

IN THE GRAND COURT OF THE CAYMAN ISLANDS

K6-03-03

CAUSE NO. 398 OF 2001

BETWEEN: (1) TELESYSTEM INTERNATIONAL WIRELESS INC
(2) TIW do BRAZIL Ltda
(3) LUIS ROBERTO DEMARCO ALMIDA

Plaintiffs

and

(1) CVC/OPPARTUNITY EQUITY PARTNERS LP
(2) CVC/OPPARTUNITY EQUITY PARTNERS LTD
(3) OPPORTUNITY FUND
(4) OPPORTUNITY ASSET MANAGEMENT INC
(5) HUNTER & HUNTER

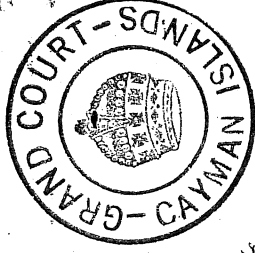
Defendants

APPEARANCES:

Mr. Elliot Simpson for the Applicants (Defendants 1 to 4)
Ms. Sandy Corbett for the Respondents (Plaintiffs)

CORAM: KELLOCK J.

DATE: 18th March 2003



REASONS FOR JUDGEMENT

The first to fourth Defendants (which I will call collectively "Opportunity") seek the following Orders;

(a) Orders discharging paragraph 1 of the Order made in this Litigation on November 14, 2001 and paragraphs 1 and 2 of the Order made November 16, 2001. Both Orders were made by Mr. Justice Sanderson

(b) Alternatively leave to make use of a document ("The TIW document") for all purposes. The use of that document has been subject to the limitations set forth in Mr. Justice Sanderson's Orders identified above.

(c) An Order relieving the first, third and fourth Defendants from the terms of paragraph 3 of Mr. Justice Sanderson's Order of November 16th 2001 in relation to the proceedings in Cause 389 of 1999.

To understand the issues to be resolved on this application, some background is necessary.

BACKGROUND FACTS

Firstly it must be recorded that the parties to this cause have been litigating a variety of disputes in this Court and in Brazil for a number of years. The disputes arose out of various business relationships which involved the Plaintiffs or one of them and the first four Defendants or some of them.

The question concerning the use to be made of the TIW document (which I will describe in due course) centres on that document and its content.

The writ which began this action was issued on June 28, 2001. The cause came on for trial before Mr. Justice Sanderson on October 22nd 2001. Reasons for judgment were issued on November 14, 2001. In those reasons my brother Sanderson found that the TIW document had been contained in the Plaintiff Demarco's computer in Sao Paulo Brazil and had been stolen from him, being a letter written by the Plaintiff Telesystem International Wireless Inc ("TIW") to Demarco in May 2001. At that time Demarco and TIW were both parties to Litigation adverse in interest to one or more of the first four Defendants and both Demarco and TIW were represented in that Litigation in this Court by the same firm of Attorneys. The letter indicates that Demarco was concerned that as both he and TIW were seeking to recover large sums of money from Opportunity there was a possibility that TIW might recover a judgment which would so deplete Opportunity's assets that it would not be in a position to satisfy a judgment in Demarco's favour. To address this real or perceived problem TIW offered to protect Demarco to a limited extent from the adverse consequences Demarco had in mind. This offer was made so that both Demarco and TIW could continue as clients of the same Attorneys in Litigation against Opportunity.

It appears, and Mr. Justice Sanderson so found that a number of documents, including the TIW document had been stolen by Demarco's estranged wife (and others) for the purpose of harming Demarco and (to quote Sanderson J) "even to use them to assist CVC (ie Opportunity) in Litigation".

The fact that the TIW document had found it's way in to the hands of Opportunity's Cayman Attorneys came to Demarco's attention in May 2001 when Opportunity sought an Order from this Court disqualifying Demarco's attorney's as well as his leading counsel from acting for him in this cause. That Order was refused.

This action was then commenced seeking, inter alia an Order restraining the Defendants from using or disclosing any of the stolen material.

