 May 2017, or in the alternative to have it stayed until further order of the Court, pending judicial review proceedings which SV has brought in Australia against the Australian Securities and Investments Commission ("ASIC").

2. SV also seeks disclosure of all documents put before the Court in support of the ex parte application by CIMA, a note or transcript of the ex parte application hearing, and further directions and ancillary orders.
3. SV is a proprietary trading firm which trades globally. It was first registered in Anguilla and has been registered in the Cayman Islands as an Exempt Company since 21 December 2015.

BACKGROUND

4. Both CIMA and ASIC are regulators of financial services businesses and parties to a multilateral memorandum of understanding ("MMOU") (under the aegis of IOSCO, the International Organisation of Securities) which deals with rights and obligations concerning international cooperation between regulators.
5. ASIC has requested assistance from CIMA to obtain information from SV to pursue an investigation into potential market manipulation. Such requests are in their nature detailed and contain confidential information.
6. On 9 March 2017 SV was served with a direction ("the Direction") from CIMA to provide certain information pursuant to section 34(9) of the Monetary Authority Law (2016 Revision) ("MAL"). The Direction referred to a request that had been made to CIMA by ASIC for assistance and information pursuant to section 50 (3) of MAL.
7. SV and ASIC have been in discussions since 2014 concerning ASIC's investigation into potential market manipulation. There has been litigation between SV and ASIC concerning its investigation. Civil proceedings for defamation and injurious falsehood have been filed by SV and Mr Daniel Schlaepfer ("DS"), the President and Chief Executive Officer of SV in the in the Supreme Court of New South Wales, Australia.
8. Furthermore and after the service of the ex parte Order obtained by CIMA, as I have said SV and DS filed an application for judicial review of the request made of CIMA by ASIC, in the Federal Court of Australia. The gist of the judicial review proceedings is to obtain declarations that ASIC has acted unlawfully and to obtain orders to quash or set aside the request and for injunctive relief restraining ASIC from pressing or renewing the request with CIMA.
9. CIMA's Direction is, more specifically, for SV to provide information and documents concerning traders who were employed by an entity in the Vantage Group, Elite Vantage.

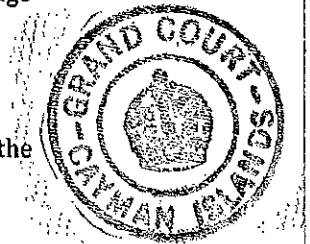
It required SV to:

"... Produce such documents as are in your possession or control listed in the Schedule hereto and provide such information listed in the Schedule."

The Schedule requests:

"(the provision of) the following information and/or documentation:

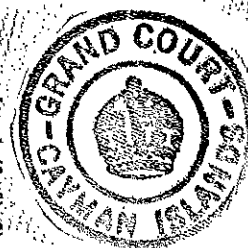
1. The name of each trader;
2. The country in which each trader was physically located whilst trading



- during the relevant period;
3. The most recently known telephone numbers of each trader;
 4. The most recently known email addresses of each trader; and
 5. The trader identifier or trader ID of each trader which was available to, or used by, Macquarie Securities Australia Limited to identify trading by that individual trader".
10. The Direction was made pursuant to section 34(9) (i) and (ii) of MAL which provide that CIMA may direct an entity to:
- (i) "provide the Authority with specified information or information of a specified description with respect to any matter relevant to the inquiries to which the request relates;
 - (ii) produce specified documents or documents of a specified description relevant to those enquiries."
11. The information requested concerns traders who placed orders on the ASX or CHI-X markets between 6 October and 21 November 2014 through the Merlito Securities Company Limited account held with Macquarie Securities Australia Limited.
12. The ex parte Order which CIMA obtained under section 34(10) of MAL is for SV to comply fully with CIMA's Direction, produce the documents and information as listed in the Schedule in a legible, intelligible and easily accessible form, and deliver the same to CIMA no later than five days from the date of service of the Order. SV were given liberty to apply to the Court to vary or discharge the Order, which it now seeks to do.
13. This Court also ordered that the affidavits of Audrey Roe, Head of the Compliance Division of CIMA sworn on 3 and 12 May 2017, the ex parte originating summons, judge's notes and all associated papers to be sealed and not be open for inspection on the Court file, without leave being obtained on notice to CIMA.

