

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

CAUSE NO: 162 OF 2017 (RPJ)

**IN THE MATTER OF THE COMPANIES LAW (2016 REVISION)
AND IN THE MATTER OF FFC FUND LTD**

BETWEEN

ANDRE VISSER

Petitioner

AND

FFC FUND LTD.

Respondent

IN CHAMBERS

Appearances: Mr. Barry Isaacs QC instructed by Mr. Anthony Heaver-Wren and Anna Snead of Appleby for the Petitioner
Mr. David Alexander QC instructed by Charles Lloyd, Mr. William Fletcher and Ms. Kristin Hanshaw of Macfarlanes, London, and Mr. Rocco Cecere, Mr. Jonathan Moffatt and Mr. Edoardo Lupi of Mourant Ozannes, Grand Cayman

Before: Hon. Justice Raj Parker

Heard: 30 January 2018

Draft Judgment
Circulated: 07 February 2018

Judgment Delivered: 12 February 2018



HEADNOTE

Winding up petition - discovery - CWR Order 12 (1) - GCR Order 24 rules 3 and 8 - relevance test- corporate structure –does Respondent have presently enforceable legal right to documents held by other entities-agency –nominated directors -Partnership Law (2013 Revision) - Exempted Limited Partnership Law (2003 and 2013 and 2014 Revisions) - Confidential Information and Disclosure Law (2016)

JUDGMENT

Introduction

1. By way of a restored summons for directions dated 8 August 2017, Mr. Andre Visser (the “**Petitioner**”), seeks an order for discovery against FFC Fund Ltd (the “**Company**”).
2. The summons was issued at the same time as the Petitioner’s winding up petition dated 4 August 2017 under section 92(e) of the *Companies Law* (2016) on a “*just and equitable*” basis.
3. There is a large measure of agreement as to the discovery the Company should make. The issues which arise for determination are whether:
 - A) The Company should make discovery of documents (within 11 defined categories) which are or have been in the possession, custody or power of FFC Management Ltd in its capacity as a general partner of FFC Holdings LP (the “**Partnership**”);
 - B) The Company should make discovery of documents (within the 11 categories) which are or have been in the possession, custody or power of the directors of Citco III Limited (“**Citco III**”) who were nominated or appointed by the Partnership;
 - C) The Company should make discovery of the register of Members of the Company, anonymised so as not to disclose the names of the shareholders in the Company and subject to confidentiality undertakings to not release the documents and information that they contain beyond the Petitioner and his legal advisers;
 - D) The Company should make discovery of documents evidencing written consents and refusals of consent obtained in respect of each extension of the Company, namely the extensions in 2010, 2012 and 2017; and
 - E) The documents relating to the Shareholders' Agreement as defined in paragraph 12(e) of the petition (all amended versions thereof and all documents purporting to supersede or replace the Shareholders' Agreement) and the original Memorandum and Articles of Association of Citco III (and all subsequently amended Memoranda and Articles of Association) are confidential as between the Petitioner and the Company.



Factual Background

4. Mr. Andre Visser is the Petitioner in these proceedings. He is the registered holder of 1,110.10 Participating Shares in the Company. The Company is a Cayman Islands exempted company and is a special purpose vehicle for an indirect equity investment into Citco Group Limited.
5. Citco Group Limited is the parent of the Citco group of companies which provides administrative, fiduciary and financial services around the world and apparently had assets under custody (as at 2016) of US \$120 billion. In 2005, the majority of the shares in Citco Group Limited were owned by a company which represented the interests of the Rotonde family trust (Rotonde Investments Limited) ("**Rotonde**") which is wholly-owned by the Foundation de Famille Sandoz.
6. The Smeets Family Citco Trust ("**SFCT**") wished to become the largest shareholder in Citco Group Limited and proposed that "*friends and family*" of Citco, including the Petitioner, should have the right to share in a transaction to achieve the acquisition of the majority shareholder's stake in the business of Citco Group Limited.
7. A proportion of the shares in Citco III were to be held by SFCT Investments Limited (a company wholly-owned by the SFCT) (418,000), a minority proportion by Rotonde (182,000) and a proportion by the Partnership (360,000) - see the Petitioner's second affidavit of 12 December 2017 at paragraph 31.
8. The acquisition was completed in July 2005. Citco Group Limited became a wholly owned subsidiary of Citco III, which is a company incorporated in the Cayman Islands for the purposes of the transaction. Citco III has two directors nominated by the Partnership: Mr Pieter Maaskant and Mr Peter Whitman.
9. It is necessary to set out some features of the investment terms and structure which are referred to in a Confidential Offering Memorandum dated 11 July 2005 (the "**OM**"). The Company (together with a Delaware limited liability company called FFC Fund LLC (the "**US Fund**")) invited subscriptions of a minimum US \$1million from the



