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CHAMBERS

#525

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

CAUSE # 389 OF 1992

BETWEEN:

(1) INTERNATIONAL CREDIT AND INVESTMENT COMPANY (OVERSEAS) LTD
(In liquidation)

(2) FINANCE AND INVESTMENT INTERNATIONAL LIMITED

Plaintiffs

AND:

(1) SHAIKH KAMAL ADHAM
(2) FAISAL SAUD AL FULAIJ
(3) GHAITH RASHAD PHARAON
(4) PHARAOH HOLDINGS LIMITED
(5) LHASA INVESTMENTS LIMITED
(7) CONCORDE INTERNATIONAL TRADING SA

Defendants

Plaintiffs, Charles Purle Q.C. and Ewan McQuater of counsel instructed by Hunter & Hunter

5th and 7th defendants, Ramon Alberga Q.C. and Mr. Edward Sibley, instructed by Myers & Alberga

HARRE C.J.

RULING

This is a summons in which the fifth and seventh defendants ("the defendants") seek an order that the first plaintiff file and serve a Further and Better List of Documents.

A supplemental list of documents was served on the 10th of June 1994 and the complaint made about it is that it did not properly

comply with the order of this Court dated 8th December 1993 or with the first plaintiff's discovery obligations generally. In particular, the supplemental list does not, it is said, sufficiently describe the individual documents to enable them to be identified and moreover, the documents which appear in various bundles do not appear to be of the same nature.

As originally submitted the bundles were not paginated but that has now been done.

The relevant Cayman rule is Rule 47 of the Grand Court (Civil Procedure) Rules which reads as follows -

> "(1) Any party may apply to the Court for leave to deliver interrogatories in writing for the examination of opposing parties or for an order in the prescribed form directing any such party to make discovery on oath of the documents which are or have been in his possession or power relating to any matter in question, or for production and inspection of any such documents.
>
> (2) On hearing such application the Court in its discretion may grant or refuse such leave or order, or impose conditions or limitations thereupon having regard to the necessity thereof in the fair disposal of the cause or for saving costs.".

Neither that rule nor the prescribed forms which relate to

it (Forms G.C. 39 and 40) indicate the manner in which lists of documents are to be compiled. That contrasts with O 24 r 5 of the English Rules of the Supreme Court which provides that the list must enumerate the documents in a convenient order and as shortly as possible but describing each of them or, in the case of bundles of documents of the same nature, each bundle sufficiently to enable it to be identified. Nevertheless, the practice in Cayman has been to be guided by O. 24 r 5, while retaining discretion within the ambit of our rule 47 (2).

It is convenient from a historical perspective to mention first the arguments of the plaintiffs. They say that the form of Order 47 is such that certain 19th century authorities are more pertinent than the modern authorities on which the defendants rely. The old authorities are Taylor v Batten (1878) IV QBD 85; Hill v Hart Davis (1884) 26 Ch D 470; Cooke v Smith (1891) 1Ch 509; Budden v Wilkinson (1893) 2 QB 432; and Milbank v Milbank (1900) 1 Ch 376. I do not propose to describe those cases at all. I will simply refer to the following passage in the judgment of Hobhouse J in the case of Sveriges Angfartygs Assurans Foreing v The 1976 Eagle Insurance Company SA & Ors (1990 transcript) in which he summarises their effect by the following quotation from the judgment of Cotton LJ in Taylor v Batten -

> "All the court requires, where there is no question of privilege or objection to produce the documents, is that they should be so far identified, that the Court can see that the documents referred to are

produced if required.".

Concerning that, he continues as follows -

> "The citation of 19th century cases decided under different circumstances (the decision of disputes about privilege) and under different Rules of Court is not a correct approach to providing the answer to practical questions of procedure in the last decade of the 20th century under the present Rules of Court. Decisions on procedural matters are governed by the Rules of Court in force at the time and the practical considerations pertaining at the time. Such decisions are neither binding nor persuasive one hundred years later when different rules and considerations are applicable.
> Decisions of courts on purely procedural questions are not of permanent validity or authority. The procedure of the courts, subject to the framework of legislation and delegated legislation, has to develop and adapt and what may or may not have been an appropriate decision in the 19th century is not necessarily still appropriate in the 20th century. If not appropriate, it should not be followed even if it was the decision of an Appellate Court.".