SV's CASE

14. Mr Murphy on behalf of SV submits that the ex parte Order should be immediately discharged for the following reasons:
- SV is unable to comply with the ex parte Order
 - The ex parte originating summons procedure used by CIMA was irregular and unlawful and the Order should not have been made on an ex parte basis. It has denied SV an opportunity to properly defend itself. He also submits that as a result SV still does not know the case it must respond to, nor the evidence in support of it, nor the legal basis upon which CIMA obtained the Order and that SV was not given a proper opportunity to be heard, which offends the principles of natural justice and fairness.
 - SV has now challenged the basis of the information sought by ASIC in judicial review proceedings. Those proceedings may result in the Australian Federal Court deciding that ASIC's request was unlawful. So to comply with CIMA's request, and for it then to pass that information to ASIC, would render the



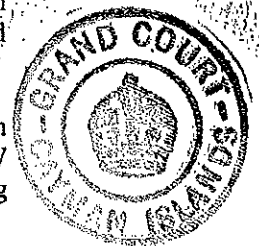
Australian judicial review proceedings nugatory and SV would be deprived of its ability to obtain effective relief in those proceedings. The ex parte Order should be discharged or stayed pending the outcome of the judicial review proceedings.

- SV should in any event be given access to the documents which were sealed by the Court on the ex parte application, as a matter of fairness and in accordance with the principles of natural justice, in order that SV can properly consider the case against it, and how the Order was obtained. It also requires the documents in order to consider its options including, if necessary, proceedings to challenge the Order by way of a judicial review application in Cayman.
 - CIMA is obliged to act in accordance with section 6 of MAL and to use its resources in the most efficient and economical way having regard to its engagements with SV, the burden placed on SV to comply with the Direction, and the need for transparency and fairness.
15. In passing I should note that I directed that a redacted summary of the written skeleton argument relied upon at the ex parte hearing by CIMA should be disclosed to SV in order that it could understand the legal basis upon which CIMA proceeded. That was done in advance of the hearing. Mr Murphy however maintains his case with regard to an absence of proper disclosure, which he says amounts to a breach of natural justice and fairness, because he argues that the redactions are so extensive that his client remains substantially in the dark.

ANALYSIS

SV is unable to comply

16. The essential point made by Mr Murphy, supported by the sworn evidence of DS, is that SV is not the entity within the Vantage Group that has or has ever had the information and documents. It does not have them and has never had them in its possession, control or power.
17. I turn now to the evidence.
18. By an affidavit sworn on 2 June 2017 DS says that SV, whilst registered in the Cayman Islands, has no physical presence in the Cayman Islands and retains no physical records other than those mandated by law and relating to its own affairs and business activities. Its sole purpose is to hold stock trading capital and it has never entered into any contracts with traders, trading location managers and/or external market data vendors because they were all employed or otherwise engaged by the parent company of SV, Elite Vantage.
19. Any and all information concerning these matters is held by Elite Vantage an Anguillan registered company physically based in Costa Rica. It follows that SV has no ability to identify and obtain such information without first contacting Elite Vantage for its assistance and requesting disclosure.
20. DS swore a second affidavit on 8 June 2017 in which he makes clear that not only is he President and Chief Executive Officer of SV, which he effectively controls (see also paragraph 7 of the originating application for judicial review), he is also "controller" of the Vantage Group, being a group of companies comprising



SV and its affiliates. 'Controller' he says means that he is the senior executive officer and director of the entities constituting the Vantage Group and is either the owner of, or a discretionary beneficiary of, the family trust that is the owner of, the entities that constitute Vantage Group (paragraphs 1 and 2).

21. He also confirms at paragraph 50 that:

"... I am the controller of SV, Elite Vantage, Merlito (until its deregistration in 2016) and the other companies within the Vantage Group. However, I exercise that control subject to my legal obligations and my fiduciary responsibilities and, where appropriate, on the basis of legal and other professional advice."

