

Smellie J
14th July 1995

CHAMBERS 9:30 A.M.

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

CAUSE NO. 123 OF 1995

In the matter of the Confidential Relationships
(Preservation) Law, (Revised)

and

In the matter of an application by John Forze as director of
Cayman Trust Bank Ltd. (in liquidation) for directions under
Section 3A (new section 4) of the said Law.

Mr. Ramon Alberga Q.C. instructed by Mr. Bryan Ashenheim of
Myers and Alberga, for the applicant.

Mr. Diamond Murray of W.S. Walker & Co. for the liquidators
of CTB Ltd. (in liquidation).

Mr. Samuel Jackson, Crown Counsel, amicus curiae.

R U L I N G

Cayman Trust Bank Ltd. "CTB" is named as the tenth defendant
to an action, brought in the Chancery Division of the High
Court of Justice of England and Wales, by Hill Samuel Bank
Limited.

There are eleven defendants in all, among whom are six named
individuals, a firm and three other corporate entities

(besides CTB) alleged to be related in some way or other to the individuals.

The evidence presented to me about the nature of the cause of action is very scant. It seems the plaintiff bank alleges against a number of the individuals, that it was induced to extend credit or loan facilities to one or other of the defendants, as a result of misrepresentations made by certain defendants and aided and abetted by others.

For the purposes of the present application, CTB's position as a party to that action is of importance.

It will also be important to note that other defendants are alleged to be or to have been clients of CTB.

In fact, in the submissions, counsel for the applicant stated his belief, based on instructions: that CTB has been joined in as a defendant in the English proceedings for the purpose only of compelling the disclosure from it of information about the other defendants thought to be its clients.

Confidential information has been required from CTB about other defendants in an order made by the English High Court on 19th March 1993.

In the relevant parts that order reads as follows:

"The tenth defendant shall by a duly authorised officer of the company within 14 days of the date of this order make and file with the Court and serve a copy on the plaintiff's solicitors at the above address an affidavit stating:

1. Whether it holds accounts in the names of the following persons or in which any of the following persons have any interest

 -----(then follows the names of five individual defendants and one other corporate defendant)

And if so stating the balance standing to any such account, the number of the account and the nature of the interest of any of the above-mentioned persons in that account;

2. What assets the tenth defendant holds whether within or without the jurisdiction whether alone or jointly with others or as the agents, nominees or trustees for the first defendant and any other person or any of the Second, Third, Sixth, Eighth or Ninth defendants whether alone or jointly with any other person, describing the nature of the said assets, their location, the manner in which the said assets are held and the full names of all persons in whose names such assets are held;
3. the full names and addresses of:
 - (i) all the directors of the Tenth defendant;
 - (ii) all of the registered shareholders of the Tenth defendant;
 - (iii) all persons known to the Tenth defendant to hold a

beneficial interest in the shares of the Tenth defendant".

Paragraph 10 of the order granted leave to the plaintiff to serve the pleadings and the order itself out of the jurisdiction upon CTB at its offices in Grand Cayman.

Paragraph 11 contains a Mareva injunction restraining CTB from disposing of or dealing in anyway with any assets held "within the jurisdiction" (presumably of the English High Court) on behalf of other named defendants.

Pursuant to the leave granted in that order to serve out, CTB was served in the Cayman Islands.

At that time CTB was not yet in liquidation. Its affairs were managed by Ansbacher Ltd. Mr. Furze, the applicant and an officer of Ansbacher Ltd., was at the time a director of CTB.

Although he remains nominally a director, he is now ineffectually so, the liquidators having intervened.

As its active director at the time of service of the English proceedings, Mr. Furze determined to respond to that service on behalf of CTB.

He filed an acknowledgment of service in the English proceedings. He also filed an affidavit in response to

paragraph 10 of the English Court order. By that means and as his counsel has observed in submissions before me, CTB may well have, perhaps unwittingly, submitted to the jurisdiction of the English Court.

Based on the state of his actual knowledge at the time, Mr. Furze deposed in that brief affidavit that CTB held no deposit or account in the names of any of the persons or entity named in paragraph 10 of the order. He also stated that CTB held no assets for any of them anywhere and that none of the parties mentioned (or anyone acting as their agent, nominee or trustee) was a shareholder or held any beneficial interest in CTB.

Mr. Furze did not consider those negative averments to have involved the disclosure of any confidential information and so did not seek the leave of this court before responding to the order of the English Court, at that time.

Since filing that affidavit it came to his attention that his affidavit was incorrect in a number of material aspects.

He then sought legal advice. As a result he filed a further affidavit in the English proceedings to alert that Court to the fact that his earlier affidavit was incorrect but without divulging the confidential information of which he then had actual knowledge.

