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Letters Rogatory - request from to whom addressed should possession of material information and request should not be refused for the purpose of fishing report.

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
BEFORE THE HONOURABLE THE CHIEF JUSTICE

ON THE 5TH & 7TH APRIL 1988

CAUSE NO. 298 of 1987

IN THE MATTER OF THE EVIDENCE (PROCEEDINGS IN OTHER JURISDICTIONS) (CAYMAN ISLANDS) ORDER, 1978 (1978 NO. 1980)

AND

IN THE MATTER OF CIVIL MATTERS NOW PROCEEDING BEFORE THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES BETWEEN BRENTWOOD PLACE APARTMENTS ET AL AND FIRST LOS ANGELES BANK ET AL CASE NO. C252 008-025 AND BETWEEN SIDNEY A DICKEY ET AL AND BARRY S. MARLIN ET AL CASE NO. C481 128

AND

IN THE MATTER OF THE CONFIDENTIAL RELATIONSHIPS (PRESERVATION) LAW, LAW 16 OF 1976 (as amended)

Mr. Angus Foster of W.S.Walker & Co. for Coopers & Lybrand
C. Johnson and J. Dinan
Mr. Michael Parkinson of C. S. Gill & Co. for First Kensington Corporation
Miss S. Brooks for the Attorney General

COLLETT, C.J.

JUDGEMENT

On the 23rd December, 1987 this Court made an order upon the ex parte application of counsel for First Kensington Corporation ("FKC") for the taking of evidence before an Examiner in the form of a deposition in accordance with a request contained in Letters Rogatory emanating from The Superior Court of the State of California U. S. A. and dated 28th September 1987. Four persons were ordered to appear before an examiner in Grand Cayman to testify and to produce documents mentioned in a subpoena duces tecum issued out of the same Court and attached to those Letters Rogatory; they are respectively Mr. Christopher Johnson and Mr.

John Dinan, partners of Coopers and Lybrand ("C & L") a Cayman Islands partnership of accountants, together with the custodian of records and another officer of that same firm to be designated by it. The order was however expressly made subject to an application which these persons were then directed to make to this Court pursuant to section 3A of the Confidential Relationships (Preservation) Law as amended for permission to give that evidence and produce those documents and as to directions concerning the manner of doing so.

By Summons dated 9th February, 1988 Messrs. Johnson and Dinan as well as C & L have applied to this Court for discharge of the order dated 23rd December 1987. Since that order was made upon ex parte application, it is clear that there is jurisdiction to discharge it in a proper case after an inter partes hearing - see O 70 rule 6 of the Rules of the Supreme Court which are applicable and in particular the note 70/1 - 6/19 at p. 1075 of the 1988 White Book.

These Letters Rogatory have been issued in connection with an action pending before the California Court which involves some twenty different parties either as complainants, defendants, cross-defendants or cross-complainants; one of them is FKC. C and L as well as Mr. Johnson were formerly involved in those proceedings as cross-defendants at the suit of FKC and others but it is common ground that by an order made on their application by the California Court on 4th September, 1987 the cross-complainant of FKC against them was dismissed for want of personal jurisdiction over them. That order is at present the subject of an appeal at the instance of FKC but unless and until it is reversed on appeal, FKC and C and L are no longer to be regarded as adversary parties to this California litigation.

The jurisdiction to give effect to Letters Rogatory of this nature derives from The Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978 of Her Majesty in Council which in effect

confers upon this Court the like jurisdiction as is vested in England and Wales in the High Court of Justice under an Act of Parliament passed in 1975. It follows that the decisions of the English Courts as the principles upon which that jurisdiction are to be exercised are pertinent authority as to the exercise of the similar jurisdiction of the Grand Court here. A statement of those principles by Summerfield C. J. in the case of U. S. A. v Roy Carver and others C/108/82 was adopted with approval by the Court of Appeal in its subsequent decision when that matter came before it on appeal (P. 10 of the judgement of Rowe J.A.). It reads as follows:-

