May 6, 2005
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IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 296 OF 1994

IN THE MATTER OF A MEMORANDUM OF AGREEMENT DATED 20TH JULY 1976 (KNOWN AS THE CONTINENTAL FOUNDATION)

AND IN THE MATTER OF A MEMORANDUM OF AGREEMENT DATED 7TH OCTOBER 1982 (KNOWN AS THE AALL FOUNDATION)

AND IN THE MATTER OF THE TRUSTS LAW (1998 REVISION)

BETWEEN:

BRIDGE TRUST COMPANY LIMITED

Plaintiff

and

(1) THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS

First Defendant

(2) EVEN WAHR-HANSEN

Second Defendant

(3) COMPASS TRUST COMPANY LIMITED

Third Defendant

(4) TRANSWORLD TRUST COMPANY

Fourth Defendant

(5) – (73) AALL TRUST AND BANKING CORPORATION LTD. & ORS AND OTHERS

Fifth to Seventy-Third Defendants

(74) EIKLAND AS

Seventy-Fourth Defendant

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

CAUSE NO. 350 OF 2004

BETWEEN:

(1) EVEN WAHR-HANSEN
(2) ANDERS JAHRES REDERI A/S
(3) BRIDGE TRUST COMPANY LIMITED

Plaintiffs

and

(1) COMPASS TRUST CO. LIMITED
(2) MADS ERIK MONSEN
(3) AALL GROUP INC.
(4) AALL TRUST & BANKING CORPORATION LTD.
(5) AALL & COMPANY LIMITED INC.
(6) TOVE BROWN
(7) ANTHONY GEORGE MERRIK, BARON TRYON OF DURNFORD
(8) FORRESTER MARITIME LIMITED
(9) FORRESTER HOLDINGS LIMITED (IN VOLUNTARY
(10) CHESTER PORTFOLIO LIMITED
(11) ORNATE LTD.
(12) BUTTERFIELD BANK (CAYMAN) LIMITED
(13) ANCHOR TRUST CO. LIMITED
(14) ROBERT N. SLATTER
(15) THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS

Defendants

Appearances: **Stephen Rubin Q.C. and Justin Higgo instructed by Elaine Gray of Charles Adams Ritchie & Duckworth for the Plaintiffs**
Camilla Bingham instructed by Carlos De Serpa Pimentel of Appleby Spurling Hunter with Maxine Mossman and David Flack All for the 1st to 13th Defendants

Before: **Hon. Justice Henderson**

Heard: **May 5 & 6 2005**

JUDGMENT

Mr. Even Wahr-Hansen applies in Causes 296 of 1994 ("the earlier action") and 350 of 2004 ("the later action") for an order relieving himself of an implied undertaking relating to documents which he obtained by disclosure in the earlier action. He wishes to sanction the use he has already made of those documents (without benefit of such an order) in the later action.

By an agreement settling an action in Norway entered into in October of 2001, Lazards agreed to produce a certain class of documents relating to entities and transactions involving Mr. Anders Jahre. The plaintiff is the administrator of the Jahre estate. In March 2002, disclosure under the settlement agreement was made and the plaintiff received some 14,000 documents.

In the earlier action, Lazards was a defendant. In August 2002, Lazards served a list of documents in the earlier action which listed the 14,000 already disclosed documents and 11,000 additional documents. These relate to what has been described as "the shipping transactions" and involve nine companies admittedly controlled by the Monsen defendants, a group of defendants in the later action. Those companies are now dissolved.

In August 2003, the plaintiff inspected the 11,000 disclosed documents which were the subject of the implied undertaking. In November 2003, the earlier action was compromised and stayed.

By 2004, the 25,000 documents had been collated together and were used to formulate the Statement of Claim in the later action. That was done, as I have indicated, without benefit of any court order relieving against the implied undertaking. Lazards has never granted an informed consent to use the 11,000 documents in that way.

The first objection to the plaintiff's request for the present order has to do with jurisdiction. The Monsen defendants have argued at some length that a court simply has no jurisdiction to relieve retroactively against an implied undertaking.

I find that proposition intuitively unappealing. More importantly, there are two authorities (one in this jurisdiction) in which retroactive permissions have been given: see *In Re H and H*

Limited, Action C 10792, per Malone, C.J.; and see *Dory and others v. Richard Wolf GMBH and others [1990]* FSR 266.

I see no reason in logic or in law why a Court may not, in a proper case, relieve against the implied undertaking even after it has been breached.

