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

CAUSE NO. 252 OF 1996

BETWEEN: Cesare Bonotto PLAINTIFF

- AND: (1) Gianni Boccaletti 1ST DEFENDANT
- (2) Elbo Ltd. 2ND DEFENDANT
- (3) Swiss Bank & Trust Corp.Ltd. 3RD DEFENDANT

Before Harre CJ

For the Plaintiff - Ramon Alberga Q.C. and Mr. Diarmad Murray
For the 1st and 2nd Defendants - Ms. Minakshi Jafa

RULING

This application by the Plaintiff has two limbs. He seeks further and better discovery by way of affidavit of specific documents or classes of documents and/or a further and better list of documents pursuant to Order 24 Rule 7 and Order 24 Rule 3 of the Grand Court Rules 1995.

Among directions given on 9th May was an order that the parties do give discovery by list within 21 days and that there be inspection within 14 days thereafter. Lists of documents were filed.

The summons is supported by an Affidavit by Mr. Diarmad M. Murray of W.S. Walker & Company sworn on 25th November 1997. I regard this affidavit as having been properly sworn by him. It relates substantially to matters within his own knowledge and he testifies that his client does not speak English.

It is now necessary to summarise, as briefly as I can, claims by the plaintiff as put forward in his statement of claim, to the extent necessary to address the issues of discovery. They are these -

The Plaintiff is an Italian businessman with interests in the European clothing industry who has for many years been a periodic visitor to Grand Cayman.

The First Defendant ("Mr. Boccaletti") is an Italian also and a former friend of the Plaintiff who resides for part of the year in Grand Cayman where he has business interests. The Second Defendant ("Elbo Ltd.") is a company incorporated in the Cayman Islands. Mr. Boccaletti is the sole registered member of and sole director of Elbo Ltd. Elbo Ltd. has, since about January 1989, had an account at the Third Defendant (Swiss Bank").

In about December 1985 the Plaintiff decided to transfer capital to the Cayman Islands. He therefore, on occasions, handed cash sums in Italian lira ("the Funds") to Mr. Boccaletti to transfer from Italy to Grand Cayman.

It was agreed between the Plaintiff and Mr. Boccaletti that the Funds would be taken by Mr. Boccaletti to Grand Cayman and held there on bank deposit by Mr. Boccaletti on the Plaintiff's behalf for investment. A proposed joint venture did not go ahead Mr. Boccaletti held the Funds on trust for the Plaintiff.

While visiting Grand Cayman in December 1986/January 1987 the Plaintiff decided to purchase the property known as unit 5, Caribbean Club, West Beach South, Block No. 12C, Parcel 22H15 ("the Property"). Wishing to hold the Property through a Cayman islands company the Plaintiff asked Mr. Boccaletti to arrange on his behalf for the incorporation and registration of such a company for this purpose. Elbo Ltd. was duly incorporated at the instance of Mr. Boccaletti on the 3rd June 1987. The initial shareholders and officers of Elbo Ltd. were

nominee companies. All these nominee companies were under the immediate control of Mr. Boccaletti. It was agreed or understood between the Plaintiff and Mr. Boccaletti that the costs of incorporation of Elbo Ltd. would be met out of the Funds and that Mr. Boccaletti would exercise his control of Elbo Ltd., via the nominees, as trustee for the Plaintiff.

Elbo Ltd. was duly registered on the Cayman Islands Register as the proprietor of the Property. The purchase price of US\$355,000 and taxes and expenses was met out of the Funds. It is claimed that Elbo Ltd. held and still holds the Property on trust for the Plaintiff.

Over the following years the Property was used by the Plaintiff and his friends as a residence during visits to Grand Cayman. The management of the Caribbean Club, the condominium of which the Property is part, communicated with the Plaintiff and acted on his instructions. Running costs of the Property were met by either rental income earned on the Property or from the Funds paid by Mr. Boccaletti as the Plaintiff's trustee.

