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

CAUSE NO. 361 OF 1993

IN THE MATTER OF BANK OF CREDIT AND COMMERCE INTERNATIONAL (OVERSEAS) LIMITED (IN LIQUIDATION

IN THE MATTER OF THE CONFIDENTIAL RELATIONSHIPS (PRESERVATION) LAW (AS AMENDED)

BANK OF CREDIT AND COMMERCE INTERNATIONAL (OVERSEAS) LIMITED (IN LIQUIDATION) PLAINTIFF

ATTORNEY GENERAL OF THE CAYMAN ISLANDS DEFENDANT

For the applicant: Mr. Huw St. J. Moses
For the Attorney General: Mr. Ivor Archie

HARRE C.J. **REASONS FOR RULING**

In its application by Originating Summons the plaintiff asked the Court to make a determination with regard to two matters of construction of the Confidential Relationships (Preservation) Law ("the Law") in relation to the seeking, divulging or obtaining of confidential information by the plaintiff in certain English High Court actions against its auditors or any consolidated proceedings arising therefrom.

The matter concerns section 3 (2) (b) (v) which reads as follows -

> "This Law has no application to the seeking, divulging, or obtaining, of confidential information -
>
> ...

(b) by or to -

...

(v) a bank in any proceedings, cause or matter when and to the extent to which it is reasonably necessary for the protection of the bank's interest, either as against its customers or as against third parties in respect of transactions of the bank for, or with, its customer;"

The first question for determination is whether the words "any proceedings, cause or matter" refer only to proceedings causes or matters within the Cayman Islands. That fell for consideration by the former Chief Justice, Sir John Summerfield, in Attorney General v Bank of Nova Scotia et al (1984-5) CILR 418. The issue before him is set out as follows at page 426 -

"Whether the first defendant can rely on S.3 (2) (b) (v) for the purpose of making disclosure of the confidential information ... to a United States Court on the ground that to do so is reasonably necessary for the protection of the bank's interest."

The following is the relevant passage from his judgment -

"The first point that should be made is that, in contrast with section 3A (1) which makes express references to proceedings within and without these Islands, section 3 (2) (b) (v) makes no reference to proceedings outside these Islands. In my view section 3 (2) (1) (v) has application only in relation to proceedings, causes or matters within these Islands."

Mr. Moses asks me to take the view that this and other observations of my learned predecessor to which I shall later refer were in part obiter, in part distinguishable and, in part, should not in any event be followed. I would not lightly adopt the last of these alternatives, although it is open to me to do so. The principle is

to be found in the following passage from the judgment of Lord Goddard CJ in Police Authority of Huddersfield v Watson (1974) 1 KB 842 at 848 -

> "... I can only say for myself that I think the modern practice, and the modern view of the subject, is that a judge of first instance, unless he is convinced the judgment is wrong, would follow it as a matter of judicial comity. He certainly is not bound to follow the decision of a judge of equal jurisdiction."

It is by now abundantly a matter of record in these Courts that many Cayman banks have customers and employ many professionals outside these Islands. The nature of their business frequently involves litigation of an international kind, and their being required to protect their interest, whether against customers or third parties. Actions of this nature may be both complex and protracted with issues possibly involving additional evidence and new parties arising along the way. It would be most onerous for banks to have to make successive applications of uncertain outcome under S. 3A of the Confidential Relationships (Preservation) Law during the conduct of litigation of this kind, simply because that litigation was taking place outside the Cayman Islands. The essence of the matter, in my judgment, and the ratio decidendi of that part of the judgment of Summerfield CJ from which the passage to which I have referred is taken lies in the question whether or not disclosure is reasonably necessary for the protection of the bank's interests within the terms of S. 3 (2) (b) (v). That is so, whether or not the disclosure is to be to a Cayman Court. If that view is right the words "to a United States Court" in the question before Summerfield C.J. do not go to the main issue and his dictum that S. 3 (2) (b) (v) has application only to proceedings causes or matters within these Islands may be considered obiter. I have come to a different view of that for the reasons which I have expressed. As a matter of drafting I

considered whether I should draw the conclusion from the omission of the words "whether, within or without these Islands", which appear in S.3A (1) of the Law, from S. 3 (2) (b) (v) that proceedings outside the Islands were intended to be excluded. I concluded that I should not. S. 3A (1) deals with a very different situation. It expresses the circumstances under which an application must be made for directions from a judge. S. 3 (2) (b) (v) expresses a total exemption, for a specific purpose, from the application of the Law. The scope of the exception should not be dependent on territorrial considerations but on the extent to which disclosure is reasonably necessary to protect the bank's interest, and what is the ambit of the interest which it is entitled to protect. That is the question which I now have to determine in relation to a second declaration sought by the applicant which I made in the following amended form -

