

IN THE HIGH COURT OF BELIZE, A.D. 2023

CLAIM No. 726 of 2018

BETWEEN

CARENZO TRADING LIMITED

CLAIMANT/RESPONDENT

AND

CINSTEN INVESTMENTS LIMITED

DEFENDANT/APPLICANT

BEFORE The Honourable Madam Justice Patricia Farnese

Hearing Date: March 7, 2023

Appearances

Allister T. Jenkins, for the Claimant/Respondent

Angeline Welsh, KC and Jose M. Alpuche, for the Defendant/Applicant

APPLICATION TO AMEND DEFENCE AND VARY ORDER

[1] Cinsten Investments Limited (Cinsten) seeks to amend its defence on the grounds that there have been two significant developments in these proceedings. First, The London Court of International Arbitration (LCIA) issued an arbitration award on 7 June 2021 between Cinsten and Ergolens Enterprises Limited (Ergolens), the beneficial owner of Carensa Trading Limited (Carensa). Second, Cinsten wishes to now plead that the original loan agreement does not exist and that the 'second counterpart' of the alleged loan agreement is a backdated forgery and that the scanned version also bears forged signatures.

[2] Cinsten further requests that an order to appoint an expert to review the document disclosed as the loan agreement by Carensa be amended. The amendment would allow the loan agreement to be removed from Belize and inspected in the United States where the appointed expert has specialized equipment.

[3] Both applications are granted as requested. The release of an arbitration award in an arguably related case and the conclusion of a dispute over the document required to be disclosed as the loan agreement represent sufficient change in circumstances to justify the amendment. Notwithstanding the order appointing the expert was with the Parties' consent, I also find the request to amend the order appointing the expert is justified in the context of this dispute.

Issues

[4] The applications raise the following issues:

1. Has there been a sufficient change in circumstances or the discovery of new information since the defense was filed that would justify amending the defence?
2. Should the Consent Order be amended to allow the Loan Agreement to be inspected by Ms. Naso at her office in the United States of America?

Analysis

Has there been a sufficient change in circumstances or the discovery of new information since the defense was filed that would justify amending the defence?

[5] Carenso disagrees that there has been significant changes in circumstances to justify amending the defence after the case management conference. The arbitration award is subject to a confidentiality agreement, is under challenge in a foreign jurisdiction, has not been recognized in Belize, and involves a company that is not a party to this dispute. In addition, the arbitration award involves a dispute over a securities sale and purchase agreement. Carenso asserts that each of these facts establishes that the arbitration agreement will not assist the court with resolving the issues in the current dispute. The defence should not be amended to allow Cinsten to submit the arbitration agreement in these circumstances.

[6] Carenso further argues that there have been no change in circumstances to warrant an amendment to allow Cinsten to plead that Carenso's original copy of the loan agreement is a forgery because the original agreement does not exist. Both the Court of Appeal and the Supreme Court, as it then was, have made orders with respect to the disclosure of the "original loan agreement." Carenso argues that the amendment is an attempt to mischaracterize the agreement in order to disregard the previous conclusions and orders of the court on this issue.

[7] In reply, Cinsten cites Article 30.1 of the LCIA that permits disclosure in some circumstances including "to protect or pursue a legal right, or to enforce or challenge an award." This specific arbitration award has also been produced and relied upon in subsequent legal

proceedings by both Ergolens and Cinsten. Cinsten also explains that the award is necessary to establish that the transfer of USD \$4,865,000 was part of asset splitting facilitated by Mr. Ovcharenko who controls Ergolens and Carens. Cinsten further asserts that:

...the true basis for the sums said to have been transferred under the alleged Loan Agreement (subject of these proceedings) and the PSAs (subject of the Award) is the same; i.e. the November 2011 Minutes entered into between Ms. Sofiyenko and Mr. Ovcharenko personally. Thus, the relationships between Mr. Ovcharenko and Ms. Sofiyenko, and any findings in relation to that relationship, are central to the present case.