Elbo Ltd. opened the account at Swiss Bank. An account opening declaration dated 23rd January 1989 stated that the beneficial owners of Elbo Ltd. were the Plaintiff, his wife and daughter. Mr. Boccaletti signed the back of the Declaration confirming its accuracy. Shortly after the opening of the Account, Mr. Boccaletti procured Elbo Ltd. to authorise the Plaintiff as a signatory to the Account with unlimited authority. Thereafter the balance of the Funds left remaining in Mr. Boccaletti's hands as the Plaintiff's trustee were paid into it and Elbo Ltd. held the Funds paid into the Account on trust for the Plaintiff.

On 29th December 1989 the entire share capital of Elbo Ltd. Was transferred from the nominee company shareholders to Mr. Boccaletti subject to the same trusts. The nominee directors of Elbo Ltd. resigned and Mr. Boccaletti was appointed sole director.

In the years following the opening of the Account, the Plaintiff, during his visits to Grand Cayman, attended on occasions with Mr. Boccaletti at Swiss Bank's premises and authorised transactions.

In January 1996 the Plaintiff visited Grand Cayman and attended Swiss Bank's premises on this occasion with his son-in-law, as interpreter. He was informed that Mr. Boccaletti as director of Elbo Ltd. had removed the Plaintiff's signing authority on the Account and that Swiss Bank could not release any information to him. When contact was made with Mr. Boccaletti he stated that he knew nothing of the removal of the Plaintiff's signing authority and that it must have been a mistake on the part of Swiss Bank. He assured the Plaintiff that he would contact Swiss Bank and remedy the situation when he visited Grand Cayman in a few weeks time. Mr. Boccaletti failed, and has since failed, to do so.

Mr. Boccaletti removed the Plaintiff's signing authority on the Account and asserted to Swiss Bank that he was the beneficial owner of Elbo Ltd. and the contents of the Account fraudulently and in breach of trust.

That is the thrust of the Plaintiff's case. In his defence Mr. Boccaletti denies his receipt of the Funds and any agreement as alleged with regard to any such funds and that Elbo Ltd. holds the contents of the Account, if any, and the proceeds thereof including the Property or the shares in Elbo Ltd. on trust for the Plaintiff. He says that the Property was paid for out of his own funds for which the Plaintiff promised but failed to reimburse him. He did not promise to complete the purchase of the Property on the Plaintiff's instructions. If the management of the Caribbean Club communicated with the Plaintiff that does not entitle the Plaintiff to claim ownership or to assert they acted on his instructions. He claims that the Plaintiff only became a signatory on the Elbo account in 1993 for holiday spending purposes.

From all this it will be obvious that the "paper trail" relating to the financial transactions concerned will be of crucial and possibly conclusive importance in this case.

The following is the list of documents for which discovery was sought in the summons. I regard such orders as I make as being most appropriately orders for specific discovery. The alphabetical indexing and numbering of the list do not run in sequence as I have omitted items where matters have been resolved since the summons was issued. Beneath each item on the list is my ruling with regard to discovery.

In respect of each I have considered what I regard as the primary factors, that is to say relevance and a prima facie case as to possession, custody or power. I have also taken into account other factors - unlikelihood of documents being in existence, expense, inconvenience or trouble in complying, existence of alternative sources of the same information, threat to confidentiality - which may tend to influence the court in the exercise of its discretion or in considering whether the test that discovery is necessary for fairly disposing of proceedings has been satisfied in accordance with Order 24 Rule 8 of the Grand Court Rules 1995.

(A) File of documents relating to Villa No. 15 at the Caribbean Club, West Bay Road.

This is not a marginal matter. The course of dealing between the parties and the condominium management is relevant. The file should be called for, discovery made or reason for unavailability explained by affidavit.