> "It is hereby declared that the Confidential Relationships (Preservation) Law (as amended) has no application to the seeking, divulging, or obtaining, of confidential information, including the giving in evidence of confidential information, by the Plaintiff in English High Court actions CH 1992-B-No. 2754, CH 1993-B-No. 1509 and CH 1993-B-No. 1512 (or any consolidated proceedings arising therefrom) to the extent that any such disclosure is reasonably necessary to protect the interests of the Plaintiff."

In the three English actions there referred to Bank of Credit and Commerce International (Overseas) Ltd is the first named plaintiff and the relief sought is in respect of, inter alia, the audit and preparation of its accounts. The defendants are firms of auditors alleged to be responsible for negligence, breach of duty and/or breach of contract and named partners or employees of those firms. The actions have been consolidated with other actions commenced by other companies in the BCCI Group.

In relation to this aspect of the matter, I shall now consider the following passage from the judgment of Summerfield CJ in the Bank of Nova Scotia case -

> "Secondly, although this provision is rather loosely worded, in my view it contemplates only proceedings, causes or matters to which the bank is a party. ... The purpose of the provision is to allow a bank, for example, to sue a customer to recover on overdrawn accounts or to sue guarantors of an overdraft or to defend proceedings relating to disputed accounts or transactions, and reveal confidential information relevant to such proceedings.
>
> Thirdly, the bank's interest which it may protect is in respect of (and confined to) transactions of the bank for, or with, its customer - and no other interest. One situation this provision does not contemplate is one where the bank discloses confidential information to a foreign court, e.g. in answer to a subpoena issued by that court, or otherwise than in accordance with the provision of the Confidential Relationships (Preservation) Law in order to escape possible contempt proceedings. Why in the world would the Legislature give a bank, and a bank alone, that latitude to undermine the operation of this law? No reasonable construction of the provision would allow that course."

Bank of Credit and Commerce International (Overseas) Ltd is, through its liquidators, a party to the proceedings in respect of which disclosure has now been sought. I agree with the view of Summerfield CJ that S. 3 (2) (b) (v) contemplates only proceedings, causes or matters to which the bank is a party. But to determine the nature of the bank's interest in respect of which it is entitled to invoke the provision in such proceedings needs consideration at rather greater length.

The Confidential Relationships (Preservation) Law is a penal statute. As first enacted it provided that nothing in it should by implication be deemed to derogate from the rule in Tournier v National Provincial & Union Bank of England (1924) 1 KB 461 which deals with the civil duty of banks to preserve the confidentiality of the business of their customers. When the Law was amended in 1979 that provision was removed and section 3 (2) (b) (v) appeared. The intention of that was clearly to seek to remove obscurity as to the precise ambit of the common law rule as applied by reference in a statute which carries penal sanctions.

Unfortunately that was not, in my judgment, a very happy legislative exercise. In developing that comment I propose to adopt what was said by Leggatt J in X AG v A Bank (1983) 2 All ER 464 in respect of Tournier. It was this -

> "First, Banks LJ considered in a classic passage what the qualifications are of the contractual duty of secrecy implied in the relationship of banker and customer, remarking that there appeared to be no authority on the point. He said -
>
> > 'On principle I think that the qualification can be classified under four heads:
> >
> > (a) where disclosure is under compulsion by law; (b) where there is a duty to the public to disclose; (c) where the interests of the bank require disclosure; (d) where the disclosure is made by the express or implied consent of the customer.'
>
> In referring in particular to examples of the third class, he mentioned the issue by a bank of a writ claiming payment of an overdraft stating on the face of the writ the amount of the overdraft. In a comparable passage Scrutton L.J. gave a similar example ... whilst Atkin L.J. expressed himself somewhat more widely, saying ...

