25.8.87

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

BEFORE THE HON MR JUSTICE HULL

CAUSE NO: 158/87

BETWEEN:	(1)	JENS KRISTIAN THUNE	
	(2)	KRISTIAN ROLL (Suing as trustees of the Bankrupt Estate of Hilmar August Reksten deceased)	PLAINTIFFS
AND:	(1)	TRANSOCEAN BANK & TRUST COMPANY LIMITED	
	(2)	THE BANK OF NOVA SCOTIA TRUST COMPANY (CAYMAN) LIMITED	
	(3)	DAVID WHITEFIELD	
	(4)	THE BANK OF NOVA SCOTIA	
	(5)	THE BANK OF NOVA SCOTIA (UNITED KINGDOM) LIMITED	DEFENDANTS

Mr. Jones for the first defendant.

Mr. Ritch for the plaintiffs.

Miss Brooks for the Attorney-General as amicus curiae.

REASONS FOR ORDER

By reason of section 3A of the Confidential Relationships (Preservation) Law, 1979, a person who is required to give confidential information (within the meaning of the Law) in evidence in or in connection with any proceedings must apply to a Judge of the Grand Court for directions before doing so.

Section 4(1) forbids the divulging of confidential information. Anybody who does so commits a criminal offence and can be fined $5000 and sent to jail for two years. In some circumstances, however, the prohibition does not apply. For example, a bank may do so if it is reasonably necessary to protect its own interests. The Financial Secretary may authorise a professional person to do so where it is necessary to protect himself or anyone else against crime.

A direction given by a judge of this Court, on an application under section 3A, may also authorise the disclosure of confidential information, notwithstanding the prohibition. The jurisdiction of a judge to give such a direction is defined in the section. He may only do so where the information is to be "given in evidence". The present application is concerned

with the scope of these words, but it is convenient to mention at this point that in the course of the hearing, two other circumstances in which confidential information may lawfully be divulged were referred to by counsel. Both touch on the question of the jurisdiction of this Court to compel a person to disclose information.

Section 3 (2)(b)(i) says that the Law has no application to the divulging of confidential information by a professional person who is acting in the "normal course of business.....". This is defined. It 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..............".

By virtue of section 3 (2)(c), the Law does not apply to the divulging of information in accordance with any other Law.

In this case, on 24th June, I ordered the first defendant to file an affidavit of discovery, on the principle in <u>Norwich Pharmacal Co. v. Commissioners of Customs and Excise [1974] A.C. 133.</u>

Mr. Jones has now applied under section 3A for directions, but he has an ulterior though innocent motive. He wants a ruling, at first instance, on the scope of section 3A. His first submission was that his own application should be dismissed because he does not think that to comply with an order for discovery is to give information in evidence within the meaning of that expression in section 3A and so he does not think a judge of this Court has jurisdiction to give directions under section 3A in respect of orders for discovery.

Miss Brooks, for the Attorney-General, disagreed. She submitted that a person who files an affidavit of discovery or who provides a list of documents by way of discovery brings himself within the statutory definition of the expression "given in evidence" in section 3A(7) and must therefore obtain directions under the section before doing so. Mr. Ritch supported her. As I understood him, Mr. Jones was prepared to accept, after hearing them, that discovery on affidavit came within the definition.

The definition, in full, says -

> " 'given in evidence' and its cognates means make a statement, answer an interrogatory or testify during or for the purposes of any proceeding."

Mr. Jones argued as follows. There are two ways of giving discovery. One is by simply exchanging lists of documents. This is much the more common way. The other is on oath pursuant to a specific order to that effect. Discovery is a form of pleading. It is not in any sense the giving of evidence. The clear purpose of section 3A is to deal with confidential information given in evidence by witnesses.

If that is wrong, nevertheless discovery by the mere exchange of a list of documents cannot be said to be the making of a statement. In any case, the section is unclear. The Law is a penal statute and must therefore be strictly interpreted. If this produces a result that is contrary to the policy that the legislature wished to achieve, the Law should be amended.

I also understood Mr. Jones to make two submissions that were aimed at showing first, that no harmful consequences would flow from a ruling that the Law does not prohibit compliance with a discovery order and, secondly, that on the proper interpretation of the Law, it does not in any way curtail the jurisdiction of the Grand Court to require discovery or the obligation of the person against whom the order is made to comply with it.

He submitted that information obtained by a person pursuant to discovery remains confidential in the hands of that person, by reason of the implied undertaking on a discovery order. I think that the answer to that is that to the extent that the Law does prohibit the disclosure of confidential information, it is a breach of the Law even if the information is only disclosed once - it does not matter that disclosure is strictly limited.

His next point was that by reason of section 3 (2)(c), the Law does not impinge on the Grand Court's jurisdiction to order discovery. That jurisdiction is contained in section 13 of the Grand Court Law. Accordingly this is a case in which information is to be divulged "in accordance with the provisions of any other Law".