"In England the general principles which should be followed in relation to a request from a foreign court for assistance in obtaining evidence for the purpose of proceedings in that court is that the English Court will ordinarily give effect to such request so far as is proper and practicable and to the extent that is permissible under English law. This principle reflects judicial and international comity and it conforms with the provisions of the Hague Convention and the 1975 Act as it conformed with the spirit of the former statutes. It is the duty and the pleasure of the English Court to do all it can to assist the foreign Court, just as the English Court would expect the foreign court to help it in like circumstances. Just as the English Court ought to give full faith and credit to a foreign judgment, so should it give full faith and credit to the request of a foreign court for evidence to assist its proceedings.

In dealing with a request for evidence from a foreign Court, the English Court has first to decide whether it has jurisdiction to make an order to give effect to the request, and secondly, if it has, whether as a matter of discretion it ought to make or refuse to make such order. As a matter of jurisdiction, in the ordinary way and in the absence of evidence to the contrary the English Court should be prepared to accept the statement of the foreign Court in its request that the evidence is required for the purpose of civil or criminal proceedings, as the case may be, in that court. On the other hand, the form of the letter of request is not conclusive; the Court must examine the request objectively by the nature of the testimony sought, and it has to look at the substance of the matter, but it may have regard to what was said in the foreign Court when the request for evidence was issued. If there is any doubt about the matter, the English Court may allow the parties to refer back to the foreign Court or Judge who issued the request for evidence.

As a matter of discretion, again in the ordinary way, the English Court should exercise its discretion to make the order asked for unless it is satisfied that the application would be regarded as falling within the description of frivolous, vexatious or an abuse of the process of the Court. The English Court has power to accept or reject the foreign request in whole or in part, whether as

""to oral or documentary evidence; and it can and should delete from the foreign request any parts that are excessive either as regards witnesses or as regards documents. The English Court will act on the principle that it should salve what it can, but should decline to comply with the foreign request in so far as it is not proper or permissible or practicable under English law to give effect to it. The English Court, moreover, ought not to embark on the process of restructuring or re-casting or re-phrasing the foreign request so that it becomes different in substance from the original request. The Court has no power so to modify the original foreign request as to substitute a different category of documents of documents for the category which has been requested by the foreign Court"."

I respectfully adopt these principles as applicable to the present case.

There can be no doubt here that these Letters Rogatory have been issued by a Court exercising jurisdiction outside the Cayman Islands or that the evidence to which the application relates is indeed required for the purposes of civil proceedings already instituted before that Court. The requirements of section 1 of the 1978 Order are therefore satisfied. However it is the contention of counsel for C & L and Mr. Johnson that the Letters Rogatory fall foul in a number of respects of section 2 (3) and (4) of that Order and that in any case this Court ought in the exercise of its discretion to discharge the provisional order of 23rd December 1987 giving them effect rather than to confirm that order.

The first ground upon which counsel contends that this Court ought not to give effect to these Letters Rogatory is that the purpose underlying them is not to obtain evidence for use in the trial of the California action but rather to obtain pre-trial discovery of information which may assist FKC to make out a case on the pre-trial issue as to the personal jurisdiction of that court over C & L and Mr. Johnson. Section 2 (3) of the 1978 Order restricts the steps which can be required to be taken by way of obtaining evidence for the California Court to those which could be required to be taken by way of obtaining evidence for the purposes of civil proceedings in the Grand Court. There can be no doubt therefore,

that if the real purpose behind these letters rogatory are as alleged by counsel then this Court cannot give effect to them, because this Court will never allow its process to be used to aid a fishing expedition of that nature: see per Lord Diplock in Re Westinghouse Uranium Contract (1978) A.C. 547 at p. 634 letter G: also per Viscount Dilhorne L.C. at p 624.