- “friends and family”* of Citco for the issue of shares by the Company (or, for US investors, interests in the US Fund). These entities, which were formed as special purpose vehicles for the single purpose of making an indirect equity investment into Citco Group Limited, by reason of their investments, became limited partners of the Partnership.
10. The general partner of the Partnership is FFC Management Limited (“**FFC Management**”) (which is a wholly-owned subsidiary of SFCT). FFC Management is also the sole director of the Company (and sole manager of the US Fund.) This structure is detailed in a partnership agreement between FFC Management (the general partner), the Company and the US Fund dated 22 July 2005.
 11. The Petitioner was invited to and did invest in the Company. The subscription monies paid by investors for shares in the Company (and the US Fund) were to be transferred by them to the Partnership and used by the Partnership to buy its shares in Citco III. Those shares remain the Partnership’s sole asset.
 12. At the time of the acquisition it was contemplated that within about 3 to 5 years there would be a public offering of shares in Citco III at which time the shares held by the Partnership would be distributed in kind to the investors pro-rata to their investments. If no public offering took place the shares would be distributed on or prior to the dissolution of the Company (or the US Fund). The date of dissolution was to be 31 August 2008, although FFC Management had a discretion to extend that date by up to two one-year periods, that is to say until 31 August 2010. In fact the date for the dissolution of the Company has been extended beyond 2010 three times, first to 31 August 2012, then to 31 August 2017, and more recently to 30 June 2018. As matters stand therefore the Company is due to be wound up later this year.
 13. The OM also contemplated a Shareholders’ Agreement between the three shareholders of Citco III: SFCT, Rotonde and the Partnership.
 14. The Petitioner raises four grounds for winding up the Company. First, that his legitimate expectation has been defeated in that his pro-rata proportion of the shares held by the Partnership would be distributed to him by 31 August 2010 at the latest.



Second, that he has lost confidence in the management of FFC Management caused by a lack of probity on their part. Third, that the Company is incapable of achieving its principal commercial object. Finally, that the Company's affairs require investigation by official liquidators.

15. There are a number of matters pleaded in the petition including the following:
- i. The Petitioner has been unable to realise his investment in the Company since there has been no public offering and the dissolution date has been extended on three occasions, most recently to 30 June 2018. The dissolution date was extended by altering the Company's Articles of Association which required the approval of a two thirds majority of its investors. I note in passing that Mr. Luckmann, a director of FFC Management agrees with this in his first affidavit dated 16 January 2018 and states that the amendments to the Articles were made in accordance with article 147 (B) which required a special majority effectively defined as a two thirds majority - see paragraphs 42-45.
 - ii. Rotonde and SFCT have been able to realise some or all of their investments in 2011 (the "**2011 Transactions**") by either selling shares to Citco III or by Citco III agreeing to convert shares to preference shares (for no consideration) which were then sold on to two new investors. Those transactions would have required the consent of the Partnership and of the Partnership's representatives, the two directors nominated to the Board of Citco III. The Shareholders' Agreement would have been amended in light of the acquisition by the two new shareholders. Those new investors are currently in the process of realising their investment which again would require the consent of the Partnership and/or the Partnership's representatives.
 - iii. Investors in the Company have also been able to realise their interests either by realising their market value as part of the larger transactions referred to above or at an undervalue (since they have been locked into their investment in the same way as the Petitioner).
 - iv. Nothing has been done to promote the interests of the Company by enabling the investors to realise their investment since 2005, there has been no public offering and the 2012 extension to the dissolution date for the Company to



2017 was obtained on the basis of representations made by FFC Management that the interests of investors in the Company would be best served by their remaining as investors (rather than their receiving a distribution of the Citco III shares) and that FFC Management would more closely align the Company's interests to those of other Citco III shareholders under the terms of the Shareholders' Agreement.

v. FFC Management has done nothing to align the Company's interest with the two new shareholders who are currently seeking to realise their investment.

16. It can be seen from the matters I have outlined as pleaded in the petition that the Petitioner alleges that there are dealings which have taken place involving Citco III which he alleges are improper and require further investigation. The Partnership had a right of veto over sales, transfers and disposals of shares. That requires according to the Petitioner, the prior written consent of all the shareholders in Citco III (that is to say SFCT, Rotonde and the Partnership).