Cinsten argues that the overlap between the loan agreement and the arbitration agreement has been recognized by other courts and the LCIA Arbitrator

[8] After careful consideration of the Parties' written and oral submissions, I grant the Application to amend the defence as requested. CPR 20.1(3) outlines circumstances when the Court may permit amendments to the statement of case:

The court may not give permission to change a statement of case after the first case management conference unless the party wishing to make the change can satisfy the court that the change is necessary because of some change in the circumstances which became known after the date of that case management conference.

CPR Rule 20.2(2) also provides the Court with discretion to permit an amendment even where such amendment has the effect of adding or substituting a new claim:

The court may allow an amendment the effect of which will be to add or substitute a new claim but only if the new claim arises out of the same or substantially the same facts as a claim in respect of which the party wishing to change the statement of case has already claimed a remedy in the proceedings.

The discretion must be exercised in a manner that ensures overall fairness to the Parties. The purpose of requiring the Court's permission after case management recognizes that fairness dictates that Parties know the case to be met as they prepare for trial. Thus, Cinsten would not be permitted to amend if the content of the proposed amendments could have been included in the original defence or the request for amendment has come after unreasonable delay.

[9] The application to amend is an interlocutory application. The Court is not required, nor would it be a just use of the court resources, to engage in a mini-trial to determine whether there has been a material change in the circumstances before deciding the application. I am satisfied that the arbitration award came after the case management conference. Cinsten has presented an

arguable case as to its relevance although the arbitration agreement's ultimate relevance will be determined after trial. I also find no violation of Article 30.1 of the LCIA through the agreement's disclosure in this process. The disclosure is necessary to pursue a legal right.

[10] Likewise, what document would ultimately be disclosed and relied upon by Carensó as the loan agreement could not have been known until Shoman J's ruling following the Court of Appeal's decision. Cinsten had no reason to contemplate a ground of forgery until that ruling. I find that Cinsten acted without delay, subsequent to that ruling, in applying to amend its defense.

[11] I am also satisfied that both circumstances arise out of the same or substantially the same facts and relate to the dispute at hand as required by Rule 20.2(2). Any prejudice to Carensó from the amendment can be mitigated by allowing Carensó to file an amended reply. The application has come at the beginning of the case management process and is not otherwise ready for trial.

Should the Consent Order be amended to allow the Loan Agreement to be inspected by Ms. Naso at her office in the United States of America?

[12] On 11 December 2019, Griffith J ordered that Ms. Jennifer Naso be appointed as an expert to examine and determine the authenticity of signatures on a loan agreement purported to have been signed between the Parties (the Consent Order). The Consent Order was made subsequent to agreement by the Parties. The examination was to take place at the offices of the counsel for Cinsten. Ms. Naso has requested that she be allowed to review the document at her office in Larchmont, New York, where she has two pieces of specialized equipment she claims will aid in her examination. Ms. Naso believes a video spectral comparator, which can visually remove the stamp that was placed over top of the stamps, and an electrostatic detection device, which analyzes indentations, would aid in her examination. Neither of these pieces of equipment are available in Belize and her investigations reveal that it would be both costly and practically difficult to temporarily import the equipment into Belize.

[13] Carensó opposes the application on the grounds that the court has no authority to vary Griffith J's order because it was a Consent Order. Consent Orders may only be varied on the basis of fraud, mistake or misrepresentation. The Consent Order also specified that any changes be made by 17 March 2020. Ms. Naso was aware of the challenges she may face in bringing the equipment into Belize on 18 December 2019. Carensó further notes that while bringing the equipment to Belize may be costly, it is not an impossibility. Carensó also expresses concerns about the possibility of the loan agreement's loss during transit.

