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IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 402 of 2008

BETWEEN: **BANCREDIT CAYMAN LIMITED (In Official Liquidation)**

Plaintiff

AND: **MANUEL ARTURO PELLERANO**

Defendant

Coram: The Hon. Mr. Justice Henderson

Appearances: Mr. Michael Crystal Q.C. instructed by Mr. Matthew Crawford of Maples and Calder for the Plaintiff

Mr. Thomas Lowe Q.C. instructed by Ms. Cherry Bridges of Ritch & Conolly for the Defendant

Heard: 12th & 13th January 2010

GRAND COURT - CAYMAN ISLANDS

AMENDED JUDGMENT

1. The Plaintiff Bancredit Cayman Limited ("Bancredit") was incorporated in the Cayman Islands in 1988 and granted an unrestricted Class B Bank and Trust Licence. It carried on business in the Cayman Islands as a bank until September, 2003, at which time the Cayman Islands Monetary Authority appointed two controllers to take charge of its business. Since Bancredit was (and is) insolvent, this Court ordered it's winding up in May 2004. This action has been brought by the company's Joint Official Liquidators ("the JOLs").

2. The Defendant Manuel Arturo Pellerano ("Mr. Pellerano") was a director of Bancredit at all material times. He is a citizen of and resident of the Dominican Republic and is now imprisoned there. This action is a claim for damages and equitable compensation arising from losses caused by Mr. Pellerano's alleged breaches of fiduciary and common law duties owed by him to the company and arising from his position as a director.

3. Mr. Pellerano was Chairman of the GFN Group of companies. Bancredit was a member of the group. Mr. Pellerano was also a director of other group members, including GFN Corporation Limited ("GFN").

4. Three sets of "transactions" are described in the Statement of Claim; Bancredit has now abandoned two of them, so the issues on this application must be judged solely with reference to what has been described as "transaction 1". In essence, this is an allegation that Mr. Pellerano allowed Bancredit to permit GFN to run up a massive but unsecured overdraft from which Bancredit derived no benefit. It is said that Mr. Pellerano knew that GFN was in severe financial difficulties, had little if any prospect of repaying this debt, and that Bancredit itself was of doubtful solvency at best. While Mr. Pellerano may have believed that the overdraft provided some benefit to GFN and to the GFN Group, it was contrary to the interests of Bancredit and amounted to a breach of his fiduciary duty to that company.

Issues

5. Mr. Pellerano was served in the Dominican Republic with the Writ of Summons after Bancredit obtained an *ex parte* order of this Court granting it leave to do so. On this review of the *ex parte* order, the issues are:

(1) Is there a good arguable case which would justify the granting of leave to serve out of the jurisdiction under O.11, r.1 (1) of the Grant Court Rules?

(2) Has the Plaintiff demonstrated that there are serious issues to be tried?

(3) Has the Plaintiff shown that the Cayman Islands is clearly and distinctly the appropriate forum for the trial of the action?

(4) Was there material non-disclosure at the ex parte hearing?

Facts

6. The GFN Group conducted business in banking, insurance, reinsurance and telecommunications. The ultimate holding company for the various subsidiaries companies is GFN, which is now in liquidation. GFN is owned indirectly by the Pellerano family. GFN is the indirect owner of Bancredito Panama SA and Bancredit is a wholly owned subsidiary of Bancredito Panama. Bancredit conducted banking services in US dollar denominated offshore accounts for customers of Banco Nacional de Credito SA ("Bancredito") a large bank incorporated and conducting business in the Dominican Republic".

7. In 2002 and 2003, the GFN Group suffered serious financial difficulties. There was a "run on the bank" of Bancredito. The Central Bank of the Dominican Republic granted it liquidity. In Panama, the Superintendent of Banks of the Republic of Panama appointed an interverner over Bancredito Panama and, subsequently, a liquidator." That led to the appointment of controllers in the Cayman Islands over Bancredit and, ultimately, to the appointment of the JOLs.

8. Between August, 2002 and September, 2003 Bancredit made very substantial advances to other entities in the GFN Group without any apparent commercial benefit to Bancredit. A number of one-sided transactions which seemed to favour other entities in the group to the detriment of Bancredit were entered into with the acquiescence, if not at the direction, of Mr. Pellerano.

