

20-9-96

Legal Dept

IN THE GRAND COURT OF THE CAYMAN ISLANDS  
HOLDEN AT GEORGE TOWN, GRAND CAYMAN  
CAUSE NO:438/96

IN THE MATTER OF THE CONFIDENTIAL RELATIONSHIPS  
(PRESERVATION) LAW (1995 REVISION)  
AND IN THE MATTER OF AN APPLICATION BY EURO BANK  
CORPORATION.

APPEARANCES:

- H. Moses for applicant, Euro Bank Corporation.
- L. Agard, Crown Counsel, for Attorney General
- P. Boni for potential defendants A&B
- R. Nelson for X Co. and potential defendant C.

13 September 1996.

Before Murphy, J.

REASONS

I have been asked by counsel who appeared on this summons to put my oral reasons into written form. I do so by providing some brief background to this matter, and then reproducing the reasons for decision I gave extemporaneously after argument.

I have disguised the names of potential defendants in these proceedings, not because of the order I have made under section 4 of the Confidential Relationships (Preservation) Law ("the Law"),



rather because there may well be a difficulty if I inadvertently disclose their identities prematurely, in view of the course this litigation may take.

I have before me an originating summons for directions pursuant to section 4 of the Law.

On August 26, 1996 in cause 429 of 1996, Mr. Justice Smellie made an ex parte order that Euro Bank Corporation ("the bank") make production of certain records relating to a bank account. I summarize the provisions of his order as follows. The bank was to provide copies of all documentation in the possession, custody or control of the bank relating to all accounts and sub-accounts designated by a particular number. That disclosure was to take place within 3 days of the date of the order. The bank was also to provide the attorneys for the plaintiff with various specified items of information related to the account, such as documentation relating to transfers of monies therefrom and the identity of the payees. The bank was to be restrained from parting with possession of such records, and further, there was a provision in the order precluding the bank from disclosing the fact that the application had been made.

The order of Mr. Justice Smellie also contained this provision:

"If the Defendant concludes that it has an obligation to make an application for directions under section 4 of the Confidential Relationships (Preservation) Law



(1995 Revision) it shall file such application within 7 days and give notice of it to the Plaintiff and the period for compliance with paragraphs 1 and 2 shall be extended until 3 days after such application is heard and determined".

It is apparent that the plaintiff in cause no 429 of 1996 contemplated an action for tracing of monies allegedly fraudulently misapplied, and was seeking an order in the nature of a Norwich Pharmacal order.

The bank account that was the subject of the order of Mr. Justice Smellie of August 26, 1996 was held in the name of X Co. Because, by the date of the order of Mr. Justice Smellie, the funds from that account had been transferred to other accounts within the bank, the bank applied to this Court for variation of the order of Mr. Justice Smellie.

On August 30, 1996 Mr. Justice Douglas made an order on consent (that is, consent of the plaintiff in cause no 429 of 1996) that had the effect of freezing all funds in certain other named accounts. Mr. Justice Douglas' order also varied the order of Mr. Justice Smellie to delete the provision in the latter order to the effect that the existence of the order of Mr. Justice Smellie could not be disclosed.

Counsel for the bank then appeared before Mr. Justice Douglas on September 6 for directions under section 4 of the Law. On that date, counsel for X Co. appeared, and requested and obtained an adjournment. Mr. Justice Douglas adjourned the matter to September 13, and it came



before me on that date.

Before me, counsel for X Co. and certain other potential defendants (who have some interest in related proceedings in the United Kingdom) sought an adjournment. It was argued by them that it would be inappropriate for me to deal with the section 4 application by virtue of the fact that they intended to bring applications to set aside or vary the order of Mr. Justice Smellie dated August 26, 1996. At the time the matter was argued before me, no such applications had been set down, but I was shown several draft summons which sought the following relief: discharge or, alternatively, variation of the order of Mr. Justice Smellie and the order of Mr. Justice Douglas; leave to add the potential defendants as parties in cause no. 429 of 1996; a stay of the orders of Mr. Justice Smellie and Mr. Justice Douglas; orders allowing withdrawal of monies from the subject accounts for purposes of legal fees and other expenses. These potential defendants also maintained that for me to sanction the disclosure pursuant to the order of Mr. Justice Smellie, under section 4 of the Law, would harm the interests of other unnamed persons (apart from the potential defendants) who supposedly had an interest in or were named in some of the documentation ordered to be disclosed. There was no evidence before me in support of these assertions. What I had before me was essentially the same material upon which Mr. Justice Smellie and Mr. Justice Douglas made their orders.