22. He goes on to say at paragraph 51:

"As the effective controller of the Vantage Group, I have the power (subject to my legal obligations and fiduciary responsibilities) to cause members of the Vantage Group to share information with one another for the purposes of business activities in the ordinary course."

23. Paragraph 52 states:

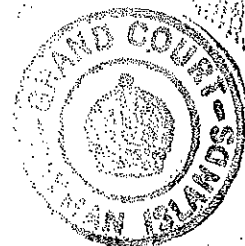
"I also have a corresponding power (again, subject to my legal obligations and fiduciary responsibilities) to cause members of Vantage Group to provide information to regulatory authorities for the purpose of complying with inquiries."

24. He also explains that compliance with the Direction would require the production of a report regarding the identity details of specific traders who were employed not by SV, but by Elite Vantage who traded on certain specified securities markets in October and November 2014. That would require that a staff member interrogated the relevant databases containing historical trading and employment histories, with the resulting output then analysed, verified, compiled and formatted into a new document for production to CIMA (paragraph 13).

25. DS says to the extent that his first affidavit was not clear in this regard, he expressly confirms that SV does not now have, and has never had, possession of the information sought in the Direction.

26. Mr Murphy told me that DS had also confirmed that the statements made at paragraphs 25 and 28 of his first affidavit (to the extent equivocal) did not mean to imply that SV or its subsidiaries (True North and Epic) have or ever have had possession and/or control of the information and documents. He confirms the same for Merlito (although it was deregistered in 2016) (paragraphs 19 and 20).

27. DS goes on to state that SV is a wholly owned subsidiary of Elite Vantage and is not capable of requiring its parent entity to produce a report containing the required information. Moreover he says by reference to a ("Trader Services Agreement") which he exhibits, governed by Anguillan law, made between Elite Vantage and SV, the use and disclosure of information that is collected or provided is strictly limited. He has not taken specific legal advice in relation to Elite Vantage's obligations under Anguillan law (paragraphs 15-19).



28. He goes on to say paragraph 21 that:

"... I consider it improper for Elite Vantage to accede to a demand for information made by SV under compulsion when the question of the lawfulness of that demand is about to be judicially considered and I would, subject to legal advice from Anguillan counsel, cause Elite Vantage to resist that request to the maximum extent available at law."

29. By paragraph 53:

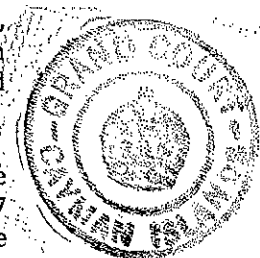
"Until recently, I considered it in the best interest of the Vantage Group and the individual companies that it comprises to cooperate fully and voluntarily with ASIC's investigation into trading in October and November 2014. This has included directing Elite Vantage to voluntarily disclose certain information to ASIC."

30. And paragraph 54:

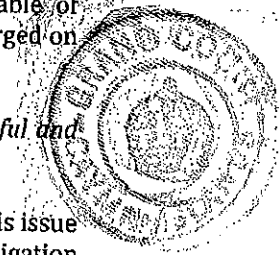
"However, as I stated in my first affidavit (at paragraph 44), I do not now consider it appropriate to cause SV, Elite Vantage or the other entities in the Vantage Group to volunteer the information sought by ASIC".