9. By the time the controllers were appointed by the Cayman Islands Monetary Authority on September 4th, 2003, GFN had an overdraft at Bancredit in excess of 93 million dollars. GFN was and is hopelessly insolvent; there is no prospect of repayment.

10. The investigation by the JOLs has satisfied them that Bancredit was also insolvent or of doubtful solvency by June 30th, 2002 at the latest. The transactions which are the subject of the Statement of Claim occurred after that date. The rapidly increasing overdraft at Bancredit in favour of GFN (in account no. 71472) is described in Schedule A to the Statement of Claim. A 29 million dollar overdraft

as at September 3rd, 2002 increased to 61 million dollars as at February 3rd, 2003, then to 78 million dollars as at April 1st, 2003 and finally to 93,889,498 dollars as at August 25th, 2003. It is alleged (in Schedule B to the Statement of Claim) that the only consideration for the overdraft was "the promise of GFN Corporation to repay the account 71472 with interest". In view of the insolvency or doubtful solvency of GFN, the size of the indebtedness and the lack of security for it suggests to the JOLs that Mr. Pellerano looted Bancredit to prop up GFN for his own personal benefit.

11. In 2004 a criminal prosecution was initiated in the Dominican Republic against Mr. Pellerano and Felipe Mendoza ("Mr. Mendoza"), who was also a director of Bancredit. After a trial in 2006, both men were convicted of fraud in relation to their management of Bancredito. Mr. Pellerano was sentenced to imprisonment for three years; that sentence was increased to eight years on appeal. Mr. Pellerano appealed further to the highest court in the Dominican Republic, which has now affirmed the conviction and eight year sentence. He was imprisoned in the Dominican Republic on November 27th 2008.

12. The trial court in the Dominican Republic found that Messrs Pellerano and Mendoza *"manipulated the information on the financial situation of* [Bancredito] *reporting a different statement of the situation to the authorities and the external auditors, with fewer loans and less deposits than those really existing....."* They were found to have approved false financial statements for the purpose of

concealment. The Court also found that the two men were engaged in the forgery of material documents. The judgment relied in part upon a forensic audit conducted by Duarte & Associates, auditors based in Santo Domingo. That report asserts that Bancredit, Bancredito and Bancredito Panama acted "jointly" to finance the Group's needs.

13. The Statement of Claim alleges that by allowing Bancredit to enter into these transactions Mr. Pellerano failed to act in good faith and to have regard for Bancredit creditors, allowed his personal interests to conflict with his fiduciary obligations as a director of Bancredit, and used his directorship powers for a collateral or improper purpose. It is said that he breached his common law duty to Bancredit by failing to exercise the level of care, skill and diligence in the management of its affairs which a reasonably diligent person would have brought to the task. As chairman of both Bancredit and GFN, Mr. Pellerano is alleged to have had actual or at least constructive knowledge of the insolvency or doubtful solvency of both entities at all material times. His obligation was to direct Bancredit not to enter into the transactions which led to the overdraft as the loan was effectively unsecured and offered no prospective benefit to Bancredit.

14. The initial defence advanced by Mr. Pellerano was that the real debtor on account 71472 was not GFN but another group affiliate, GFN Capital. GFN Capital's business was to act as the issuer of negotiable instruments in the form of redeemable commercial paper. These instruments, which were sold to investors

in the Dominican Republic, were payable through Bancredit. Mauricia Santos, a former director of Bancredit, has explained that the instruments were continuously "rolled over" and their purpose was to raise money for the granting of longer term loans. That process, she says, broke down in late 2002 and early 2003 because of a general loss of confidence in banks and the collapse of the Dominican Republic currency. The overdraft on account number 71472 represents the payments made in satisfaction of these negotiable instruments which "could not be replaced by new notes".

