

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

CAUSE NO: FSD 226 OF 2018 (IKJ)

**IN THE MATTER OF THE CONFIDENTIAL INFORMATION DISCLOSURE LAW
(2016 REVISION)**

AND

**IN THE MATTER BETWEEN XYZ LTD. AND GENESIS TRUST & CORPORATE
SERVICES LTD**

IN CHAMBERS

Appearances: Mr Ardil Salem, Carey Olsen, for Genesis Trust & Corporate
Services Ltd (the “Applicant”)

Before: The Hon. Justice Kawaley

Heard: 19 December 2018

**Draft Judgment
Circulated:** 5 February 2019

**Judgment
Delivered:** 12 February 2019



HEADNOTE

Norwich Pharmacal Order requiring Applicant to produce confidential information without clients' consent-application under section 4 of Confidential Information Disclosure Law-meaning and practical effect of section 4 of Law-when section 4 application required

REASONS FOR DECISION

Introductory

1. By an Ex parte Originating Summons dated December 7, 2018, the Applicant sought an Order that:

“1. The Applicant is authorised to disclose the Documents specified in the Order of the Honourable Justice Kawaley dated 15 November 2018 issued in Cause No. FSD 213 of 2018 (IKJ) (the ‘NP ORDER’), to the Plaintiff named in the NP Order.”

2. The Attorney-General was served but elected not to appear at the hearing of the application.
3. I granted the Order sought, accepting the submissions of the Applicant that my decision in *Discover Investment Company-v-Vietnam Holding Asset Management Limited & Another* (unreported), Judgment dated November 5, 2018, did not clearly relieve the Applicant of having to seek this relief. In *Discover*, it was held that where a *Norwich Pharmacal* order was made, the defendant required to produce information could properly do so without (a) client consent, and (b) seeking an express direction under the Confidential Information Disclosure Law, (2016) (“CIDL”). However, in the earlier case, the order was made following a hearing in which the respondents had participated and the Court had expressly considered the CIDL position.
4. When could a defendant comply with a Court order requiring the production of confidential information without both client consent and a confirmatory Court direction under CIDL? Counsel invited the Court to give reasons for the Order granted in the present case with a view to clarifying the legal position, in order to assist practitioners in the future. These are the reasons for that decision. It is hoped that these reasons also furnish the clarification sought.

The NP Order

5. The NP Order was made on an ex parte, without notice basis in proceedings in which the Applicant was the Respondent. It substantively required the Applicant to produce copies of specified categories of documents and information (paragraph 6) and, where any of the documents were in the possession of third parties, furnish contact details of those third parties to the plaintiff’s attorneys (paragraph 7). The NP Order included the following paragraph which is relevant to the present application:

“3. The Defendant must not notify or inform any third party (including but not limited to any of the Companies referred to in paragraph 6(a) hereof, or any agent or person who might reasonably be supposed to be acting for or in concert with any of those entities including but not limited to (i) director; (ii) shareholder; (iii) beneficial owner; (iv) employee; (v) representative or agent; or (vi) any person or entity that was formerly one of the foregoing categories of persons or entities), of any of the following:



- (a) the existence or content of these proceedings;
- (b) the existence or content of this Order; and/or
- (c) any documents, material and/or evidence filed in or in connection with these proceedings by any party....

9. If the Defendant considers that disclosure of any of the Documents requires leave from the Court pursuant to the Confidential Information Disclosure Law 2016, ("**Confidential Information**" and "**CIDL**" respectively) the Defendant must within five working days of service of this Order notify the Plaintiff's attorneys which of the Documents contain(s) said Confidential Information (the "**Confidential Documents**")."

- 6. The NP Order was based on this Court's acceptance of the submission that a good arguable case of wrongdoing was made out in reliance upon not simply a "failure to pay the debt created by [an] Arbitral Award...but rather a series of positive actions deliberately taken with a view to frustrating enforcement": NP Order applicant's Skeleton Argument, page 15. The Order was also obtained at an ex parte, without notice hearing.