Although we do not have Order 24 r 5 in the Cayman Islands I see no more reason to regard the old case as persuasive than did Hobhouse J. Whatever may be the drafting relationship between the older English Rule and our present rule different considerations are

now applicable in Cayman and our rule is widely enough drafted to take them into account. The present case alone (and it is far from being alone) is enough to show how deeply, for better or worse, these Islands are embroiled in the vanguard of modern commercial litigation.

The organisation of discoverable documents is a major burden of costs for the litigants and more so here because of the inadequate provisions for the recovery of costs by a successful litigant. That situation is, at this very moment, being actively addressed. So the dispute on this procedural matter, as Hobhouse J pointed out, really is about who is to do the work. This is what he said about that -

> "The Rules of Court require the party giving the discovery to itemise the individual documents with some description, however brief, of the document. The obligation is qualified by a limited exception regarding documents of the same nature which may be disclosed by a bundle. Subject to that exception, the party giving the discovery must do the work.".

Certain broad principles are referred to not only in the English Supreme Court Practice at note 24/5/22 but also in the affidavit of Mr. Farrington of Lovell White Durrant on behalf of the plaintiffs. The provisions for enumeration and description are to enable the Court to see whether the rule or order for discovery has been complied with and to enable it to make an order for production which is clear and can be enforced. That is a survival from Taylor v Batten. Although they are not for the purpose of enabling the other party to discover the contents of the document from the description nor to test thereby the soundness of a plea of privilege they must

also be identified sufficiently to enable the other party to ask for those which he wishes to inspect, specifying them appropriately. Accordingly (except where the documents are too numerous and include large numbers of documents of the same nature) the lists should usually consist of items in order of date with the number of the item, the description and the date.

The plaintiffs say that the pagination which they have done will enable these objectives to be fulfilled, though I cannot see how pagination alone can fully address the problem.

Unlike Hobhouse J in the Sveriges case I have not seen any sample bundle. I doubt if it would have helped much if I had. There was no criticism of the filing system used by the defendant against whom the complaint was made in Sveriges. By contrast Mr. Farrington says that -

> "The records of ICIC were not maintained by ICIC in any readily accessible manner and were not the subject of any reliable filing or index system.".

It could be argued in relation to a properly kept filing system that if documents are to be found in a particular file they must be "of a similar nature" insofar as they deal with the same subject matter. That argument was rejected in the Sveriges case. Whether an invoice relating to the purchase of, say, a commercial aircraft is more similar in nature to a letter dealing with the same purchase than to another invoice dealing with an item such as a box of paper clips is of academic interest only. What is important is the

extent to which the form of listing chosen achieves the objectives of the discovery process which I have described. In this particular case bundles presented by reference to ICIC files or boxes are, in view of the way in which the ICIC record keeping is described in the evidence particularly inappropriate unless their contents are particularly clearly identified but I accept that it is important to maintain the files in their original state at the present time. Fabrication has been alleged, and the sequence of documents on the record is important.

Having looked at the lists and doing the best I can without having seen any of the documents concerned I seek to arrive at an order which does not impose an undue burden on ICIC while addressing some legitimate concerns of the defendants, particularly with regard to aspects of the bundles. In doing so I am mindful of what Mr. Justice Goff, as he then was, said in Lonrho Ltd and anor v The Shell Petroleum Company and another, delivered on 25th January 1980, of which I have a transcript. His belief, which I respectfully share, is that whatever form of discovery one adopts in a complex commercial case is going to have some virtues and some vices - and here I quote the words of the learned judge -

> "I strongly suspect that the word "convenient" in the Rule means convenient for the purposes for which the rule is designed, namely to enable the Court to ensure that the Order for Discovery has been complied with. But assuming that the word "convenient" has a much wider connotation and looks

> at the difficulties which face a solicitor on inspection, I find it impossible to say this was not a convenient order, although other convenient orders might equally have been adopted and possibly might, on balance, have been more helpful. I therefore reject the argument based upon the alleged inconvenience of the order of enumeration.".

The main thrust of Mr. Sibley's objection is without doubt the lack of consistent format between the supplemental list and the original list. It would have been more helpful, he says, and indeed obligatory, to relate the two lists, and because if the failure to do so the supplementary list is fatally flawed. The order which he seeks from me is, as he described it "all or nothing". He wants the supplementary list recast to conform descriptively with the first, since otherwise the requirement of convenience will not be achieved. In assessing convenience I keep in mind the evidence of Mr. Farrington. He says that Mr. Sibley had by 15th June 1994 already made arrangements to inspect the documents in the supplemental list, and that even without pagination, the present form of the list does not appear to have caused any practical difficulties for him. He has already inspected originals or copies of all of the documents in the supplemental list. There are a number of original documents copies of which he has seen and which will be inspected in Cayman during his current visit.

