

20-01-01

Appeal No. 24 of 2006
Grand Court Causes 40, 181 and 193 of 2006

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

BETWEEN:

ALDO GIANNE

APPELLANT

AND:

**PATRICIA MILLER and CONDOCO
GRAND CAYMAN RESORTS LTD.**

RESPONDENTS

BEFORE: The Right Hon. E. Zacca, P.
The Hon. M.R. Taylor, J.A.
The Hon. I. Forte, J.A.



Stephen Hall-Jones instructed by Diamond Law Associates for the Appellant.
Alex Horsbrugh-Porter of Ritch & Conolly for the Respondent Patricia Miller.
Melanie McLaughlin of Appleby for the Respondent Condoco Grand Cayman Resorts Ltd.

Heard: April 16 & 17, 2007

Released: 20th July, 2007

JUDGMENT

TAYLOR, J.A.

The central question raised in these and related proceedings is whether the Respondent Patricia Miller was deceived in the course of California divorce proceedings by her then husband, the Appellant Aldo Gianne, into giving up claims against him in the belief he was virtually without means when, directly or through a Cayman company, he

owned real estate interests in the Cayman Islands subject to division between them under California matrimonial law that are alleged to be worth \$23,000,000 (US).

During the last 18 months the parties have been engaged in complex procedural disputes involving three actions in California and four in the Cayman Islands without moving appreciably closer to a resolution of the factual issue involved. Three of the Cayman actions are involved in the present appeals, the focus being on an application by Ms. Miller for discovery of documents in the possession of the second Respondent, the vendor under agreements for the sale of the real property in question to a company operated by Mr. Gianne. That application was brought by Ms. Miller under the equitable jurisdiction identified with the decision of the House of Lords in *Norwich Pharmacal Co. v. Customs and Excise Commissioners* [1974] A.C. 133 and since applied in a variety of differing circumstances. The exercise of the jurisdiction in the present case has involved an application also under the Cayman Islands *Confidential Relationships (Preservation) Law*, which forbids disclosure of protected information except in defined circumstances and with leave of the Cayman Islands Grand Court.

The background to the present appeals can best be explained by a chronological review of the seven actions so far brought.

(a) The Proceedings

(1) In August 2005 the parties agreed to disposition of their matrimonial claims under a stipulated – or consent – judgment in the action in the Family Court of California by which their marriage was dissolved. In so agreeing Mr. Gianne represented that he had no relevant undisclosed assets. By the terms of the judgment any matrimonial assets owned by him that might later be discovered, or their value, are to be shared equally with Ms. Miller, as she elects, and the California Family Court retains its jurisdiction with respect to any such after-discovered assets.

(2) In January 2006, Ms. Miller brought an action against Mr. Gianne in the Grand Court of the Cayman Islands claiming damages for breach of warranty and fraudulent misrepresentation. She alleged that, either personally or through a Cayman Islands company named Redwood Hotel Investment Corporation, Mr. Gianne had entered into agreements with the Respondent Condoco Grand Cayman Resort Ltd. to purchase five apartments at the new Ritz-Carlton resort on Seven Mile Beach. She alleged that the interests in land thereby acquired were assets that he ought to have disclosed prior to execution of the agreement incorporated in the California consent judgment and that he was accordingly in breach of the warranty there given that he did not “own any property of any kind other than the property set forth in this Agreement”. This action was doomed to be dismissed in September 2006 on *forum non conveniens* grounds.

(3) In March 2006, two months after bringing her Cayman Islands action, and no doubt in apprehension that it might suffer the fate that it eventually did, Ms. Miller brought a similar damage claim in the Superior Court of California at Los Angeles. This action was destined to be dismissed on demurer in May 2006, when Mr. Gianne successfully contended that the jurisdiction reserved by the stipulated judgment of the California Family Court must be regarded as exclusive.