I have been referred to the ^{terms} of the Letters of Request themselves as well as to a stipulation (or agreed submission) of counsel for all the current parties to the California action which led Judge Donald Pyke to make the order for their issuance and also to a sworn declaration of Lewis Koss, California attorney acting for FKC dated 15th September 1987 in support of his application for that order. It appears that Mr. Koss is indeed the draftsman of each of these documents which were all exhibited to the affidavit of Mr. Parkinson in support of the original application to this Court. These documents show, though contemporaneous material, what were the actual representations made by FKC's attorneys to the California Court in order to obtain issuance of these Letters Rogatory in September 1987. It is impossible to resist the conclusion that the primary purpose which they reveal was to depose the four witnesses concerned and to obtain documentation supposed to be in their possession tending to demonstrate the falsity of the contention advanced by C & L that it did business only in the Cayman Islands and had no significant contact with the parties to the action in the State of California.

Those are or were precisely the crucial issues raised in the successful application by C & L and Mr. Johnson to have service of the California process on them set aside for lack of sufficient personal jurisdiction. There is no evidence at all to suggest that they are or may be issues in the trial of the action itself which have not yet crystallised.

The most curious feature which emerges from the evidence in this case is that no mention was made in Mr. Parkinson's initial affidavit of the fact that, before the Letters Rogatory had been issued by the California Court the motion to dismiss C & L and Mr. Johnson from the action there had not only been filed but heard and determined in their favour. What was represented to this Court as an application to interrogate parties to the action now turns out to have been an application to interrogate witnesses who were once parties but who had already ceased to be so and to obtain documents from them at a pre-trial stage apparently for pre-trial purposes. Mr. Parkinson's affidavit was based and necessarily so upon information

and belief derived as he has testified from Mr. Koss. Mr. Koss did not think fit to mention it to Mr. Parkinson and in his own later affidavit sworn to on 18th March 1988 Mr. Koss seeks to demonstrate that it is not relevant. Since I have reached the conclusion that the real purpose of these Letters Rogatory was to uncover evidence relating to a pre-trial issue as to jurisdiction, I entirely fail to appreciate how it could be other than relevant to disclose the fact that, before the request was ever issued, that issue had been heard and determined against the applicant. One is left with more than an uneasy suspicion that the application was thereafter persisted in and then brought in due course before this Court in the hope that the examination would uncover material which could be used before the appellate Court in California to obtain a rehearing of the motion on the jurisdiction issue. Meanwhile however the change in status of the wished-for deponents could be conveniently left unmentioned.

In a further supplemental affidavit sworn on the 23rd March 1988, Mr. Koss seeks to flesh out the contentions first advanced in his affidavit of 18th March that what is really being sought by these Letters Rogatory is the evidence of witnesses relevant to FKC's case against other parties in the action. He asserts that certain 'evidence indicates' that these four witnesses have testimony to give which could assist the case of FKC in various respects. But what this evidence is has not been disclosed, nor has it been yet explained what particular relevance it has to issues likely to arise at trial. Most significantly however the absence of any of the suggestions now advanced by Mr. Koss from the contemporaneous material which he drafted last September for the benefit of the California Court can only lead to an inference that he is now trying to shift ground and to cobble together reasons why the evidence sought might be relevant at trial whereas the real purpose was and still is such as I have concluded it to be.

This is enough by itself to lead to a determination that this is not a case in which this court with the best will possible towards the California Court can find it proper or legally permissible to give effect to these Letters Rogatory. There is however a second reason why that

cannot legitimately be done and that is to be found in the nature and contents of the subpoena duces tecum and in the affidavit evidence concerning the documents which the potential witnesses are to be required to produce ^{to} the examiner in the course of their testimony.

Section 2 (4) (b) of the 1978 Order provides that a person shall only be required to produce "particular documents specified..... as being documents appearing to the Court to be or to be likely to be, in his possession custody or power." The scope of this provision has been considered by the House of Lords in Re Asbestos Insurance Coverage Cases (1985) 1 All E. R. 716. In construing the requirement for particular documents to be specified, Lord Frazer at p. 721 made reference to the view expressed by Lord Diplock at p. 635 of the Westinghouse report that what is called for is the specification of individual documents separately described. Lord Frazer went on at letter 'e' to say that he did not think that Lord Diplock had intended to rule out a compendious description of several documents provided that the exact document in each case is clearly indicated. As an example he suggested an order for production of a person's monthly bank statements for a particular year relating to his current account.