He was also advised that he owed a duty to the English Court to rectify the position as fully as he could. But that before so doing, he was obliged to apply to this Court for directions pursuant to the Confidential (Relationships) Preservation Law Revised, Section 4 "the Law". Hence this application.

Before the filing of this application CTB was put into liquidation and so the liquidator is separately represented.

At first, the understandable position he assumed was that Mr. Furze was not to be at liberty to disclose any confidential information in the context of the English proceedings purporting to act on behalf of CTB. The liquidator expressed uncertainty about the ramifications of the English proceedings and concern about CTB's position as a defendant in them. And, of course, concern about CTB's position as a fiduciary which obtained and holds confidential information on behalf of clients.

Nonetheless, after the application was adjourned for further advice to be taken, the liquidators eventually offered no objection to disclosure by Mr. Furze. This was on condition however that the latter is permitted on the directions of this Court. The details of that disclosure, insofar as the liquidators addressed the issue before me, would relate to the confidential information now believed to be held in

respect of other named defendants in the English proceedings.

The interests of third parties, insofar as they might be affected by disclosure, and the divulgence of information about CTB itself, as contemplated by subparagraph (3) of paragraph 10 of the High Court's order, were matters left entirely to be decided in the discretion of this Court.

Crown Counsel, as amicus, did express concerns whether the court should direct that the evidence be given.

These are concerns which the court itself raised at the adjourned hearing and which, after the benefit of further arguments on the points, remain such as to determine the directions to be given on this application.

Mr. Furze, for his part, while anxious to fulfil his duty, as advised, to give full and frank disclosure to the English Court; accepts that he is bound by the directions to be given by this court.

The concerns can be conveniently discussed under two heads.

The first is whether the order of the English Court is so wide in terms as to amount to "fishing" and whether, by its wide ambit, it unreasonably requires the disclosure of information that might unfairly affect mere innocent third

parties.

The second involves the inevitable issues of public policy which arise in this jurisdiction whenever an order of a foreign court, albeit of a court of an affiliated or friendly jurisdiction, seeks directly to compel the divulgence of confidential information. Those issues arise especially when disclosure is sought from a person or entity in this jurisdiction owing, at least prima facie, a duty of confidentiality to others who might be affected.

I will attempt briefly to deal with each issue in that stated sequence.

It is appropriate before so doing that I also note and take account of the well - established and mutual obligations of judicial comity which enjoin our respective courts.

If it is proper to do so, this court is obliged to assist the English court in its quest to do justice between the parties, by the honouring of its orders in this jurisdiction.

The reasons which follow are intended to explain why it appeared improper to do so, at any rate as the matter stands before me, on this application.

I have already noted that information about the nature of the

English proceedings is scanty.

That is hardly surprising, from CTB's point of view, if it has been joined in primarily for the purpose of extracting information about the affairs of other defendants.

The English court, I must assume, found sufficient justification for the order it made in terms against CTB as defendant. From what I am told the plaintiff bank's case seems to be premised upon a tracing claim in equity for funds which were improperly obtained from it.

Where a strong prima facie case of that nature is shown to exist, a plaintiff bank is entitled to early discovery in wide terms to enable it to trace and recover its assets and in aid of a Mareva injunction freezing those assets in the meantime - wherever they may be. (see Bankers Trust v Shapiro [1980] 1 W.L.R. 1274 and several written decisions of this court: most recently in Cuproquim v Plato and others Cause 482/93 judgment delivered 4.8.94)

Before I might direct compliance with that order, as a separate matter of the exercise of this court's discretion, I must consider whether that strong prima facie case has been shown. For reasons already mentioned, it has not.

Unfortunately, that, perhaps, is nothing more than a function of the direct manner by which the order of the English court seeks to compel CTB.

But whatever the reason, there is insufficient evidence presented to me to justify directions which would allow CTB to respond in terms of the order. Moreover, those terms are so framed as to suggest a train of enquiry so wide in nature that I doubt it could, in some respects, be justified in any event.

Here I refer in particular, to those aspects of the order which require the disclosure of confidential information about the affairs "of any other person" with whom or on whose behalf any of the defendants hold or have held assets.

Ex facie, those aspects of the order would affect persons who may be complete strangers to the allegations raised in the English proceedings.

The same criticism, in principle, can properly apply to subparagraph (3) of the order. It seeks the full disclosure of the identities and addresses of all persons who have been directors of CTB or who have any legal or beneficial interest in CTB itself.

There is nothing before me to justify an argument that CTB

itself or its officers may have acted knowingly in concert with the principal alleged wrongdoers in the alleged scheme. From what I have been told it seems the allegation is that CTB may have acted in the course of its business as a bank and trust company, in some way as a repository of assets coming from certain of the other defendants. CTB was at the material times licensed in this jurisdiction to conduct that sort of business. The ordinary course of the conduct of that business, by itself, can be no proper basis for the order. No other basis has been shown to this Court.

