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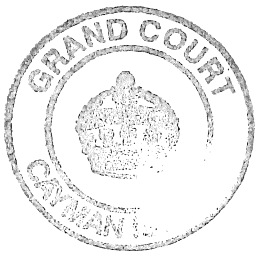
IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

C 332/97



BETWEEN: Spartacus Corp. PLAINTIFF

AND: Barclays Bank PLC. DEFENDANT

HARRE CJ

For the Plaintiff - Mr. R. Alberga, QC & Mr. A. McLaughlin
For the Defendant - Mr. A. Turner

RULING

The relationship of banker and customer is one of contract. The plaintiff appointed the defendant as its banker by resolution dated 8th October 1996. On 9th October Mrs. Felderhof, as director of the plaintiff signed a document containing supplementary provisions relating to the application of foreign currency accounts of the company.

They contained, among other things, the following -

> "You may at any time, at your discretion, refuse to execute our instructions or any part thereof, without incurring any responsibility for loss, liability or expenses arising out of such refusal."

I can continue the narrative in the words of Mr. Alexander Wood which are to be found at paragraph 4 of his affidavit dated 5th June 1997. He says this -

> "I understand that the funds which are held by the Defendant on behalf of the Plaintiff represent the proceeds of shares which were sold by Mr. John Felderhof ("Mr. Felderhof") in Bre-X Minerals limited ("Bre-X"). There have been a number of adverse reports in the international and local media about the affairs of Bre-X and the collapse of its share price. There have also been a number of adverse reports about Mr. Felderhof's involvement in

> Bre-X... The Defendant has been advised by W.S. Walker & Company ("Walkers") and verily believes that as a result of the information which the Defendant has available it would be appropriate for the Defendant to await further developments before complying with any instructions by the Plaintiff to make payment of substantial sums of money held by the Defendant on behalf of the Plaintiff. In view of this advice the Defendant has attempted to strike a reasonable balance in light of the discretion conferred upon the Defendant by the letter of 9th October, 1996."

This course of action provoked a writ and statement of claim. A number of reliefs were sought but I can encapsulate them simply by saying that the Plaintiff seeks that its freedom to use the money deposited with the Defendant be restored. A summons for Summary Judgment in relation to this was issued on 3rd June 1997.

In the defence dated 5th June the Defendant relies on the contractual term to which I have referred and says that it acted reasonably in exercising its discretion to refuse to execute certain transactions and to make other payments on the instructions of Mrs. Felderhof.

Mr. Alberga likens the actions of the bank to the imposing by it of a Mareva Injunction - a function which only the courts can perform. But there must be many contractual terms agreed upon by parties which by their nature are analogous to orders which are made by the court. That does not, in my judgment, in itself make them objectionable.

No party has made a claim against the funds of the Plaintiff company . It was submitted that claimants, and particularly regulatory authorities, in both the U.S. and Canada had had ample time to do so. That is a matter for speculation. It is common

ground that the deposits of many millions of dollars credited to the Plaintiff at the Defendant bank in October 1996 came from the sale of Bre-X shares. It is also now common ground that this case turns on the interpretation of the contractual term to which I have referred. Although this is an application for summary judgment, both parties agree that I should go beyond granting or refusing leave to defend and determine that matter now. I will do so.

My view is that the clause goes wider than the interpretation urged upon me by Mr. Alberga, in effect "We do not want your business, so please take it elsewhere."

The Plaintiff has granted a wide discretion to the bank to refuse to execute its instructions. That is my view of the plain English meaning of the words used. Like any discretion, it must be exercised reasonably. In my view the bank has acted reasonably so far in dealing with the matter in the way described in the affidavit of Mr. Wood, in the light of the public record of which it had become aware. The bank had to consider its position not only to its customer but also as a leading institution in a tightly regulated financial community. It does not surprise me that it sought to retain a discretion in wide terms in respect of this very large deposit of funds. In my view it succeeded. To that I must add a rider. It was most unfortunate that prompt notification was not given to the Plaintiff of the action taken and that cheques were unexpectedly returned marked "Insufficient funds." There is one feature of the contractual position to which the analogy with a Mareva Injunction is apposite. Any refusal to execute any instruction should be directed towards preventing dissipation of assets, not curtailing customary living expenses and the meeting, in particular, of legal

fees. Both parties are advised by attorneys with great experience of these matters and it is to be hoped that they will not find it necessary to return on the basis of any disagreement about that. However, what I deem to be reasonable today cannot continue to be reasonable indefinitely. If claims are to be laid against these funds they must be laid expeditiously. In relation to that aspect there will be a general liberty to apply.

In the light of the view which I have given of the meaning of the relevant clause of the special contractual conditions between the parties, I simply make a formal disposition of the summons for summary judgment by giving general leave to defend.

Leave to appeal granted.

Costs to follow the event.

17th June 1997

G.E. Harre
Chief Justice