

CJ/LIB

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 296/1994

31-07-03

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 Trust Law (1998 Revision)

BETWEEN:

BRIDGE TRUST COMPANY LTD.

Plaintiff

AND:

(1) THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS

First Defendant

(2) EVEN WAHR-HANSEN

Second Defendant

(3) COMPASS TRUST COMPANY LTD.

Third Defendant

(4) TRANSWORLD TRUST COMPANY

Fourth Defendant

(5-73) AALL TRUST AND BANKING CORPORATION LTD
AND OTHERS

Fifth to Seventy-third Defendant

(74) EIKLANDS AS

Seventy-Fourth Defendant

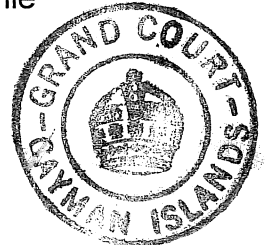
BEFORE: The Hon. Justice Priva Levers

APPEARANCES:

Counsel for the Third Defendant: Mr. Voss, Q.C. and Mr. Nigel Clifford

Counsel for the Second Defendant: Mr. Doctor, Q.C. and Mr. Graham Ritchie

Heard: 23rd and 24th July, 2003



RULING

This is a Summons for Specific Discovery issued by the Third Defendant, Compass Trust Company Limited asking for the following relief:

1. That the Second Defendant do make and serve on all parties within 20 days of this Order, a Supplemental List of Documents in respect of the documents specified in the Schedule hereto;
2. That the Second Defendant do make and serve on all parties within 20 days of this Order an affidavit verifying such Supplemental List of Documents which are or have been in his possession, custody or power and if no longer in his possession, custody or power, stating when he parted with them or what has become of them;
3. That the Second Defendant do make such list of documents, except such as by affidavit he may object to produce, available for inspection by the Third Defendant only;
4. That the Third Defendant do, within 15 days of the inspection of documents as aforesaid, indicate to the Second Defendant any documents over which it may claim privilege or otherwise object to production, whereafter the Second Defendant shall forthwith make the remaining documents on the Supplemental List of Documents available for inspection by all parties.

The Scheduled referred in the paragraph (1) of the Summons reads:

1. All documents, agreements, correspondence, notes, attendances or memoranda or any other record of communication relating to or arising out of the dealings between the Second Defendant and Dr. Henry McKinnell or their respective agents.
2. All documents or records provided to the Second Defendant or his agents by or on behalf of Dr. Henry McKinnell or his agencies.

The Third Defendant, Compass Trust Company Limited, supports this Summons with an affidavit from Mr. Nigel Clifford, Attorney-at-Law. The Second Defendant, Even Wahr-Hansen, objects to the Summons and has filed an affidavit, in support of his objection.

The parties to the Application.

Compass, is the personal representative of Thorleif Monsen who died in Cayman on the 10th October 1992. Compass replaces the Fifth Defendant, Aall Trust and Banking Corporation Limited, Mr. Thorleif Monsen's personal representative.

On the 29th September 1993, Compass obtained the consent of the Grand Court to distribute Thorleif Monsen's Estate.

Thorleif Monsen is the beneficiary of substantial funds which are alleged by the 2nd Defendant to have belong to a Mr. Jahre.

Mr. Wahr-Hansen, the Second Defendant is the personal representative of the Estate of Anders Jahre who died on the 26th February 1982 in Sanford Norway. He on behalf of the Government of Norway claims the monies that the Compass says belongs to Thorlief Monsen.

The Chronology

It is not necessary to go into a detailed analysis of the facts of this case for purposes of this application, save and expect to say that by consent the parties agreed to discovery of certain documents including what is called "the McKinnell documents". These documents were allegedly purchased by Mr. Wahr-Hansen from a Doctor McKinnell who was the son-in-law of the Thorlief Monsen. The condition of sale of the documents were reduced to writing in an agreement. The essence of the Agreement was that McKinnell was obliged to deliver to Mr. Wahr-Hansen documents which directly or indirectly related to Jahre's Estate or to claims that Jahre may have had to those assets in exchange of sums of money. Wahr-Hansen has never suggested that the documents delivered relates to some other assets alleged to belong to Jahre apart from those in issue in these proceedings. The actual documents were physically handed over to Mr. Wahr-Hansen in May 1993. In October 1993 a letter of demand was written on his behalf and proceedings were initially commenced in 1994.

In an affidavit sworn in proceedings commenced in the United Kingdom, Mr. Wahr-Hansen categorically states that the foundation of that legal action were these

documents, thereby admitting use of these documents in those proceedings. Mr. Wahr-Hansen has released some documents and not others on the basis that he considered the retained documents not relevant to the issues raised by the pleadings. In his affidavit at paragraph 36 he says:

“Discovery was given by mutually exchange of lists on the 16th December 2002. It includes all the documents I have described above. My list of documents was prepared with the assistance of BAHR, Jones Day, Charles Adams Ritchie & Duckworth and separate English Leading Counsel not instructed as regards to the conduct of the case but only as regards the listing of certain documents.”

