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

ON 1ST NOVEMBER 1993

5-11-93

C 360 OF 1993

IN THE MATTER	of an application under Section 3A of the Confidential Relationships (Preservation) Law
AND IN THE MATTER	of BankAmerica Trust & Banking Corporation (Cayman) Ltd.
AND IN THE MATTER	of Bank of America National Trust and Savings Association

Mr. Neil Timms for the applicant
Mr. Michael Marsden, Acting Solicitor General, as Amicus Curiae

HARRE C.J. **JUDGMENT**

The background which has led to this very important application must be set out in some detail if the issues are to be understood.

On 15th June 1988 the United States Internal Revenue Service ("IRS") issued a summons to Bank of America NT&SA ("the Bank") seeking records relating to transfers of $9,500 or more by any person during any 90 day period between the United States, the Cayman Islands, Hong Kong, and certain other locations during the calendar years 1986 and 1987. The Bank is a national banking association organised under the Laws of the United States with branches and subsidiaries there and in various locations around the world. One of its subsidiaries, wholly but indirectly owned, is BankAmerica Trust and Banking Corporation (Cayman Ltd) ("Cayman Trust").

Because Cayman Trust is wholly owned by the Bank, documents located at the Trust are deemed under United States Law to be within

the legal control of the Bank to the extent that the Bank can be compelled, on threat of sanction, including being found in contempt of court, to produce the documents in response to a subpoena issued to the Bank.

The summons issued by the IRS was for the purpose of determining the possible United States tax liability of persons who transferred or received the funds. Such a summons, which is known as a John Doe Summons, does not identify the persons in respect of whose liability it is issued and it can only be served on the authority of an order from a United States Court.

Various domestic records were produced to the IRS between 1988 and 1990 and in October 1990 the IRS requested the Bank to produce both foreign and domestic records underlying some 1500 transfers of funds.

In January 1991 the IRS filed a motion in the United States District Court for the Northern District of California seeking to enforce its summons in relation to these transfers. At that stage the only category of documents concerning which agreement had not been reached were those located in Hong Kong and no documents held by Cayman Trust had been called for.

There is a relationship between the course of events in respect of Hong Kong and the present proceedings, and I shall describe the salient features of those events.

The Bank took the position that it could not be required to produce the documents located in Hong Kong because of the application of the Hong Kong Banking Confidentiality Laws. The IRS argued to the contrary and on 24th May 1991 the District Court ordered that the Bank must produce the documents notwithstanding Hong Kong law. In response to this order the Government of the United Kingdom issued a diplomatic note of protest to the United States. The Governments of Hong Kong and the United Kingdom issued special directions to the Bank

prohibiting it from complying with the summons. The Bank consequently filed a motion with the District Court asking that the enforcement order be vacated or modified and undertook to pursue other avenues by which it might be able to produce the requested documents without violating Hong Kong Law.

On 11th March 1992 the District Court found that the actions of the Hong Kong and United Kingdom Governments demonstrated their substantial governmental interest in enforcing their confidentiality laws and that interest, in the circumstances, outweighed the IRS interest in enforcing its John Doe summons. In so doing they applied the balancing test found inthe Restatement (Third) of the foreign Relations Law of the United States Cap.442 (1987). The Court accordingly modified its order to "eliminate the possibility that the bank might be sanctioned for failing to produce the Hong Kong bank records sought by the IRS" but that the Bank must extend "all good faith efforts" to attempt to produce the records. It directed the Bank to file periodic status reports summarising its efforts so that the courts could monitor the Bank's compliance.

The Bank first learned that the IRS was seeking under its summons documents located at the Cayman Trust on 22nd May 1991. It advised the IRS and the District Court that the documents were protected from disclosure by banking confidentiality laws but undertook to produce the documents where it had a consent to disclosure from the relevant customer of the bank.

It was also on March 1992, that the IRS filed a second motion to enforce its summons, this time in relation to documents for transfers to or from Cayman Trust. The Bank opposed this, arguing that the District Court's ruling as to the Hong Kong documents applied equally strongly to the documents located in the Cayman Islands. As amici curiae the Governments of the United Kingdom and the Cayman Islands submitted a brief to the court opposing the IRS position. That brief argued the following three main points -

A The June 14th 1988 and May 24th 1991 orders, as applied

to Cayman Bank Records are inconsistent with International Law and Comity.

B The Balance of Relevant Factors favours the substantial interests of the Governments of the United Kingdom and the Cayman Islands in enforcing the Cayman Islands Confidential Relationships (Preservation) Law.

