

Civil

9/4/05



1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 IN CHAMBERS
3 CAUSE NO: 44 OF 2005

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IN THE MATTER OF **CYBERVEST FUND**

7 Appearances:
8 Mr. James Lagan of Maples & Calder
9 Mr. Hector Robinson of Quin & Hampson
10
11 Before: Justice Anderson (Acting GC Judge)
12
13 Date of hearing: 5th April 2005
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JUDGMENT

17 The matter before me today, is an application by way of summons on behalf of the
18 Petitioner herein, (Public Institution for Social Security of Kuwait) seeking the following
19 Orders:

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- 21 1. That the Company produce forthwith unredacted copies of the letters sent to
- 22 shareholders in accordance with the Order of this Court dated 4 March 2005.
- 23 2. That failing production of the unredacted copies of the letters the notice of
- 24 opposition to the petition filed by the Company be struck out.
- 25 3. An Order that the costs of and incidental to this application be payable by the
- 26 Company

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28 The application arises out of the Order for Directions made by Sanderson J. on March 4,
29 2005. In particular, the application is made in relation to Order number 2, of the learned
30 judge's orders, which is in the following terms.

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- 32 2. The Company shall serve on all the shareholders of the Company before
- 33 March 11th (the "shareholders") except the Petitioner copies of
- 34 2.1 The Petition;

1 2.2 The affidavit of Abdullah Al-Sabah sworn 31 January 2005; and

2 2.3 This Order, when sealed...

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4 Service is to be effected by the Company sending the said documents to the
5 Shareholders by fax and by courier with a letter explaining the effect of this
6 Order, such letters to be copied to the Petitioner's attorneys, Maples and
7 Calder.

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9 It was the position of counsel for the Petitioner, Mr. Imrie, that the Company had failed
10 to comply with the Order above, in that it had not sent the copies of the letters sent to the
11 other shareholders to Maples and Calder but had instead, proposed sending redacted
12 copies of the aforesaid letter, with the contact information for each shareholder redacted.
13 In his view, this was a clear breach of the Order of Sanderson J., and he supported that
14 position with the following submissions.

15 A. The Order For Directions was a "Consent Order" which, by its terms, required the
16 Company to provide the copy letters specifically as sent to the respective
17 shareholders. "Such letters" in the Order meant copies of the actual letters sent.
18 Redacted copies would therefore not be in compliance with the Order. Had the
19 Company not consented to this Order, the Petitioner would have sought and, on
20 his reading of the matter obtained, an order requiring the Company to disclose
21 "immediately and if necessary by means of an affidavit, a list of participating
22 shareholders.

23 B. Pelling v Families Need Fathers Ltd [2001] EWCA Civ 1280 at page 645,
24 although an English case based upon the English statute, was authority for the
25 proposition that where the applicant has a "*legitimate purpose*" for seeking the
26 details of the identity of the members, the court has a discretion to make an
27 appropriate order. In that case it was to "canvass members of the association for
28 their votes at the forthcoming annual general meeting". It was argued by analogy
29 that in this contributories' winding-up petition, there was a "legitimate purpose"
30 in relation to which the court would exercise its discretion. That purpose was to

1 ascertain who those shareholders are in order to canvass their support for the view
2 which the Petitioner held on the present status and activities of the company.

3 C. Article 143 of the Company's Articles of Association is in the following terms:
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5 The Directors, Investment Manager, Administrator or other agent of
6 the Company shall if lawfully required to do so under the laws of any
7 jurisdiction to which the Company is subject or in compliance with
8 the rules of any Stock Exchanges upon which the shares are listed be
9 entitled to disclose any information regarding the affairs of the
10 Company including without limitation information contained in the
11 Register of Members and transfer books of the Company.

12 It was counsel's submission that this article was determinative of the issue as to
13 the Company's right to give effect to Order #2, as it gave clear authority for the
14 Company to disclose the identity of the shareholders, pursuant to the Order of
15 March 4, 2005. In other words, the Order made the information agreed to be given
16 in paragraph 2 of the Order, "lawfully required". Article 91 also authorizes the
17 directors to make disclosure when they consider it necessary and "in the interests
18 of the company".

