

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

IN CHAMBERS

CAUSE NO. 488/95

IN THE MATTER OF THE CONFIDENTIAL RELATIONSHIPS
(PRESERVATION) LAW (1995 REVISION) (the Law)

IN THE MATTER OF AN ACTION OF DISCOVERY (CAUSE NO. 468
OF 1995) BETWEEN CORPORACION NACIONAL DEL COBRE DE CHILE AS
PLAINTIFF AND DEUTSCH-SUDAMERIKANISCHE BANK AG AS DEFENDANT

BETWEEN:

DEUTSCH-SUDAMERIKANISCHE BANK A.G. ("the Bank")
APPLICANT

AND:

CORPORACION NACIONAL DEL COBRE DE CHILE ("Codelco")
and
THE ATTORNEY GENERAL
RESPONDENTS

APPEARANCES:

Mr. Jones for the applicant
Mr. Helfrecht for the Attorney General
Mr. Ritchie for Codelco

In Cause 468 of 1995 Codelco has presented strong prima facie evidence in support of its "Norwich Pharmacal" application [Norwich Pharmacal v. Commissioner of Customs and Excise (1973) 3 W.L.R. 164] which discloses that one ^{a former} of its senior executive officers is the central figure in a fraudulent conspiracy perpetrated against it. As a result Codelco has been defrauded very large sums of money, in the

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order of 175m United States dollars.

Cause 468/95 in this jurisdiction is one of a number of actions brought by Codelco outside of Chile to trace and recover its money.

These civil proceedings are being directed by the Consejo de defensa del Estado, a council of experienced lawyers convened to conduct the actions on behalf of the Chilean State.

At the same time there are ongoing in Chile, Congressional and judicial criminal *inquisitorial* proceedings.

The evidence presented in Cause 468 of 1995 reveals a trail of transactions leading to the Bank and involving the person at the centre of the fraudulent scheme. The evidence also suggests that others have become involved in those transactions, some like the bank itself, innocently, others with culpability.

Thus, the basis of the discovery action in Cause 468 of 1995 and of the order granted ex parte therein, is Codelco's prima facie right to full information about the identity of all wrong-doers, and about the extent of their wrongdoings.

The ex parte order having been served upon it, this is the Bank's application for directions pursuant to Section 4 of the Confidential Relationships (Preservation) Law ("the Law"). The Bank

seeks directions which will enable it to comply with the order for early discovery but with certain conditions and limitations for so doing.

In making the earlier ex parte order, this Court was satisfied that the bank had become involved, albeit innocently, in the wrongdoings of others. It was also clear that although the plaintiff knew the identities of some wrongdoers but there were still others, in respect of whom there was evidence to ground reasonable belief that they existed, whose identities were not yet known.

On this application, the Bank, while not expressly accepting the wide ambit of the ex parte order, does not seek to challenge it - the evidence is clear that Codelco had been the victim of fraud and that some at least of the known wrongdoers had become clients of the bank or otherwise "mixed-up" with it.

The Bank does, however, point to matters of public policy which require that the courts, in appropriate circumstances, impose conditions and restrictions to safeguard the public interest in confidentiality.

In this case, that public interest is to be recognised where unconditional or unrestricted disclosure would involve the risk of disclosing confidential information about the affairs of innocent third parties or of the respondent bank itself and when that disclosure might be prejudicial to the interests of those third

parties or of the Bank.

In this context, "innocent third parties" are to be categorized under two heads.

Those myriad customers of the bank whose affairs may be disclosed in what the Bank describes as its "Bundlesbuch" - its general computerised transaction ledger showing all account transactions going through the Bank. This would include transactions by or relating to the wrongdoers but listed at large with transactions of other customers.

Secondly, those innocent third parties who have transacted through the Bank, but unwittingly in some way in connection with one or other of the wrongdoers. These are clients of the bank who may, themselves, even be victims of the wrongdoers.

Then there is the Bank itself which although "mixed-up" in the wrongdoing as an unwitting aider or abettor, is nonetheless itself entirely innocent of wrongdoing.

With some difficulty the Bundlesbuch may be redacted to show the relevant transactions only.

But the position is more complicated when it comes to safeguarding the interests of the other innocent third parties and of the Bank itself.

What the Bank proposes is that it should be allowed to satisfy the order by giving full information by means of affidavit setting out that information but without having to produce the underlying documentation from which it is to be gleaned.

In his submissions Mr. Ritchie for the plaintiffs proposed the following approach instead:

(i) "That the Court should start from the premise that all relevant documents - or as many as may be appropriately redacted to recognise the public policy interest in confidentiality on the one hand and on the other to ensure the fullest possible discovery and disclosure of information - should be produced."