15. The assertion that account no. 71472 really belonged to GFN Capital was examined by our Court of Appeal in ***GFN Corporation Limited v Bancredit Cayman Limited*** (Civil Appeal No. 1 of 2009) in a judgment given November 26th, 2009. The issue was argued within the context of an appeal from an order winding up GFN on the petition of Bancredit (initiated on its behalf by the JOLs). A resolution of this issue was necessary to determine if Bancredit was a creditor with the appropriate *locus standi*. The Court held that there was *"no foundation in fact for the assertion"* that the account belonged to GFN Capital and not to GFN. Their Lordships found that Bancredit is a creditor of GFN *"in respect of at least a substantial part of the petition debt"*. That debt includes the sum at issue in the present action.

16. Mr. Pellerano has sworn an affidavit in support of the present application. He says that Bancredit did not have a *"physical branch operation"* and its employees were located in Panama at the offices of its parent, Bancredito Panama. The

"majority" of the records relating to Bancredit business were kept in Panama. He says he was not "primarily responsible" for the banking operations; they were run by Mr. Mendoza. His affidavit then repeats the assertion that account no. 71472 represented an indebtedness owed by GFN Capital, whose obligation it was to redeem the instruments it had issued. These instruments tended to have a 3 month term and paid a fixed rate of interest. The expectation was that *"a redemption would be counter balanced by a sale of an equivalent new note"*. He characterized this (in paragraph 27 of his first affidavit) as a typical feature of the banking business. He explained that, *"the overdrawn balance increased from month to month as old notes were redeemed as no one was willing to take up fresh notes because of loss of confidence in the bank"*.

17. In his Ruling on the *ex parte* application which is now under review, the Chief Justice found that there was a good arguable case to justify service out of the jurisdiction, and that the requirements of O.11, r.1 (1) (f) and (ff) had been satisfied. He also held that the Grand Court is the appropriate forum for the trial of the action. In doing so, he took note of Mr. Pellerano's imprisonment in the Dominican Republic and said that, in due course, it might justify a stay of proceedings pending his release from prison.

Issue 1: leave to serve out of the jurisdiction

18. The first question is whether there is a good arguable case that one of the grounds for service out of the jurisdiction has been satisfied. I am satisfied that there is.

Bancredit is a company registered within the Cayman Islands and is governed by the laws of the Islands. Mr. Pellerano was a director of Bancredit at all material times; his fiduciary obligations to the company are those described by the laws of the Cayman Islands. The essence of the claim is an allegation that he has breached his fiduciary duty during the time he was a director and, as a consequence, has caused Bancredit to suffer a loss. That is enough to satisfy the requirements of O.11, r.1 (1) (ff).

Issue 2: serious issues to be tried

19. I must also be satisfied that the claims pose serious issues to be tried: *Seaconsar v. Bank Markazi* [1994] 1 AC 438 (HL).

20. On behalf of Mr. Pellerano, it is said that there is no evidence before me that the overdraft was created on an instruction from him. His case is that Mr. Mendoza was running Bancredit on a day to day basis and Mr. Pellerano's attentions were directed elsewhere. There is, however, a body of evidence from which a trier of fact could draw the inference that Mr. Pellerano was aware of the rapidly increasing overdraft and the lack of security for it. Mr. Pellerano was one of Bancredit's signing officers. He approved the audited financial statements for the year ended December 31st, 2002. He was the party of reference specified in several of the transfer instructions which served to increase the overdraft (see second affidavit of Richard Fogerty, paragraph 26.3, and pages 1227, 1231, 1233, 1237, 1241, 1243, 1245 and 1247).

21. As at December 31st, 2002 account no. 71472 had a credit balance of 201,958 dollars. The evidence suggests that this was the only occasion between July 31st, 2002 and August 28th, 2003 when the account was not in very substantial overdraft. Three large deposits were made to the account on December 30. Two of these deposits were reversed shortly afterwards. The third came from the account of a customer of Bancredit which was wholly unrelated to the GFN Group. Thus, these financial statements (signed by Mr. Pellerano) conveyed a wholly misleading impression of Bancredit's circumstances at a crucial time.

22. These instructions are capable of supporting an inference that the transfers were made with his knowledge and approval. Any damage sustained by Bancredit as a result of the transactions occurred here. The evidence satisfies me that there is a serious issue to be tried arising from the allegation of breach of fiduciary duty.