The proof of this pudding is in the eating. Like Mr.

Justice Goff, I do not say that this ordering of the list is free of vices or that another order would not have been more convenient. But I reject the "all or nothing" argument based on the alleged difficulty in collating the two lists.

Nevertheless, there are observations and directions which I will make.

Mr. Sibley has objected to the descriptive matter on page 2 of the supplementary list. He says all references are to files. In fact, as is immediately clear from looking at the list itself, both files, some of which are described as bundles, and individual documents are included. The descriptive section does no more than seek to indicate in the broadest terms the categories under which the supplementary list has been presented. I see nothing to object to there. I now turn to the items described as bundles. The criticism of the bundles which I think is justified is not that they are not described sufficiently to enable the bundle to be identified but that they do not contain documents of the same nature. I do not want these bundles to be broken up for the purpose of the exercise. None of them is of great size. Some of them to which Mr. Sibley has made objection can, I think, be conveniently dealt with, now that the pages have been numbered, by creating, to use an inelegant term, sub-bundles by reference to those numbers. I will illustrate what I mean by taking an example. It is item 2 in section 1 (A) of Schedule 1 Part 1. It reads as follows -

"Bundle entitled "FIIL ACCOUNTS FROM 1984"

containing bills, invoices, credit advices, account instructions to bank, statements etc"

It should not be burdensome to deal with this by indicating in an index the page numbers of the documents of the same nature on the following lines -

Bundle entitled "FIIL ACCOUNTS FROM 1984"
containing -
Bills (pages 1,3,5,7 ---)
invoices (pages 2,4,6,8 ---)
credit advices (pages 9,11,13,15 ---) - and so on.

The period of time covered by the items in each sub-bundle and the number of the pages in each whole bundle should be shown.

The contents of other items described as bundles and to which Mr. Sibley objects may be so heterogeneous as not to led themselves to this treatment. If so, each item will have to be separately described.

These observations relate to Parts (A) and (B) of Schedule 1 Part 1. Part (C) is concerned with the Personnel files of individuals. Those files must be, in my view, so specific and homogenous in nature as not, to require any further description or itemisation. In particular, there should be no difficulty at all in relating them to material on the previous list.

With regard to item (D) and notwithstanding the observation

of Hobhouse J on a reinsurance broker's file which he saw, I conclude that files on numbered accounts cannot on the face of it conveniently be further categorised by reference to individual items therein. It is not necessary.

The period covered by each file is however important and should be given. Items 32, 34 and 35 seem to me to be satisfactorily described as ledger extracts, except to the extent that the opening and closing dates of the extract should be given.

Mr. Sibley is here in the Cayman Islands for another week. It would be lamentable if the process of inspection were held up by reason of the directions which I have given. They do not relate to most of the documents. I remind the parties of and adopt the following observations of Hobhouse J in the Sveriges case, which he considered to be particularly relevant to commercial litigation -

> "This court expects the legal representatives of the parties to co-operate with each other using the procedures of the court to achieve an appropriate outcome to the litigation with expedition and economy. There must be an element if give and take between the solicitors and commons sense must be applied. Parties are perfectly at liberty to agree to informality when that is appropriate. There may be many cases where costs can be saved by adopting a flexible and fairly informal approach to discovery. But it must at the same time be appreciated that the discipline provided by the rules and procedures of the court exist because in general a disciplined approach is more efficient and in the long term more expeditious and economical and will better serve the ends of justice.....
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> To summarise therefore, the starting point is the strict provision of the rules of the

court. Within that framework the parties representatives may, and should adopt by agreement the most sensible and economical procedure in the circumstances of the particular case. If they cannot agree, then they should ask for directions from the court. The Commercial Court has a wide discretion which it will exercise to give directions, including the relaxation of formal procedures., to ensure that the litigation is conducted in the most efficient, economical and expeditious manner that is consistent with the paramount requirement of doing justice between the parties."

That philosophy calls for the work of preparing and serving the Further and Better List to be done as soon as possible and in any event consistently with the order already made that any discovery consequent upon further exchange of pleadings shall take place by 21st September, with inspection within 48 hours thereafter.

5th August 1994

G.E. Harre

Chief Justice