Findings

31. I find the evidence of DS to be less than convincing. The points taken are at best technical and I find them to be on the whole unmeritorious. They are not points that would be taken by the effective controller, senior executive officer and owner of, or discretionary beneficiary of the family trust that is the owner of, the entities in the Vantage Group, who was seeking to be cooperative and compliant with CIMA's Direction.
32. He accepts that he could procure that the information and documents be provided. I find that he has simply chosen not to do so for his own reasons, which seem to me to relate to his concerns more fully set out in the judicial review proceedings and the correspondence between Ogier and CIMA.
33. I find that the information and documents are in the control of SV, in that DS could procure them to be provided in the form requested.
34. As is clear from the third affidavit of Audrey Roe of CIMA sworn on 5 June 2017, despite extensive correspondence between CIMA and Ogier, between 16 March 2017 and 17 May 2017 no point was taken that the information and documentation sought in the Direction was not in SV's possession or control.
35. Indeed the filed and stamped originating application for judicial review in the Federal Court of Australia between DS and SV and ASIC, dated 24 May 2017 states at paragraph 5 that the "information listed in the said schedule (to the Direction) is not set out in any presently existing document in the possession or control of (SV)." However it further provides by paragraph 6 that "compliance by (SV) with the Direction would therefore require the creation by (SV) of a new document that sets out the required information". Neither DS nor SV state that SV is not in possession or control of the information and/or documentation sought by CIMA in the Direction. That is of course consistent with paragraph 13 of his second affidavit.



36. Ms Roe says at paragraph 19 of her third affidavit that up until early in June 2017 CIMA understood that SV was not saying that it was incapable of complying with the Direction because it did not possess or control the information sought. In fact the correspondence seeks assurances from CIMA, some of which were given, on the premise that the information could be provided. She says that it was reasonable for CIMA to believe that up until that point SV had information relevant to the enquiry. I accept her evidence and agree with her conclusion.
37. I note in passing that in the 'Details of claim' section of the originating application for judicial review, again, rather than take the point now put forward by Mr Murphy that the specified documents and information were not in the control of SV, it is pleaded that certain things needed to be done by DS, as the controller of SV, to comply with the Direction: to gather and compile the information listed in the schedule; and create a new document setting out that information; and deliver the new document to CIMA. It is further pleaded that that new document would constitute a representation by SV as to the truth and completeness of that document and that given DS's duties as a director of SV and given his necessary involvement in causing SV to comply with the Direction and deliver the new document to CIMA, this would amount to an attestation by DS that the newly created document is true and complete. I infer from this that the concern seems to have been more about the truth and accuracy of the information to be compiled rather than an ability to compile it. Indeed at paragraph 14 (a) it is pleaded that in making the request to CIMA (ASIC) is seeking to compel DS to make testimony that might later be used against him by (ASIC) in criminal or civil penalty proceedings.
38. Concern as to the purpose of ASIC in seeking the material and any subsequent use against SV and DS is a thread that runs through the correspondence between Ogier and CIMA and I find that this is the real the reason that the material sought has not been produced, rather than any real inability to produce it.
39. I accept that that might involve DS as President and CEO of SV and Elite Vantage considering his separate legal and fiduciary duties to each company and taking relevant legal advice where necessary. That does not mean that it is not within his power to do so, and so SV's power to procure that the material be obtained and be provided.
40. I therefore reject Mr Murphy's submission that SV is entirely incapable of complying with the Direction and that the ex parte Order must be discharged on that basis.
- The ex parte summons procedure used by CIMA was irregular and unlawful and the Order should not have been made on an ex parte basis*
41. The premise upon which Mr Murphy's submissions are founded is that this issue ought to be looked at as one would in an ordinary commercial /civil litigation context. In such a case the relevant rules prescribe limitations upon the use of ex parte procedure.
42. The Cayman Islands Grand Court Rules (1995 Revision) "GCR" by Orders 10, 12 and 28 regulate service, disclosure and procedure. Mr Murphy submits that it



was a serious procedural irregularity for CIMA to proceed by way of ex parte originating summons, and these rules should have been followed. He submits that a failure to comply with the GCR means that SV is prejudiced because it has not had an opportunity to properly understand and respond to the case against it. Moreover since CIMA has refused to disclose the material on the ex parte application SV cannot discern the legal basis upon which CIMA has proceeded.

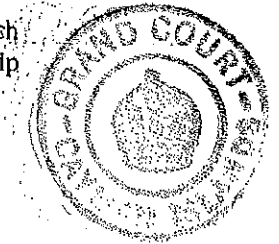
43. Mr Miller on behalf of CIMA submits that the authority made its ex parte application under the statutory regime outlined at section 34 (10) of MAL which provides that:

"Where a person fails to comply with a requirement under subsection (8) or a direction given under subsection (9) within three days from the date of the requirement or direction or such longer period as the Authority may permit, the Authority may apply to the court for an order requiring the person to comply with the requirement or direction."