23. The evidence of Mr. Pellerano seems to foreshadow a defence that he was unaware, or not sufficiently aware, of the state of the overdraft and of Bancredit's slide towards insolvency. His attention was directed elsewhere while Mr. Mendoza had oversight of Bancredit's day to day operations. If this position is established at trial, there will remain a serious issue to be tried concerning the allegation of negligence in the performance of his director's duties.

Issue 3: appropriate forum for trial

24. The *ex parte* order cannot be upheld unless I conclude that the Cayman Islands is "clearly and distinctly" the appropriate forum in which the action can most conveniently be heard in the interests of the parties and the ends of justice: ***Spiliada Maritime Corporation v Cansulex Ltd.*** [1987] AC 460 (HL).

25. It is clear that the law of the Cayman Islands governs the relationship between a director and a company incorporated here; this factor is entitled to considerable weight in the choice of forum although it is not determinative.

26. The parties are not agreed as to the whereabouts of the important books and records of Bancredit which will need to be produced at trial. Clearly, the JOLs are in possession of a significant portion of the records. Mr. Pellerano says that Bancredit's records were maintained in Panama and its customers were, for the most part, in the Dominican Republic. He suggests that this is a factor which points to the Dominican Republic as the most appropriate forum. However, the controllers of Bancredit were appointed in 2003 and the JOLs were appointed in 2004. The obligation of Bancredit's directors and officers is to deliver its books and records to these officials in the Cayman Islands and that is an obligation which has persisted for several years. The location of the books and records is a factor which tends to favour a trial in the Cayman Islands.

27. Many of the documents are written in the Spanish language and would require translation at a trial here. Some are written in English and some are accounting records not requiring translation. Many of the most important witnesses are Spanish speaking and would, I assume, testify in Spanish through an interpreter at a trial in the Cayman Islands. On the other hand the JOLs (who may have relevant evidence to give on the question of insolvency) will testify in English. Overall, the question of language points to the desirability of the case being tried in the Dominican Republic.

28. The question of convenience to the parties is (apart from the issue of Mr. Pellerano's imprisonment, which is addressed separately below) split equally. As a Cayman Islands company formerly under regulation by the Cayman Islands Monetary Authority and now controlled by official liquidators resident in the Cayman Islands, Bancredit's convenience is best served by a trial in this jurisdiction. Even apart from the obvious fact of his imprisonment, Mr. Pellerano's convenience would be best served by a trial in the Dominican Republic.

29. Witnesses are likely to be needed from the Dominican Republic, Panama, the Cayman Islands and, possibly, New York. It would seem that the largest number of these is located in Santo Domingo. Facilities exist in the Grand Court for taking evidence from abroad by video link. There is no evidence as to whether corresponding facilities exist in Santo Domingo or will exist there by the time of

trial. The convenience of the witnesses, therefore, is a factor which tends to favour a trial in the Dominican Republic.

30. In my judgment, the facts that Bancredit is a Cayman company, that the applicable law on the duties of directors is that of the Cayman Islands, and that the books and records containing the necessary evidence are (or should be) here, establish that this is clearly and distinctly the appropriate forum, subject only to the question of whether a fair trial here is possible while Mr. Pellerano remains in prison in the Dominican Republic.

Imprisonment

31. Much of Mr. Pellerano's submission on the question of *forum conveniens* was directed to the fact of his imprisonment. He began serving an eight year sentence in November, 2008. There is no evidence as to when, if ever, he may expect to be released on parole. It is said that he will be denied his right to a fair trial if he remains in prison while the proceedings are in progress here. In addition to the obvious difficulties his incarceration would pose, he says it would violate his right to be present physically (as opposed to a 'presence' facilitated by video link).

32. Although Mr. Pellerano has lawyers in both jurisdictions, there is evidence that it is difficult at best for the lawyers to obtain instructions from him in private. He says that it is difficult to leave documents with him and there are no copying facilities at the prison. In reality, the difficulties posed for Mr. Pellerano in

defending the action here while in prison in the Dominican Republic are so obvious as to need little elaboration.