This proposition was premised on the authority of the Norwich Pharmacal case itself which Mr. Ritchie submits obliges the Bank to give the fullest possible assistance to enable the plaintiff, not only to identify the wrongdoers and identify the cause of action, but also to prosecute it to completion. This he submitted notwithstanding the exceptional nature of the Norwich Pharmacal relief itself, which involves early pretrial discovery.

(ii) "That the Court should only depart from that approach if satisfied that there are compelling reasons, in the public interest, based on public policy considerations, for so doing."

This he submitted in recognition of the statutory discretion vested by Section 4(3)(a) of the Law, which allows conditions to be imposed in the interest of safeguarding the confidentiality of information to be given in evidence.

(iii) "That, in any event, the conditions which the Bank seeks to impose in this case are in the case of the first, unnecessary and in the case of the second, extremely prejudicial to the plaintiff."

Those conditions, which I eventually imposed with appropriate modifications are set out, as amended, as follows:

"The Bank shall comply with the order as amended only if Codelco undertake in a form acceptable to the Court to the effect that -

- (a) The affidavit or affidavits sworn by the Bank and the information contained therein shall be used only for the purpose of proceedings to be commenced in this Court or for such other civil or commercial proceedings as may be specifically authorised by further order of this Court; and
- (b) Codelco will not seek any order for discovery against the Bank in respect of the documents and information specified in paragraphs 1 and 2 of the Order in any other jurisdiction

Provided that nothing in this Order shall preclude any (foreign) court or tribunal from issuing any letter of request to this Court."

In light of the terms of those conditions and restrictions, I need to state some reasons for them.

They show that in this case and at this stage of the proceedings it is appropriate, and for the sake of preserving confidentiality, that the disclosure should be full disclosure of all known information, but in the form of affidavit evidence only.

As a matter of the exercise of the statutory discretion given by section 4 of the law, I was satisfied that it was in the public interest in that way, to preserve aspects of confidentiality contained within the underlying documentation.

I was also convinced that an attempt at redaction of the sensitive information in question from the documents involved would not have been a practicable means of addressing the Bank's or the Attorney General's concerns.

I should emphasise that those concerns in no way relate to or are intended to preserve the confidentiality of information about the wrongdoers themselves.

Moreover, the conditions were imposed notwithstanding the agreed principle that ordinarily, by means of a proper Norwich Pharmacal application, a plaintiff would be entitled to the production of the supporting documentary or other real evidence, not only the sworn interpretation or extrapolation of that evidence by means of affidavit.

Having noted that, I must also note that the evidence to be given by affidavit will be full and accurate and must be certain to serve the plaintiff, to identify the wrongdoers and to establish the necessary and appropriate course of action against them. In that respect also, there is to be afforded the plaintiff the opportunity to discuss the affidavit in draft form in order to be able to address any

areas of doubt or lack of clarity, beforehand.

Submissions were made by Mr. Jones and Mr. Helfretch that in any event, a plaintiff who seeks Norwich Pharmacal relief, although ordinarily entitled to real as well as testimonial evidence to assist him, is only entitled to the extent of that evidence which is necessary to enable him to identify the wrongdoer (if identity is an issue) and to be able to establish his cause of action and to get it off the ground.

He is not, they submitted, at those early stages entitled to the full ambit of discovery which comes at the later stages of litigation where the issues are joined in the pleadings and the parties are better placed in the position of knowing what information might be respectively relevant to their discovery obligations. In a case such as this one, where the allegation is fraudulent conduct, that later discovery will eventually be of the fullest possible ambit: see Bankers Trust v Shapira (1980) 1 W.L.R. 1274.

In support of those submissions both counsel referred me to passages in the speeches of Lord Reid and Lord Kilbrand in the Norwich Pharmacal case (supra) which they submit suggest that the Norwich Pharmacal relief is of that limited kind.

Moreover, they observed, it is to be noted from those passages that the equitable Norwich Pharmacal relief is subject to considerations of public policy.

At page 168 letters G - H Lord Reid said these oft-quoted

words:

"(The authorities) seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should cooperate in righting the wrong if he unwittingly facilitated its perpetration"

and later at page 169 letters A - B:

"... I would therefore hold that the respondents must disclose the information now sought unless there is some consideration of public policy which prevents that."