(4) On May 12, 2006, shortly after dismissal of her California action, Ms. Miller brought proceedings in the Grand Court by originating summons against the Condoco company for equitable third-party discovery of documents in its possession relating to the purchase of five Ritz Carlton units by Mr. Gianne or his company, and also documents in its possession evidencing Mr. Gianne's interest in the Redwood company, all being for use in aid of her Cayman Islands damage action, which then remained extant. She thereafter obtained an *ex parte* order dated May 16, 2006, by which such discovery was ordered, but subject to a successful application first being brought by Condoco under s. 4 of the *Confidential Relationships (Preservation) Law*, permitting disclosure of information protected by that statute, and to service of such application being made by Condoco on both Mr. Gianne and Redwood.

(5) On May 19, 2006, Condoco brought action by Originating Summons under the *Confidential Relationships (Preservation) Law* seeking direction whether the information sought by Ms. Miller should be given. This document is described as an *ex*

parte summons, but was in fact served as directed on Mr. Gianne and Redwood. The documents in respect of which leave to disclose was sought comprised *all* of the documents in the possession of Condoco that fell within the order obtained by Ms. Miller. On June 21, 2006, an order was made following an *inter partes* hearing before Mr. Justice Henderson authorizing disclosure of all the documents listed by Condoco, and these documents were shortly thereafter disclosed by Condoco to Ms. Miller. No appeal has ever been brought, nor any stay application made, in respect of this order, either by Mr. Gianne or by Redwood. If the discovery order was valid at the time of delivery of the documents – which is not conceded by the Appellant – Ms. Miller was thus entitled to use the information disclosed for the proper purposes for which it was sought, that is to say for the purposes of her Cayman Islands damage action, or any other purpose thereafter approved by the Grand Court. The Cayman damage action was dismissed on *forum non conveniens* grounds by reasons for judgment of Mr. Justice Harrison given September 19, 2006. Consequential issues arising out of that decision were thereafter decided by Mr. Justice Henderson on November 9 and 15, 2006. By the latter order Ms. Miller was given leave to use the documents disclosed for the purpose of any further action that she might bring, either in the Cayman Islands or in California, to advance her claim to share in Mr. Gianne's alleged Cayman Islands assets.

(6) On November 17, 2006, two days after Mr. Justice Henderson made the last-mentioned order, action was commenced by Ms. Miller in the Grand Court claiming a declaration that she is entitled to part-ownership of Mr. Gianne's shares in Redwood, a

Cayman-incorporated company, or of that company's interests in Cayman Islands real property. An application by Mr. Gianne to strike out this action has since been dismissed by an order of the Chief Justice.

(7) On December 1, 2006, Ms. Miller commenced action in the Family Court of California on her claim against Mr. Gianne to part-ownership of his shares in Redwood or of his, or the company's, interest in real property here.

(b) The Orders Under Appeal

The present appeals are brought in the proceedings numbered (2), (4) and (5) above – the original Cayman damage action, the proceedings for equitable discovery against Condoco and those under the *Confidential Relationships (Preservation) Law* for leave to make the required disclosure – these appeals being against the orders made by Mr. Justice Henderson on November 9 and 15, 2006, and their purpose to prevent Ms. Miller from using in her present Cayman and California actions information provided by Condoco under the orders in actions (4) and (5) above.

In a careful and detailed submission Mr. Hall-Jones takes the following position on behalf of Mr. Gianne: (i) that the *ex parte* order granting equitable discovery in action (4) ought not to have been granted; (ii) that Mr. Justice Henderson erred in finding the validity of that order to be *res judicata* by reason of his order in the subsequent *inter partes* proceedings in action (5) under the *Confidential Relationships (Preservation) Law*;

(iii) that Mr. Justice Henderson erred, in any event, in releasing Ms. Miller from her implied undertaking restricting use of the material to action (2) for which the disclosure was sought; and (iv) that the judge ought not to have made and upheld costs orders against Mr. Gianne in respect of the discovery-related proceedings. Mr. Hall-Jones contends that there has never been any order made on an *inter partes* basis in the discovery proceedings – action (4) above – on which a plea of *res judicata* could be based, that upon dismissal of action (2) in respect of which the discovery was sought, no action remained in which the information disclosed could properly be used, and that an order cannot be made under the confidentiality protection statute permitting disclosure of information to be used in an action not yet commenced.

