

25.5.92



Doc #812

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
CAUSE NO. 284/91

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

- AND -

IN THE MATTER OF
THE BANKS AND TRUST COMPANIES LAW 1989

- AND -

IN THE MATTER OF
THE COMPANIES LAW (REVISED)

For the liquidators: Mr. T. Shea

REASONS FOR RULING

This was an ex parte application on behalf of the official liquidators for directions that they be authorised and directed to disclose specific information to various professional advisers to the majority shareholders of BCCI (Holdings) Luxembourg S.A. notwithstanding that such material may be confidential to Bank of Credit and Commerce International (Overseas) Ltd ("BCCI Overseas") or any of its customers provided that the official liquidators should not be required to disclose any such material which in their sole opinion it is not in the interests of BCCI (Overseas) to disclose. The information sought is that described in a list of 20 heterogeneous items exhibited to the affidavit in support of the summons, together with such further information, documents and data relating to the audit of BCCI Group companies by two named firms of accountants, and related claims, as may be reasonably requested by the professional advisers to whom I have referred.

On the 11th March 1992 a corresponding application was made to the Vice Chancellor in the High Court in London on behalf of the official liquidators of Bank of Credit and Commerce International S.A. ("BCCI S.A"). The directions sought by BCCI S.A. were approved. I had before me for the purposes of the present application the report submitted in connection with the application in London which was adopted in its entirety by the applicants here.

Had the law in the Cayman Islands been the same as the law in England I would have given the directions as sought. However, it was accepted by the applicant that some of the information concerned fell within the definition of "confidential information" as defined in our Confidential Relationships (Preservation) Law, 1976 (the Law). It was therefore necessary for the applicant to persuade me that the matter came within one or other of the exceptions set out in Section 3 of the Law, as amended. Sub-section (2) (b) of that Section provides, among other things, that the Law has no application to the seeking, divulging or obtaining of confidential information by or to -

"(i) Any professional person acting in the normal course of business...

(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 banks interest, either as against its customers or as against third parties in respect of transactions of the bank for, or with, its customer;"

"Normal course of business" is defined as follows in section 2 of the Law -

"Normal course of business" means the ordinary and necessary routine involved in the efficient carrying out of the instructions of a principal including compliance with such laws and legal process as arises out of and in connection therewith and the routine exchange of information between licensees;"

That is far removed, in my judgment, from a situation where the liquidators of a failed bank seek to disclose confidential information to the professional advisers of its ultimate majority shareholders in the knowledge that the disclosure is for the purpose of litigation on which those shareholders are embarking. Exception (i) is of no help to the applicants.

Exception (v) was considered by Sir John Summerfield CJ in Attorney General v. Bank of Nova Scotia and ors (1985) CLR 418. One of the questions for determination in that case was whether one of the defendant banks could rely on the exception for the purpose of making disclosure of confidential information to a United States court on the ground that to do so was reasonably necessary for the protection of the bank's interest by the avoidance of possible contempt proceedings for non-disclosure.

The learned Chief Justice came to three conclusions in interpreting the statutory provision. Firstly, that it had application only to proceedings, causes or matters within the Cayman Islands. That in my view is not a difficulty in the present case - the liquidation of BCCI (Overseas) being such a proceeding, cause or matter. The second view to which he came was that although the provision is rather loosely worded it contemplates only proceedings, causes or matters to which the bank is a party. "One cannot conceive" he said "it becoming reasonably necessary for the protection of the banks interest to disclose confidential information concerning a client's account in litigation to which the bank is not a party." I need not speculate on whether he would have come to a different conclusion when confronted with the unprecedented complexities of the BCCI Group's intercompany practices and the steps taken to address them, because it is his third conclusion which was, in my view, inescapable and is fatal to this application. It was expressed as follows -

"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

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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."

A fortiori, that must apply to the disclosure of confidential information in aid of foreign proceedings in response to a mere request backed by no legal sanction. A glance at the list of items of information requested reveals that it cannot relate only to protecting the banks interest in respect of its transactions for or with a customer. For these reasons the application fails.

There is, however, an alternative route which the liquidators can consider. The Law provides, in subsection 3 (2) (b) (iv) that it has no application to the seeking, divulging or obtaining of confidential information by or to certain named public officers and "in relation to specific information specified by the Governor, such other person as the Governor may authorise."



G.E. Harre
Judge

25th May, 1992