Thus, the wide compass of the enquiry smacks of "fishing" for information. The principles of international judicial comity notwithstanding, it is well-established that that form of discovery will not be directed by this Court: UJB Financial Corporation v Chilmark Offshore Capital Fund Limited 1992-93 CILR 53 and In the matter of Bank America Trust and Banking Corporation (Cayman) Limited 1992-93 CILR 574.

If the allegations are wider and carry other implications, they have not been canvassed before me. And in that case there are in any event more appropriate avenues to be employed for obtaining evidence in aid of foreign proceedings. As an example, a request by letters rogatory would better afford this court the basis for assessing whether the information sought should be divulged in the context of the English proceedings. It would better afford

the requesting, as well as the requested court, the means by which to meet the obligations of judicial comity.

The other concerns give rise to considerations of public policy. These are the considerations which typically arise from the orders of foreign courts seeking to compel the divulgence of information deemed confidential by local confidentiality laws.

In exercising its discretion under section 4 of the Law, this Court has constantly sought to strike the proper balance between the competing imperatives. On the one hand, disclosure in the interest of enabling the just resolution of disputes between parties and, on the other, the preservation in the public interest in the Cayman Islands, of the confidentiality of information obtained in the course of professional relationships. Examples of cases on the point are too numerous to cite but a good reference point from more than 10 years ago would be In the matter of ABC Limited 1984 CILR 130. In that case it was established that a Cayman court should not allow its statutory powers to direct a bank to disclose confidential information (with its important safeguards for protecting the confidentiality of personal affairs) to be undermined by a foreign court's order which was in reality a direction by that court to the bank to disclose information. And this applied notwithstanding that the direction of the foreign court purported to be a

direction with the consent of the bank's client.

In the case before me, although there is not the complicating factor of the so-called "consent directive", I am informed by counsel that CTB is of the view that the real objective of the joinder of CTB as a party to the English proceedings is to extract information from it about other defendants, believed to be its clients. Certainly from the material put before me, no other basis emerges.

What I am presented with then is on one hand a less than clear prima facie case and, on the other, the public interest in preserving information deemed confidential by law.

A factor not to be put in the balance when taken by itself, is the bank's possible exposure to sanctions for contempt of the foreign court's order should it fail to comply: Attorney General v Bank of Nova Scotia 1985 CILR 481, applied on this point recently in In the matter of Bank America Trust and Banking Corporation (Cayman) Limited (supra). The bank is obliged, once served with the foreign order (or any order for that matter requiring a bank to give confidential information in evidence) to seek the directions of this court, unless the principal has clearly and appropriately consented to disclosure. It is then the bank's further duty to comply with any directions given by the Court. Attorney General v Bank of Nova Scotia (supra).

It has not been submitted to me that CTB, as a party to the English proceedings, requires to be able to disclose the confidential information in question in order to defend itself. It therefore has not sought to rely on the provision of section 3 (2) (b) (v) of the Law which provides a bank that exceptional basis for disclosure of confidential information. See In the matter of Bank of Credit and Commerce International (Overseas) Limited (in liquidation) 1994-95 CILR 56 (doubting and not following earlier and different pronouncement of this Court on the point in: A.G. v B.N.S. (supra).

I mention this aspect of the matter to be clear that the direction I will give should not be taken as cutting across any proper basis CTB may have for relying on that exception.

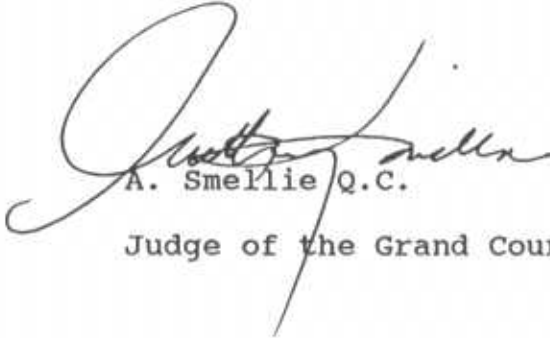
In the same context another factor should be mentioned . It is the fact that certain of the named defendants to the English proceedings have offered CTB their apparent consent to the divulgence of certain information.

Those consents are not, however, unqualified consents. Moreover, they cannot be acted upon by CTB as authority to disclose information which may also affect third parties.

CTB's reluctance to act on the basis of those consents without the directions so to do from this Court, is therefore

understandable.

For all the foregoing reasons I conclude that the information of which Mr. Furze now has actual knowledge should not be disclosed and I direct accordingly pursuant to section 4 of the Law.


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



Dated this 14th July 1995