19 D. The Company could not refuse to disclose the information sought by virtue of the
20 Confidential Relationships (Preservation) Law, (the "Confidentiality Law" or "the
21 Law"), because the information was not "confidential", within the meaning of that
22 Law. This was because, as articulated earlier, knowing the identities of the other
23 shareholders was critical in a case involving a contributories' winding up petition,
24 and the petitioner's purpose of itself wishing to communicate with other
25 shareholders was a "legitimate purpose". Further, to be confidential information,
26 the Principal must in the course of transacting of business of a professional nature
27 have imparted the information to a "Professional person". This was not the
28 position here unless the definition of "commercial agent and adviser" is wide
29 enough to cover the directors. It must also be information "otherwise than in the
30 normal course of business". If it is "in the normal; course of business", then by
31 definition, it is "not confidential". If it is not, then the appropriate application
32 under section 4 of the Law must be made.

33 E. In any event, if it is of the view that the disclosure of the information requested
34 may cause them to run afoul of the Confidentiality Law the Company cannot just

1 sit back and do nothing. They then have a duty to seek directions under section 4
2 of the Confidentiality Law so that the court may consider its position. Mr. Imrie
3 also pointed out that there was no evidence beyond the suggestion by the Mr.
4 Robinson of Quin & Hampson in a letter, that “some shareholders may not wish
5 to be identified”, that there was any objection to such disclosure by the Company.

6 F. Mr. Imrie also rejected the proposition that the case of **UJB Financial**
7 **Corporation v Chilmark Offshore Capital Fund Limited**, decided by
8 Schofield J. in the Grand Court on April 9, 1992, and cited by the Company’s
9 attorneys, was of assistance in establishing that the information was in fact
10 confidential. He pointed out that in that case the information sought was being
11 sought, not of the directors, but of the commercial agent, namely Pierson Holding
12 & Pierson Ltd. Moreover, if the information being sought was already available
13 elsewhere, then it would already be outside the definition of confidential
14 information. Maples and Calder had sought to ascertain from the attorneys for the
15 Company whether this was the case but had not received confirmation in respect
16 of their request.

17 G. In further support of the submission that this was not confidential information,
18 counsel cited Smellie J. (as he then was) in **the Matter of The Ontario**
19 **Securities Commission** (Grand Court June 26, 1994) as authority for the
20 proposition that there was a distinction between “agents” and “companies” in the
21 Confidentiality Law. It was also submitted that the decision of Smellie C.J in **Re**
22 **Ansbacher (Cayman) Limited**[2001, CILR 214 supported the submission that
23 the categories in respect of which the Court may exercise jurisdiction are not
24 limited to those set out in section 4(6) of the Law. **Thune and Roll v Transocean**
25 **Bank and Trust Company Limited and Four Others** (Grand Court August 25,
26 1987) showed that the expression “required to give confidential information in
27 evidence” was to be widely construed.

28 H. Finally, Mr. Imrie submitted that the Court should reject the Company’s
29 suggestion that the Order For Directions should be amended in relation to
30 Paragraph 2. He submitted that if the Company was to be allowed to apply for
31 directions under the Law, a strict timetable should be given so as to prevent

1 further delay in this action. In support of this he cited In Re Euro bank
2 Corp.(Grand Court, Murphy J., September 20, 1996 in which it was stated:

3 On application for directions under the Confidential Relationships
4 (Preservation) Law (1995 Revision) s.4, the Court will not
5 repeatedly adjourn the proceedings so as to delay the operation of
6 an order for the production of documents vital to the plaintiff's
7 future course of action, on the basis of unsupported allegations that
8 the defendants intend to apply to have the order set aside, or that
9 unnamed third parties may be affected by the disclosure. The court
10 will consider the propriety of disclosure solely in accordance with
11 the guidelines set out in s.4 (6) of the Law, and will not review the
12 decision to order discovery or the evidence upon which it was
13 made.