A formal Order was issued on November 30th 2001. Mr. Justice Sanderson's reasons which were released November 14, 2001 concluded with the following:

"For the foregoing reasons (that I partially delivered orally on Monday October 29th 2001) I Order;

1. The Plaintiffs claims are dismissed except;
2. The Defendants are to be enjoined from receiving, reviewing, examining or making use of any confidential documents that were or might have been taken from the Plaintiffs or the Plaintiff's companies, without first obtaining leave of the Court."

A second formal Order (which was approved as to form and content by the attorneys for all parties) was then issued and provides as follows:

1. The draft document exhibited to the First Affidavit of Maria Armalia Coutrim in Cause No. 389 of 1999 and Cause No. 229 or 2001 respectively. (“the TIW document) may be used by the Defendants and their attorneys in and for the purpose of the proceedings in Cause No. 389 or 1999 but for no other purpose and in no other proceedings. Accordingly, that portion of the Plaintiff’s claim seeking to prevent the use of the TIW document in Cause No. 389 of 1999 be dismissed;
2. Hunter & Hunter are not enjoined from acting as Counsel for the Plaintiff in Cause No. 389 of 1999. Accordingly paragraph 4 of the Plaintiffs’ claim as pleaded in the Statement of Claim is dismissed;
3. Subject to paragraph 1 of this Order, the Defendants are enjoined from receiving, reviewing, examining or making any use of any confidential documents that were or might have been taken from the Plaintiffs or the Plaintiffs’ companies, without first obtaining leave of the Court;
4. Subject to paragraph 1 of this Order, the Fifth Defendant and Mr. Anthony Trace QC, are enjoined from receiving, reviewing, examining or making use of any documents from the First to Fourth Defendants, their servants or agents, that were or might have been taken from the Plaintiffs or the Plaintiffs’ companies, without first obtaining leave of the Court;

This Order was dated November 14, 2001 and filed November 29, 2001.

Despite this Order the TIW document was published on the internet.

As a result Sanderson J made a further Order on November 16, 2001. Again the formal Order was approved by the attorneys for all parties.

It provides inter alia as follows:

1. The First Defendant be restrained, whether by themselves, their servants or agents or otherwise whoever, without first obtaining leave from this Court, from repeating or continuing the publication on the world wide web or by any other means the draft document exhibited to the affidavit of Maria Amalia Coutrim sworn on 11th June 2001 in Cause No. 389 or 1999 and on 13th June in Cause No. 229 of 2001 (referred to in the Order of Sanderson J. or 29th October 2001, and hereafter in this Summons, as “the TIW document”):
2. The First to Fourth Defendants be restrained, without first obtaining leave from this Court, from making any use of the TIW document other than in and for the purpose of Cause Number 389 of 1999:
3. All parties hereto be enjoined from publishing to the public and in particular in any media any of the facts or events relating to these

proceedings or those in Cause Number 229 of 2001, 389 or 1999, and 439 of 1999 or any appeals pending in respect of those proceedings respectively (including any Judgment and Order) without first obtaining leave from this Court. Any party shall have liberty to apply in relation to this issue.

While the formal Order is dated November 14, 2001 it appears that some of it's terms were announced by Sanderson J at the conclusion of the evidence on October 29, 2001.

It should be noted that by paragraph 1 of the November 14, 2001 Order (which is in the same terms as paragraph 1 of the October 30, 2001 Order) Sanderson J allowed the use of the TIW document for the purpose of the proceedings in Cause No. 389 of 1999, but for other purpose and in other proceedings.

The use of other stolen documents was specifically dealt with in paragraph 3 of the November 14, 2001 Order. Paragraph 3 was expressly made subject to paragraph 1.

It is reasonable to conclude that the remaining stolen documents, (i.e documents other than the TIW document), which may have included some 4,000 e-mail messages, were dealt with in the November 14, 2001 Order differently because the Court had not subjected all of those documents to the scrutiny which the TIW document had received.

