DISCLOSURE – Secondary disclosure by the Regulator – Financial support direction – Allegation of inconsistent practice by Regulator – Whether documents relating to clearances sought by other companies would assist applicant's case as disclosed in its reply – No – Whether such documents constituted restricted information – Yes – Whether Regulator can assert privilege in respect of communications with pension fund trustees – Yes – Pensions Act 2004 s.82 – PRT Rules 2005.690 r 7(1) – Application dismissed

THE PENSIONS REGULATOR TRIBUNAL

SEA CONTAINERS LTD (a company registered under the laws of Bermuda) **First Applicant**

- and –

THE TRUSTEES OF THE SEA CONTAINERS 1983 PENSION SCHEME **Second Applicant**

- and -

THE TRUSTEES OF THE SEA CONTAINERS 1990 PENSION SCHEME **Third Applicant**

- and -

THE PENSIONS REGULATOR **Respondent**

Tribunal: SIR STEPHEN OLIVER QC (Chairman)

Sitting in public in London on 17 December 2007

Ben Jaffey, counsel, instructed by Kirkland & Ellis International LLP, for the First Applicant

Raquel Agnello, counsel, instructed by the solicitor to the Pensions Regulator, for the Respondent

DECISION

1. This application by Sea Containers Ltd ("SCL"), made under rule 10(g) of the Pensions Regulator, Tribunal Rules 2005 ("the Rules") is for disclosure by the Regulator of files and documents falling into certain specified categories.

Background

2. SCL is a company registered in Bermuda. It is the ultimate parent of Sea Containers Services Ltd ("SCSL"), a UK registered company. SCSL is the employer in relation to the two pension schemes that are the other Applicants in these proceedings. SCL is the person to whom a direction in accordance with section 43 of the Pensions Act 2004, a Financial Support Direction ("FSD") has been issued. (All further statutory references in this Decision are to the Pensions Act 2004 unless otherwise stated.)

3. SCL's main business operation relates to marine containers leasing. SCSL was set up as a service company for the SCL group and in particular for SCL. SCSL employed many of the group's key central management and its offices were based in London.

4. On 7 June 2006 the Regulator was contacted by solicitors acting on behalf of the Trustees of the Sea Containers 1983 Pension Scheme. On 13 July 2006 the Regulator asked SCL to provide assistance to the Regulator in carrying out its regulatory function and in particular to provide financial information. A meeting followed on 24 July 2006 at which SCL outlined proposals for financial structuring of the group. The financial information requested had not by then been provided. Further meetings ensued as between the Trustees and SCL. No application for clearance had been made and no proposal for clearance had been presented. By letter dated 29 September 2006 the Regulator set out its concerns and informed SCL that its view was that SCL may well be the subject of a FSD under section 43. On 15 October 2006, SCL and SCSL filed for "Chapter 11 protection" in the United States. No application for clearance and/or proposals were made and on 19 October 2006, Warning Notices were sent to SCL.

5. A hearing of the Determinations Panel took place in June 2007. The Determinations Panel made its Determination to issue FSDs on 15 June 2007. In accordance with section 96(c) and rule 4(1) of the Rules, a reference was made by SCL to this Tribunal. The Regulator has filed its Statement of Case and SCL has filed its Reply in accordance with the Tribunal Rules. There has also been the response of the Regulator and responses from both sets of Trustees of the Pension Schemes to the Reply of SCL.

SCL's requests for disclosure of documents

6. SCL's request for disclosure of documents is contained in letters of 17 and 28 October. The documents for which disclosure is requested can be summarised as follows:

(i) Warning notices, determination notices, applications for clearance and documents which record decisions to issue clearances and the reasons for such decisions in respect of pensions schemes which had entered the PPS assessment period within twelve months following clearance, which were in the PPS assessment period when the application for clearance was made or which did not enter the PPS assessment period but after the clearance application the principal employer changed. This request is stated to include but not to be limited to the cases of Kvaerner, Polestar, Turner & Newell, Dana, Heath Lampert, Pittards and Courts.

(ii) Documents recording decisions and the reasoning for decisions not to investigate or further investigate the issuance of contribution notices or FSDs or not to issue contribution notices or FSDs.

(iii) Documents relied upon by the Regulator in making its decision to issue the warning notice or seeking to issue the present FSD, including documents relating or referring to SCL which were used or referred to by the Regulator in making its decision: or documents recording meetings or discussions with parties who imparted information to the Regulator other than in documentary form.

(iv) Documents, including internal documents and communications with third parties which bear upon the matters in dispute and are reasonably likely to assist the SCL case.