17. Further, the Partnership's representatives on the board of Citco III, Mr. Maaskant and Mr. Whitman, had a right of veto over certain matters. Under the Shareholders' Agreement, Citco III's board was composed of six persons: three appointed by SFCT, two by the Partnership and one by Rotonde. There is a category of matters defined as "*Board Super Reserved Matters*" which it is alleged would or might affect the value of an investor's holding which required the prior consent of at least three quarters of all the directors for approval. That meant that effectively, given the Partnership had two representatives on the board, they had a right of veto over those matters, which included the transactions referred to in the petition.

18. In relation to the 2011 Transactions it is not disputed by the Company that the Citco III directors did not exercise their right of veto, nor that the Partnership duly approved them.

The Petitioner's Case

19. Mr. Barry Isaacs QC submitted that the Petitioner has been given very few documents relevant to the petition. Although the parties had attempted to reach agreement on the



categories requested, no agreement had been reached for several months save for certain annual audited financial statements for the Company, Citco III and the Partnership which had been provided. He argued that the discovery sought was necessary for a fair resolution of the matters set out in the petition.

20. The Petitioner sets out in his third affidavit of 22 January 2018 his concerns that he should see all documentation relevant to the allegations he has made in the petition and if the Company succeeds in limiting discovery he would be deprived of a fair trial. In order to prove his allegations that the relevant transactions were not in the best interests of the Company and not entered into for a proper purpose, he requires not only the documentation held by the Company, but also the documentation held by the general partner, FFC Management, and the two directors nominated for appointment to Citco III by the Partnership, as well as that held by the Company. All of the categories sought should be disclosed by list and inspection given by the Company as soon as possible as they have been outstanding for several months. The test for relevance is very wide under Cayman law (see below) and he was entitled to documents which may fairly lead him to ascertain documents and information with which to advance the matters pleaded in the petition, or to undermine the Company's case.
21. Mr. Isaacs QC submitted that the Company, whose sole director, FFC Management, is also the general partner of the Partnership, will be able to give detailed evidence refuting the allegations at the hearing of the petition and to be denied disclosure and inspection of relevant documentation would be unfair to the Petitioner who is entitled to challenge that evidence.

The Company's Case

22. Mr David Alexander QC characterised the Petitioner's application for the discovery of documents as a 'fishing expedition' brought in the context of a meritless winding up petition to put commercial pressure on the Company, which is in any case to be dissolved by 30 June 2018.
23. He submits that all shareholders would be redeemed at that stage. The Petitioner can seek to sell his shares if he wishes before then and he is not "locked in". His investments



have performed well and the Petitioner himself voted in favour of the extensions to 2017 – see first affidavit of Mr. Aron dated 6 September 2017 at paragraphs 8c and f.

24. He also set out the Company’s position that the allegations in the petition are fully denied and now is not the appropriate time to consider them in any detail. There will of course be an opportunity to consider these matters as necessary at trial.
25. Further, he submitted that many of the disclosure requests were speculative, vague and would put the Company to an enormous amount of time and effort to satisfy. It was wholly disproportionate in the circumstances of this case to make an order for discovery in the terms sought. Those points applied even in relation to many of the documents requested which were now or have been within the Company’s possession custody or power. However, if that was all that was ordered the Company would be prepared to give discovery with limited exceptions, for example in relation to the *Confidential Information and Disclosure Law* 2016 (“*CIDL*”), which would require an application to the court first.
26. His principal objection was the request that the Company disclose documents which are or have been in the possession, custody and power of third parties: the two directors of Citco III (nominated by the Partnership); and FFC Management in its capacity as general partner of the Partnership. He submits that there is no basis for such an order which would in his submission be extreme and novel. It would, he argued, disregard the separate legal entities forming part of the overall corporate structure and the contractual arrangements between them. Moreover, he said that if the corporate veil was lifted in this way it would have serious consequences for the fund industry in the Cayman Islands. The corporate structure had been carefully designed with different stakeholders and interests at each level: the Citco III level with its directors; the three shareholders in Citco III: SFCT, the Partnership, and Rotonde; FFC Management as the general partner of the Partnership and sole director of the Company; and the two limited partner SPV companies with investors who invest indirectly in the Partnership. Separate rights existed between each corporate entity, governed by different contractual arrangements and indeed relevant partnership legislation also set out certain obligations.