It is further contended for Mr. Gianne that equitable third-party discovery cannot, in any event, be granted in aid of foreign proceedings, such as those now brought by Ms. Miller in the California Family Court.

(c) **The Decisions in Issue**

By reserved decision of September 19, 2006, Mr. Justice Harrison dismissed Ms. Miller's claim for fraudulent misrepresentation (action (2) above), and discharged a Mareva injunction issued in support of that claim, on the ground that the California Family Court is the only proper forum for a damage claim arising out of the stipulated judgment, but the judge did not deal with Mr. Gianne's applications, also before him, for consequential relief with respect to the orders for equitable discovery against Condoco

and under the *Confidential Relationships (Protection) Law* permitting such discovery, nor with Mr. Gianne's claim for indemnity costs.

Since Mr. Justice Harrison had left the Islands, these and other undecided matters were brought before Mr. Justice Henderson on application to 'perfect' the judgment of Mr. Justice Harrison, and dealt with by oral decision of November 9, 2006, and written reasons for judgment of November 15 and December 4, 2006. In his oral decision Mr. Justice Henderson dismissed Mr. Gianne's application for orders setting aside the third-party discovery order and that permitting disclosure under the confidential relations protection statute, declined to order return of the discovered documents or restrain further use by Ms. Miller of the information they contain, and allowed Mr. Gianne's application to discharge inhibitions filed by Ms. Miller against the Ritz-Carlton suites named in her action. By his oral decision Mr. Justice Henderson permitted Ms. Miller to use the documents in *any* proceedings she might thereafter commence in furtherance of her claim that Mr. Gianne had defrauded her by obtaining her consent to the California judgment without disclosing Cayman assets, and awarded her costs of the discovery and confidentiality proceedings.

In his written reasons for judgment of November 15, 2006, Mr. Justice Henderson refers to the nature of the *inter partes* hearing on June 21, 2006, in which he granted the order under the *Confidential Relationships (Preservation) Law* permitting Condoco to make disclosure under the *ex parte* discovery order. During this *inter partes* hearing then

counsel for Mr. Gianne had taken objection to enforcement of the discovery order on the ground that the California Superior Court damage action (action (3) above) had by then been dismissed on demurer and contended that it followed that the Cayman damage action (action (2) above), for which the discovery was sought, “must also fall away”, and that the discovery action should be dismissed. Mr. Justice Henderson says that the hearing on June 21 thus became, in effect, also an “*inter partes* review of the *Norwich Pharmacal ex parte* order”, and that by implication he affirmed that order in granting the application under the confidentiality statute.

In these reasons the judge notes that the damage actions commenced by Ms. Miller, both in the Cayman Islands and in California, had been dismissed on the basis that the proper forum for Ms. Miller’s claims was the California Family Court, but that it was still open to her to seek relief in the California Family Court and by a proprietary claim in the Cayman Court, and that either would “provide a grounding for granting her the equitable relief she requested”. The judge further observes that the order granting discovery had long been complied with “and is now spent”, expressing doubt as to “the viability of seeking to stuff the genie back into the bottle at this point”. The judge nevertheless considered and rejected several grounds on which the granting of the original discovery order was attacked, and which are re-asserted before us.

In these November 15 reasons Mr. Justice Henderson concludes that the “focus” of the application for discovery was “not a particular court action but a claim, or cause of

action”, and rejects the contention that the disclosure ordered would necessarily be restricted to use in an action brought in the Cayman Islands. The judge says that both the discovery order and the order granting leave to disclose under the confidentiality preservation statute could be made before any action anywhere had been commenced. The judge proceeds, however, to restrict relaxation of Ms. Miller’s implied undertaking with respect to use of the disclosed material so that she would be at liberty to use the documents only in pursuit of “any claim made in this court in relation to the ownership of the five condominium units” and “any claim advanced in the State of California in relation to the stipulated judgment there”.

