22/7/08

THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 350 OF 2004

BETWEEN:

EVEN WAHR-HANSEN ET AL

PLAINTIFFS

- AND -

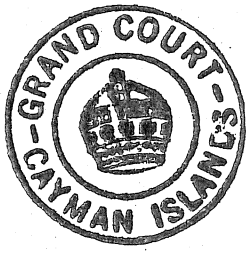
COMPASS TRUST CO LIMITED ET AL

DEFENDANTS

**Appearances:** **Mr. Stephen Rubin QC and Mr. Justin Higgo instructed by David Collier of Charles Adams Ritchie & Duckworth for the Plaintiffs**
**Mr. Carlos Pimentel and Mr. Michael Loberg of Appleby for the 1st to 13th Defendants**

**Before:** **Hon. Justice Henderson**

**Heard:** **July 22, 2008**




## RULING

The First to Thirteenth Defendants seek an injunction restraining the Plaintiffs from using a certain attendance note of a meeting on September 22, 1992, in support of their case at trial. They say the note is privileged, that the privilege has never been waived, and that the Plaintiffs are therefore barred from making any use of that note in evidence. The note was created by Mr. Colin Shaw, a solicitor in this jurisdiction.

The Plaintiffs have received disclosure of a large quantity of documents from

Dr. Hank McKinnell in exchange for a promise of a share of any recovery in this action. A copy of the attendance note was a part of the disclosure by McKinnell.

These documents were disclosed by the Plaintiffs to at least some of the First to Thirteenth Defendants in a previous but related action in this jurisdiction. There was an agreement between the parties in the current litigation that further disclosure of the McKinnell documents was unnecessary.

The First to Thirteenth Defendants provided to the Plaintiffs a bundle of documents relating to what I will call the 'honesty issue'. The attendance note was a part of that bundle.

The copy of the attendance note, which was disclosed in the honesty issue bundle, was not the same copy of the document which formed a part of the McKinnell documents disclosed in the earlier litigation. This currently disclosed copy came from some other source. It must have been provided to the Defendants' solicitors by one of the Defendants.

I accept that the disclosure of this copy in this litigation was a mistake in the limited sense that a particular piece of paper which the Defendants disclosed to the Plaintiffs was something over which they intended to assert a claim of privilege.

In my view, the application is misconceived for two reasons.

First, the Defendants have always intended to deploy this particular document in evidence as a McKinnell document. They say that the arrangement made with Dr. McKinnell amounts to an abuse of the process of the court. They claim that the action should be stayed or dismissed as a result. In support of that contention, they have always intended to enter the attendance note in evidence.

Mr. Pimentel has argued that his clients have no intention of waiving privilege over the attendance note and, therefore, the document cannot be used for more than the limited purpose which I have already described. He contemplates the document being made available to the court for the purpose of the court's consideration of the abuse-of-process issue, but yet being entirely unavailable for consideration of any other aspect of the case.

I do not accept that in civil litigation a privileged document may be entered in evidence and used to buttress a party's case on a single issue and yet continue to be privileged and hence unavailable for use on other issues. A party cannot limit the use made of a document in this way. Either the defendants must maintain the privilege and not tender the attendance note in evidence at all, or they must waive the privilege and accept that the document is admissible for all purposes. In argument, Mr. Pimentel has already said clearly that the Defendants intend to enter this document in evidence.

The second, and more fundamental, reason for refusing the application is this: the claim alleges that several of the Defendants who were directors of Aall Trust and Banking Corporation acted dishonestly in connection with the conversion of assets of

the Aall Foundation. These Defendants deny the allegation and will be offering an affirmative case at trial that their honesty is demonstrated by the actions they took in the latter half of 1992. The attendance note is central to this case. It shows that the directors instructed a solicitor, Mr. Shaw, to carry out a thorough, retrospective investigation of the transactions in question and to advise on what should be done to set things right. The attendance note was disclosed by the defendants in a set of documents, including minutes of board meetings and correspondence, which go to this issue.

A reasonable and objective observer standing in the shoes of the Plaintiffs' solicitors when they received disclosure of the attendance note would have had no inkling that the disclosure was a mistake. That, in itself, argues strongly for the plaintiffs' position on this application (see *Fayed and others v. Commissioner of Police and others* Case No. A2/2002/0758 Court of Appeal Civil Division).

Ultimately, the consideration for me is trial fairness. From what has been said about how the Defendants will approach the honesty issue, I see no unfairness in my conclusion that any privilege attaching to the attendance note has been waived. For these reasons the application is dismissed.

Dated this 22nd day of July, 2008

Henderson, J.

GRAND COURT - CAYMAN ISLANDS

Henderson, J.
Judge of the Grand Court