33. Mr. Pellerano will also experience significant difficulty in defending himself at a trial in Santo Domingo while he remains in prison. The immediate question is not the degree of difficulty that a trial here would present but, rather, the degree of additional difficulty posed by trying the case in the Cayman Islands rather than in the Dominican Republic. Resolution of this issue depends upon a comparison of the measures available in both jurisdictions to alleviate any potential unfairness caused by the Defendant's incarceration.

34. Some of the potential difficulties are not factors which tip the scales either way. For example, the Affidavit of Ms. Bridges says that the "real problem" with attorneys gaining access to Mr. Pellerano is that all his communications are monitored. There is no reason to suppose, however, that this impediment would be removed by holding the trial in the Dominican Republic as long as he remains incarcerated. Incarceration poses difficulties for any litigant, no matter where the trial may be held.

35. The evidence before me does not present any basis for an extended comparison of the impediments present for Mr. Pellerano in each jurisdiction. For example, there is no evidence as to whether, if he were still incarcerated at the time of a trial in the Dominican Republic, he would be permitted to be present physically at

his trial or compelled to "appear" only by video link. If it is the latter, the physical presence factor cannot tip the scales towards either jurisdiction because video link technology is available here as well.

36. In any event, the ultimate question is whether Mr. Pellerano can have a fair trial in the Cayman Islands in the circumstances. Unless I am confident that he can, I am unable to conclude that this is clearly and distinctly the appropriate forum. The right to a fair trial ("the right to a fair and public hearing in the determination of his or her legal rights and obligations") is now enshrined in section 7 (1) of the Bill of Rights in the new *Constitution of the Cayman Islands*. The same right to a fair and public hearing is contained in Article 6(1) of the *European Convention on Human Rights*.

37. Commentary on the right as it applies to physical presence at a civil trial suggests that the law on the subject is still undeveloped and evolving. Lester & Pannick, in *Human Rights Law and Practice*, 2009, 3rd Edition, at pp. 302-3, say that "a party will generally enjoy the right to be physically present at a hearing, but there can be exceptions which justify departure from this." The requirement of fairness "implies not merely the defendant's physical presence, but also the ability to hear and follow the proceedings, to understand the evidence and argument, to instruct lawyers and to give evidence" (at p. 303). Clayton & Tomlinson, in *The Law of Human Rights*, 2nd Edition, 2008, at pp. 860-2, say that, "In civil cases, there is only a right to be present in cases in which the 'personal character' [or] conduct

of the applicant is relevant, or where the particular experience that he may have undergone can only be explained orally." I accept that the allegations before me place both the character and conduct of Mr. Pellerano very much in issue.

Inability to attend a trial can be viewed also as an interference with the right to equality of arms. In a civil case, a litigant must be afforded "a reasonable opportunity of presenting his case to the court under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent": Clayton & Tomlinson *op. cit.*, page 862; Lester & Pannick, *op. cit.*, page 305; ***McLean and Another v Procurator Fiscal (Scotland)*** [2001] UKPC D3 (24 May 2001).

38. These passages must now be read subject to the recent judgment of the Court of Appeal in ***Attorney General of Zambia v. Meer Care & Desai & others***, [2006] EWCA Civ 390. Defendants in a civil action in England applied for a stay of proceedings on the ground (among others) that their right to a fair trial would be infringed because they were resident in Zambia and unable to leave that country. They were defendants in 2 criminal cases in Zambia; the terms of their bail prevented them from traveling. The nature of the allegations in the civil action placed the character and conduct of the defendants in issue. In affirming the trial court ruling which dismissed the application, May, LJ (with whom Jacob, LJ agreed) said:

I am persuaded that in the modern electronic world, defendants in civil proceedings do not have an absolute right to attend every part of a hearing personally.