(v) All internal and external policy documents which bear upon, affect or guide the Regulator's conduct or behaviour in making decisions in relation to how and whether to take action in regard to companies.

SCL's position, in summary

7. SCL contends, in paragraphs 30-32 of its Reply that it should be given a reasonable opportunity to restructure and seek a clearance under section 46. (I mention at this stage that this ground does not appear to be relied upon for purposes of the present application for disclosure. Obtaining a clearance has always been open to SCL: nothing in the list of documents summarised above will, it is not disputed, reasonably be expected to assist SCL in this regard, there being nothing preventing SCL from making such an application.)

8. The present issue arises on account of SCL's contention that the Regulator's decision to issue FSDs is inconsistent with the policy previously applied by it. SCL

have quoted, in the Reply, from a publication by KPMG called "Business News". In short, the passage states that the Regulator will not issue a FSD which undermines a formal insolvency process to benefit the pension trustees at the expense of other creditors.

9. The letter of 19 October 2007 which calls for disclosure of the categories of documents referred to above met with the response from the Regulator of 24 October contending that the Regulator had complied with its disclosure obligations and explaining why no further documents would be provided. Reference was made to section 82 (placing an embargo on disclosure of "restricted information") and to the raising a possible claim to privilege.

10. SCL, in its letter of 30 October, identified what it saw as the issues for determination. These were:

> (a) Should the "comparator documents", i.e. those that related to other clearance cases which showed the Regulator's approach in those previous cases (concerned with clearances), be disclosed?
>
> (b) Can the Regulator rely on common interest privilege and litigation privilege in refusing to disclosure documents (and, if so, to what extent)?

The relevance of SCL's request for disclosure

11. SCL's request is for secondary disclosure pursuant to rule 7(1) of the Rules. This provides as follows:

> "(1) Following the filing of the applicant's reply, if there is any further material which might be reasonably expected to assist the applicant's case as disclosed in the applicant's reply and which is not mentioned in the list provided in accordance with rule 5(3)(a), the Regulator shall file a list of such further material."

So far as is relevant SCL's reply asserts that it is wrong in principle of the Regulator to undermine a formal insolvency process (such as "Chapter 11" proceedings that cover both SCL and SCSL) so as to benefit pension trustees at the expense of other creditors; to the extent that the issue of the FSD does so, it is therefore (i) wrong in law and (ii) inconsistent with previous cases. I observe that the first point, being a matter of law, can be advanced without further disclosure; the second point (say SCL) depends on documents in the Regulator's possession to demonstrate such inconsistent behaviour.

12. In its Reply, SCL put this second point in issue. With reference to the KPMG news release about the Courts case. I quote from the Reply:

> "In October 2005 the Regulator granted clearance under section 46 that FSDs would not be issued to solvent subsidiaries of Courts Plc which was in

administration and owed substantial sums to the Courts Pension Scheme. This was reported by KPMG in their "Business News" as follows:

> *"The public policy argument was essentially that the Regulator should not seek to help the pension scheme "leapfrog" the statutory order of priorities for distributing funds to creditors in an insolvency. Were the Regulator to order FSDs to be imposed, the pension scheme would benefit but the other creditors of the administration would lose out, as the sale proceeds of the subsidiaries would be likely to be reduced. This would not be consistent with a pari passu treatment of creditors."*

The Regulator considered that it would not be appropriate for the pension scheme to gain "super priority" over other creditors where there was a formal insolvency process on foot.

SCL agrees and adopts the Regulator's reasoning, as reported by KPMG. It would be wrong in principle to undermine a formal insolvency process to benefit pension trustees at the expense of other creditors …"

13. SCL, through Ben Jaffey, say that the documents sought from the Regulator are plainly relevant. They are relevant to the task of the Tribunal which, by section 103(4), is to decide what action the Regulator should take (if any) in the matter referred to it. The Tribunal must therefore consider whether it would be reasonable to impose a FSD on SCL (see section 43(5)(b) which restricts such a course to cases where the Regulator considers it is reasonable to do so). For purposes of that exercise, policies and practices of the Regulator as applied in other cases are relevant. On the basis of the information of which disclosure is sought, the Tribunal would have guidance showing that it would be unreasonable to impose a FSD on SCL because that would result in its being treated less favourably than others in a comparable position, i.e. those to whom clearances under section 46 had been granted. Moreover, that information would undermine the Regulator's stance that a FSD is the only proper and reasonable approach to the present circumstances.