Factual basis of the application

- 7. The Applicant relied upon the First Affidavit of Marcus Parker, one of its directors. He explained that the Applicant provided registered office services to the two companies to which the NP Order related. He noted that no wrongdoing was asserted against the present Applicant. The reasons for the application were explained by the deponent in the following terms:

"12. I believe that disclosure of the Documents held by Genesis...would give rise to the possibility that Genesis is breaching a duty of confidence that it owes to each of the Companies.

*13. Clause 2(c) of the administration agreements which Genesis has with each of the Companies contains a confidentiality provision (the '**Confidentiality Provision**') requiring Genesis:*

'to keep confidential all documents, materials and other information relating to the Business of the Company and not to disclose any of the aforesaid without the prior consent of the Company unless it is necessary to protect the interests of the Administrator of the Company or pursuant to an order of any court or authority with jurisdiction over the Administrator of the Company.'

14. As a result of the 'gagging' provision...it is not possible for Genesis to seek the Companies' consent to provide disclosure of the Documents to the Plaintiff.

15. Further, notwithstanding the carve out in the Confidentiality Provision authorising compliance with a court order, Genesis is concerned that without a direction from this Honourable Court pursuant to section 4 of CIDL, it could be exposed to an action by the Companies for breach of confidence if it discloses



the Documents. Such an action would involve arguments about the scope and proper interpretation of the Confidentiality Provision. By contrast, a direction by this Honourable Court authorising disclosure of the Documents under section 4 of CIDL, before any such disclosure is made, would mean that Genesis could rely directly on the statutory defence contained in section 3(1) of CIDL and avoid the need for argument between Genesis and the Companies about the scope of the Confidentiality Provision.”

The Applicant’s submissions

8. Mr Salem firstly submitted that section 4(2) of CIDL, according to its terms, required the Applicant to seek a direction. He conceded that that the Confidentiality Provision contained in the contracts between the Applicant and its clients permitted the disclosure of confidential material, *inter alia*, to comply with a Court Order. However, it was argued in the Applicant’s Skeleton argument (at paragraph 9(b)):

“(b) the fact that the Applicant is permitted under the Confidentiality Provision to disclose Confidential Information to comply with a court order or to protect its interests does not provide a complete protection (or indeed answer) to the Applicant. The scope and interpretation of the Confidentiality Provision, and in particular whether it is contingent upon a requirement to notify the Companies of the fact of disclosure (which is not possible due to the ‘gagging provision’ in the NP Order) could be placed in issue by the Companies in any action for breach of confidence, which would entail costly litigation:

(i) Put in the language of CIDL, there would be an argument available to the Companies that they had not provided their:

(A) ‘consent, express or implied’ as envisaged by section 3(1)(b) of CIDL; or

(B) ‘express consent’ by section 4(2) of CIDL,

to the disclosure being made by the Applicant.

(ii) The potential inconsistency between these two provisions, which appears to provide the ability to provide disclosure in reliance on implied consent under section 3(1)(b) on the one hand, yet suggests an expectation under section 4(2) to make an application for directions in the absence of ‘express consent’ is another potential area of dispute in this regard.”

9. Next it was submitted that it did not appear that the defence under section 3(2) of CIDL, available “*where the recipient of confidential information discloses the information acting in good faith in the belief that the information constitutes evidence of, inter alia, wrongdoing*” (*Discover*, paragraph 84), would apply in the circumstances of the present case. This was because:

(a) the Applicant did not believe that the Confidential Information



constituted evidence of the wrongdoing upon which the NP Order was based;

- (b) the information sought was designed to assist in identifying the beneficial owner of the companies and assets against which enforcement steps could be taken, it not being contended by the NP Order applicant that the material sought related to suspected wrongdoing on the part of the Companies themselves; and
- (c) it was unclear whether *Discover* decided that whenever an NP Order was made, no need to apply for a direction under section 4(2) of CIDL would arise.

The relevant provisions of CIDL

10. The most directly relevant provision in CIDL is the section under which the present application was made. Section 4 provides:

“(1) In this section-

‘give in evidence’ means make a statement, produce a document by way of discovery, answer an interrogatory or testify during or for the purposes of any proceeding; and

‘proceeding’ means any court proceeding, civil or criminal, and includes a preliminary or interlocutory matter leading to or arising out of a proceeding.