27. Where certain documents (eg the Shareholders' Agreement and the Memorandum and Articles of Citco III) contained confidential information within the meaning of the *CIDL* they could only be disclosed after an order is made pursuant to *CIDL*. The Company is willing to apply for such an order as soon as the scope of its obligations are clear.
28. As a result of the corporate structure and the contractual arrangements, together with the applicable partnership legislation, he made the following points:
- i. The right of the Petitioner to call for particular documents as a shareholder in the Company is governed by the Memorandum and Articles of Association of the Company and the *Companies Law* (2016 revision).
 - ii. The Company as a limited partner only in the Partnership has the right to call for a very limited set of documents from the general partner (FFC Management) under the Partnership Agreement dated 22 July 2005 (the “PA”) and the relevant legislation (the *Exempted Limited Partnership Law* 2014 (the “ELPL”) and the *Partnership Law* (2013 Revision) (the “PL”). The ambit of that limited right extends only to books of account and audited financial statements.
29. Section 5.1 of the PA provides in material part:

“Books of account; Fiscal year. Proper books of account shall be kept under the accrual method of accounting, and there shall be entered therein or transactions, matters and things relating to the partnership’s business as are required by all applicable laws and regulations and in accordance with IFRS, except as otherwise expressly provided in this agreement. The books of accounts and records of the partnership shall be open for inspection in accordance with and subject to the limitations set forth in the Limited Partnership Law.”

30. Section 5.4 provides:

“Annual and Other Reports. Each Limited Partner shall be furnished with annual audited financial statements relating to the operations of the partnership and such other reports as are required to be given to



Limited Partners by the rules and regulations promulgated by any governmental authority that has jurisdiction over the activities of the Partnership. Limited partners may also be furnished with any other reports or information which the general partner in its discretion determines to be necessary and appropriate.”

31. The Company does not have any right to demand from its own corporate director (FFC Management) documents which are held on behalf of an entity other than the Company, i.e. the documents that FFC Management holds on behalf of the Partnership for which it also acts as general partner.
32. Similarly, where documents are held by the directors of Citco III on behalf of Citco III the Company has no right to call for those documents notwithstanding that the Partnership had the right to nominate two persons to act as directors. Such documents belong to Citco III, not the Partnership.

Approach of the Court

33. Under Order 3, rule 12 (1) of the *Companies Winding Up Rules* 2008, the court can give such directions as it thinks appropriate in respect of the discovery and inspection of documents.
34. Under the *Grand Court Rules* Order 24, rules 3 and 8, the court may order discovery by way of list of documents which are or have been in a party's possession custody or power relating to any matter in question. Disclosure may be limited to such documents or classes of documents or to certain matters in question as may be specified. If the court on the hearing of an application for such an order (by way of list) is not satisfied that discovery is necessary or that it is not necessary at a particular stage of the cause or matter the court has a discretion to adjourn or refuse to make such an order. It will do so if it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter, or for saving costs.
35. In *AHAB v SAAD 2013 (1) CILR* Smellie CJ made the point that discovery in this jurisdiction extended to documents which related to any matter in question in the action.



so defining relevance in the widest possible terms. That test has been narrowed under the CPR in England. He approved extracts from the Supreme Court Practice 24/12/11 which clarified the test of relevance to mean any document which, it is reasonable to suppose, “contains information which may enable the party (applying for discovery) either to advance his own case or to damage that of his adversary, if it is a document which may fairly lead him to a train of enquiry which may have either of those two consequences” applying *Peruvian Guano* (1882)11 QBD at 63. Smellie CJ also confirmed the court's long-standing refusal to allow the process of discovery to be used as a ‘fishing expedition’.

36. In relation to discovery of documents held by FFC Management, there are a number of decisions dealing with the ambit of the discovery obligation as it relates to a company's right to inspect documents held by another company in the same group. In *Lonrho v Shell* [1980] 1 WLR at page 635 Lord Diplock said:

“... The expression “power” must, in my view, mean a presently enforceable legal right to obtain from whoever actually holds the document inspection of it without the need to obtain the consent of anyone else. Provided that the right is presently enforceable, the fact that for physical reasons it may not be possible for the person entitled to it to obtain immediate inspection would not prevent the document from being within his power; but in the absence of a presently enforceable right there is, in my view, nothing in Order 24 to compel a party to a cause or matter to take steps that will enable him to acquire one in the future.”

37. A right to inspect can also exist in a principal to agent relationship in relation to documents held by the agent on behalf of the principal. As a general rule it is a legal incident of the principal and agent relationship that a principal is entitled to require production by the agent of documents relating to the affairs of the principal - see *Fairstar* [2013]EWCA Civ 886 CA.

