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1 IN THE GRAND COURT OF THE CAYMAN ISLANDS  
2 HOLDEN AT GEORGE TOWN, GRAND CAYMAN

3  
4 CAUSE NO. 370 OF 2006

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6  
7 BETWEEN:

- 8  
9 (1) ZUBLIN CHILE INGENIERIAL Y CONSTRUCCIONES LTDA  
10 (2) ZUBLIN CHILE INGENIERIAL Y CONSTRUCCIONES LTDA  
11 SUCURSAL PERU



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13  
14  
15 AND:

- 16  
17 (1) ALBERT FORSYTH (also known as ALBERT FORSYTH SOLARI)  
18 (2) FADIA DANERI DE FORSYTH  
19 (3) ATLANTIC SECURITY BANK

20  
21 Defendants

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24  
25 **Appearances:** Mr. Graeme Halkerston and Mr. Jonathan Tarboton of Appleby for the  
26 Plaintiffs  
27 Mr. Neil Timms instructed by Mr. Steven Barrie of Nelson & Company  
28 both for the First and Second Defendants  
29 Mr. Matthew Crawford of Maples & Calder for the Third Defendant

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32 **Before:** Hon. Justice Henderson

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35 **Heard:** July 30<sup>th</sup>, 2007



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38 RULING

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41 1. I have two applications before me. The plaintiffs apply in separate summonses for the  
42 production of documentation by the third defendant, the Atlantic Security Bank, and for an  
43 order compelling the first and second defendants to provide responses to interrogatories.

1 2. I have already concluded and said during argument that the application to compel responses  
2 to the interrogatories must be dismissed. In the context of this application, which I will  
3 shortly describe, that request must be viewed as a fishing expedition and not one calculated  
4 to advance the fair and expedient resolution of the jurisdictional issue.

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6 3. The plaintiffs in their amended writ of summons allege that the first and second defendants,  
7 Mr. and Mrs. Forsythe, became involved in a conspiracy to defraud. It is alleged that  
8 approximately US \$12 million was embezzled by the co-conspirators from the plaintiffs and  
9 their parent company. The plaintiffs say that approximately US \$1.6 million of the  
10 embezzled amount was "routed" to an account in the name of Mr. Forsythe and/or his wife  
11 at the third defendant, the Atlantic Security Bank. Payments to that bank are particularized  
12 in paragraph 15 of the amended pleading. Those payments are said to have taken place on  
13 diverse dates between 1999 and 2002.

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15 4. It is alleged that, by virtue of its receipt of the said funds and upon receiving the requisite  
16 knowledge, the bank became (or will become) a constructive trustee of the funds. There is  
17 a claim that the \$1.6 million US is impressed with a constructive trust in favour of the  
18 plaintiffs.

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20 5. Leave to serve out was obtained *ex parte*. The application set for September, 2007 is a  
21 review *inter partes* of that order.  
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1 6. The first and second defendants have, by their summons of March 6th, 2007, argued that  
2 leave should not have been granted. They say the claim cannot be shown to fall within  
3 subrules (i) or (j) of Order 11, Rule 1; that is, they will argue that there is not sufficient  
4 evidence of a proprietary right in movable property or a claim to the benefit of a  
5 constructive trust established under Cayman Islands law. They say there is no reasonable  
6 basis for maintaining the claims now and there was no reasonable basis for initiating them  
7 last September.

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9 7. The affidavit in support by Mr. Forsythe advances a number of considerations (not all of  
10 which are important or even relevant) but, critically, says this at paragraph 11:

11 “Neither I nor my wife have or had at the time of the application for  
12 leave any assets in the islands as alleged by the plaintiffs who failed,  
13 in any event, to be frank about the facts giving rise to their purported  
14 belief that there were any such assets. Consequently the court had no  
15 jurisdiction under GCR O.11, r. 1(1) (i) or (j).”  
16

17 8. Thus, the plaintiffs assert through their pleading that the bank has funds on deposit which  
18 are impressed with a constructive trust and the first and second defendants deny that any  
19 such funds exist or did exist when the action was commenced. That is the context for the  
20 issue which will be decided in September. The basis for this disclosure application is that  
21 production of the requested documents is necessary to resolve the relatively narrow  
22 question concerning jurisdiction.

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24 9. The plaintiffs cite *Canada Trust and others v. Stolzenberg and others* [1997] 4 All E.R. 983.  
25 (Court of Appeal, Civil Division). That decision establishes that, on an application to  
26 determine whether or not a high court possessing inherent jurisdiction has jurisdiction over

1 a particular action, the court may order disclosure of documents relevant and necessary for  
2 the resolution of the jurisdiction question. I accept that as an accurate statement of law in  
3 these islands. I also accept, as the court in *Canada Trust* and other similar decisions has  
4 noted, the need for caution in ordering disclosure at this early stage. Any such disclosure  
5 will be ordered only on an exceptional basis and only where the court is entirely satisfied  
6 that the documentation sought is necessary.

7  
8 10. In the instant case, given the generality of the affidavit evidence offered by Mr. Forsythe;  
9 given the nature of the allegations in the amended statement of claim, i.e. a large-scale  
10 fraud; and given the fact that the requested documentation is likely to be conclusive of the  
11 jurisdiction issue one way or the other; I do consider it necessary for the fair and  
12 expeditious resolution of this issue to order some disclosure. The disclosure cannot be in  
13 the form requested, which goes well beyond what is needed.

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15 11. I am prepared to order disclosure of all documentation evidencing the state of accounts  
16 between this bank and Mr. and Mrs. Forsythe during the period from September 6th, 2006,  
17 to the present date. I am not prepared to accede to the request for documentation stretching  
18 back to January 1999. The documentation to be produced is not necessarily limited to  
19 accounts in the names of Mr. and/or Mrs. Forsythe. Any documentation relating to an  
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1 12. account which the bank has reason to believe is beneficially owned, wholly or in part, by  
2 Mr. or Mrs. Forsythe should be produced.

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4 13. The balance of the relief sought in the summons of July 9th, 2007, is dismissed.

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6 Dated this 30<sup>th</sup> day of July, 2007

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Henderson, J.

9 Henderson, J.  
10 Judge of the Grand Court

