

Judge Smellie

*Noted*

IN THE GRAND COURT OF THE CAYMAN ISLANDS  
HOLDEN AT GEORGE TOWN, GRAND CAYMAN  
CAUSE NO. 200/94

22-08-94

IN THE MATTER OF THE EVIDENCE (PROCEEDINGS IN OTHER  
JURISDICTION) (CAYMAN ISLANDS) ORDER 1978

AND

IN THE MATTER OF ORDER 70 OF THE RULES OF THE  
GRAND COURT

AND

IN THE MATTER OF A PROCEEDING COMMENCED BY THE  
DEMOCRATIC CONSTITUENT CONGRESS CONGRESS COMMITTEE  
FOR THE ELECTRIC TRAIN AND MASS TRANSPORT PROJECTS  
IN LIMA AND CALLAO ("CITEL")

Mr. Charles Quin of Paget-Brown, Quin and Hampson  
for Worldwide Financial Holding  
Mr. Ramon Alberga QC with Mr. Shawn McCann  
for CITEL

JUDGMENT

On the 22nd June 1994, on an ex parte application on a request contained in Letters Rogatory from the President of the Democratic Constituent Congress Committee investigating the contracts for the Electric Train and Mass Transport Projects for Lima and Callao, Peru, (CITEL) I ordered that depositions be taken from the Manager of Barclays Bank PLC, Grand Cayman and any director, shareholder or officer of the Cayman Islands Company which holds a certain account



at Barclays Bank the number of which was contained in the request and the order. These individuals were to present themselves for examination and to produce all documents relating to three particularised transactions on the bank account above referred to and all documents relating to the receipt of other monies credited to that account since 13th February 1989, and the subsequent disposition thereof. They were to produce all correspondence and other documents used in the ordinary course of business relating to the above transactions and all corporate records relating to the beneficial ownership of the company.

Worldwide Financial Holding ("Worldwide") is the holder of the account referred to in the order and makes this application, inter partes to set aside my ex parte order. There are four grounds to the application:-

- (1) CITEL does not constitute a Court or Tribunal as defined by Section 1 of the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978;
- (2) CITEL is conducting an enquiry for pre-trial discovery and not for testimony to be used at trial;
- (3) Criminal proceedings have not been instituted against the targets and therefore this Court does not have the jurisdiction to make the Order; and
- (4) The documents requested in the Courts's order



are not sufficiently particularised and therefore no documents should be produced.

On the 13th February, 1989, a contract was entered into between an Italian consortium and a Peruvian Government organization for the Lima Electric Train Project. There is evidence that certain Peruvian officials, and in particular a former President of the Republic of Peru, Mr. Alan Garcia, corruptly received payments of money in relation to the project. According to the Constitution of Peru it falls to Congress to determine whether criminal charges against the highest state officials, including the President or former President of the Republic, shall proceed to trial before the Supreme Court. Congress sets up a Commission of Control or Special Committee to commence an investigatory proceeding for gathering together all the evidence. CITELE is a special Committee empowered by Congress to examine the evidence against Mr. Garcia and certain other named individuals. It conducts hearings and has the same powers as a Court to examine witnesses. Before CITELE accused public officials have a right to defend themselves in person or by a legal representative.

Once the evidence is before it the Committee prepares a final report on whether or not the alleged charges should go further. This report goes before a plenary meeting of Congress, acting as a jury. The Committee's report is considered, but is not binding on Congress. If Congress passes a resolution to that effect the Public Prosecutor is obliged to prosecute the state officials concerned and neither the Public Prosecutor nor the Supreme Court may reduce or extend the terms



of the accusation.

In contrast an ordinary criminal action is instituted with an accusation filed by the Public Prosecutor before a judge of the Criminal Court. Once charges are laid the judge issues a resolution either opening the investigative process or dismissing it. During the investigative stage the judge directs the gathering of evidence as well as ascertaining the liability of the accused person or persons. Once the preliminary investigation is over the judge and the Public Prosecutor prepare reports which are considered by the Criminal Branch of the Superior Courts which decide whether a public hearing shall commence. Three judges will determine on the guilt or otherwise of the accused person or persons.

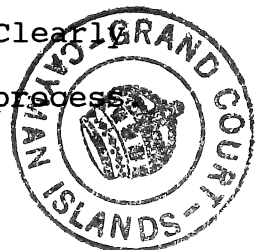
At present such ordinary criminal proceedings are pending in the Peruvian Courts against certain individuals for allegedly corrupting high ranking State officials in connection with the Lima Electric Train Special Project.

During the CITEL hearings one Sergio Seragusa testified that Mr. Alan Garcia corruptly solicited money from the Italian Consortium involved in the Electric Train Project. That in particular three payments were made by the consortium, totalling US \$840.000, to a certain account with Barclays Bank, Grand Cayman, at the behest of Mr. Garcia. The request sought evidence about the bank account, the three payments into it and the corporate records of any company which holds that account.



The jurisdiction to grant the request is given by the Evidence Proceedings in Other Jurisdiction (Cayman Islands) Order 1978 of Her Majesty in Council ("the 1978 Order"). By section 1 of the 1978 Order, as applied to Criminal Proceedings by section 5, this Court must be satisfied that the application is made in pursuance of a request issued by or on behalf of a court or tribunal exercising jurisdiction in a country or territory outside the Cayman Islands. Where the evidence to which the application relates is to be obtained for the purpose of criminal proceedings those proceedings must already have been instituted (See Section 5 (1) (b) of the 1978 Order). It is argued for Worldwide , the applicant, that CITEL is not a court or tribunal within the meaning of the Order. It is further argued that CITEL is conducting an investigative procedure and proceedings have not been instituted against anyone.