It seems to me that the application under section 4 is necessarily narrow one. It must focus exclusively upon the propriety of



disclosure, within the guidelines set out in the Law. It is entirely conceptually distinct from the normal processes of civil procedure, such as, in this case, the granting of ex parte orders and subsequent proposed applications to set them aside.

My function today is not to look behind the order of Mr. Justice Smellie in any way. I simply accept that there was evidence to satisfy Mr. Justice Smellie and to justify an order for disclosure based on the principles in Norwich Pharmacal.

Paragraph 5 of the order of Mr. Justice Smellie makes clear the urgency of the matter before him, not surprisingly so because of the subject matter. He makes it clear that the section 4 application should be brought expeditiously. In fact, when the section 4 application was first brought on before Mr. Justice Douglas it was adjourned for one week. The clear implication is that it was to be heard on the return date that was precisely specified in Mr. Justice Douglas' order. X Co. requested that adjournment. It has not seen fit to put further material before me for consideration on the section 4 application.

I make it clear that I am only considering the disclosure of information related to the X Co. account, not information related to any other account.

A section 4 application involves a process of weighing various considerations, essentially from a public policy standpoint.



In the particular circumstances of this application, counsel for the bank took the view that the plaintiff's counsel could not participate in the argument before me as that would have involved premature disclosure.

The plaintiff in cause no. 429 of 1996 was not in fact represented before me.

However, on the section 4 application I am bound to consider the plaintiff's interest in this litigation. I mean no criticism when I observe that those who did appear before me (except the Attorney General) would no doubt be content if the operation of the order of Mr. Justice Smellie were to be deferred, but I must consider the plaintiff in cause no. 429 of 1996 as well.

I stress that the section 4 procedure is not to be used or manipulated, in effect, to create or provide an automatic stay of an order such as the order of Mr. Justice Smellie, where there would be no automatic stay otherwise. That is essentially what counsel for the potential defendants are asking me to do on this application. I am not prepared to allow this application to be used to emasculate the order of Mr. Justice Smellie. That is what will happen if this application is adjourned further.

From the standpoint of section 4 (6) (a) of the Law, and looking strictly at the material before me, I conclude that it is more important to give effect to the order of Mr. Justice Smellie than to



stall its operation. The order is obviously meant to allow tracing claims to proceed. The benefits of such an order outweigh any harm I can see.

Those who see themselves as potential defendants can proceed as they see fit vis-a-vis the orders of Mr. Justice Smellie of August 26 and Mr. Justice Douglas of August 30, but that is not my concern today. I specifically decline to consider any proposed future proceedings, or any speculation or unsupported submissions to the effect that other unnamed persons apart from the account-holder X Co. itself might be affected by disclosure. If I acceded to that sort of vague request, these kinds of orders might never take effect at all.

Those who may be harmed by the order of Mr. Justice Smellie, if there is anyone in that category, have the plaintiff's broad undertaking in damages. I refer as well to the protection afforded by subsection 4(5) of the Law.

I am prepared to make the order sought under section 4 of the Law for disclosure of the information specified in the order of Mr. Justice Smellie of August 26. My order is unconditional.

However, I decline to extend my section 4 directions to cover the extended request of the bank which was that the section 4 directions also apply to further disclosures the bank anticipates it will be ordered to make as a result of the initial disclosures. Purely as a matter of principle, I decline to make such an extended order in a




vacuum without knowing what relief is actually being sought and what may be granted. Having said that, assuming an order is made in future in respect of the accounts disclosed in the material before Mr. Justice Douglas, it would seem highly unlikely and undesirable that this Court should withhold its section 4 approval. However, I decline to decide that matter now.

Costs to be in the cause in cause no 429/96.

Dated this 20<sup>th</sup> day of September, 1996



  
J.D. Murphy

Judge of the Grand Court

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