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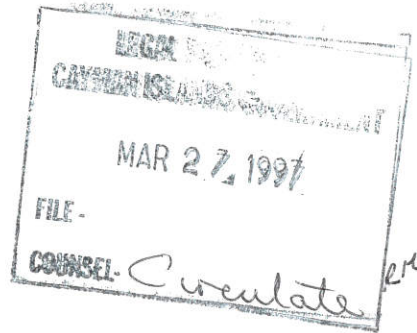
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IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 249 OF 1996

IN CHAMBERS



**IN THE MATTER OF THE CONFIDENTIAL RELATIONSHIPS
(PRESERVATION) LAW (1995 REVISION) ("THE LAW")**

AND

**IN THE MATTER OF PROCEEDINGS PENDING BEFORE THE UNITED
STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA, UNITED STATES OF AMERICA AND/OR A GRAND JURY
INVESTIGATION THEREIN AGAINST JOHN P. HALL (SNR.) IN CASE NO.
MISC. 1: M1-94-218**

APPEARANCES:

Mr. Michael Parkinson for the applicant John P. Hall II.
Mr. Ivor Archie, Solicitor General as amicus curiae.

RULING AND DIRECTIONS

The applicant seeks directions pursuant to Section 4 of the Law whether he should comply with a subpoena which has been served upon him in Pennsylvania in the United States of America requiring him to testify before a Grand Jury there.

The subpoena is in respect of the Grand Jury's investigations into the activities of the applicant and his father John P Hall Snr. relating to alleged violations of the United States Bankruptcy Code. In particular, it is alleged that Hall Snr. voluntarily declared himself bankrupt by petition under



44 Chapter 11 of the United States Bankruptcy Code presented to the
45 Pennsylvania Court and that in the context of those proceedings failed to
46 disclose to the Court or to his trustee-a-bankruptcy, certain assets situated in
47 the Cayman Islands.

48

49 The applicant has not complied with the subpoena. He is of the view that to
50 do so without first bringing this application would have placed him in
51 breach of Cayman Islands law - the information which he holds in respect of
52 the Cayman Islands assets is confidential information within the meaning of
53 the Law. Hence this application.

54

55 More specifically, it is the position of the applicant and of Hall Snr. that the
56 assets in the Cayman Islands are the property of the applicant which he
57 holds as trustee according to the express terms of a trust, originally settled
58 by deed in January 1979, and amended to effect the applicant's appointment
59 as trustee in September 1984.

60

61 Notwithstanding that position, it is the intention of the applicant, as
62 explained to me by his attorney Mr. Parkinson, to comply with the Grand
63 Jury subpoena. Compliance has been temporarily stayed pending this
64 application by an order of the Pennsylvania Court, but the applicant, as an
65 American citizen and resident, remains prima facie liable to the sanctions
66 which may arise from non-compliance and will be at pain of penalty there,
67 if the Pennsylvania Court lifts its stay.

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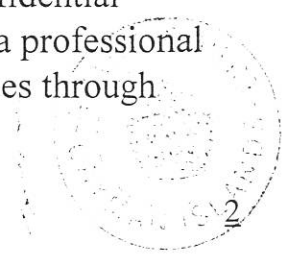
69 This application must therefore also be seen as the fulfilment of the
70 applicant's obligations to the American Court in good faith to seek to obtain
71 the directions of this Court for disclosure.

72

73 Against that background it is appropriate that I should first express my
74 views that this application is indeed required by the Law.

75

76 The applicant has the express authorisation to divulge, neither of Hall Snr.,
77 as settlor, nor of the underlying trust companies which hold the assets to
78 which the subpoenaed information relates. As a "principal" within section 2
79 of the Law means a person who has imparted to another confidential
80 information in the course of the transaction of a business of a professional
81 nature, the applicants' principals would be the trust companies through



82 which he obtained access to that information or else Hall Snr., as settlor. In
83 this context it should also be noted that under the trust deed the latter's
84 consent was required to effect the applicant's appointment and
85 consequential custodianship, as trustee.