The case for the Applicant

On behalf of the Third Defendant, Compass. Mr Vass, QC strenuously argues that this Court should exercise its discretion and grant the Summons on the following grounds that:

1. The discovery proceedings is not limited to what Mr. Wahr-Hansen may feel is relevant or not, because the applicant is entitled to discovery, and that Mr. Wahr-Hansen has not even purported to give discovery on the pleaded defense. The pleaded defenses he submits are abuse of process, laches and estoppel. He says this is not a fishing expedition but that these documents are essential to and material to the proper conduct of this trial. Further that this Court should order discovery because it has every right to ensure that these documents were not obtained in breach of the Cayman Confidentiality Law.

The case for the Defendant

1. Mr. Doctor on the other hand alleges that the applicant is on a fishing expedition.
2. That he has no interest in these proceedings and that he has simply adopted the Plaintiff's case.
3. That in fact, abuse of process is not a pleaded issue in this matter as no details and particulars have been given and that discovery has been sought to try and create a new offence;
4. That the discovery of the documents as far as laches is concerned is of little relevance because any delay would only be between the months of May to October 1993; and
5. That this Court should not concern itself as to how these documents were obtained or whether they were obtained in breach of the Law in Cayman as the use of them has not been pleaded in the proceedings. The fact that the use of these documents has been denied by Mr. Wahr-Hansen in these proceedings, does not make it a live issue.

The Law

There is no hard and fast rule as to class of cases in which discovery should be ordered, but the judge must exercise a reasonable discretion in every case after carefully looking at all the facts and taking into account all the circumstances.

The question of discovery is governed by Order 24; in particular, Order 24, rule 7:

“An Application for an order under this rule must be supported by an affidavit stating the belief of the deponent that the party from whom discovery is sought under this rule has, or at some time had, in its possession custody or power the document, or class of documents specified or described in the application and that it relates to one or more of the matters in question in the cause or matter.”

Rule 8 reads:

“On the hearing of an application for an order under rule 3 or 7 the Court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or, as the case may be, adjourn the application and shall in any case refuse to make such an order if and so far as it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs.”

I need therefore to ask myself the question “Is it necessary for disposing fairly of the cause or matter in this case to order the specific discovery as requested by the applicants?”

Order 24 also states:

“Discovery must be given of any documents relating to any matter in question between the parties in the action.”

It is not restricted to documents which would be admissible evidence at trial. In *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co.* (1882)

11QBD 55, Brett LJ stated the principle thus:

“ ...every document relate to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable, to suppose, contains information which may – not which must – either directly or indirectly enable the party [seeking discovery] either to advance his own case or to damage the case of his adversary ...a document can properly be said to contain information which may enable the party if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences.”

It is clear that the Courts will not allow discovery to be used as a fishing expedition. A party who does not have the material for even an arguable case, but hopes to find them forom the other side, is said to be fishing. Nor will discovery be allowed on matters relevant solely to credibility of witnesses.

In this case, however, abuse of process has been pleaded. It is now for me to ask the question “the discovery if permitted will it enable the Third Defendant to commence a new cause of action against the Second Defendant or will it merely mean that it will enable the party to advance his case and or damage the case of the Second Defendant.

Mr. Doctor, Q.C. argues that in pleading abuse of process the applicants have not pleaded use of the documents, and the request for discovery is being made to enable the Third Defendant to confirm that these documents were obtained in breach of the *Confidential Relation (Preservation Law)* and thereafter lay a new cause of action. I disagree however and I am in agreement with Mr. Voss, Q.C, who says Mr. Wahr-Hansen’s denial that he used the documents, makes the issue, a live one in the pleadings. I do not believe that an order for discovery in these circumstances would

enable the defendant to seek evidence by which the claim may be proven. I do believe, however, that the discovery is necessary and desirable to enable the Third Defendant to plead his case more effectively and hold that the disclosure and production of documents is necessary for disposing fairly of the proceedings in this matter and that the Second Defendant has not discharged his burden to show why discovery is not necessary. The applicant has satisfied the Court that the production is necessary for the fair disposition of this case.

I therefore make the Order in terms of paragraphs 1 to 4 of the Summons dated the 11th June 2003 as amended to read "30 days" in paragraph 2 of the Summons and "30 days" in paragraph 4 of Summons. Discovery of all documents relevant to the pleaded issues must be made and these issues are:

Abuse of process, including all documents or communications dealing with the use of the McKinnell documents;

Laches; and

Estopple.

Dated this } (day of July, 2003



P. Levers
Judge of the Grand Court