14. Mr Jaffey emphasised that underlying the exercise of the power to impose a FSD is the duty to act consistently and proportionately. That duty is recognised by the Regulator in, for example, its 2005 Publication "Clearance Statements" which states that the "Regulator will be consistent in its exercise of anti-avoidance powers and the operation of clearance". (Anti-avoidance powers include the imposition of FSDs and contribution notices, both of which are "reserved regulatory functions" and require a determination from the Determinations Panel; the granting of a clearance statement does not require such a determination.) The Tribunal must, so SCL's argument runs, have the comparable clearance cases available to it to enable it to apply the test of consistent treatment; and if the Tribunal were to take the view that the Regulator was treating SCL inconsistently, the proper course for the Tribunal could be to direct the Regulator to take no action against the SCL.

15. Section 82 does not, it was argued, place a statutory bar on disclosure in the present circumstances. This follows from the fact that section 87 permits disclosure

of restricted information in connection with any proceedings arising out of the Pension Act 2004. Moreover section 87(5) provides that section 82 does not preclude disclosure where it is required by or by virtue of an enactment. The disclosure sought in the present case is indeed by virtue of an enactment (so the argument runs), being a disclosure application under the Rules which are made by virtue of statutory powers. Similarly, it was argued for SCL, the Tribunal could make an order for production of the relevant documents under its powers in paragraph 11 of Schedule 4.

16. The Regulator, through Raquel Agnello, points to the wording of rules 5(3) and 7. Rule 7 in particular requires the disclosure of further information that "might reasonably be expected to assist the applicant's case as disclosed by the applicant's reply". (SCL's Reply, so far as is relevant, is summarised above.) In effect, the Regulator comments, SCL's case in this respect relates to whether it is reasonable to issue a FSD in the case where it is alleged that there is some inconsistent treatment in like cases by the Regulator. But, says the Regulator, SCL has produced no evidence of there being such a previous practice of the Regulator, save only in the case of "Courts", a clearance case described in the unofficial summary prepared by KPMG. The facts of the Courts clearance application were, to judge from the KPMG summary, significantly different from the circumstances of SCL.

17. The Regulator referred to a report prepared for the trustees of the present pension schemes by a Mr Squires. This has been disclosed to SCL and was not challenged in the course of the Determination Panel's proceedings or elsewhere. It analyses the facts in the public domain relating to five clearance cases, one of which was Courts. Other than Courts, the Regulator pointed out, SCL did not rely on these for comparison purposes. But, in its letter of 17 October (see above) SCL has sought documents relating to all five cases and to two more without giving any details as to the facts and relevancy of those two cases.

18. The Regulator denies that there is a previous practice as alleged, i.e. action taken in the past in a certain way such that it would constitute inconsistent treatment now to issue a FSD; and Mr Squires' report (which refers to 5 out of 261 clearance applications made to the Regulator) shows how each of the cases dealt with in the report is different on its fact from SCL.

19. Regarding section 82 the Regulator contends that the Tribunal Rules are to be read subject to the general embargo on disclosure of restricted information. Section 87(2)(a) makes it clear that restricted information, howsoever obtained, relating to the business or other affairs of SCL can be disclosed to SCL and other directly affected parties once proceedings have been brought under the Pensions Act 2004; but it does not permit the Regulator to disclose relevant information relating to Courts and other companies which are in no way connected with the proceedings.

Conclusions on disclosure, generally

20. The terms of rule 7(1) contain the disclosure obligation which SCL contends requires the Tribunal to make the directions for additional disclosure. Rule 7(1) is set out in full above.

21. SCL's case as disclosed in its Reply challenges the Regulator on eight grounds. Six of those (set out in paragraph 8 of the Reply) raise essentially legal arguments to which the information requested in the disclosure application has no relevance. One argument is directed at the quantum of the FSD and the information requested has no relevance to that. The only relevant contention of SCL disclosed in its Reply is that the Regulator's decision is "inconsistent with the policy previously applied by it in previous cases". That alleged policy is referred to in paragraph 30 with the KPMG news report relating to Courts as its source. Paragraph 32 of the Reply goes on to say that SCL is unable to particularise its case on the issue of fair and consistent treatment as the Regulator has not released copies of its determination in the Courts case, or other relevant previous determinations.

22. Aside from the KPMG news report I can see no basis for the allegation of inconsistent treatment. Nor can I see anything, other than the inference of the writer of the news report that a public policy existed whereby the Regulator will not seek to help pension schemes "leapfrog" the statutory order for priorities for distributing funds to creditors in an insolvency. The KPMG news report is, as I see it, the only matter disclosed in SCL's Reply.

23. The Regulator states that there is no such practice. The report of Mr Squires shows how each of the cases he has looked at are different on their facts from those of SCL. That leaves only the Courts case as the comparator on which SCL relies. What then does the Reply disclose of the Courts clearance that further material might be reasonably expected to assist?