Counsel for FKC has argued that the description of documents given under paragraphs 1 - 26 inclusive of the subpoena duces tecum in this case qualifies as a compendious description of exact documents, formidable in number and wide ranging in character as these may be. One is uneasily aware that a description of this length and nature is not likely to be what was in the mind of either Lord Frazer or Lord Diplock when the principle was formulated; yet it is difficult to see where the argument in favour of its application here breaks down. Had the requirement for specification of particular documents stood alone, the Court would have felt obliged to side in this particular with counsel's argument.

But section 2 (4) (b) goes further: It requires in addition that the documents sought should appear to this Court to be or to be likely to be in the possession, custody or power of the witnesses whose testimony is sought. The Court can of course be satisfied of this only by admissible evidence. 1

have examined with some care the affidavits filed by the Applicants F.K.C., but I can find no such evidence to the effect that any of the documents specified in the subpoena are or have ever been in the possession, custody or power of any of these four persons or in that of C & L as a firm. There are indeed as we have seen some statements in the second affidavit of Lewis Koss to the effect that 'evidence indicates' that C & L and Mr. Johnson are in possession of certain descriptions of document unspecified. But such a statement is evidently hearsay: further, it does not tie in with any of the 26 different classes of document specified in the subpoena. The only tangible evidence comes from Mr. Johnson's own affidavit of 8th March 1988 which categorically denies that either he or C and L have any documents belonging or relating to FKC or Mr. Parry Marlin. Mr. Johnson states that he is the Court appointed liquidator of First Kensington Bank, one of the entities mentioned in the subpoena duces tecum but neither Mr. Johnson in that capacity nor the Bank as such are a party to the California proceedings. The relevance of that Bank's documents to those proceedings is quite unexplained by FKC.

In this state of the evidence it would be quite impossible for this Court to hold that the bulk of the documents specified in the subpoena are or are likely to be in the possession, custody or power of these hoped-for witnesses and, in these circumstances the Court is obliged by the terms of the subsection to decline to order their production as adjunct to the testimony which is sought from them.

It is unnecessary to adjudicate upon the third line of argument relied upon by counsel in support of the application to discharge, namely, the alleged failure to make full and frank disclosure of the facts when the ex parte application came before this Court on 23rd December 1987. While content to acquit those concerned of any intention to deceive, I must nevertheless comment that there is powerful weight to counsel's submissions on this point.

Finally, counsel for FKC submitted that even if this Court should

conclude that the predominant purpose of seeking this evidence is to fuel the current appeal on the personal jurisdiction issue, as I have indeed found it to be, the Court should nevertheless not discharge its order of 23rd December, 1987. Instead he says, it should defer the whole examination and refer back to the California Court for clarification of what was intended to be the purpose of its request. There is, as we have seen from the observation of Summerfield C.J. in U.S.A. v Carver, jurisdiction to follow such a course if there is any doubt about the matter.

Here however there is no such doubt. Reference back to the California Court would serve no useful purpose. It would merely give Mr. Koss an opportunity to use the machinery of the California process further to obfuscate the issue. The more that issue is examined by reference to the contemporaneous material put in evidence before this Court, the more it becomes ^{even} clearer: the real purpose underlying these Letters Rogatory is such as I have held it to be and no amount of ex post facto explanation can alter that essential fact.

Accordingly in the result, the order of 23rd December, 1987 must be discharged and it is so ordered. F.K.C. must pay the costs of Messrs. Christopher Johnson, John Dinan and C and L as well as those of the Attorney General in these proceedings.

Dated 26th April, ~~April~~ 1988.


CHIEF JUSTICE