Sir Anthony Clarke, MR (with whom May, LJ and Jacob, LJ agreed) was of the view that three possible measures, alone or in combination, could alleviate the difficulty sufficiently that a fair trial could be expected. He mentioned the possibility (to which the Zambian Government had agreed) that a commissioner, or the trial judge himself, could take the evidence of the disadvantaged defendants and their witnesses in Zambia. Evidence taken in England could be watched and listened to by the defendants in Zambia by means of a video link; the evidence showed that the technology was available. Moreover, transcripts of the evidence could be transmitted to Zambia on a daily basis, thus allowing the defendants to have meaningful discussions with their attorneys overnight. These measures had been mooted by the Chambers judge. He then continued:

> *43 ... Was the judge justified in holding that the appellants would each receive a fair trial on the basis proposed in his judgment? In my opinion, he was. It is submitted that a defendant in a civil trial is entitled to attend the trial so as to be able, if he wishes, to give evidence and to give instructions. Other things being equal, I would accept that submission, but that is not an absolute right.*
>
> *44 The irreducible minimum is that every party is entitled to a fair trial, both under article 6 of the Convention and at common law. The question in any case is whether, viewed as a whole, the trial process is fair. I am not persuaded that a party to civil proceedings has a right to be physically present throughout. No authority has been cited to us in support of such a proposition.*
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> ...
>
> *47 The key point is that each party must know what the case against him is and be able fully and properly to answer it. It is plain from the judgment in this case that the judge will ensure that each of the appellants can do precisely that. Moreover, the appellants will be represented throughout and thus will be present either in person, when they give evidence through a video link or in Zambia or through their solicitors and counsel. The*

> *judge will be astute to ensure that each appellant is able to give instructions to his lawyers in London. If there prove to be difficulties in communication between Zambia and London, and if at any stage one of the appellants' counsel or solicitors needs time to take instructions, it is plain that the judge will afford him a reasonable time in which to do so. I do not think that there is any risk that any of the appellants will not receive a fair trial because he is not able to give instructions in person.*
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> *48 As to that the appellants' own evidence, as the passage from the judgment of the judge which I have quoted shows, each appellant will be able to give evidence either by video link or in person to the judge. Evidence by video link is becoming more common, perhaps as the links become more reliable.*

Thus, a party to a civil action does not enjoy an absolute right to be present physically throughout the trial even where his character and conduct are in issue. Whether his inability to be present will render the process unfair depends entirely upon the circumstances and particularly upon the measures which might be taken to alleviate the prejudice.

39. The taking of evidence by video link and the use of real-time court reporting (which enables the oral evidence to be sent as an email attachment) are common features of trials in the Cayman Islands. Most of the documentary evidence will have been disclosed well before trial; new documents which are entered as exhibits can be sent by fax to the Dominican Republic. Order 39 of the Grand Court Rules provides for the appointment of a Special Examiner to take evidence in a foreign jurisdiction. At present, what is lacking is evidence before me of the likelihood that these various measures, collectively, will alleviate the prejudice to Mr. Pellerano and ensure a fair trial. Can the authorities be persuaded to give him

internet access for the duration of the trial to permit him to receive real-time transcripts? Can he be permitted unrestricted telephone access to his attorneys for the trial? Is a video link possible? If so, could he observe the entire trial and give evidence by that means? Can he receive faxed documents? Will the Dominican Republic permit the taking of evidence by a Special Examiner appointed by this Court? These are questions to be answered before a final assessment of the fairness issue is possible.

40. ***In Bank Geselleschaft Berlin International SA v. Zihnali and others***, [2001] All ER (D) 192 (Commercial Court), an application similar to the one at bar was made by a party who was incarcerated in Turkey because of a criminal investigation into his activities while in control of a Turkish bank. It was unclear how long the party would remain in detention; the trial was about 18 months away. Colman, J concluded that England was the natural forum. He was able to address the fairness issue by granting leave to the party to renew his application for a stay of proceedings at a later date if and when the prejudice arising from his circumstances became manifest. I consider that I should adopt that course here.

41. The application for a stay will be dismissed but Mr. Pellerano will be given leave to apply again when the action is ready for trial. At that time, the parties should address the questions I have posed above with evidence and argument.

Issue 4: material non-disclosure

42. On the ex parte application to the Chief Justice, BanCredit was obliged to make full and frank disclosure of all material matters: ***Brinks Mat Ltd. v. Elcombe*** [1988] 1 WLR 1350, 1356-7; ***The Hagen*** [1908] P. 189, 201. Mr. Pellerano says that a number of material matters were concealed.