If that is so it is unclear why the TIW document was subjected to different treatment in paragraph 1 of the November 16, 2001 Order which purports to provide liberty to apply for an Order allowing its use in some circumstances. This provision would of course, if effective, have constituted a variation of the November 14, 2001 Order which prohibited any use of the TIW document except for the purpose of the proceedings in Cause No. 389 of 1999.

That cause involved claims and counterclaims between Demarco and Opportunity relating to Demarco's employment with the Opportunity Group.

Cause No. 389 of 1999 came on for trial before me on April 22, 2002.

In his Reasons of November 2001 Mr. Justice Sanderson took the view that the TIW document was relevant for the purposes of the trial of Cause 389 of 1999 and that is why an exception was made in his November 14, 2001 Order so that the TIW document might be used at the trial.

As the trial Judge I took a different view. Although the TIW document was read into the record at trial is was so read as part and parcel of the argument as to its relevance. It was not made an exhibit and it was not put to any witness.

The argument on this application involved a discussion of when a Court may vary an earlier order and when it cannot. On the basis of the authorities cited it is extremely

doubtful whether the November 14th, 2001 Order could be varied by the November 16, 2002 Order if anyone had considered the question at the time and that does not appear to have been the case.

However, as the November 16, 2001 Order was approved by Counsel for the Plaintiffs, I am content for the purposes of this application to treat the November 16, 2001 Order as the operative Order.

To complete the background story it is necessary to recite that on February 28, 2002 the Chief Justice found that one Daniel Dantas who was and is the man who controls Opportunity caused the TIW document to be filed in criminal proceedings instigated by Dantas against Demarco. It was so filed on October 31, 2001.

As a result the Chief Justice ordered Dantas to write to the Brazilian authorities (in a form approved by the Court).....” to explain to the Brazilian authorities that the Court has concluded that the TIW document is a confidential document which has been stolen from Demarco and that it evidences on its face nothing more than an arrangement for the sharing of the services of attorneys for the representation of the Demarco/TIW parties in related proceedings before this Court’.

I should say that I agree entirely with that assessment which is binding on Dantas and the parties to this case and in particular is binding on the Applicants the first to fourth Defendants.

The Chief Justice went on to find that Opportunity had disobeyed Mr. Justice Sanderson's Order by "causing the publication of the TIW document on the world wide web and in using it for the publication in "O Globo" (a newspaper). As a consequence Opportunity was fined C\$100,000.00 and ordered to pay indemnity costs.

In support of this application Opportunity put forward an Affidavit of an attorney employed by Boxalls (Opportunities attorneys of record) which simply identifies as an exhibit, an Affidavit sworn by one Rodrigo Andrade sworn November 11, 2002.

Reference is made in this Affidavit and attachments to a number of newspaper articles published in Brazil commencing November 1, 2001. The Andrade Affidavit then "submits" that in light of these publications and what transpired at the trial of Cause No. 389 of 1999 "that the whole of the TIW document and it's contents are wholly in the public domain"

THE APPLICANT'S SUBMISSIONS

Mr. Simpson submits that either Mr. Justice Sanderson's Orders should be varied to remove all restrictions on the use of the TIW document or in the alternative the Court should grant leave to Opportunity to make whatever use they wish of the document.

Both forms or relief are based upon the assertion that the TIW document is now in the public domain.

The proposition is put as follows in paragraph 4 of Mr. Simpson's skeleton argument:

“Assuming the TIW document is confidential in circumstances giving rise *prima facie* to a duty on the Respondents not to disclose it that duty of confidence was extinguished at the latest when the TIW document entered the public domain by being extensively and completely referred to in open Court in Cause No. 389 of 1999 [See: *O. Mustad & Son v S Allcock & Co Ltd* [1963] 3 ALL ER 416: *Attorney-General v Observer Ltd* [1990] 1 AC 109 esp. at p 285 B – 286A].”

The *Mustad* case involved an attempt by an inventor to restrain an employee from disclosing the details of an invention, which the inventor had made the subject of a patent application. The House of Lords held that the Court of Appeal had been right in holding that an injunction restraining the employee from disclosing the substance of the patent application should be dissolved.

