IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE OF GUYANA

CONSTITUTIONAL AND ADMINISTRATIVE DIVISION

PROCEEDING FOR JUDICIAL REVIEW

2022-HC-DEM-SOC-342

BETWEEN:

POLLARDS ET FILLES (GUYANA) INC.

Claimant

and

THE GUYANA SECURITIES COUNCIL

Defendant

Mr. T. Housty for claimant.

Mr. J. Vasconcellos and Mr. M. Jagnanan for defendant.

1. The claimant challenges a letter dated August 25, 2022 (Aug 25 letter) written by the defendant in which the claimant contends that the defendant misstated the law in s 22 (2)(bA) of the Anti-Money Laundering and Countering the Financing of Terrorism Act (AML Act) Chapter 10:11. As a consequence, the claimant seeks the following declarations:
    a. That the statement in the said correspondence is (i) not correct in that the statement (ii) is an error of law on the face of the record, (iii) is irregular and (iv) an improper exercise of discretion
    b. That as a consequence of this erroneous interpretation of s 22 (2)(bA), the claimant seeks a declaration that the request for copies of documents relating to clients of the claimant pursuant thereto is irrational, unreasonable, irregular, an improper exercise of discretion, disproportionate, and an error of law on the face of the record, such as to make the request null and void.
2. In addition, the claimant seeks an order of certiorari quashing the defendant's decision as contained in the letter dated August 25, 2022 to request the said documentation. And as a further consequence, seeks an order of prohibition to prevent the defendant from acting on the documents provided by the claimant on August 31, 2022 in response to the August 25 letter.
3. The claimant also challenges the content of a letter dated September 13, 2022 (September 13 letter) requesting the claimant to produce complete files and all records of its clients and seeks a declaration that the issuance of this letter is irrational, unreasonable, irregular, an improper exercise of discretion, and disproportionate.

4. As a consequence, a further declaration is sought that the defendant has breached ss 15 and 16 of the Jud Rev Act when it failed to give reasons for the September 13 letter despite a request by the claimant for such. Consequential orders of certiorari and prohibition regarding quashing the request and prohibiting the defendant from acting on the said request are sought.
5. The claimant also challenges a letter dated November 9, 2022 (November 9 letter) regarding a request for client information as also being irrational, unreasonable, irregular, an improper exercise of discretion, and disproportionate. Consequential orders of certiorari and prohibition are also sought.
6. The defendant counterclaims for a declaration that the claimant is a reporting entity but this was not denied by the claimant and there is nothing in dispute in this regard. A declaration was also sought that as a reporting entity it unlawfully refused the defendant's personnel, servants or agents entry to its premises. The defendant seeks an order that the claimant produce the documents requested by the letters sent within 12 hours of the grant of the order of court if there is a finding in its favour.
7. In reply, in the main the claimant contests the defendant's requirement of the information sought stating that it is outside the scope of customer due diligence. It is urged that the claimant instituted these proceedings to determine the scope and powers of the defendant.
8. Affidavits of documents exhibiting the documents relied on by the parties were filed. Witness statements were also filed on behalf of the parties.
9. The witness statement on behalf of the defendant was sworn to by Ms. Tevera Franklin, its legal counsel/corporate secretary, who outlined the statutory framework under which the defendant operates. She also stated that based on the site visit, documents were requested. It was found that the documentation provided was deficient and hence follow up requests were made which requests have not been complied with.
10. On behalf of the claimants, Mr. David Pollard swore to the affidavit of documents while Ms. Christel Cummings, an officer of the claimant, deposed to the affidavit to which the documents were exhibited. Mr. David Pollard swore to the witness statement. Mr. Pollard gave evidence about the operations of the claimant and the services it provides. I do not consider that this is relevant to the issue to be determined which is whether the defendant acted within the parameters of s 22 of the AML Act.
11. It was agreed that this was a case that required an interpretation of the AML Act and that there was no need for the cross examination of witnesses. Indeed, the Statement of Claim read like an unsworn affidavit. It was however not struck out on this basis although it is considered that as such the claim would have been better filed as a Fixed Date Application.