[14] In response, Cinsten argues that Carensó has provided no evidence to support its claim that the loan agreement cannot be securely transported. Ms. Naso swears in an affidavit that the

loan agreement's safety can be assured by having it personally transported in a locked case to and from New York if transport by courier is not acceptable. She also explains that if she brings her equipment into Belize and it is held in customs for any length of time or is damaged, she would be prevented from earning a living as she would lack the tools she requires. The cost of replacing her equipment is US\$40,000 and the video spectral comparator, in particular, is quite fragile. Cinsten further disputes that I have the jurisdiction to vary the consent order.

[15] Carenso further argues that there has been unreasonable delay in making the application to amend. The arbitration award is dated 9 June 2021 and Carenso disclosed its list of documents on 29 January 2020. The application to amend the defence is dated 25 November 2022. In reply, Cinsten reminds the Court that the status of the "second counterpart" of the loan agreement was the subject of an appeal and all proceedings were stayed until the Court of Appeal issued its judgment on 30 August 2022.

[16] As a general rule, I find this Court ought not to revisit a previous order unless there has been a material change in circumstances or evidence that the court was, innocently or purposefully, misled as to the correct facts before it.¹ When deciding whether to vary a consent order the Court must look at the specific context of the case and evaluate the impact of the proposed variations.²

[17] Carenso urges the Court to treat the consent order similar to a contract concluded after negotiations between the parties and be hesitant to vary the terms. Where there is evidence that the consent order reflects "a mere order of the court to which the parties agreed or did not object," the Court has more latitude to intervene.³ The Court can vary a consent order "to correct clerical errors, clarify terms of the judgment or facilitate the working out of the order."⁴ The Court's intervention to vary a consent order is also justified where the consent order was obtained through "fraud, misrepresentation, nondisclosure of material facts, and other such grounds upon which an agreement may be invalidated."⁵ Even where the consent order contains language that either party is at liberty to apply to the Court for further directions, the Court is not at liberty to vary the terms of the agreement where the consent order reflects a negotiated settlement between the Parties.⁶

[18] Cinsten argues that Parties cannot oust the Court's discretion found in CPR Rule 11 to vary orders. The Court's authority to vary a consent order is no longer dependent on a finding

¹ *Collier v. Williams* [2006] EWCA Civ 20, adopted with approval in Belize in *IDB Corporate Retreat Club Ltd. v. Green Light Equity Partners LLC.*, S.C. Claim No. 645 of 2011.

² *Causwell v. Clacken* Civ. Appeal No. 129/2002 (Jamaica) at 18 [*Causwell*].

³ *Little Belize Corn Mill Co. Limited v. Horizon Distributors Ltd.* [2017] JMCC Comm 13, at para 48 [*Little Belize*].

⁴ *Little Belize* at para 47.

⁵ *Little Belize*, at para 50.

⁶ *Causwell* at 18.

that the consent order is akin to a real contract or a finding that unusual circumstances exist.⁷ The introduction of the overriding objective into the *CPR* now places the necessity to do justice at the centre of the court's inherent jurisdiction to manage cases.⁸ While Cinsten agrees that the Court must consider the context wherein the agreement was reached that led to the consent order, the weight given to agreement depends on the subject of the agreement. More weight is given where the consent order reflects final settlement proceedings or the compromise of a substantive dispute. Less weight should be given where the consent order relates to a procedural accommodation of a case management directive.⁹ Cinsten urges the Court to consider the impact on its claim if Ms. Naso cannot thoroughly examine the loan agreement.

[19] I do not find that the approaches presented by the Parties are necessarily mutually exclusive. The context necessarily requires me to consider the nature of the agreement of the Parties that is reflected in the Consent Order and the timing of the application. The Court must act with caution when disturbing a negotiated agreement between the Parties especially where that agreement reflects final settlement of the proceedings or the compromise of a substantive dispute. The Court also ought to resist amendments that disturb a consent order where there is evidence that the subject of the amendment either was or would have been reasonable to have been contemplated by the Parties during the negotiations of the consent order. In this case, the Consent Order specifies that the timing and location of Ms. Naso's review of the loan agreement. It cannot be argued that the Parties did not contemplate the subject of the amendment.