- (2) *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.*
- (3) *An application for directions under subsection (2) shall be made to and be heard and determined by, a Judge of the Grand Court.*
- (4) *Notice of an application under subsection (3) shall be served on the Attorney-General and if the Judge so orders, [on] any person who is a party to the proceedings relating to the application being made.*
- (5) *The Attorney-General may appear as amicus curiae at the hearing of an application under this section and any party on whom notice has been served under subsection (4) is entitled to be heard with respect to the application, either in person or by an attorney-at-law representing the person.*
- (6) *Upon hearing an application under subsection (3), a Judge shall*



direct-

- (a) *that the evidence be given;*
 - (b) *that some or all of the evidence shall not be given; or*
 - (c) *that the evidence be given subject to conditions which the Judge may specify whereby the confidentiality of the information is safeguarded.*
- (7) *In order to safeguard the confidentiality of a document, statement, answer or testimony ordered to be given under subsection (6)(c), a Judge may order-*
- (a) *that the divulgence of the document, statement, answer or testimony be restricted to certain persons named by the Judge in the order;*
 - (b) *that evidence be taken in private in a manner specified by the Judge to ensure privacy; and*
 - (c) *that the reference to the name, address and description of any person be made by the assignment of alphabetical letters, numbers or symbols representing the name, address and description of the person, the key to which reference shall be provided to restricted persons named by the Judge.*
- (8) *A person receiving confidential information by operation of subsection (3) is as fully bound by the duty of confidence, as if the information had been disclosed to the person in confidence by the principal.*
- (9) *In considering what order to make under this section, a Judge shall have regard to –*
- (a) *whether the order would operate as a denial of the rights of any person in the enforcement of a claim;*
 - (b) *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;*
 - (c) *in any criminal case, the requirements of the interests of justice.”* “
[Emphasis added]

11. Section 4(2) by its terms provides that where a person intends to give confidential information in evidence without the consent of the person to whom the confidence is owed, an application “shall” be made for directions from the Court.

12. I decided in *Discover* that “shall” in section 4(2) is directory rather than mandatory through construing the interaction of section 4 with section 3, which delineates

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circumstances in which duties of confidence protected by the Law do not apply. Section 3 provides (so far as is relevant for present purposes):

“(1) *Where a person owes a duty of confidence, the disclosure by that person of confidential information-*

(a) in compliance with the directions of a court pursuant to section 4;

(b) in the normal course of business or with the consent, express or implied, of a principal;

...

(j) in accordance with, or pursuant to, a right or duty created by any other Law or Regulation,

shall not constitute a breach of the duty of confidence and shall not be actionable at the suit of any person.

(2) *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.”*

13. Section 3(1) (b) provides more expansive protection than the Applicant’s contract because it provides immunity from suit in the instance of implied as well as express consent of a “*principal*”. It is difficult to see how this sub-paragraph sheds any light on the mandatory or directory character of section 4(2) of the Law as the Applicant submitted. Section 3(2) potentially provides a defence whenever a *Norwich Pharmacal* order is made and a respondent is required to produce “*evidence of wrongdoing*”. Here, the Applicant’s counsel was right to draw a distinction between the facts of the present case and those in *Discover*. And section 3(1)(f) also provides a potential defence whenever a respondent is required to produce confidential information pursuant to, *inter alia*, an order made pursuant to a statutory power other than the statutes expressly mentioned in sub-paragraphs (d)-(i) of section 3(1), which I will briefly refer to below.
14. The Grand Court’s equitable jurisdiction to grant, *inter alia*, *Norwich Pharmacal* relief has the following statutory derivation found in the Grand Court Law:

“11. (1) *The Court shall be a superior court of record and, in addition to any jurisdiction heretofore exercised by the Court or conferred by this or any other law for the time being in force in the Islands, shall possess and exercise, subject to this and any other law, the like jurisdiction within the Islands which is vested in or capable of being exercised in England by-*



(a) Her Majesty's High Court of Justice; and

(b) the Divisional Courts of that Court,

as constituted by the Senior Courts Act, 1981, and any Act of the Parliament of the United Kingdom amending or replacing that Act.