> "It is difficult to hit upon a formula which will define the maximum of the obligation which must necessarily be implied. But I think it safe to say that the obligation not to disclose information such as I have mentioned is subject to the qualification that the bank has the right to disclose such information when, and to the extent to which it is reasonably necessary for the protection of the bank's interests, either against their customer or as against third parties in respect of transactions of the bank for or with their customer, or for protecting the bank, or persons interested, or the public, against fraud or crime."

Leggatt J. referred to a submission by counsel to the effect that the duty described by their Lordships in Tournier was not absolute and that the first three of Banks LJ's qualifications or exceptions were only examples of public policy, and that Tournier does not constitute a statute and does not fall to be construed as such. I think that is right. Unfortunately the Confidential Relationships (Preservation) Law is a statute and does fall to be construed as such. That task is made no easier because of the ambiguity of the wording of S. 3 (2) (l) (v), which can be illustrated by the adding of notional commas in the text of the statute at the following alternative points:-

EITHER

... interests, either as against their customer or as against third parties, in respect of ...

OR

... interests, either as against their customer or, as against third parties, in respect of ....

In favouring the second construction I must respectfully differ from what was said by my predecessor the first sentence of his third conclusion in the Bank of Nova Scotia case while entirely agreeing with the rest of that conclusion. My first reason for this view is

because the alternative would bring in from the judgment of Atkin LJ in Tournier a restriction which does not appear in the other judgments of the court in that case; secondly because it is a more natural construction of the words used; and most importantly because it is the only interpretation which is consistent with the less elliptically phrased expression of the principle in the following passage which appears a few lines earlier in the judgment of Atkin LJ -

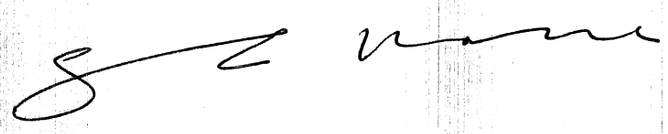
> "But the bank is entitled to secure itself in respect of liabilities it incurs to the customer, or the customer to it, and in respect of liabilities to third parties in respect of the transactions it conducts for or with its customer."

In my view what Lord Atkin there said about liabilities to third parties must apply equally to rights against third parties.

I have already briefly described the nature of the English actions referred to in my second declaration on the summons. They are actions against auditors. On 4th March 1993 the English High Court ordered that five actions, in three of which the company was the principal plaintiff and which are the three referred to in my declaration, be consolidated. There was before me at the hearing of the summons a draft of the consolidated statement of claim in the English proceedings. It gave this Court an opportunity to consider the matters there in issue and in respect of which confidential information and documents might be given in evidence. The draft contained schedules of matters which, taken alone or together, were indications that the business of Overseas and other companies in the BCCI Group might have been conducted in a manner in which there was a risk of material misstatements resulting from error or fraud. Among those matters were the growth of high risk activities and the losses incurred; the heavy dependency of the Group in general on a small number of major borrowers or groups of borrowers; and the increasing number of numbered accounts in relation to which there was no recorded identification of the relevant borrower or depositor. These matters, insofar as they relate to Overseas, are in respect of (though not necessarily confined to) "transactions by the bank for, or with, its customer" and it is in evidence in this application that the bulk

of the confidential information as defined by the Confidential Relationships (Preservation) Law is contained in Appendices to Schedule 7 of the draft Statement of Claim which contain details of borrower groups which are alleged to be relevant to those matters. The Appendices purport to set out particulars of imprudent conduct "in relation to each target account of the target borrowers." Seventeen such target borrowers are identified by name.

This is an action by the liquidators, based on these allegations, the purpose of which is to recover sums for the benefit principally of the depositors of the bank who have lost so heavily as a result of the activities of the bank and its associated companies. It must be in the bank's interest to recover the maximum possible sum for its creditors in this way. If there are some transactions which may fall outside the strict banker-customer relationship they are likely both to be minimal in relation to the vast overall size of this matter and in any event not to involve confidential information as defined in the Law. It is for these reasons that I made my order dated 27th August 1993.



G. E. Harre
Chief Justice

26th January 1994.