In my opinion, quite apart from section 3 (2)(c), nothing in the Confidential Relationships (Preservation) Law, 1979, limits the jurisdiction of this Court to order discovery in a legal proceeding. It would require express language or necessary implication to do so. It appears to me to be important that the Court should be free in the first instance to make such orders as are proper, applying the ordinary principles that govern discovery, and should be jealous in maintaining its jurisdiction to do so. There is nothing in the Law which expressly or by necessary implication limits that jurisdiction in the first instance.

There are, however, two provisions in the Confidential Relationships (Preservation) Law, 1979, which indicate that it is intended to place on persons to whom court orders are addressed restrictions on their freedom to carry out those orders.

Section 3A is mandatory. A person who is required to give confidential information in evidence must first seek directions. As long as he complies with those directions, by virtue of section 3 (2)(a) he does not break the law by giving the evidence. The implication (because otherwise there would be no point in having either section 3 (2)(a) or section 3A) is that the penal provisions in section 4 extend to the divulging of confidential information pursuant to a subpoena or otherwise in evidence as defined in section 3A(7).

The wording of section 3 (2)(b)(i) also implies that section 4 is intended to apply to persons who have been required by legal process to divulge confidential information. In an earlier application under section 3A, it had been argued that by reason of the definition "normal course of business", that expression in every case includes the disclosure of confidential information by a professional person in the course of complying with any laws and legal process arising out of the principal's business, so that in so disclosing the information, the former is not contravening section 4.

That is not in my opinion a correct interpretation. In the phrase "including compliance with such laws and legal process as arises out of and in connection therewith" in that definition, the word "therewith" refers back to the words "ordinary and necessary routine involved in the efficient carrying out of the instructions of a principal". In some instances, compliance with legal process will fall under that heading but in other cases it will not. It must depend on the nature of the business which the professional person conducts for the principal. Before he can safely rely on section 3 (2)(b)(i) as authorising him to disclose information on the basis that it falls within the normal course of business to do so, he will need to consider his position. In many instances, compliance with a <u>Norwich</u> discovery order will not be a routine matter at all.

It seems to me that there is again, therefore, an implication that section 4 is intended to apply even to disclosure pursuant to legal process, except as otherwise provided in section 3(2). It is not, in logic, a necessary implication, and it is a weaker implication than the first one. I also think that the drafting of section 3 is open to the criticism that insofar as the section affects the working of the judicial process, more care ought to have been taken by the draftsman to spell out the intended

policy. Nevertheless I also think that the proper inference to be drawn is that section 3 (2)(c) does not mean that because the Grand Court has jurisdiction under another statute, the Grand Court Law, to require a person to disclose information, the Confidential Relationships (Preservation) Law 1979 does not apply to that person if he discloses confidential information pursuant to the Court's order. In any case which falls within section 3A of the 1979 Law, it does apply. The section, being mandatory and specific, is to be interpreted as qualifying the apparent generality of section 3(2) (c), and as I say, I also think, because of the wording used in the definition "normal course of business", that there will be other cases in which the 1979 Law will apply to a person who has been required by a court order to disclose confidential information.

The obvious practical purpose of section 3A is to provide for the adjustment of the competing principles of the efficacy of the judicial process as a means of enforcing just civil claims and of administering criminal justice on the one hand and, on the other, of the preservation in the public interest in the Cayman Islands of the confidentiality of information obtained in the course of professional relationships. In this respect, it is worth noting that discovery, like answers to interrogatories, is necessarily a process by which such information may be disclosed and that in each case, although the disclosure would not fall within the ordinary meaning of the words "given in evidence", the party to whom the material is revealed may put it in evidence eventually.

Section 3A is not limited to the disclosure of information in proceedings as such. It also applies to disclosure in connection with proceedings. Although to "testify" means to give viva voce evidence and so cannot include affidavits, it is beyond argument that by swearing an affidavit for use in any proceedings, a person would be giving evidence within the meaning of section 3A. In its ordinary meaning, a statement certainly includes a representation or declaration of fact in writing so it must therefore include any affidavit. One effect of the extended definition "given in evidence" in section 3A (7) is that before a professional person can swear an affidavit or answer interrogatories in connection with any proceedings, and disclose the contents to any one other than his principal, he must, to the extent that the disclosure would reveal confidential information, come to the Court for directions, even if the material has not yet been put in evidence in the proceedings.

Before a professional person discloses such information to any third person by means of an affidavit complying with an order under Rule 47 of the Grand Court (Civil Procedure) Rules for discovery on oath, he must therefore obtain directions authorising him to do so, and he must comply

with the directions in doing so. Swearing such an affidavit amounts to making a statement within the meaning of the definition "given in evidence".

Of course, although section 3A is couched in mandatory terms, if the principal consents to disclosure, or if in any particular case it can be said that the swearing of the affidavit of discovery is an act which falls within the ambit of complying with the order for discovery in the course of the ordinary and necessary routine involved in efficiently carrying out the principal's instructions, there will be no obligation to make an application under section 3A because in either of those events, by the operation of section 3 (2), the divulging of the information ceases to be a disclosure to which the Law applies.