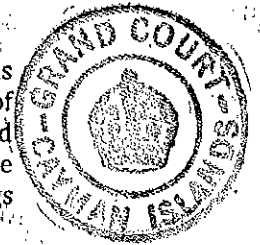
44. There is no procedure set out in the GCR or elsewhere by which CIMA should proceed to obtain such an order. It chose to do so by way of ex parte originating application.
45. Mr Miller submits that the Authority's actions were completely lawful and are reasonable in the circumstances. It is a creature of statute, and its dealings with the request from an overseas regulatory authority is entirely governed by MAL. By section 6 (1) it has a positive duty to take appropriate steps to cooperate and provide assistance. It complied fully with its obligations under section 50.
46. Moreover, he submits that SV has had ample opportunity to make written representations to CIMA and did so before the commencement of proceedings. The Authority made it explicitly clear in correspondence that it would pursue any non-compliance with the Direction.
47. Mr Miller submits that the material before the court on the ex parte application should not be disclosed because of section 50 (1) of MAL. That section makes it clear that any person who discloses any information shared by or with an overseas regulatory authority or any communication related thereto, which was acquired in the course of his duties or the exercise of the Authority's functions, commits a criminal offence.
48. The material requested by ASIC is expressed to be confidential and such confidentiality is essential to preserve the open and cooperative relationship between CIMA and ASIC and indeed with other regulators around the world.

Findings

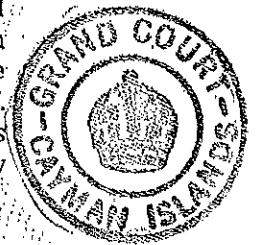
49. I accept Mr Miller's submissions.
50. In my view CIMA were perfectly at liberty to choose to apply for an order on an ex parte basis to this Court. Nothing in the GCR limits or permits such applications in MAL cases.
51. CIMA should not be prevented from, in the appropriate case, applying for ex parte relief from this Court where it has good grounds to do so.



52. Whilst there is no GCR directly on point, one can by analogy see how Order 95 r.2 is an albeit imperfect analogy. By that Rule the authority shall make an application under s.12 (5) of the Banks and Trust Companies Law (2003 Revision) ("BTCL") with regard to suspected offences by licencees under the regulation of the BTCL. It does so by way of ex parte originating summons.
53. Of course it is an imperfect analogy because SV is not subject to the BTCL and it is a different regime to the present case under MAL, but that does not mean that the GCR is silent on the procedure being used in a specific case. Neither does this mean it is only to be used in that narrow area.
54. I have the advantage of having been the judge on the ex parte application and I obviously regarded it as an appropriate case at the time. Even taking into account Mr Murphy's powerfully made submissions in his application to discharge that Order, I still regard it as having been an appropriate case.
55. I also have of course, had the advantage of seeing material which Mr Murphy has not had an opportunity to see, including all the evidence relied on by CIMA. I am satisfied that the procedure was appropriate and that the order obtained was justified on the grounds of urgency. The principle of open justice is an important one, but it may be departed from procedurally for good or exceptional reasons.
56. I was persuaded that one of these reasons, namely, the giving of notice, would have resulted in a defeat of the application by reason of further delay, or it may have precipitated action which the application was designed to prevent, that is to say the potential disappearance of the material: see the Supreme Court Practice 1999 Ed. At 29/1A/21 and 29/1A/25. I have not been dissuaded of that view by reference to matters raised in these proceedings.
57. It goes without saying that the information sought, relating to a time period in October and November 2014 and specific details as to traders and trading activities, is already potentially difficult to find and if necessary, reconstitute. Moreover there is evidence that the Vantage Group entities are in more than one jurisdiction, and sometimes change jurisdiction, which makes regulatory investigation and enforcement more difficult.
58. It is clear from the conduct of SV, demonstrated by the correspondence, DS' evidence and proceedings it has brought in Australia that it is not prepared to cooperate with CIMA, notwithstanding its protestations to the contrary.
59. Between March and April 2017 it asked for ASIC's letter of request; various assurances that CIMA had adhered to the relevant laws and procedures; a stay of the Direction whilst it launched a judicial review application against ASIC; and claimed that ASIC had acted with an improper purpose in seeking the information (as well as reserving its rights to bring judicial review proceedings in Cayman against CIMA).
60. I note in passing that SV's claims as to improper purpose on the part of ASIC have not been pursued or substantiated to any degree before this Court. I find that CIMA are entitled to treat the request on its face and are not required to look behind it for any alleged undisclosed purpose or impropriety - see *FSA v AMRO* [2010] EWCA Civ 123.