43. It is said that the Chief Justice should have been told about transactions two and three and Mr. Pellerano's defences to those claims as that would have illuminated the weakness of Bancredit's case on transaction one. I do not agree. Transaction one is the only claim Bancredit is pursuing (now) in this action and must be assessed on its own merits. The fact that Bancredit's case on transactions two and three may have been misconceived (about which I express no opinion) can have little bearing on the viability of its remaining claim. Those matters were not material.

44. Mr. Pellerano complains that the decision in ***Spiliada*** was not explained in a balanced and accurate way to the Chief Justice. Undoubtedly, the Chief Justice was well aware of the principle arising from that decision and would not have needed any elaboration upon it.

45. A further complaint is that Mr. Pellerano's likely responses to the claim were not considered. Mr. Fogerty's Affidavit (in para. 21) does set out in summary form the most likely defences. Given the difficulty any plaintiff will experience in

predicting the stance a defendant will adopt, I consider his summary to be adequate.

46. Mr. Pellerano now characterizes the issue as "whether [he] could have done anything about [the redemptions] in the period during which he 'allowed' the overdraft to accrue" (Skeleton, para. 50). He says this issue was not presented "properly" to the Chief Justice. Given Mr. Pellerano's dominant role within the GFN Group and his involvement in both Bancredit and GFN, the proposition is debatable at best. Elaboration on this theme could not have prevented a finding that there was a serious issue to be tried.

47. Mr. Pellerano says that Bancredit did not tell the Chief Justice that his imprisonment was relevant to the choice of forum. It is not suggested that Bancredit argued that the imprisonment was immaterial to the Chief Justice's decision. What Bancredit did say in its Skeleton Brief was: ""Pellerano's imprisonment is not a factor weighing against the Cayman Islands being the natural forum" (para. 20.7). There is an Attendance Note describing the oral submissions made at the *ex parte* hearing. The Chief Justice was told that Mr. Pellerano is incarcerated in the Dominican Republic, is serving an 8 year sentence, and there is no indication of when he might be released. The leading decisions in *Spiliada* and *Seaconsar* were mentioned. The Note describes Counsel's submission in this way:

> *The Cayman Islands ought to be considered the natural and most appropriate forum in circumstances where the case involved questions relating to the duties owed by a director to a Cayman Islands company. He submitted that it was an important factor that Mr. Pellerano chose to be a director of Bancredit, an entity he knew to be incorporated and regulated in the Cayman Islands. [Counsel] noted that he was not suggesting that the CJ consider public policy issues ...*

> *... [Counsel] noted that the liquidation had been ongoing for some time, and, therefore, the centre of gravity was in the Cayman Islands, now potentially even more so than when Bancredit was trading. There were also a large number of documents in the Cayman Islands. Also, if documents existed that explained the transactions further, these should have been delivered to the JOLs a long time ago by Pellerano and the GFN group entities.*

48. The Chief Justice took the view that the obvious impact upon trial fairness of Mr. Pellerano's imprisonment was a question to be considered at a later stage. His view was not induced by any form of non-disclosure during this submission.

49. For these reasons, I am satisfied that the order should not be set aside on account of material non-disclosure.

Order

50. The application is dismissed with respect to transaction one. Mr. Pellerano is at liberty to apply again. The claim with respect to transactions two and three is stayed. The action is transferred to the Financial Services Division.

Dated: June 10, 2010

Henderson, J.

The Hon. Mr. Justice Alexander Henderson
Judge of the Grand Court

GRAND COURT – CAYMAN ISLANDS

Disclosure

43. The husband and wife and the oldest child all have rights to seek information about the B Trust as enforcers under section 102 of the *Trusts Law*. They are also at liberty to place this judgment and the evidence provided to me on this application before the Court in Hong Kong. They may not, of course, use the evidence for any other purpose without leave of this Court.

Liberty to Apply

44. The situation is fluid and the Trustee may need further directions as the circumstances change. As usual, it is at liberty to apply, as are the other parties to these proceedings.

Dated this 9th day of December, 2010

GRAND COURT - CAYMAN ISLANDS

Henderson, J.

Henderson, J.
Judge of the Grand Court