- (B) (ii) Documents showing, in relation to Elbo Ltd.'s account with the Third Defendant, that:-
- (a) the Plaintiff was permitted by the First and Second Defendants to become a signatory on the account; and
 - (b) the First Defendant arranged for the Plaintiff to become a signatory at his request.

There must have been documentary evidence of these matters which, if it still exists, will be in the possession of the first defendant or obtainable from the third defendant ("Swiss Bank"). There should be discovery or explanation by affidavit. It is not sufficient to say that oral evidence will be given. Parties are entitled to test such evidence against contemporaneous documents or comment on their absence. Notwithstanding any discovery by Swiss Bank of documents described in (B)(ii), copies in the possession of other defendants are discoverable.

- (iii) The Plaintiff's written consent, i.e. the relevant share transfer, in respect of the transfer of the shares in Elbo Ltd. from the original nominees to the First Defendant.

Discoverable, unless it is the first defendants case (as it seems to be from paragraph B (iii) of his fourth affidavit) that the shares were transferred simply on the basis of an alleged verbal permission.

- (C) (i) Documents showing the First Defendant funded the Elbo Ltd. Account with the Third Defendant and/or the purchase of Unit 15 Caribbean Club.
 (ii) Documents showing that a number of the First Defendant's guests used Unit 15 at the Caribbean Club.
 (iii) Documents showing that the First Defendant typically paid for all expenses in relation to Unit 15 Caribbean Club.

(i) refers to the central issue in this case. There must have been documents showing the source of funds for the Elbo account. The first defendant should file his own affidavit, as he has offered to do in his 4th affidavit, and not simply adopt the discovery made by the Swiss Bank. All relevant documents should be in his possession, custody or power. If not, he should explain why. See also (G).

(ii) and (iii) cp (A). The same applies to any other material relating to the use of the Property.

- (F) All the First Defendant's passports for the period 1986 to 1996 inclusive.

No further discovery. Production of passports for years subsequent to 1986 is oppressive and in view of the concerns expressed in affidavit form by the first defendant (whether or not well founded) may be prejudicial to the fair trial of the action. There are sinister allegations made by each side. It is incumbent on the Court to scrutinise the relevance of these very carefully in the interests of justice. The first defendant has given a very full explanation of his position in his 4th affidavit.

- (G) All documents relating to any accounts of Bobo Ltd. with the Third Defendant, all bank statements for Elbo Ltd's account with the Third Defendant numbered 53034 for the period from 1986 to 1996 inclusive and all documents relating to Sphinx Corporation that demonstrate that it was the recipient of funds from any accounts with the Third Defendant in which the Plaintiff or Defendant have claimed an interest together with all documents that show what has become of such funds.

By letter to Maples & Calder, the attorneys for Swiss Bank dated 15th December 1997, Hunter & Hunter, on instruction of the account holders, called for any further documents which the Swiss Bank, the third defendants, might have relating to Sphinx Corporation, Elbo Ltd., Bobo Ltd and Mr. Boccaletti personally. The alleged roles of Bobo, Elbo and Sphinx in this matter is set out at length in Mr. Murrays' first affidavit dated 25th November 1997. It suffices at present to refer to his saying that discovery made so far by Swiss Bank indicates that the Elbo account was funded by the Bobo account,

that Bobo was funded from Sphinx and Mr. Boccaletti's personal account and that sums were transferred out again from Elbo to Sphinx. The record of funds into and from Elbo clearly relate to the matters in question, in particular the source of funds used to purchase the Property and the competing claims to beneficial ownership of Elbo. Ms. Jafa concedes that Hunter & Hunter received no formal reply from Maples & Calder but heard "from high up in Swiss Bank" that there were no more documents. More than that is needed. There must be evidence of that from the bank on oath.

Discovery as prayed in respect of this item is ordered.

- (H) The notarised reference referred to in document number 1 of Schedule 1 (Part 1) of the First Defendant's list and the said document number 1 itself.

I am satisfied with the explanation given in paragraph H of the first defendants' 4th affidavit.