24. First, the Reply states that there has been an instance that might, if substantiated by further information, shows an inconsistent treatment on the Regulator's part to that imposed on SCL by the Regulator in the form of the FSD. My reaction is to say that one instance cannot be taken to constitute a practice.

25. Second, the facts of the Courts clearance application, as described in the news report, are different from the circumstances of SCL's FSD. Courts and a subsidiary were both UK resident companies. Neither was a "service" company. Certain other subsidiaries of Courts were outside insolvency and were viable companies. The administrator decided to seek to sell the viable subsidiaries rather than liquidate them and sell their businesses and assets. The administrator sought clearance that FSDs would not be issued in those circumstances, i.e. following sales of share in the viable subsidiaries; clearances would protect purchasers of those subsidiaries. The Regulator, when granting the clearance, apparently took account of the facts that the viable subsidiaries had been supported by Courts in ways that were not detrimental to creditors and the subsidiaries had been "recharged" for shared services and had been paying normal dividends up to the holding company. Those are not comparable

circumstances to that of SCL. SCL has made no clearance application in relation to any circumstances. Moreover, it is not clear how an application for the sale of a subsidiary, to protect the interests of the purchaser, necessarily supports the conclusion of the writer of the KPMG report, i.e. that "the public policy argument was essentially that the Regulator should not seek to help pension schemes leapfrog the statutory order of priorities in distributing funds to creditors in an insolvency".

26. Third, clearance applications under section 46 and FSDs are not really comparable. A clearance seeks a safe haven against a FSD "in relation to the circumstances described in the application" (section 46(1)), but no further. A FSD may be imposed where the Regulator is of opinion that the employer in relation to the scheme is a "service company" or is insufficiently resourced; it may require financial support to be put in place. A clearance is a managerial function; a FSD is a reserved regulatory function.

27. Fourth, the Regulator does not publish details of clearance applications; to do so would be in breach of section 82.

28. Lastly, this is the first case that "refers" a determination to impose a FSD; with that in mind it is difficult to see how there can be any such practice as is alleged by SCL.

29. I conclude on this point that the disclosure sought in support of the "inconsistency" contention, i.e. disclosure of the other cases with which the Regulator has dealt including the Courts case, is not to be directed. There is no basis for SCL's allegation of inconsistency as disclosed in its Reply in particular in paragraphs 30-32. The details of the clearances sought or obtained in those cases are irrelevant for all the reasons given above.

The application of section 82 – conclusion

30. I am satisfied that the Regulator would be in breach of section 82 if he were to disclose to SCL details of clearance applications made by the seven companies referred to in SCL's request for disclosure.

31. Section 82, so far as is relevant, reads as follows:

> "(1) Restricted information must not be disclosed –
>
> (a) by the Regulator, or
>
> (b) by any person who receives the information directly or indirectly from the Regulator.
>
> (2) Subsection (1) is subject to –
>
> (a) subsection (3) … restricted information may be disclosed with the consent of the person to whom it relates and (if different) the person from whom the Regulator obtained it.

(4) For the purposes of this section and sections 83 to 87, "restricted information" means any information obtained by the Regulator in the exercise of its functions which relates to the business or other affairs of any person, except for information –

(a) which at the time of the disclosure is or has been made available to the public from other sources, or

(b) which is in the form of a summary or collection of information so framed as not to enable information relating to any particular person to be ascertained from it.

(5) …"

Sections 82-87 provide a full " disclosure code". The embargo on disclosure is relaxed for certain defined purposes (e.g. to facilitate the exercise of the Regulator's or the FSA's functions). SCL relies on section 87(2)(b) which provides that section 82 "does not preclude the disclosure of relevant information … (b) in connection with any proceedings arising out of … this Act": and "(d) in connection with any proceedings under the Insolvency Act 1986 …"

32. Section 87(2)(b) cannot in my view be construed as allowing disclosure to SCL of restricted information relating to other parties just because there are proceedings involving SCL arising out of the Pensions Act 2004. Such a contention would undermine earlier provisions of the disclosure code by making them practically ineffective once proceedings have been brought under, e.g, the Insolvency Act or the Pensions Act.

33. Where section 87(2)(b) refers to disclosure of restricted information in connection with any proceedings arising out of "this Act", it is referring to restricted information howsoever obtained relating to the business or other affairs of the party to the proceedings or to someone directly affected by them. It is not referring to information concerning other companies such as Courts that have no connection with the SCL proceedings under the Pensions Act.