Statutory provisions

12. Section 22 (2) (bA) of the AML Act as is relevant to this case states:

"(2) In accordance with this Act, the supervisory authority shall -

(bA) in order to secure compliance with the requirements under this Act for monitoring purposes, the supervisory authority ***may*** *take any of the following actions –*

(a) enter into premises of a reporting entity during ordinary working hours in order to –

i. inspect or take documents or make copies or extracts of information from such documents;

ii. inspect the premises; and

iii. observe the manner in which certain functions are undertaken; and

(bB) request and be given information relevant to money laundering and terrorist financing matters from its reporting entities. *"*

Relevant facts gleaned from the pleadings, witness statements and the statutory provisions

13. The claimant is a licensed and registered investment advisor that is registered with the defendant. For the purposes of the AML Act, the claimant is a reporting entity. The claimant has not denied this and therefore there is no need for a declaration to this effect as sought by the defendant in its counterclaim.
14. The defendant is a body corporate established by s 4 of the Securities Industry Act, No. 21 of 1998 (SIA) and is a supervisory authority pursuant to s 22 of the AML Act. As supervisory authority, it has an oversight and supervisory role over reporting entities for compliance with ss 15, 16, 18, 19 and 20 of the AML Act. Therefore, it has supervisory authority over the claimant as a reporting entity.
15. The engagement between the parties that ultimately led to the correspondence under challenge began in January 2022 in relation to compliance with the AML framework. Correspondence was exchanged and a site visit occurred on August 15, 2022. At the conclusion of this meeting, the defendant requested the claimant's client files, operating manual, AML manual and internal audit guidelines. The latter three were provided, but the claimant sought clarification regarding the relevant laws as the source of the defendant's request for full copies of transactions for each of its client. It is in this context that the defendant sent the August 25 letter about which there is complaint. In response to this letter, copies of client information were provided to the defendant on August 31, 2022. The claimant is nevertheless challenging this request as having no legal basis and therefore seeks an order that the defendant cannot act on the information provided.
16. The major complaint in relation to the August 25 letter as outlined in para 26 of the SOC is that the defendant, in referring to s 22 (2) (bA), stated in it as follows:

"In accordance with this Act, the supervisory authority **shall** –

(a) *enter into the business premises of a reporting entity during ordinary working hours in order to –*

i. Inspect or take documents or make copies or extracts of information from such documents

ii. Inspect premises; and

iii. observe the manner in which certain functions are undertaken; and

(b) require any person on the premises to provide an explanation or any such information." (Emphasis mine)

In this regard, requests were made for specific documentation.

17. The use of the word 'shall' in this August 25 letter is therefore the source of the claimant's concerns that led to this litigation.
18. Further, it is the contention of the claimant in para 32 of its SOC that "the defendant knew or ought to have known that the wording "... information relevant to money laundering and terrorist financing matters ..." in para (bB) clearly limits the scope of the documentation that the defendant can request and that transaction documentation is not part of the KYC ['know your customer'] and BO [beneficial ownership] information required for the purpose of the law." As such it is argued that s 22(2)(bA) is limited by the s 22(2)bB) as regards the information that can be sought.
19. The defendant subsequently sent a letter dated November 9, 2022 which reiterated its position as contained in the August 25 letter, hence the claimant's challenge to this November letter.
20. The defendant, as a supervisory authority, conducts examination of reporting entities such as the claimant. Pursuant to its letter of June 9, 2022, the first on-site visit was conducted where there were discussions on a range of compliance matters. Flowing from this visit, two issues arose. Firstly, it was found that there was a change in the organizational structure of the claimant. Secondly, a customer was found to be a politically exposed person as defined in the AML Act which required the claimant to conduct enhanced due diligence of which it was determined that no evidence had been produced by the claimant. Thus, a request for complete files for the customer was made which the claimant undertook to comply with.
21. The defendant relies on a June 9, 2022 letter which commenced the process of requests and contends that the August 25 letter was merely a follow up to this letter and the site visit of August 15, 2022. It is further advanced that the request for customer files was good in law, reasonable, valid and within the meaning of the AML Act.
22. The claimant contends that s 22(2)(bA) provides that the defendant 'may' act while its letter of August 25 to the claimant said that it 'shall' act.
23. The claimant states that the files are confidential and protected by the claimant's investor confidentiality arrangements. In addition, the claimant claims that providing such documentation is outside the scope of the AML Act.
24. The position of the defendant in its correspondence in reply to the concerns raised by the claimant, which position it has maintained in these proceedings is that s 22 (2)(aA)(aB) permit it to make the request it did following the site visit. Further, it is submitted that the

defendant had not made any decision in relation to the claimant, moreso one that could be considered to be adverse. As such, it sought clarification from the claimant in this regard.