86

87 Mr. Parkinson informs me that Hall Snr. does not object to the divulgence
88 of the subpoenaed information by the applicant but that is not, in these
89 circumstances, to be taken as authorisation within the meaning of the Law.
90 Hall Snr. is also an American citizen and is the subject of the Grand Jury
91 criminal investigations. It is now to be regarded as settled law that even an
92 expressed consent, let alone acquiescence or non-objection if given under
93 pain of penalty may not be accepted by our Courts as valid consent or
94 authorisation - In re ABC Ltd 1984-85 CILR 130.

95

96 The subject-matter of this application being trust property, (which includes
97 information about the property - see sections 2 of the Law) another arguable
98 view is that the applicant, as trustee, is his own principal.

99

100 Even if this latter view is the true common law nature of the relationship
101 between the applicant as trustee and the assets of the trust, I may not
102 overlook the meaning of the statute.

103

104 That meaning places the applicant in the position of a person to whom
105 confidential information has been imparted by others (the trust companies
106 and the settlor) during the transaction of business of a professional nature
107 ie: the succession to trusteeship. That situation comes squarely within
108 section 2 of the Law and thus requires that the applicant be regarded as a
109 recipient of confidential information for the purposes of the Law. And
110 trustees have in the past been regarded as requiring directions from this
111 Court under the Law before they might divulge into evidence information in
112 respect of their trusts - In the matter of an Application Pursuant to Section
113 34 of the Confidential Relationships (Preservation) Law 1976 (as amended)
114 Cause 26 of 1987 written judgment of Collett CJ delivered 19th January
115 1989 and reported at 1988 CILR note 6.

116

117 In the event I am wrong on that view of the Law as it applies to a trustee, I
118 should also note my views that upon the necessary application which a
119 trustee would be required to make for directions in these circumstances,



120 under section 45 of the Trust Law (1996 Revision), I would have felt
121 obliged to reach the same conclusion.

122

123 I proceed to consider this application on the basis that it is indeed a
124 necessary and proper application under the Law and that barring the proper
125 consent of the appropriate principal, the applicant, as a matter of Cayman
126 Islands law, is obliged to bring this application and to abide by the outcome.

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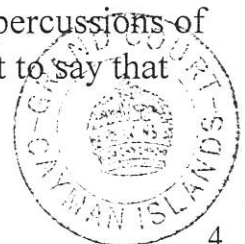
128 By way of further background it is to be noted that there is pending before
129 this Court an action in Cause no. 207 of 1995 by which the trustee-in-
130 bankruptcy of Hall Snr. seeks to have the trust declared invalid. The
131 applicant and Hall Snr are among the defendants in that action, which also
132 includes the underlying trust companies as defendants. The validity of the
133 trust is therefore an issue which is not only relevant to the Grand Jury
134 investigation but is also central to that action to be determined by this
135 Court.

136

137 Of significance also is the nature of the true ownership of the information
138 sought to be compelled by the Grand Jury subpoena. It is information about
139 assets which are vested in the trustee to be held in trust for the beneficiaries.
140 The trustee therefore owes fiduciary obligations to the beneficiaries not to
141 divulge that information except in accordance with Cayman Islands law
142 which governs the trust - see the Trust Law (1996 Revision) section 85,
143 which prima facie applies to the Trust by virtue of Article 25 of the deed of
144 settlement. Among the beneficiaries are persons (the deed also
145 contemplates possible remoter beneficiaries) who are in no sense the subject
146 of the Grand Jury investigations and for those purposes must be regarded as
147 innocent third parties. These are all factors not to be overlooked when
148 considering what directions are to be appropriately given pursuant to this
149 application.

150

151 Apart from the reasons of policy and of wider principle which follow for the
152 directions I will give; I would have felt obliged to arrive at the same
153 conclusion generally in the interests of justice which must recognise the
154 rights of the beneficiaries so long as the trust is one deemed valid under
155 Cayman Islands law. I need not go into what the potential repercussions of
156 unwarranted disclosure may be for the beneficiaries: suffice it to say that



157 they remain beneficially entitled to that information and to its
158 confidentiality .

159

160 **Jurisdiction and Comity**

161 It is a well-established principle of English common law - (and thus of
162 Cayman Islands law) - that a court should not regard as being without
163 territorial limit the matters which it might treat as amenable to its own
164 process or the things which it could order a person within its jurisdiction to
165 do elsewhere.