For obvious reasons, it will be only in the most exceptional circumstances that such relief will be granted. The party applying is presumably in contempt and has abused the process of the Court. There is a strong public interest underlying the implied undertaking – the encouragement of litigants to make full disclosure of private matters in circumstances where it may be contrary to their commercial interest to do so. The ready availability of after-the-fact permission to use the documents for another purpose would only erode this important incentive to disclosure.

It is useful to ask at the outset, "whose financial privacy is at stake?" Many of the reported cases involve litigants whose own privacy was protected by the implied undertaking. In the case of a bank, an investment house, a brokerage, an accounting firm, or a law firm (to name a few examples), it is the financial privacy of the firm's client which must be protected.

Here, the privacy interest in the 11,000 documents was enjoyed by a number of corporate entities which have since been dissolved. The arguments before me have proceeded on the assumption that the fact of dissolution does not destroy the privacy interest or alter Lazards' obligation of confidentiality.

Would I have relieved the plaintiff from the implied undertaking if he had requested it at the proper time? Cases in which such relief has been granted seem to fall in one of three distinct categories.

Some involve Anton Pillar orders and Mareva relief. In these cases, typically, an order is obtained requiring the defendant to make disclosure. It would be inconsistent and unreasonable to prevent the plaintiff from using what he learns in a subsequent action involving the same subject matter. These sorts of cases have no application here.

In another class of case, a strong countervailing public interest has been identified, such as the detection of crime or fraud. I see no parallel in the present case. This is a private dispute between the administrator of an estate and those in possession of assets which allegedly belong to it.

In a third type of case, relief against the implied undertaking is granted because that will have the effect only of accelerating a disclosure which would have to be made in due course. The cause of action is the same. It cannot be said, therefore, that the disclosed documents are being used for a collateral or ulterior purpose. The party giving disclosure and the party seeking relief from the implied undertaking are parties to both actions. The present case cannot be said to fall in that category.

In the earlier action, a claim was advanced to assets derived from an 80 percent shareholding in Continental Trust Company. The later action is a similar claim but to the other 20 percent. There is an obvious overlap in the evidence. Most of the parties are the same. However, it is not the same cause of action. Moreover, the party giving disclosure in the earlier action, Lazards, is not a party to the later action. The Monsen defendants may eventually have to make disclosure of the 11,000 documents on the ground that it is within their power to obtain them from Lazards, but that is unclear at this point.

I do not consider that the earlier and later actions are based upon the same cause of action. It is not merely adventitious that there are two actions rather than one. They are not, in substance, one proceeding. It follows that, had I been asked to grant this order prospectively, I would have declined to do so.

The plaintiff's explanation for his breach of the implied undertaking is inadequate. It never descends from the general to the particular. He asserts that the breach was inadvertent but fails to identify who is responsible or how it occurred. There is a sense arising from the evidence that the implied undertaking was regarded as a mere technicality.

An important aspect of the administration of justice is at stake. The Court is entitled to expect that its officers will pay scrupulous attention to document gathering and collation, and will put systems in place to ensure that an implied undertaking is respected. An intentional breach will likely attract sanctions in the form of professional discipline. An unintentional but careless breach is also a serious matter. It is only proper that adverse consequences should follow.

If I were to assume, contrary to my earlier finding, that I would have relieved against the implied undertaking if application had been made at the proper time, I would still be unwilling to make that order now. The difficulty is of the plaintiff's own making. He must bear the consequences.

For these reasons the application is dismissed.

Judgment on Costs

I think this case falls well within the class of case in which indemnity costs can and should be awarded. The Court must express its displeasure with what has happened in a tangible way.

I am awarding to the Monsen defendants their costs on an indemnity basis of all of those steps taken in pursuing this application from December 3rd, 2004 until the present. Those costs are payable forthwith in any event of the cause.

Direction

I will direct that the plaintiff deliver and file within 21 days an Amended Statement of Claim relying only upon documents which were not the subject of the implied undertaking. The plaintiff is to deliver and file an affidavit at the same time setting out the documents relied upon for the amended provisions and the documents relied upon for the surviving provisions.

The plaintiff is not permitted to take any step in the action in the interim which relies in any way upon part 3 of the Statement of Claim.

The Monsen defendants are at liberty to apply either to strike out portions of the existing Statement of Claim or to oppose the amendment of the new pleading. My intent is that this issue will be fully ventilated at a hearing in the reasonably near future.

Dated this 6th day of May, 2005

Henderson, J.

Henderson, J.
Judge of the Grand Court

GRAND COURT CAYMAN ISLANDS