The appointment of CITEL was an essential first step in the institution of criminal proceedings against Mr. Alan Garcia and other high State officials in Peru. According to the evidence before me there is no other way in which criminal proceedings can be pursued against those officials. I have admitted an affidavit of one Ednardo Molina Montaya, an attorney practising in Lima Peru, who emphasizes the investigative nature of CITEL and that its report is not binding upon Congress. However, he does not contradict the assertion of Juan Armando Langua-Balbi, another practising attorney in Peru, whose experience is set out in his affidavit, that the criminal liability of high State Officials must first be ascertained by Congress. Clearly the proceedings of CITEL are the first stage in the criminal process.



Certainly it has investigatory powers which a Court in a common Law jurisdiction would not exercise. But such is the case in criminal process against an ordinary citizen in Peru. Such a situation is not unknown in countries which practice the Civil Code. The first stage of a criminal case combines trial and what we would regard as pre-trial matters. Be that as it may, I am satisfied that CITEL conducts hearings with the same powers to call evidence as the Courts. There are, according to Mr. Langua-Balbi's affidavit, accusations which have to be faced by accused persons even though there may not, at this stage, be formal charges. Those accused persons have a right to be heard either personally or through their legal representative. I am satisfied that CITEL is a tribunal within the meaning of the 1978 Order.

But are criminal proceedings instituted at this stage?

In Rio Tinto Zinc Corporation and others v. Westinghouse Electric Corporation [1978] 1 All ER 434 it was held that evidence sought for an American grand jury investigation could not form the subject of an order under the English equivalent of our 1978 Order because by that stage proceedings had not been instituted (per Lord Wilberforce at p.447, Lord Diplock at p.466 and per Lord Fraser at p.476). American Grand jury proceedings are to be distinguished from a Special Commission appointed by the Congress of the Republic of Peru in that grand jury proceedings are closed proceedings, the defence having no right to be heard, and they are optional at the behest of the prosecutor. He can reach a judge by a more direct route if he so chooses. Furthermore, the appointment of CITEL required a specific



resolution of Congress. That resolution was the first and a necessary step in the pursuit of criminal charges against individuals who hold or have held one of the offices stated in the Constitution of the Republic of Peru. I consider that the interests of judicial and international comity require me to give effect to the request of such a formally constituted tribunal so far as that request falls within the terms of the 1978 Order (See United States v. Carver and Others 1980-83 CILR 297).

The House of Lords in Rio Tinto Zinc v. Westinghouse (Supra) resoundingly held that it was impermissible to give effect to a request for pre-trial discovery in the nature of "fishing expeditions". In this case, however, there has been specific evidence tendered by a witness to CITEC that specific payments have been made into a specific bank account in Grand Cayman. One can hardly be surprised at the anxiety of CITEC to obtain direct evidence about that account and those transactions. It is directly relevant to CITEC's final determination whether the evidence of the witness can be corroborated or is false. This is not a "fishing expedition"; it is a request made as a result of direct evidence given to the tribunal, CITEC, about specific matters which are relevant to its deliberations.

Having said that about the request generally, I am of the view that my order of the 22nd June 1994, was too wide. As their Lordships decided in Rio Tinto Zinc v. Westinghouse (Supra) if a request for documents ranges too wide and extends beyond particular documents which are identified then it is possible for the Court to sever the



impermissible parts from its order.

It was proper to order the manager of Barclays Bank and any director, shareholder or officer of the company holding the specified account to attend before an Examiner to testify. It was proper for me to order them to produce all documents relating to the receipt of the three sums which were testified to before CITELE and regarding their subsequent disposition. It was proper for me to order the production of all correspondence (including letters or notes of instruction) ledgers, day books, account books and computer records used in the ordinary course of business relating to those transactions. It was proper for me to order the production of all corporate records including (but not exclusive of) the register of Shareholders, Directors and Officers, Memorandum and Articles of Association, Share Certificates, nominee agreements and any other documents pertaining to the beneficial ownership of the company holding the account. All that is relevant to CITELE's consideration of the evidence relating to specific incidents of the corrupt receipt of money. For me to order that all documents relating to the receipt of any other monies credited to the account since 13th February 1989, and the subsequent disposition thereof was, I now acknowledge, an error. I went too far in ordering documents to be produced about which there was no evidence before CITELE and no reason to suppose would be of direct relevance to its deliberations. I delete paragraph (2) (ii) of my order of the 22nd. June 1994.

The last point I ought to deal with is the submission of Counsel for



CITEL that Worldwide has no locus standi to make this application. He asks me to follow the ruling of Smellie J. in Cause 83 of 1994, In the Matter of a Civil Action Proceeding before the Ontario Securities Commission Toronto, Canada. In that case an order was made under the 1978 Order that certain named individuals attend for oral examination and produce documents of, inter alia, three companies of which those individuals may at some time have been the officers or directors. Smellie J. held that the three companies may have had a commercial or proprietary interest in the information to be disclosed but they had no legal interest which could fall to be determined in either the letters rogatory proceedings in this jurisdiction or in the proceedings before the Ontario Securities Commission. As such they had no locus standi to apply to discharge his order. This case is entirely different. I have ordered that any director, shareholder or officer of the company holding the bank account at Barclays Bank attend to be examined and to produce certain records. A company can only act through its officers and I have, in effect, ordered Worldwide into these proceedings. That company is the holder of the account about which evidence is sought. It has a legal interest in these proceedings and locus standi to make this application.

I order that my order of the 22nd June 1994, remain in force save that paragraph (2) (ii) thereof is deleted.

Costs to the CITEL.



DATED 22/8/94

*[Handwritten signature]*