(2) Without prejudice to subsection (1), the Court shall have and shall be deemed always to have had power to make binding declarations of right in any matter whether any consequential relief is or could be claimed or not.”

Discover Investment Company-v-Vietnam Holding Asset Management Limited & Another

The issues

15. In *Discover*, the application was made on an ex parte on notice basis. The position adopted by the respondents was described as follows:

“5. The Respondents’ position was not to positively oppose the application but rather to raise such principled objections as they could identify with a view to ensuring that they did not in substance consent to the making of an Order which ought not properly to be made. VNHAM, it appeared to me, had received some encouragement to adopt this stance as MW had apparently threatened legal action for breach of the confidentiality obligations in one or more of the contracts which Discover was seeking to obtain copies of. The contract sought from SAMC is also believed to be subject to similar confidentiality obligations governed by Swiss law. The principles governing the grant of Norwich Pharmacal relief being essentially common ground, issue was joined as to whether or not:

- (a) Discover had demonstrated that the Order sought was necessary in the requisite legal and factual sense;
- (b) assuming this Court possessed general jurisdictional competence to make the Order, the scope of the Order sought was sufficiently proportionate to justify exercising the jurisdiction on the facts of the present case; and
- (c) if an Order was granted, it should be on Discover’s undertaking not to use the information obtained in proceedings against the Respondents without further leave of the Court.”

16. However, what ended up being the most important question of legal principle arose in the following way:



“6. Issue was also joined on a fourth, important ancillary matter. VNHAM contended that it could not properly be required to produce the information sought without directions being given under the Confidential Information Disclosure Law 2016 (“CIDL”). Discover and SAMC contended that CIDL did not apply. This was a difficult point not directly addressed by previous authority which was dealt with by counsel in an economical way. Counsel understandably focussed their effort on a detailed analysis of the Norwich Pharmacal jurisdiction, and their submissions greatly assisted the Court.”

Findings in relation to CIDL

17. The crucial findings in relation to CIDL are captured by the following extracts from the Judgment:

“74. I find that no application for directions under section 4(2) of CIDL is obligatorily required in all the circumstances of the present case because:

- (a) Discover is entitled to compel the Respondents to produce the confidential information “in accordance with, or pursuant to a right or duty created by any other Law or Regulation” (section 3(1) (j)); and/or
- (b) this Court having ruled that the Respondents are obliged to produce the information sought by way of granting relief for suspected wrongdoing, they are entitled to produce the information “in good faith and in the reasonable belief that the information [is] substantially true and disclosed evidence of wrongdoing” (section 3(2)). In these circumstances they would have a statutory defence to any breach of confidence claim brought by their “principal”; and
- (c) the mandatory language of section 4(2) which suggests that directions must be sought in all cases where confidential information is to be deployed or obtained in legal proceedings must in the wider context of the Act be given merely directory effect...

...

80. Reading sections 3 and 4 in a purposive way designed to give consistency to the provisions read as a whole and applying a meaning which does not lead to absurd results, I find as follows. Section 4(2) of CIDL properly construed does not require in a mandatory sense that a party seeking to adduce confidential material, or a party being compelled to produce confidential material, to seek directions from this Court whenever this situation arises. The obligation to seek directions is only triggered in circumstances where such parties harbour doubts about their ability to adduce or produce the confidential evidence without breaching confidentiality obligations which appear to apply.