[20] Nonetheless, I find the context in this case justifies the Court allowing the amendment in this case. The amendment reflects Ms. Naso's concerns that she requires specialized equipment to complete the report the Court has asked her to provide. The *CPR* clearly outlines that the expert's overall duty is to assist the Court with justly resolving the proceedings:

32.2 Expert evidence must be restricted to that which is reasonably required to resolve the proceedings justly.

32.3 (1) It is the duty of an expert witness to help the court impartially on the matters relevant to his expertise. (2) This duty overrides any obligations to the person by whom he is instructed or paid.

While it is appropriate for the Parties to negotiate the scope of an expert's report (i.e. the question the expert is asked to address), allowing Parties to dictate the methodology and tools used to engage in the expert's preparation of that report places an expert's independence and impartiality at risk.

⁷ *Pannone LLP v. Aardvark Digital Ltd* [2011] EWCA Civ 803.

⁸ *Safin v. Estate of Dr. Said Ahmend Said Badrig* at para 61

⁹ *Pannone* at para 33.

[21] Ms. Naso has stated to the court that she requires specialized equipment to provide her opinion on the authenticity of the signatures on the loan agreement. Her affidavit in support of the application to amend the Consent Order clearly outlines how the equipment will support her analysis and her explanation for why the review must occur in the United States is reasonable. While Carensop opposes the amendment, they have not done so on the basis that the equipment cannot do what Ms. Naso states that it will or that the information to be gathered is not relevant to the question Ms. Naso has been asked.

[22] I also find that the Court is likely to benefit from the information made available by the use of this equipment. The forensic analysis of documents to determine their authenticity is not an exact science. As a result, there is a reasonable possibility that the two experts in this case will reach different conclusions about the loan agreement's authenticity. The Court will then be placed in a position to prefer one opinion over the other. The additional information gathered from the analysis with this specialized equipment may assist the Court with making findings about the loan agreement's authenticity – a central factual determination in this case.

[23] The Parties' pleadings and submissions demonstrate a profound distrust between the Parties. I am also mindful that the loan agreement carries significant evidentiary importance in this matter. Carensop's objection to the Consent Order's amendment out of concern for the loan agreement's safekeeping is noted by the Court. The Court will oversee the transport of the loan agreement to Ms. Naso's office and its return to Belize.

Disposition

[24] It is hereby ordered that:

1. The application to amend Cinsten's defence is granted as requested.
2. The Consent Order of Griffith J dated 11 December 2019 is amended as follows:
 - a. Paragraph (2) is substituted by and now reads as follows:
 - i. (2) That Jennifer Naso be and is hereby appointed as the Defendant's expert to assist the Court in determining whether documents disclosed by the Claimant pursuant to paragraph (1) of this Order by List of Documents dated 29th January 2020 (the "Documents") are authentic by examining the signature of the party or parties appearing thereon and producing her expert opinion in relation to its authenticity.
 - b. Paragraph (3) is substituted by and now reads as follows:

- i. (3) That the Defendant give two weeks' notice prior to the specific date on which it intends to attend, inspect and examine the Documents.
- c. Paragraph (4) is substituted by and now reads as follows:
 - i. (4) That the inspection and examination of the Documents shall take place at the offices of Ms. Naso at Riley Welch LaPorte & Associates at 21 Mohegan Road, Larchmont, New York, 10538, USA between the 1st day of July, 2023 and the 31st day of August, 2023, inclusive, and that the Defendant will arrange that the Documents shall be personally transported to Ms. Naso's offices and returned to the Claimant's custody by Ms. Shadae Westby, Marshall to the High Court Chambers of Madam Justice Patricia Farnese. The Defendant will arrange the required air travel and ground transportation, suitable accommodations, and sufficient expense per diem for Ms. Westby.

3. Costs shall be in the cause.

Dated 12 June 2023



Patricia Farnese
Justice of the High Court