By brief supplementary reasons dated December 11, 2006, the judge draws attention to recent cases in which it had been held that third-party discovery orders could be made in aid of foreign proceedings: *Systems Design Ltd. et al. v. President of Equatorial Guinea et al.* Guernsey C.A. civil appeal 354 (April 5, 2005) and *Secilpar SDL v. Fidelity Trust*, Gibraltar C.A. (Sept. 24, 2004).

Ms. Miller thereafter commenced her latest actions in California and the Cayman Islands (actions (6) and (7) above), and the Chief Justice dismissed an application by Mr. Gianne to strike out the latter for want of jurisdiction.

(d) The Decisive Issues

The trial court judge was in our view right in holding that further litigation of issues involving the correctness of the original third-party discovery order and the order granting leave under the *Confidential Relationships (Preservation) Law* is barred by operation of the principle of *res judicata*.

No set-aside application has ever been brought on behalf of Mr. Gianne in respect of the *ex parte* discovery order, as ought to have been done promptly after learning of the order if any challenge was to be made, nor has any appeal against that order been brought. Mr. Gianne was, however, permitted to challenge that order in the statutory proceedings which the order required Condoco to bring on an *inter partes* basis, these being proceedings ancillary to the discovery action, rather than collateral proceedings. Having attacked the discovery order in the confidentiality protection proceedings, having not sought to stay the resulting order authorizing disclosure of the documents, and having brought no appeal against either of these orders, Mr. Gianne is in our view clearly foreclosed – those orders having now been fully complied with by delivery of documents in question – from seeking to impeach the correctness of either of them.

The only aspects of Mr. Justice Henderson's decisions of November 9 and 15, 2006, open to challenge are those by which the judge gave Ms. Miller leave to use the documents received by her under the discovery order in new proceedings in this jurisdiction and California that she had not then commenced.

There can be no doubt that third-party discovery orders may be made for the purpose of contemplated proceedings – this was, indeed, the situation in the *Norwich Pharmacal* case itself. The jurisdiction being equitable, and its application having been greatly expanded during the 30 years since that decision, there is no basis today for restricting its use in prospective proceedings to cases in which the intended defendant remains, at the time of application, unknown. That the jurisdiction may be used in foreign proceedings is supported by the decisions to which the judge referred in his supplementary reasons. The fact, emphasized by Mr. Hall-Jones, that legislation has been enacted in the Cayman Islands under which evidence may be obtained for use in foreign proceedings does not justify a conclusion that the legislature intended thereby to exclude the use of equitable discovery for such purpose. The material having already been disclosed for the purposes of the claim which Ms. Miller is now pursuing, and there being no basis for any objection at this stage to disclosure for that purpose, the judge was in our view entitled to exercise his discretion in favour of extending use under the implied undertaking to new proceedings in respect of that same claim: see, for example, *Sybron Corporation et al. v. Barclays Bank PLC* [1985] Ch. 299.

The final point raised is whether leave may be granted under the *Confidential Relationships (Preservation) Law* for disclosure of information to be used in proceedings not yet brought. Mr. Hall-Jones forcefully advanced a construction of s. 4 of the Law which suggests that the Court could only authorize disclosure of protected information for use in an action already in progress. Ms. Miller's present Cayman Islands and California

proceedings had not been commenced when Mr. Justice Henderson made his order, but they were commenced while that order was in place, and had not been stayed. The order could certainly have been made at any time during the five months since the new proceedings were brought, and is one that ought to be made.

To the extent that any error of law may have occurred by reason of prematurity in the making of the revised confidentiality protection order, we are of the view that it is of a technical nature. The effect of the revised order in our view clearly being “to do substantial justice between the parties”, within the meaning of the proviso to s. 5 of the *Court of Appeal Law*, it should not be disturbed on appeal.

(e) **Disposition**

The combined appeals in Grand Court causes 40, 181 and 193 of 2006 are accordingly dismissed and the decisions and costs orders below affirmed. The Respondents will have their costs of the appeals, to be taxed if not agreed.

E. Zacca, P.

M.R. Taylor, J.A.

I. Forte, J.A.