54. The three days prescribed in section 34 (10) of MAL suggest urgency. There has been no sense of urgency on SV's side. It has been quite content to drag things out for months until CIMA reached the end of its belief that it would ever obtain the material in a cooperative way.
55. The legislation clearly envisages a speedy resolution to an application for an order and CIMA is anxious to fulfil its obligations of cooperation to ASIC with the assistance of the Cayman Grand Court. It should be allowed to do so.
56. SV is of course entitled to be treated fairly and to have a proper opportunity to argue its case. Mr Murphy submits that it has been considerably prejudiced in its ability to do so.
57. I am satisfied that any prejudice (which I find is minimal) which SV says it has suffered as a result of the ex parte procedure used, has been adequately mitigated. This has been partially through the provision of the redacted skeleton argument of MAL, which has allowed it to properly understand the legal basis of the case against it, whilst preserving the obligations of confidentiality CIMA has assumed. In addition, the extensive correspondence between the parties makes it clear to me that SV understands a great deal more about the case against it than Mr Murphy now contends.
58. Moreover, since service of the order on 17 May 2017 SV has had ample opportunity to deal with the case, submit evidence in opposition, and put together its legal submissions to vary or discharge the ex parte order. That was the basis upon which SV were given liberty to apply in the order itself, it being envisaged by CIMA and the Court that SV would have an opportunity to properly engage in the dispute. This it has now done as shown by the extensive oral and written submissions advanced by Mr Murphy at the hearing.
59. In *Bank Mellat (2013) UKSC 39* Lord Sumption summarised the law in this area and said:
- "... Fairness will very often require that a person who may be adversely affected by a decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."
60. I find that SV has had a fair hearing as to the determination of its rights and has had more than enough opportunity to know the gist of the case against it and to challenge it through this application. There has been no breach of SV's fundamental right to natural justice as Mr Murphy has contended.
61. I also find that Section 50 (1) of MAL affords CIMA a complete answer to the disclosure of material, sealed by this Court, to a party subject to a regulatory investigation by an overseas regulator. Certain information has been passed to it in confidence by ASIC pursuant to agreements and understandings between CIMA and ASIC and under the MMOU regime. It should not be disclosed to SV.
62. Withholding that material in any event has not caused any breach of natural justice or fairness to SV. It is perfectly able to consider its options from the case



brought against it by CIMA and the evidence in support and disclosure that has been given.

Discharge or stay because of the Australian judicial review proceedings

63. Mr Murphy submits that if his client is successful in the judicial review application it takes away the whole basis of ASIC's request. It is clear that the judicial review proceedings are at an early stage. I have no basis for making any determination as to whether they will be successful or unsuccessful, ultimately. They will not be determined for some time. No doubt forms of interlocutory relief can be applied for in those proceedings.
64. In my judgement there are no grounds upon which to either discharge the ex parte order granted by this Court or to grant a stay of it in view of the Australian judicial review proceedings. This Court should not be used to delay the investigation by ASIC any further.

Conclusion

65. SV's application fails. CIMA has properly complied with its statutory duties and powers under MAL. The order granted on 16 May 2017 should be complied with.
66. SV should pay CIMA's reasonable costs of this application to be taxed if not agreed.


THE HON JUSTICE M.J. PARKER
JUDGE OF THE GRAND COURT