C The Court should give deference to Cayman Law in light of the ongoing and successful co-operation between the Government of the Cayman Islands and the United States Government in criminal prosecution and investigations.

The IRS withdrew its 11th March 1992 motion before it was heard in the District Court and over the ensuing months the bank produced further records from within the United States. On the basis of these and other documents the IRS is seeking the production of documents located in the Cayman Islands.

The bank has mailed letters to its customers whose records are currently being sought asking whether they will consent to the bank producing their records and has not produced to the IRS any documents located at the Cayman Trust for customers who have not given their consent to disclosure.

The IRS had intended to refile its motion to enforce its summons with respect to the documents at the Cayman Trust but has now decided not to do so until after the resolution of these Grand Court proceedings. If the District Court were to grant the motion the bank could be subject to substantial penalties for non compliance. It has made the present application to the Grand Court in an effort to find a resolution to this matter and to discharge its obligation under United States Law to undertake all good faith efforts to secure production of the documents.

The arguments of the bank in favour of disclosure are threefold. The first involves consideration of the common law rule in Tournier v National Provincial and Union Bank of England Ltd (1923) All ER 550 and, as a distinct but closely related matter the

applicability of the exemption in section 3 (2) (b) (v) of the Confidential Relationships (Preservation) Law, which reads as follows:

> "(2) 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...."

I recently concluded in another matter that, notwithstanding the observation to the contrary of my learned predecessor, Sir John Summerfield CJ in Attorney-General v Bank of Nova Scotia and ors 1985 CILR the words "any proceedings, cause or matter" in the above passage did not have application only in relation to proceedings causes or matters within these Islands. I shall be delivering reasons in that matter shortly, and shall not anticipate them here.

The apparent purpose of section 3 (2) (b) (v) was to import the exception to the general common law rule as to banking confidentiality which was expressed in identical words by Lord Justice Atkin in Tournier into the penal provisions of the Confidential Relationships (Preservation) Law. It was therefore appropriate for the Bank to invite me to consider the common law principles and to submit that if the equivalent exception to the Tournier rule applied, section 3 (2) (b) (v) should be construed to the same effect. It was acknowledged on its behalf that in the light of the facts which I have described it was faced with advancing arguments which had failed in XAG v A Bank (1983) 2 All ER 464 and with the decision in Attorney General v Bank of Nova Scotia.

In XAG two corporate customers of an American bank applied for an injunction to restrict the bank from producing documents relating to their accounts pursuant to a subpoena issued by a Grand Jury and upheld by a United States District Court. The injunction to

restrain disclosure was granted.

The converse case arose in R v Grossman (1981) 73 Cr App Rep 302, where an order was made ex parte under s7 of the Bankers' Books Evidence Act 1879 on Barclays Bank Ltd at its head office in London requiring it to allow the Inland Revenue to inspect and take copies of an account maintained by an Isle of Man company with Barclays Bank's branch in the Isle of Man. An application for a similar order had previously been made to the court of the Isle of Man and had been refused. The Court of Appeal set aside the inspection order. In the words of Lord Denning MR -

> "It seems to me that the court here ought not in its discretion to make an order against the head office here in respect of the books of the branch in the Isle of Man in regard to the customers of that branch. ... Any order in respect of the production of the books ought to be made by the courts in the Isle of Man - if they will make such an order. It ought not to be made by these courts. Otherwise there would be danger of a conflict of jurisdictions between the High Court here and the courts of the Isle of Man. That is a conflict which we must always avoid. ... It seems to me that, although this court has jurisdiction to order the head office here to produce the books, in our discretion it should not be done.".

R v Grossman was applied in Mackinnon v Donaldson, Lufkin and Jenrette Securities Corpn. (1986) 1 All ER 653, which was referred to by Sir John Summerfield in the Bank of Nova Scotia case, by way of an observation that many of the principles set out in the judgment of Hoffman J. were appropriate and supported the approach adopted in Bank of Nova Scotia. One such principle was the following -

> "The need to exercise the court's jurisdiction with due regard to the sovereignty of others is particularly important in the case of banks. Banks are in a special position because there documents are concerned not only with their own business but with that of their customers. They will owe their customers a duty of confidence regulated by the law of the country where the account is kept. That duty is in some countries reinforced by criminal sanctions and sometimes by 'blocking statutes' which specifically forbid the bank to provide information for the purposes of foreign legal proceedings. .... If every country where a bank happened to carry on business asserted a right to require that bank to produce documents relating to accounts kept in any other such country, banks would be in the unhappy position of

being forced to submit to whichever sovereign was able to apply the greatest pressure".