166

167 The case law reveals that only in exceptional circumstances will the courts
168 seek to exercise extra-territorial jurisdiction so as to exact compliance in
169 another country and which compliance may be regarded as being in breach
170 of the law there. Examples of such exceptional circumstances have
171 typically arisen where it would be in the interests of justice which will be
172 denied in an important matter because no other recourse is available for
173 obtaining evidence which is vital to the outcome.

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175 That was the conclusion of the English High Court of Justice in Mackinnon
176 v Donaldson Lifkin and Jenrette Securities Corp and others [1986] 1 All
177 E.R. 653 per Hoffman J.

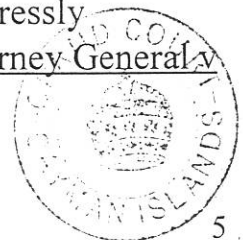
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179 In that case after a careful consideration of the leading cases (and for that
180 matter of the expert opinions of pre-eminent American lawyers as to the
181 equivalent American law) Hoffman J. discharged a subpoena and order of
182 the English court which would require an American bank operating in
183 England to produce documents held at the bank's head office in New York,
184 as the subpoena and order would take effect in New York and accordingly
185 would be an infringement of the sovereignty of the United States.

186

187 In so deciding he observed that it was an established principle that a State
188 should refrain from demanding obedience to its sovereign authority on the
189 part of foreigners in respect of their conduct outside the jurisdiction. And
190 that that principle was to be described as a self-imposed limitation on a
191 state's sovereign authority.

192 The same principles would apply here, and this court has expressly
193 recognised those principles of the Mackinnon case. See Attorney General v
194 Bank of Nova Scotia [1985] CILR 418 at p. 431.



195 Hoffman J. did emphasise in Mackinnon's case that he was particularly
196 concerned on the facts of that case, with the need to exercise the courts'
197 jurisdiction with due regard to the sovereignty of others, particularly in the
198 case of banks (see for example supra at page 658 letters f-h where he sets
199 out some of those reasons). Perhaps the most obvious is the international
200 nature of banking business which dictates that banks' obligations to their
201 clients, including the duty of confidentiality, will vary from jurisdiction to
202 jurisdiction and an order for disclosure from one will likely create a conflict
203 with the laws of another.

204

205 For present purposes I can, however, see no basis for distinguishing
206 between the position of a bank and that of a trustee (whether an individual
207 or corporate) being required to divulge for the purposes of domestic public
208 proceedings and under pain of penalty, information which is held in another
209 country and which by the laws that govern the trust, is to be treated as
210 confidential.

211

212 There is, of course, an important distinction between compulsion for the
213 purposes of private rights and compulsion of action overseas for the
214 purposes of enforcing and assisting in the domestic administration of
215 justice. The enforcement of the former by injunction or specific
216 performance for example, even if requiring the performance of acts abroad
217 is unobjectionable - the issue is as between private parties for the
218 enforcement of rights as between them: see Mackinnon's case (supra) p.
219 658 letter J. But as is also there noted, a penal subpoena such as here being
220 considered, does not involve the enforcement of a private right. It is an
221 exercise of sovereign authority to require citizens and foreigners within the
222 jurisdiction to assist in the administration of justice. Thus, to that extent, a
223 subpoena is intended to take effect, when issued for compliance overseas,
224 by way of infringement of the sovereignty of the foreign State.

225

226 Nor does it matter, for present purposes that the person to be compelled (as
227 in this case the applicant from the Grand Jury's point of view - is not a
228 foreigner but a citizen and amenable to the American jurisdiction. The
229 action to be compelled - here the disclosure of confidential information - is
230 to impact overseas and would purport to compel a breach of foreign law ie:
231 Cayman Islands law. See R v Grossman (1981) 73 Cr. App. R. 302 - where
232 the English Court of Appeal refused to order a domestic bank to divulge to



233 The Revenue for use in penal proceedings confidential information relating
234 to the defendant's account with its branch in the Isle of Man.

235

236 It follows from all the foregoing that I should consider this application from
237 the point of view of whether this Court would regard the case as an
238 appropriate one for the issuance of a subpoena to a person amenable to its
239 jurisdiction but to take effect elsewhere - in this case in the American
240 jurisdiction, were the circumstances to be reversed.

241

242 While the jurisdiction exists, it is to be sparingly exercised and only in
243 exceptional circumstances. I do not regard such circumstances as existing
244 here.