25. There was much by way of correspondence between the parties, each seeking to rely on its position regarding the requests made by the defendant. Then on October 21, 2022, with less than 30 minutes notice, the defendant indicated that it would conduct a site visit. The defendant was refused entry to the claimant's premises stating that it was exercising its rights pursuant to art 143(1) of the Constitution of Guyana which prohibits arbitrary search and entry.
26. The claimant has not challenged the statutory provision in the AML Act which permits the defendant to enter premises. None of the reliefs sought relies on a breach of art 143. In any event, it is noted that art 143 permits such search and entry in the interests of public order. I construe public order to include operations under criminal and or regulatory provisions of laws.
27. The defendant submits that the claimant is asking the court to rely on one sentence in a letter without acknowledging the full context. Further, it is contended that the phrase in s 22(bB) 'information relevant to money laundering and terrorist financing matters' does not limit the scope of the defendant's authority in relation to requests for information that could be made pursuant to customer due diligence and the record keeping obligations of regarding clients and all transactions pursuant to s 16 of the AML Act. It was contended that s 22 (2)(bA) does not fetter the exercise of discretion but sets out the parameters of the discretion that is to be exercised. Section 22 (2) as amended includes the word shall. As such, the defendant did not cause the claimant to act to its detriment.
28. The defendant further pleaded that the Securities Industry Act and AML Act override the confidentiality concerns that the claimant has raised. It was also stated that the request for information is not a decision. The visit in relation to which the defendant was refused entry was during working hours. The AML Act does not provide for notice of a visit to be given. In this instance, the defendant decided to visit in light of the claimant's failure to produce the documentation and information requested.

RULING

29. Having perused the legislation and the relevant documents which have been produced, moreso the challenged documents, I do not consider that the claim has any merit. The AML Act clearly states that the defendant as a supervisory authority must examine and supervise a reporting entity. This is evidenced by the words that the supervisory authority "shall examine and supervise the reporting entity and regulate and oversee effective compliance with the obligations set out in sections 15, 16, 18, 19 and 20 and any other preventive measures in relation to combating money laundering and terrorist financing" in s 22 (2)(a). In consonance with this mandatory obligation to examine and supervise a reporting entity, it may engage in such pursuant to the list of actions it may take as outlined in s 22 (2)(bA) and (bB).
30. I do not see that the use of the word 'shall' is cause for the alarm as advanced by the claimant. The claimant has omitted to focus on the chapeau to subsection (2) which states "In accordance with this Act, the supervisory authority shall". Therefore, there is

mandatory language in the section. The language of the subsection utilizes 'may' in order to convey that the defendant has the option of taking any of the listed actions. If it decides to take any of the actions, then in that sense it shall do it. The legislation does not then require the agreement of the entity to be inspected, in this case the claimant, with any of the actions the defendant decides to take pursuant to s 22 (2)(bA).

31. I do not see that paraphrasing the section rather than quoting it verbatim, works to the disadvantage of the claimant. If the sub-section had been spelt out verbatim, it would not have precluded the defendant from acting or making the request as contained in the August 25 letter. I agree with the defendant that the August 25 letter does not convey a decision, finding or ruling having been made by it such as to require reasons. The August 25 letter simply requested information.
32. And as such, I do not consider that the choice of words in the letter would have caused the claimant to act to its detriment. Thus, the claimant would have been duty bound to comply with the August 25 request which it did for the most part on August 31.
33. I accept the submission on behalf of the defendants that the letters sent on August 25, with a follow up on September 13 and Nov 9, 2022 are not decisions nor did they contain decisions. They were simply requests for information. As regards the September 13 letter which the claimant contends that reasons should have been given and that these were not forthcoming, since it did not contain a decision, there is no necessity to provide reasons. In any event, the AML framework allows for requests for information. There is no limitation provided regarding such requests. It may seem onerous but the legislation has no restrictions. It is the claimant who is trying to restrict the scope of the provisions.
34. The law permits entry by a supervisory authority. There is no limitation on this right of entry. There is nothing in the AML Act that requires the permission of the court for an entry to be made. Thus, entry by a supervisory authority cannot be considered disproportionate. While the claimant apparently invoked art 143 of the Constitution as a reason for the refusal to allow the defendant's officers and agents to enter its premises, as noted earlier, no relief based on the Constitution is sought. The Jamaican case, **Attorney-General v Jamaican Bar Association, General Legal Council v Jamaican Bar Association [2023] UKPC ; 102 WIR 475; [2023] 3 LRC 459**[1], cited for the claimant, can be distinguished, since that case reveals that the GLC would not have had the statutory powers of search and seizure pursuant to the Proceeds of Crime Act, 2007 as amended in 2013, without the consent of the lawyer of pursuant to a warrant or court order. Here the defendant has the necessary statutory authority to enter premises for the purposes of inspection etc.
35. And for the avoidance of doubt, the claimant has produced no evidence of forced entry or entry without permission by the defendant. It cannot be said that an indication by letter dated Ocotber 21, 2022 to enter 30 minutes before arrival is forced entry. In any event, there is no claim for relief in this regard.
36. On the issue of confidentiality, the AML Act does not provide for such as regards the operations of the claimant. The claimant does not fall within the provisions of s 18 (12)

[1] See paras 69 – 74 of the UKPC Report

and (13) of the AML Act such that its communications with its clients and therefore information is privileged or confidential. Indeed, the reporting obligations of a reporting entity mean that confidentiality is at a minimum.