Lord Buckmaster put the relevant question and answer as follows (1963 3 ALL ER 418).

“The important point about the patent is not whether it was valid or invalid but what it was that it disclosed, because, after the disclosure had been made by the Appellants to all the world it was impossible for them to get an injunction restraining the Respondents from disclosing what was common knowledge”.

It seems important to observe here that whatever the nature or extent of the disclosure of the TIW document has been, it was not due to any act or failure to act on the part of the Plaintiffs.

The Observer case concerns the publication of a book called "Spy Catcher" authored by a former member of MI 5 about his experiences in the British Secret Service. The author was obliged to abide by his oath of secrecy and the official Secrets Act. The book was published in the United States and as a result a British newspaper sought to publish excerpts from it in the United Kingdom.

The House of Lords discharged injunctions obtained to prevent this publication since the world-wide publication of Spy Catcher had destroyed any secrecy as to its contents and copies of the book were readily obtainable by all. The House of Lords held that while a person subject to a duty of confidence might be held to that duty, any duty of confidence which a third party might be subjected to was extinguished by the information becoming available.

I note that third parties are not involved in this application

In addition to these cases I was referred to *Harman v Secretary of State* 1983 AC 280 [H of L]. The question in that case was whether or not a Solicitor was in breach of the implied undertaking not to make use of documents disclosed in Litigation for purposes other than the conduct of the Litigation in which the documents had been produced. It

was held that the fact that the documents were read in open court whether admitted in evidence or not, did not bring that implied obligation to an end.

It is said that a judgment may be rescinded on the ground of the discovery of new evidence which would have had a material affect upon the decision of the Court (37 HALS 4th paragraph 1210). That however, is not this case. Mr. Justice Sanderson was well aware when he made his Order of November 16, 2001 that the TIW document had been referred to on the internet and explicitly prohibited Opportunity from repeating it's breaches of his earlier Order.

In addition, as appears from paragraph 3 of that Order Sanderson J. was aware that Opportunity had or might in future publish the TIW document in the media or make it public in some other way.

Whatever the nature and extent of the publication of the TIW document on the internet or any other public media there is no evidence before me to suggest that the effective source of the information is anyone but Opportunity.

There is accordingly no basis upon which the Court could or should consider acceding to Opportunity's pleas for a variation of my brother Sanderson's Orders.

Assuming as I do for the purposes of this application only that the Court may grant leave to Opportunity to make some use of the TIW document I decline to do so on the simple

ground that I do not know what use Opportunity intends to make of it. I asked Mr. Simpson to tell me that during the argument which he, (and I presume on instructions), would not do. I gather also that there was correspondence between Counsel and that the Plaintiffs attorneys sought this information from Opportunity's attorneys. Boxalls response according to Demarco's Affidavit sworn March 11, 2003 was:

“Our clients position is that they should be able to use the TIW document as a public document in the same way as anyone else. We do not have a list of purposes for which it might be used”

There is one further matter.

Paragraph 4 of Opportunity's Summons seeks an order that;

“The First, third and fourth Defendants (and if necessary the Second Defendant) no longer be enjoined by the terms of paragraph 3 of the Order herein of Mr. Justice Sanderson made on 16th November 2001 in relation to Cause No. 389 of 1999 and any appeal therein.”

In argument Mr. Simpson sought a different Order in effect amending my Order of July 2, 2002 in Cause No. 389 of 1999 concerning the use to be made of the trial proceedings in that case.

I am more aware now, or at least more fully aware, of Opportunity's use or perhaps I should say abuse of the TIW document than I was in July last year. In the absence of any indication as to what specific use Opportunity seeks to make of that information I am not inclined to vary or amend that or any other Order I have made or Mr. Justice Sanderson has made even if I had the jurisdiction to do so, which I very much doubt.

Consequently Opportunity's applications will be dismissed with costs. I may be spoken to as to the scale and manner of the assessment of those costs.


Justice Keillor