81. *The purpose of section 3 of the Law, developed in an incremental way over the years, is to avoid the absurd consequences which would flow from having to make a section 4 application whenever the need to deploy confidential information without the consent of the person to whom confidence is owed arises. 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) 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.”*

18. In summary, in circumstances where the respondents had actually appeared before the Court and both (a) tested the Court’s jurisdiction to make the *Norwich Pharmacal* Order and addressed their obligations under CIDL, I found that no application under section 4(2) of CIDL was required to enable them to comply with the order without their clients consent because they had a defence under section 3(1) (j) and 3(2) of CIDL. I construed section 4(2) as a non-mandatory provision which could be invoked whenever a party is required to produce confidential information without the consent of the owner of the confidential information considered it appropriate to seek the protection of directions from this Court.
19. The present case arose in a materially different context in that the Applicant (the respondent in the NP Order proceedings) had not participated in the proceeding which resulted in the NP Order which was, accordingly, granted without any express consideration of the CIDL position. The decision in *Discover* did not directly consider the position of a respondent who did not actively participate in the hearing or who was forbidden from notifying its client of the fact that the order had been made.

Findings: the Applicant was entitled to comply with the NP Order without client consent

20. The issue raised by the present application may initially be distilled into the following key question: was the Applicant required to comply with the NP Order? The short answer to this question is that unless the Applicant could persuade the Court that the Order ought not to have been made, of course the NP Order had to be complied with. To the extent that the Applicant had an express confidentiality agreement which provided that prior consent of the client for disclosure was not required for disclosure “pursuant to an order of any court or authority with jurisdiction over the Administrator of the Company”, this question was also crucial to the private law confidentiality position. The more generous implied consent statutory defence was not obviously available in circumstances where the client or principal had no knowledge of the proposed disclosure at all.
21. In my judgment it is clear from the provisions of CIDL which I consider to be central to the present analysis, that whenever a person is required to produce confidential material by a party validly invoking a “a right or duty created by any other Law or Regulation” (CIDL, section 3(1) (j)), the judicial or administrative/executive order may

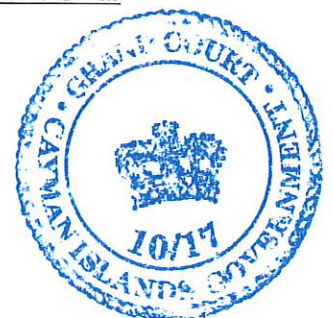


be complied with and no need to apply for directions under section 4(2) automatically arises. A person complying with a validly made *Norwich Pharmacal* order, made under the foundational jurisdiction of section 11 of the Grand Court Law, has the benefit of a statutory defence under section 3 of the Law. A “principal” seeking to establish that this defence was not available would surely have to establish not merely that discretionary grounds for refusing to grant or setting aside the order exist, but rather that no jurisdiction to make the relevant order in the applicable factual context existed.

22. The availability of statutory defences such as those created by section 3(1) in my judgment cannot depend upon considerations as ephemeral as whether or not on one view the information gathering power ought not to have been deployed by a judge or executive authority. Precisely how a litigant would establish that a section 3 defence was unavailable to a person complying with a judicial or executive order will obviously depend on the facts of each case. However it seems safe to assume that this Court will not lightly conclude that a judicial or executive order apparently validly made pursuant to a statutory provision was legally ineffective.
23. It is probably the case that judicial orders made by courts of unlimited jurisdiction generally enjoy a higher legal status than executive orders, but I express no view on whether this makes a difference in the CIDL context. The present application nonetheless concerns an order of this Court. As the English Court of Appeal has recently observed in *Antoine-v-Barclays Bank UK Plc and Chief Land Registrar* [2018] EWCA (Asplin LJ):

“47. It seems to me that in such circumstances, the Judge was right to conclude as she did at [116.5] of her judgment, that registration on the basis of a valid court order is "akin" to the position in relation to a voidable transaction. As Kitchin LJ held in NRAM v Evans, the fact that a voidable transaction is subsequently rescinded does not make the entry on the Register made before the rescission a mistake: see NRAM v Evans at [52], [53] and [59].