37. Importantly, by permitting a supervisory authority the power to enter and take documents as well as request information, the AML Act perforce permits the defendant wide latitude in seeking information for the purpose of money laundering and terrorist financing matters. The claimant has not explained exactly what it means by the submission in para 34 that the defendant's "request is wide in scope and beyond the discretion conferred under section 22(2)(bB)", and why it considers that the request for information is "rather sought to exercise its statutory powers to conduct a fishing exercise outside the remit of the intent of the legislation." Merely stating that the "request for complete files is too wide in scope and falls outside the purposes of the powers intended by section 22 (2)(bB)" is vague. Therefore, the claimant has not explained what fetter s 22 (2)(bB) provides for. In fact, the requirement for the claimant to keep detailed information and records on its clients cannot be for cosmetic purposes. It has to be for a reason – that is for production if required by a supervising authority.
38. I note the submissions on behalf of the claimant at para 16 which state that there was a failure to take into consideration the human rights implications of its decisions. It is unclear whose human rights the claimant is seeking to protect. It certainly cannot be its human rights. And why would this be a consideration in the decision making of the defendant as a supervisory authority pursuant to the AML Act. If the claimant is so aggrieved by the provisions then it may seek to challenge the Act. There is nothing in the actions of the defendant that speak to a detriment to or anything that is unfavourable to the claimant in anyway.
39. In sum, the statutory framework of the AML Act, even if unpalatable to the claimant, permits the defendant to act as it did and to seek the information requested. Thus, there can be no issue of it having acted irrationally or unreasonably and thereby unlawfully. The claimant in my view has taken a rather simple interpretation issue and made it into a huge one when there was no need to do so. Thus, the submissions on proportionality are not relevant or necessary. The question is – what does s 22 mean and whether the defendant acted within the four bounds of the AML Act. The defendant has not acted outside the boundaries of s 22. The claimant has totally misconstrued s 22 in focusing on a portion of it and not the whole provision which includes the chapeau. Thus, the claim is dismissed.
40. On the counterclaim, as stated earlier, there is no dispute that the defendant is a reporting entity and there is no need for a declaration in this regard. However, the claimant, by its own admission, refused the defendant entry of its premises on specious grounds. Because it is a reporting entity, and pursuant to the AML Act it cannot refuse entry of the supervising authority. But, I do not consider that the request for the production of the information within 12 hours of the grant of the order to be reasonable.
41. The following orders on the counterclaim are hereby made:
    a. It is hereby declared that the defendant, as a supervisory authority over the claimant as a reporting entity is permitted to enter the claimant's premises pursuant to the

provisions of the Anti-Money Laundering and Countering the Financing of Terrorism Act No. 13 of 2009 as amended.

b. It is hereby further ordered that the claimant provides the information requested by the defendant in the letters dated August 25, September 13, September 30, October 12, October 14, October 21, November 4 and November 9, 2022 on or before November 8, 2024.

42. The claimant sought prescribed costs. This regime provides for a scale of costs and a percentage of such to be calculated depending on the stage of the case. Costs should be awarded against the claimant for the dismissal of its claim as well as to the defendant on its counterclaim.

43. Schedule B of the CPR regarding costs states that where there is no value of the claim, the value should be deemed to be $10,000,000. Since there is no value in this case, the value as set by the Rules has to be applied. This translates to $1,000,000 in costs. This was an SOC with witness statements, though the parties agreed that there was no need for cross-examination as it was a case for the interpretation of a statute. Thus, there was no full trial of the case. I therefore consider that the prescribed costs should be calculated as at a pre-trial review stage which would be 80% of the prescribed costs which would be $800,000, which in the circumstances I consider the costs award to be reasonable. However, I would reduce the costs award to $500,000 based on submissions of counsel. The orders on the counterclaim flowed from the dismissal of the claimant's case and therefore I only award $100,000 costs for their success on the counterclaim. Therefore, the total costs awarded is $600,000.

44. The court was required to take up very precious judicial time to review a number of provisions in the many amendments to the AML Act and consider the submissions of counsel in order to determine what in the end was a matter that really should not have engaged the intervention of the court.

45. Judgment on the claim and counterclaim accordingly with total costs to be paid by the claimant to the defendant in the sum of $600,000 which costs are to be paid on or before December 4, 2024.

Roxane George
Chief Justice (ag)
November 4, 2024