245

246 If indeed the trust is to be upheld as validly constituted as a matter of
247 Cayman Islands law, its assets and information about them remain
248 confidential. The alleged failure by Hall Snr to disclose to the American
249 court and to his trustee-in-bankruptcy would not in those circumstances be a
250 recognisable offence under Cayman Islands law. If validly constituted, the
251 trust holds property independently of its settlor.

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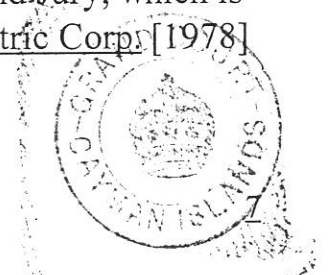
253 That pivotal issue of validity remains to be decided within the proceedings
254 pending here, as a matter of Cayman Islands law which governs the trust.

255

256 While that pivotal issue remains to be decided, far from being exceptionally
257 justified, it would be contrary to public policy and an unwarranted negation
258 of the applicant's duty of confidentiality owed as trustee, to direct that he
259 gives into evidence confidential information in criminal proceedings which
260 as a matter of Cayman Islands law, may yet come to be regarded as
261 misconceived.

262

263 Moreover it is to be noted that the subpoena in question, which would seek
264 to have effect in this jurisdiction, does not emanate from the Pennsylvania
265 court but from the Grand Jury. By this no disrespect is meant for the latter's
266 proceedings. It is however a well-established principle of English common
267 law that the court will not, and are not as a matter of judicial comity,
268 obliged to render assistance to the deliberations of the Grand Jury, which is
269 not a court. See Rio Tinto Zinc Corp v Westinghouse Electric Corp [1978]



270 1 All E.R. 434. The affidavit evidence tendered to me in support of this
271 application, apart from the reference to the stay ordered by the Pennsylvania
272 court, does not go on to explain whether that Court has otherwise by its own
273 order, sought to endorse the Grand Jury subpoena, even while imposing the
274 stay.

275
276 I should therefore note that even in that latter event I would be obliged to
277 conclude that that would be the exercise by the United States court in these
278 Islands of powers which, by the standards of our courts, would be regarded
279 as excessive.

280
281 In conclusion, I am obliged, for all the foregoing reasons, to direct that the
282 evidence not be given. In so concluding I do not overlook the possible
283 alternative avenue which the Grand Jury may have if the trust is held to be
284 invalid and the trustee-in-bankruptcy becomes recognised within this
285 jurisdiction. Then the trustee-in-bankruptcy would come to own the assets
286 and the information in respect of them would be matters within his domain,
287 subject only to any further directions this Court may then give as to the use
288 of that information abroad.

289
290 Until then this Court is obliged to give effect to the matters of principle and
291 public policy identified above and which can only be allowed to be
292 overridden in exceptional circumstances not shown to exist here. The
293 general importance of this duty of the court is recognised also in the
294 following statement of Evershed MR made almost half a century ago and
295 reiterated more recently by Leggatt J in XAG and Others v A Bank [1983] 2
296 All E.R. 464 at 473:

297
298 “the courts of this country will, in the natural
299 course, pay great respect and attention to the
300 (orders) of the superior courts of the United States
301 of America, but I conceive that it is nonetheless
302 the proper province of English Courts, when their
303 jurisdiction is involved, not to refrain from
304 exercising that jurisdiction if they think that it is
305 their duty so to do for the protection of rights
306 which are peculiarly subject to their protection. In




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so saying, I do not conceive that I am offending in any way against the principles of comity”.

That statement of principle has been recognised and applied by our Courts, a more recent example being In the matter of Bank of American Trust and Banking Corporation (Cayman) Limited 1992-93 CILR 574. From my reading of a number of the cases, in particular Mackinnon’s case (supra) it also comes through that the American courts would view a penal order emanating from a foreign court in very much the same way as the English and our courts are required to do. That being so I am assured also that the exercise of my discretion under section 4 of the Law directing that the evidence not be given will be regarded as in no way offending against the principles of comity.

I direct that a formal order for signature and filing, embodying the directions given above, be submitted.


A. Smellie Q.C.
Judge of the Grand Court

Dated this 8th day of October 1996