48. This should not be taken to equate the position in relation to a court order, which is valid on its face and is a vesting order, too closely with that of a voidable transaction. As the Privy Council pointed out in Isaacs v Robertson, the concepts of 'void' and 'voidable' belong to the realm of the law of contract and therefore, in the context of Land Registration are applicable when one is concerned with a registration based on the transaction itself. They are not apposite in relation to court orders. Court orders are either 'regular' and can only be overturned on appeal or 'irregular' and may be set aside by the court that made them upon application to that court. Even if a party is entitled to have an order set aside as of right, and it is 'void' in the sense that the court would have no alternative but to do so, it must be obeyed until it is set aside: Isaac v Robertson as followed in Hillgate House Ltd v Expert Clothing Service & Sale Ltd [1987] 1 EGLR 65 per Browne-Wilkinson VC at 66L.”[Emphasis added]



24. In the present case there was no need to rely upon the somewhat more complicated section 3(2) defence; it mattered not that the Applicant’s counsel was correct to harbour doubts as to whether the information sought in the present case “*disclosed evidence of wrongdoing*”. The *Norwich Pharmacal* jurisdiction is far broader than section 3(2) in that it is available where “*the person against whom the order is sought ... [is]... able or likely to be able to provide... information necessary to enable the ultimate wrongdoer to be sued* (Flaux J in *Ramilos Trading Limited-v-Buyanovsky* [2016] EWHC 3175, at paragraph 11). In my judgment, assuming of course that the NP Order was validly made, section 3(1) (j) clearly applied. That assumption of validity was legally justified because the NP Order was legally effective until it was set aside and no grounds were identified for even potentially setting it aside.
25. Accordingly, the fundamental obligation of a respondent served with a *Norwich Pharmacal* order, and any other statute-based order purporting to require them to disclose information protected by CIDL, is to ensure that on the face of the order (and the supporting materials which are made available to them), the order was properly made. The purpose of section 3, read in conjunction with section 4(2) given permissive rather than mandatory effect, is to facilitate compliance with other statutory information-gathering powers, not to undermine their efficacy. Court orders are, after all, presumed to be valid until set aside. As regards administrative or executive orders issued by public bodies or officials, there is a presumption of regularity in relation to official acts. It would, as I found in *Discover*, lead to absurd results if section 4(2) of CIDL were to be construed as imposing a mandatory obligation on a respondent to apply to court to vindicate his obligation to comply with an apparently valid judicial or executive order.
26. In my judgment this interpretative approach is consistent with the modern terms and effect of CIDL, which seeks to strike a balance between protecting confidential information while facilitating compliance with information-gathering powers conferred by other statutes. The statutes expressly mentioned in section 3(1) are the Criminal Justice (International Cooperation) Law (2015 Revision) (sub-paragraph (d)), the Mutual Assistance (United States) Law (2015 Revision) (sub-paragraph (e)), the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order, 1978 (sub-paragraph (f)), the Monetary Authority Law (2013 Revision) “*or regulatory laws*” (sub-paragraph (g)), the Proceeds of Crime Law (2014 Revision) and the Terrorism Law (2015 Revision) (sub-paragraph (h)) and the Anti-Corruption Law (2014 Revision) (sub-paragraph (i)).

Summary

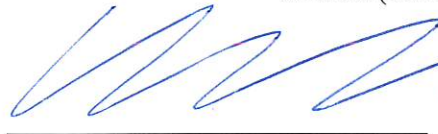
27. In summary, the statutory defences under section 3 will in most cases be available where a respondent is able to demonstrate that he complied with what appeared to be a lawful demand to produce confidential information, in cases where client consent cannot be obtained. The need to seek directions under section 4(2) should arise only in exceptional circumstances, even where consent for disclosure cannot be obtained. The most obvious examples are:

- (a) cases where on the face of the order or other demand for the production of protected material, it appears that the order ought not to have been



made;

- (b) cases where, having regard to the unusually sensitive nature of the relevant information, the respondent considers that special protective measures are required in relation to the way in which the information is deployed which the applicant is unwilling to agree; and/or
- (c) cases where the respondent has properly sought consent to produce the confidential information from the person to whom the duty of confidence is owed, and that person has either:
 - (i) threatened an action for breach of confidence,
 - (ii) raised doubts as to whether the respondent is legally obliged to comply with the production request, or
 - (iii) failed to respond at all, resulting in doubt as to whether or not the respondent can rely on the statutory defence of implied consent (CIDL, section 3(1)(b)).



HON IAN RC KAWALEY
JUDGE OF THE GRAND COURT