14 Mr. Farrow for the Company submitted that there was no dispute between shareholders
15 so as to allow the disclosure of the contact information. The dispute he said was between
16 the Petitioner and the Fund Managers. He was of the view that if the contact details were
17 redacted, the Petitioner would still have the information that it required and that further,
18 to supply the contact information would breach the provisions of section 4 of the Law,
19 absent some special exception. He pointed out that like a Mareva injunction, disclosure
20 orders are often made in anticipation of a section 4 application being made.

21 He submitted that there was no intention that paragraph 2 of the Order was to provide the
22 information now being requested by the Petitioner. It was merely to put the shareholders
23 in the same position that they would have been if the petition were advertised. He also
24 submitted that the identities and contact details of shareholders are "confidential
25 information" within the Law and reinforced this submission with the proposition that "the
26 register of members of an exempted company, unlike that of other companies, is not open
27 to public inspection: see s. 44 Companies Law (2004 Revision).

28 Thirdly, it was submitted that the relevant paragraph of the Order ought to be varied
29 pursuant to the liberty to apply provision in paragraph 11 so as to relieve the company of
30 the need to comply with the disclosure now being sought by the Petitioner on the basis
31 that it was a mere interlocutory order for direction; the confidentiality point was never
32 considered by the court at the time the order was made.

1 Even if the unredacted letters were provided to the Petitioner, it would not provide
2 evidence that every shareholder had been contacted, as only the register of members
3 would be able to show that. The Petitioner perhaps should consider making an application
4 to the Court for the register to be provided. Moreover, even if the order in paragraph 2 is
5 not varied, “it should at least be supplemented by time stipulations sufficient to permit
6 the company to make a section 4 application”.

7 Finally, it was submitted that it was not at all clear that the circumstances herein, where
8 there was no affidavit, would give the court jurisdiction to hear a section 4 application
9 and Thune (above) was cited in this regard. The court was urged to the view that the
10 nature of the information being sought here was “far removed from giving of “evidence
11 in or in connection with any proceeding”, as required by the Law. For these reasons, the
12 Order should be varied or time given to the Company to file a section 4 application.

13 Having heard the submissions, I have come to the following conclusions.

14 The Order for Directions is on its face clear. I do not believe that there is need to enquire
15 further into what his lordship meant when the order was made. The order was a consent
16 order and it was one which the attorneys on both sides had carefully worked out. I do not
17 necessarily agree with counsel for the Petitioner that it was the purpose of paragraph 2 of
18 the Order that the contact information be provided. However, it was a natural and
19 necessary result of the Order and I so find. It is not at all clear to me that in those
20 circumstances it is open to a court to amend the order without the consent of both sides. I
21 recognize that there are cases in which it will be necessary to amend such order such as
22 where timeframes given in an order have not been met and those timeframes have passed.
23 I do not believe that this is an appropriate case.

24 Secondly, I accept the submission of Mr. Imrie that Article 143 provides the necessary
25 authority for the Company to release the unredacted copy letters in order to provide the
26 contact information which the Petitioner seeks. I do not accept Mr. Farrow’s submission
27 that the expression “lawfully required” in Article 143, is to be restricted to the meaning
28 “lawfully required under the general laws” of the Cayman or any other country. If,
29 however, I am wrong in this view, I would hold that the provision of contact information

1 in the instant case is “in the ordinary course of business”, and so is not “confidential
2 information” for the purposes of the Law and these proceedings.

3 I am, accordingly, of the view that the Petitioner is entitled to the Order sought in
4 paragraph 1 of the summons. I further order that the said copies are to be provided on or
5 before Monday April 11, 2005. As I perhaps indicated at the end of the submissions, I am
6 also of the view that the Petitioner’s attorneys must give an undertaking to this court that
7 it will use the information solely for the purposes of this litigation, and I so order. I do not
8 think it is necessary to grant the second order sought, since if the Company should
9 disobey this order, it will be liable, in any event, to sanctions.

10 Finally, I order that the costs of this application be reserved to the hearing of this matter.

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13 Judge of the Grand Court