- (K) The draft and original director's minutes and agreement referred to in document number 29 of Schedule 1 (Part 1) of the First Defendant's list.

Document 29 is a statement dated 31st January 1988 for services rendered in relation to "draft directors minutes re purchase of Laguana del Mar Execution of Agreement."

Other documents in the plaintiff's possession show sums as having been paid out from the account of Bobo Ltd in respect of a purchase of Laguana del Mar Unit 11. An interim billing from attorney dated 27th January 1988 titled "Elbow (sic) Ltd - 11 Laguana del Mar recites work which includes a meeting to have agreements executed. Other discovered documents point to a resale of this apartment with the proceeds sent to Swiss Bank. The source and application of the funds used in these transactions are relevant to the issues in this case and are discoverable. It is not enough for the defendant simply to say that he has made diligent enquiries with regard to the documents sought. He must describe these enquiries and their result, exhibiting any documentation recording these enquiries.

- (L) The proxy referred to in document number 30 of Schedule 1 (Part 1) of the First Defendant's list.

Document No. 30 is a Notice dated 8th March 1988 of a General Meeting of Strata Plan 38 (the Caribbean Club). It is the plaintiff's case that Mr. Boccaletti was neither a shareholder nor a director of Elbo Ltd at that time. It is for the plaintiff to call evidence of this documentation if it exists.

- (M) The copy assignment, agreement for sale, corporate file, minutes and resolutions (of Elbo Ltd.) referred to in document number 36 of Schedule 1 (Part 1) of the First Defendant's list.
- This is a letter dated 23rd August 1998 titled Assignment - Agreement for sale Elbo Ltd and referring to an enclosed copy assignment duly executed and a copy agreement for sale Dios Mar Ltd to Elbo Ltd. It also refers to the necessary minutes and resolutions to cover the assignment and the corporate file of Elbo. These documents do relate to matters in question in this action. It is not enough for the first defendant to say that the matter was aborted and he would assume that the draft documentation was destroyed in the normal course of business. He must either produce the documents referred to as enclosures to the letter or evidence on oath as to their fate. As to the advice to "create" the necessary minutes and resolutions, the absence of any such minutes and resolutions in the corporate file of Elbo Ltd will be a matter which may be raised at trial.
- (O) The retained mail referred to in document number 55 of Schedule 1 (Part 1) of the First Defendant's list.
- Document 55 is said on the first defendant's list to have been dated 3rd August 1989. The plaintiff says it enclosed retained mail. The first defendant's explanation that any mail thus enclosed will have formed part of his general discovery is sufficient.
- (P) The document, minute and banking files of Elbo Ltd. Referred to in document number 61 of Schedule 1 (Part 1) of the First Defendant's list.
- These documents obviously relate to matters in question in the action and are to be discovered. Cp (G).
- (Q) The CIBC returned cheque referred to in document number 62 of Schedule (Part 1) of the First Defendant's list.
- See (V). No order for discovery.
- (S) Maples and Calder's files regarding the establishment of Bobo Ltd.
- (T) Charles Adams, Ritchie & Duckworth's files regarding Elbo Ltd. and its affairs.

I am satisfied by the explanation given in the first defendants 4th affidavit with regard to these items.

- (U) Offshore Management Limited's and Financial & Management Consultants Ltd.'s files regarding the affairs of Elbo Ltd. All documents evidencing the management of Elbo Ltd., its beneficial ownership and details of its officers. Likely to be relevant and within the power of first and/or second defendant to obtain. Discovery is ordered.
- (V) All documents regarding the account with CIBC to and from which payments were made re Elbo Ltd., Bobo Ltd. and Sphinx Corporation.
- The first defendant says on oath that at all material times the only payments that were routed via CIBC were payments from Swiss Bank to Financial and Management Consultants Ltd for management fees etc. I decline to order discovery. It is likely to waste costs.



23rd January 1998

G.E. Harre
Chief Justice