Having returned to the Bank of Nova Scotia case. I can respectfully adopt the following from the judgment of Summerfield CJ on the scope of section 3 (2) (b) (v) of the Confidential Relationships (Preservation) Law -

> "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 provisions 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.
>
> In this case the first defendant is not a party to any proceedings (except these) in relation to the subject matter with which this application is concerned, either here or abroad, but it has been served with a subpoena to produce some of the material with which this application is concerned. Where the bank, or anyone else for that matter, is served with a subpoena requiring the disclosure of confidential information then its correct course is to make application pursuant to s.3A of the Confidential Relationships (Preservation) Law and abide by any final order that emerges. I do not se how the provisions of s. 3A(2)(b)(v) are in any way relevant to the circumstances disclosed so far.".

In my view that applies also in the present case. If s.3(2)(b)(v) were extended to matters of enforcement process emanating from another jurisdiction it would allow all the carefully crafted safeguards in section 3A to be bypassed completely. At that point, and in the light of the obviously intended relationship between section 3(2)(b)(v) and the rule in Tournier it is, I think, appropriate to refer to and adopt what was said by Leggatt J in XAG. It had been argued that, on the basis of Tournier obedience to the foreign subpoena should prevail over the duty of secrecy, because the bank had a genuine and legitimate interest of its own to obey the subpoena since it was issued pursuant to the law the country to which it was subject and the fear of being held in contempt was genuine and not unreasonable.

On that point, Leggat J said this -

> "Suffice to say that the protection which the bank seeks appears to me to be different in character from that which was contemplated in the Tournier case, where the circumstances before the court were totally different.".

This case falls to be decided as an exercise of discretion under section 3A. Before turning to that, I will refer briefly to another matter which was raised.

It is conceded that in England the High Court can have jurisdiction in a fiscal matter under the Evidence (Proceedings in other Jurisdictions) Act 1975. See Re State of Norway's Application (No.2). (1989) 2 WLR 458. I do not think that case takes me any further than that. The state of Norway was following the procedure set out in an English statute, which gave effect to a negotiated treaty. It is a wholly different situation where a foreign state seeks even conditionally to enforce one of its own orders in the face of the confidentiality laws of another country. The cases to which I have already referred indicate the unwillingness of English courts to do this.

I revert, then, to the exercise of my discretion. If the application is refused, the Bank will be placed, without blame, in a position where it may suffer very substantial penalties. It may not come to that and it would be quite wrong for me to speculate on what course an American court might take. It is appropriate however, to acknowledge the action of the IRS in postponing its enforcement proceedings until the decision of this court is known, as indicating a reluctance to seek action that would be directly contrary to Cayman law. Nevertheless the Bank remains in jeopardy, in spite of the efforts which have been made on its behalf in argument before me.

It cannot be ruled out that other banks might find themselves in the same unhappy position, but on the other hand the preservation of confidentiality is a cornerstone of their business.

In my judgment the preservation of this confidentiality and the confidence in it on which the economy of the Cayman Islands so

substantially relies outweighs the interests of the IRS in enforcing its John Doe summons. The summons itself lacks reference to any specific person as the subject of IRS investigation. Its clear purpose is to identify individuals for such investigation. That is "fishing" and, in my view, that feature is in itself an unreasonable exercise of purported extraterritorial jurisdiction. Moreover, there is evidence that the Bank has already been able to assist the IRS substantially from its records within the United States. It has not been shown tht important interests of the United States will be undermined by non-compliance or that the information sought is of vital interest to the investigation. Moreover, there is now in place a fabric of relationships, notably through the Mutual Legal Assistance Treaty between the United States and the Cayman Islands, whereby confidentiality may be pierced, but only in carefully defined instances.

I referred in the course of this judgment to the arguments presented by the Government of the United Kingdom and the Cayman Islands as amici curiae and it would be otiose for me to refer to them in any detail as they will in any event be considered by the United States Court. I have, of course, studied them carefully. Moreover, certain of the arguments which I have considered in relation to the Tournier rule and the applicability of the exception under s.3 (2) (b) (v) are also, in my judgment, relevant to the exercise of my discretion under s. 3A.

It would be quite wrong, in my judgment, in the light of all the factors to which I have referred, for me to authorise disclosure to IRS in evidence of the confidential information referred to in the Originating Summons by the Bank or the Cayman Trust.

My direction in accordance with section 3A subsection (3) of the Confidential Relationships (Preservation) Law is that this evidence shall not be given.

G. E. Harre
Chief Justice.

5th November 1993