At page 197 letters B - E Lord Kilbrandon said:

"In my opinion, accordingly the respondents, in consequence of the relationship in which they stand, arising out of their statutory functions, to the goods imported can properly be ordered by the court to disclose to the appellant the names of the persons whom the appellants bona fide believe to be infringing their rights, this being their only practicable source of information as to whom they should sue ... that ... will always be subject to judicial discretion, and it may well be that the reason for the limitation in practice on what may be a wider power to order discovery ... is that that is the way in which judicial discretion ought to be exercised".
(emphasis added)

It is not necessary for me, on this application, to form a final view of the correctness of the submission insofar as they suggest the limitation on the ambit of this type of discovery relief. I will say, in any event, that I would have been reluctant to agree in light of the decisions since the Norwich Pharmacal case itself. See in particular Societe Romanaise de la Chauseure S.A. v British Shoe Corp Ltd [1991] F.S.R. 1 at 5 cf Dubai Bank Ltd v Galadari (No. 6) The Times October 14, 1992 C.A. - both discussed in The Litigation Library's Discovery 1st Edition (Sweet & Maxwell 1992) at page 22, paragraph 2:08.

In the text it is noted "that disclosure of the wrongdoers identity is not enough, the obligation extends to giving full information".

Thus, without concluding one way or the other on the correctness of the submission that the right to discovery relief now is limited only to what is necessary to identify the wrongdoer and to get the action off the ground, it does appear that the ambit of the grant of the equitable relief is to be subject to judicial discretion to be exercised according to the circumstances of the case. And clearly and more to the point, in the present case those circumstances may demand that discovery be limited having regard to what in the discretion of the judge is proper in the public interest.

To that extent the equitable rights and the equitable jurisdiction are not at odds with the statutory discretionary

jurisdiction to be exercised on this section 4 application.

Being satisfied that it is proper to recognise the Bank's invocation of the public policy interest in the protection of confidentiality and other concerns of public policy expressed by the Attorney General to ensure that information given is not abused elsewhere, the order was made placing the conditions on the manner and extent to which discovery is to be given.

Mr. Ritchie also raised the concern that condition one (which requires a written undertaking from the plaintiffs to abide by the terms of the order) - is unnecessary and wrong in principle.

He argued it is sufficient to have the implied undertaking which obligates the party getting discovery and its counsel, to ensure that the information is used for no purpose other than that for which it is given.

Mr. Ritchie cited Home Office v Harman [1983] A.C. 280, the leading authority which establishes that there is an implied undertaking owed to the Court that improper use will not be made of documents discovered by order of the Court. That undertaking is not only binding upon the party to whom the evidence has been disclosed, but also extends to his attorney and to anyone into whose hands the documents may come - see Distillers Co. v Times Newspaper Ltd. [1975] 1Q.B. 613.

In Alterskye v Scott [1948] 1 ALL E.R. 469 and in Church of Scientology v D.H.S.S. [1919] 1 W.L.R. 723 - both discussed in Discovery (op. cit) at page 256 it was said that only in exceptional circumstances will the Court require an express undertaking as a condition of providing discovery as the implied undertaking is usually sufficient to protect the position of the party giving discovery. Mr. Ritchie relied on this passage from the textbook.

Mr. Helfrecht, on behalf of the Attorney General and Mr. Jones cited the potential for abuse of confidential information allowed to be given overseas and beyond the jurisdiction of this court. This was not only as that potential is apparent from the circumstances of this case but as well in many cases of the kind where discovery in this jurisdiction is sought either for the purpose of advancing proceedings here, which are offshoots to foreign proceedings, or for the purpose of use directly in the foreign proceedings.

For those reasons, both submitted it was also appropriate, as a matter of public policy, to require express undertakings to be given more as the rule than as the exception.

I note that the cases cited and relied upon by Mr. Ritchie derive from the English jurisdiction where all but the exceptional order for discovery is made for the purposes of local English proceedings and where the parties and others who are likely to come into control of the discovered information usually remain, throughout,

directly amenable to the jurisdiction of the English Court.

Clearly the difference in circumstances which often exist in Cayman will require, in appropriate cases, that written undertakings be given. Such cases will likely be less exceptional than they are in England and must be left to be recognised and dealt with in the discretion of the Court.

Having heard the concerns of the Bank and of the Attorney General, I was persuaded that this is a case in which the written undertakings should be required by the order.

Finally, a word on the second condition that the plaintiff will not again seek discovery against the Bank in respect of the same information contained in the affidavits to be given. It was imposed to avoid the possibility of any attempt to circumvent the order made here by seeking orders for discovery of the same information against the Bank in some other jurisdiction.

That condition is not intended to preclude an application or appropriate orders made therein, in this jurisdiction, for full production of the underlying documents at a later and more appropriate stage.

Anthony Smellie Q.C.
Judge of the Grand Court

9th December 1995