38. In *Yasuda v Orion* [1995] QB 174, the defendants acted as underwriting agents for the plaintiff under various underwriting agency agreements. Colman J stated that the



plaintiff as principal was entitled to be provided with records relating to transactions with third parties entered into by the agent on his behalf because the agent had been entrusted with the authority to bind the principal to those transactions and the principal was entitled to know what his personal contractual rights and duties were in relation to those third parties as well as what he was entitled to receive by way of payment from the agent (page 185 at D).

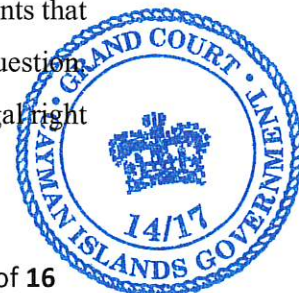
39. As to discovery of documents held by the Citco III nominated directors, it is clear that nominee directors must not put the interests of their nominators above those of the Company, as they have to act in the best interests of the Company notwithstanding the wishes of their nominators - see *Re Neath Rugby [2010] BCC 597 CA*. It may be that a director owes the nominator certain duties where there is a formal or informal agreement between them. But that cannot override the fiduciary obligations the director owes to the company.
40. The Partnership was established and registered as an exempted limited partnership under the applicable law at the time. The relevant legislation in relation to exempted limited partnerships is the *ELPL* (2003 Revision) which is referred to in the recitals to the PA. There were subsequent amendments made to that law which were ultimately reflected in the *ELPL* (2013 Revision) and the repeal of that law by the *ELPL* (2014 Revision), but they are not material to the analysis below.
41. Under the *ELPL* there is a saving of rules of equity and common law applicable to partnership - see section 3. Therefore one does have to look at the *PL* (2013 Revision). Under the *PL* there is a limited right for partners to inspect and copy the 'partnership books' pursuant to section 24 (i) which is expressly subject to any express or implied agreement entered into between the partners.
42. 'Partnership books' is circumscribed by sections 28(2) and (3) of the *PL* which define the books of account a partner, other than a limited partner, is required to keep. Those provisions refer to books of account and underlying documentation including contracts and invoices relating to monies received and expended, sales and purchases of goods, and assets and liabilities concerning the partnership. All such books are not to be



deemed “kept” if they are not kept in a way which gives a true and fair view of the business and financial condition of the partnership and to explain its transactions. Sections 21(1) and (2) of the *ELPL* contain materially the same wording concerning the books a general partner of an exempted limited partnership is required to keep.

Analysis

43. The main issue before the court is whether the Company, as a limited partner of the Partnership, has an enforceable legal right to inspect the documents from FFC Management in its capacity as general partner of the Partnership and is entitled to documents held by the directors of Citco III nominated by the Partnership as a matter of law.
44. Discovery is sought from the Company of documents which are held or were held by non-parties. The respondent to the petition is a special purpose vehicle formed expressly to make an indirect investment into Citco III. Other corporate entities such as FFC Management, the Partnership (and the other shareholders in Citco III) and Citco III itself are not parties. Neither are the two Citco III directors nominated by the Partnership.
45. I accept the test for relevance under Cayman law is a very broad one. However, in relation to the pleaded issues it is not clear to me how it could be said that the Company was a party to the transactions which the Petitioner alleges were not entered into for a proper purpose. Further it is not clear to me how it is said that the Company would have had any control over those transactions even if any link or nexus could be established. The Company has no direct interest in or rights against Citco III. It has only an indirect financial interest in Citco III through the Partnership.
46. Transactions between Citco III and its direct investors are matters in which the Company is not directly involved. I accept the evidence of Mr. Luckmann at paragraph 11 of his first affidavit of 16 January 2018 in this regard. It follows that documents that the Company itself holds may be quite limited in relation to the transactions in question. But that is not a reason in itself for holding that it has a presently enforceable legal right



to call for the documents or is otherwise entitled to them as a matter of law from other entities.