34. Finally, I do not accept SCL's argument that Schedule 4 paragraph 11 overrides or undermines section 82. It gives the *vires* for the Tribunal's own procedural rules. Any disclosure direction under the Tribunal's own procedures will be governed by the Rules and will be subject to the terms of section 82.

Policy documents

35. SCL's request covers documents relied upon by the Regulator in making its decision to issue the Warning Notice or in seeking to issue the FSD. To the extent that there are policy documents, two points arise.

36. All public statements of the Regulator have of course been published. Section 93(2)(d) requires the Regulator to comply with section 93 in relation to clearance statements, i.e. to follow the procedures that the Regulator has determined in that regard. But section 93 has no application to FSDs which are reserved regulatory functions to be exercised through the Determinations Panel and in accordance with the published Determinations Panel Procedure (see the publication of July 2006).

37. The Regulator claims that there are no other documents likely to assist SCL's case as disclosed in its Reply. And if there were and these were restricted information, these would be subject to section 82 or covered by privilege.

38. On the basis of those two points, I reject SCL's application for disclosure of documents in that category.

Privilege

39. SCL requests disclosure of documents, including internal documents and communications with third parties, which bear upon the matters in dispute and which are likely to assist the SCL case. SCL points out that the Regulator has had many meetings and other communications with the pension scheme trustees, none of which has been disclosed.

40. While it remains clear, as a matter of law, that the Regulator can assert legal professional privilege, I can see nothing in the Pensions Act 2004 that destroys this. Mr Jaffey for SCL referred to the Regulator's claim as "a discredited practice". I cannot comment on that, save to say that the case he refers to, *Legal & General v FSA* relates to information sought by Legal & General which went (as I understand it) to a key issue of fact in the case, i.e. whether there had been "mis-selling" of mortgage endowment policies. The Tribunal ordered the FSA to disclose anonymised details of "private warnings" that had been given to third party mortgage endowment companies. Here the only element in SCL's case as disclosed in the Reply that might be assisted by such communications is the "consistency" issue. I cannot see how these documents and communications would assist in that respect. I should mention in this respect that Raquel Agnello stated to the Tribunal that the Regulator had looked through all the communications and had decided that they were neither relevant nor likely to assist SCL's case.

41. SCL challenged the Regulator's claims for privilege to the extent that it was based on common interest privilege as explained in *Buttes v Hammer (No.3)* [1981] QB 233 at 243 (Denning MR). The Regulator, it was said, has no common interest with the trustees of the pension schemes, its duty being to make a fair and impartial decision on the matter before it. It must remain independent from, and is in fact independent of, the pension fund trustees.

42. The Regulator points out that its objectives and interests are materially the same as those of the pension fund trustees. Section 5 of the Act is in point. This reads, so far as is relevant,

> "(1) The main objectives of the Regulator in exercising its functions are –

(a) to protect the benefits under occupational pension schemes of, or in respect of, members of such schemes,

(b) to protect the benefits under personal pension schemes of, or in respect of, members of such schemes within subsection (2),

(c) to reduce the risk of situations arising which may lead to compensation being payable from the Pension Protection Fund …

(2) For the purposes of subsection (1)(b) the members of pension schemes within this subsection are –

(a) the members who are employees in respect of whom direct payment arrangements exists, and

(b) where this scheme is a stakeholder pension scheme, any other members.

…"

43. It seems to me that there is a strong commonalty of interest between the Regulator and the trustees of the two pension schemes. Moreover SCL have not to date set out why they believed that they are entitled to any of the documents, insofar as they are not covered by privilege. The request, if it is to succeed, needs to fall under rule 7 and must be relevant to the matters raised in the SCL Reply. The matters raised in the SCL Reply raised no issues that could possibly relate to communications as between the Regulator and third parties. In relation to rule 5(3), the Regulator has already stated that in its opinion there is no further material that might undermine the decision to take the action, being the decision of the Determinations Panel. Moreover, the SCL Reply does not disclose any need for any further information that might reasonably be expected to assist SCL. Communications with third parties are, as I see it, entirely irrelevant in relation to the allegation of inconsistent treatment.

44. It follows that I am not satisfied that there is any further disclosure obligation under rule 7(1). The privilege issue does not appear to arise. But if it were to arise, I would recognise that common interest privilege existed in relation to documents and communications between the Regulator and the pension fund trustees as regards their common interest in the present proceedings.

45. For those reasons I reject SCL's claim for disclosure to the extent that it asserts that the documents and communications are not covered by privilege.

SIR STEPHEN OLIVER QC
CHAIRMAN

RELEASED:

PRT 2007/0001
PRT 2007/0002
PRT 2007/0003
PRT 2007/0004