47. As to the argument that the Company as a limited partner can obtain documents from the Partnership, I am not satisfied that this is a proper basis for ordering discovery against the Company. The Company as a limited partner in the corporate structure has the right to call for a very limited set of documents from the general partner under the PA and relevant legislation, namely the *ELPL* (2014 Revision) and the *PL* (the material provisions of which are set out above). Those documents comprise the Partnerships' books of account and audited financial statements. Further, the PA at section 5.1 refers to the limitations in the relevant partnership law which applied to exempted limited partnerships. The limited partners' right to copy and inspect 'partnership books' is accordingly limited. Whilst there is a discretion given to the general partner, FFC Management, under section 5.4 to provide more if it determines that to be necessary or appropriate, that does not amount to a presently enforceable legal right available to the Company to call for more.
48. Further, there is no proper basis for holding that the Company's corporate director, FFC Management, has an obligation to provide documents to the Company held on behalf of an entity other than the Company, i.e. the Partnership, for whom it acts as general partner. Where an agent acts for multiple principals the principals are only entitled to require the agent to provide documents held on their behalf, not documents held by the agent on behalf of another principal. There is no evidence to suggest that FFC Management has consented in the past to the provision of such documents to the Company. Where FFC Management is acting as general partner to the Partnership, it is not acting for the Company and has no obligation to provide it with relevant documentation in that regard. The direct investors into Citco III, including the Partnership, are in a different position to investors in the Company.
49. As to the directors of Citco III, the mere fact that they have been nominated by the Partnership has no bearing on their legal duties as directors of Citco III. Their primary legal obligations are to Citco III. They are not officers of the Company or FFC Management. The Company played no role in their appointment. I accept the evidence



of Mr. Luckmann at paragraph 24 of his first affidavit dated 16 January 2018 in this regard.

50. It follows that the Company has no legal right to compel them to produce relevant material. Any such material as these two individuals may hold (or have held) is therefore not within the Company's possession, custody or power. There is no evidence to show that they were agents of the Partnership or the Company in relation to the matters they dealt with on the board of Citco III. There is no evidence to establish that there was any agreement between the Partnership and Citco III obliging the nominated directors to hand over to the Partnership material obtained in their capacity as directors of Citco III, where one of their primary obligations would be to preserve the confidentiality of that information and documentation for Citco III.

Result

51. It follows that the Company should not be ordered to make discovery of documents at paragraph 2 of the draft order and I answer issues A and B above in the negative.
52. As to issue C, the register of members is to be disclosed by the Company, but in a way so as not to disclose the names of shareholders in the Company. I understand there is no objection to disclosing by way of list all documents evidencing changes to the authorised and/or issued share capital of the Company in this anonymised way.
53. As to issue D, the Petitioner raises concerns about the validity of the voting process and each extension of the life of the Company obtained in 2010, 2012 and 2017. He states at paragraph 46 of his second affidavit dated 12 December 2017 that he wishes to investigate whether the votes of the trustees of a Citco pension fund have been treated as a single vote or whether multiple votes have been cast directly or indirectly and whether the Company's treatment of the votes of the trustees has been consistent. As I have said, Mr. Luckmann has confirmed that the Company obtained the necessary two thirds majority required under the Articles. Moreover, Mr. Luckmann points out at paragraph 45 of his affidavit dated 16 January 2018 that no one else has challenged the voting results or process. Clearly, the individual votes are confidential to each member. I am not prepared to order that the copies of all written consents and refusals of consent



in relation to the relevant extensions be listed and disclosed (even with the undertakings offered by the Petitioner) because that would cut across the confidentiality of the vote of each member and is not in my judgement necessary for disposing fairly of this issue. Instead, the Company should provide an affidavit setting out how each extension was obtained as a matter of process and the numbers of votes cast for and against each extension in as much particularity as is possible without revealing information confidential to particular voters.

54. As to issue E, I am told by Mr. Alexander QC that the Shareholders' Agreement contains a confidentiality restriction which also applies to certain other documents including the Memorandum and Articles of Association of Citco III. I do not accept Mr. Isaacs QC's submissions that the terms of the Shareholders' Agreement and the Articles form part of the terms of investment by the Petitioner so are not confidential as regards the Company and him, or that the OM provisions allowed for full copies of these documents to be provided upon request and that is sufficient to overcome confidentiality restrictions in the documents. If the Company takes the view that it owes a duty of confidence to other persons as a consequence of the express provisions of the Shareholders' Agreement, it is perfectly entitled and indeed may be obliged to apply to the Grand Court under section 4 of *CIDL*. It seems to me the Company is in a position to do so and should then provide whatever discovery it can, assuming a *CIDL* order is made and in accordance with its terms.

55. I am confident that the parties can reach an agreement to an agreed form of order for discovery reflecting the terms of this judgment.


HON. JUSTICE RAJ PARKER
JUDGE OF THE GRAND COURT