If section 3A applies to the swearing of an affidavit of discovery, it must be the case that that both methods of discovery, ie. under Rules 46 and 47, where they involve the disclosure of confidential information, are subject to the prohibition in section 4 of the Law unless by operation either of paragraphs (a) or (b)(i) of section 3 (2) (or of some other exception not under consideration here) the Law does not apply. If it were otherwise, the Law would apply if discovery on oath have been ordered, but not if discovery was only to be by delivery of a list of documents. That cannot be the intention. The facts that section 3A is mandatory and that it includes discovery on oath must mean that the inference to be drawn is that all discovery falls within the umbrella of the Law, but subject to any applicable exceptions.

The remaining question here is therefore whether, when discovery is ordered under Rule 46, the person to whom the order is addressed can obtain a direction under section 3A to comply with it. If on the proper construction of the section he cannot, then he cannot comply with the order (unless of course he can bring himself under some other exception such as section 3 (2)(b)(i)).

As I think Mr. Jones pointed out at the hearing, it will not necessarily lead to an unworkable result if, on its correct interpretation, section 3A does not apply to discovery under Rule 46. What it will mean is that a party who wishes to obtain discovery, and anticipates that it may involve the disclosure of confidential information, will have to make sure he obtains an order under Rule 47.

However, with respect, I do not think that the distinction which Mr. Jones draws between discovery on oath and discovery by delivery of a list is a sound one. Each, in my opinion, amounts to the making of a statement. It would be a little odd if it were otherwise because in each case, the process of complying with the order for discovery will involve the disclosure of information. I think that the answer to his point lies in the words

"is <u>required</u> to give in evidence" in section 3A(1). When the Court makes an order under Rule 46, what it is ordering is that a party shall state, in the form of a list, the documents relevant to the case which are to have been in possession, custody or power. The order, commonly, is that the parties do "exchange lists" but that is simply a summary way of saying that they shall each state, in a list, those documents. That is what they are being required to do. I am not au fait with the way in which, in practice here, attorneys-at-law do draft their lists. I find it a little difficult to envisage how they can do so without employing some sort of a statement. In <u>Atkins Court Forms, Second Edition, Volume 15,</u> for example, Form 4 on page 116 is a form for lists of documents. It begins with the statement "The following is a list of the documents relating to the matters in question in this action which are to have been in the possession, custody or power of ...." and so on. If attorneys-at-law here use some less formal method it doesn't really matter. What matters is the requirement, ie. the order, and that an order under Rule 46 is a requirement to state what documents a party has.

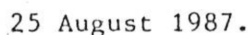
In my opinion, therefore, a party who is required under Rule 46 to discover confidential material is also obliged first to seek directions under section 3A unless he can show that for some other reason the Law does not apply in the particular case.

For these reasons I held that I had jurisdiction to entertain this application and consequently gave directions under section 3A. The applicant's costs were agreed by it with the plaintiffs.

When I gave my ruling, Mr. Jones raised another matter. He pointed out the desirability, if it is possible to frame one, of a practice direction for the guidance of attorneys-at-law where an order for discovery will give rise to a requirement to seek directions under section 3A. He explained that in some cases (and I would accept that they are not so uncommon as not to warrant consideration of the point) there is a need to make several 3A applications. This can be very expensive. He suggested the possibility of a practice direction aimed at ensuring that the application for discovery and directions under section 3A are dealt with at one hearing. I think the idea is a good one. Any such procedure will have to be so devised as to ensure that the requisite notice is given to the Attorney-General. There will be cases when it will only be apparent to the party from whom discovery is sought that a question of confidentiality arises. The procedure would therefore also need to place an obligation on that party in those circumstances to take some step to bring it into play. Counsel may also recall (but then again I suppose they may not, necessarily) that in <u>Ferrostaal A.G. v. Jones and Five Others 1984 C1LR 143</u> I expressed the view that the importance of a

section 3A application in these Islands is such that it should be the subject of a specific application, to be considered deliberatively as such. That does not necessarily mean, however, that it cannot be dealt with at the same time as a summons for directions. Apart from the obvious merits of minimising the number of hearings that are necessary in a particular case, combining an application for discovery with a section 3A application relating to it in my view has another virtue. Although I have expressed the opinion that nothing in the Confidential Relationships (Preservation) Law 1979 limits the jurisdiction of this Court, in the first instance, to order discovery, the operation of the Law in relation to persons to whom such orders are addressed does affect their efficacy. I recognise that the distinction I have sought to make may in some cases be an academic one, ie. in any case where on the 3A application the Court having heard the arguments against disclosure, then directs that it should not be made. Clearly, in that kind of situation it is desirable, if possible, that at the outset the Court should have the opportunity to consider all aspects of the matter comprehensively, so that any order it makes will be fully effective at once, and not merely conditional on the possibility that a direction will be given subsequently allowing disclosure by the person affected.

Whether or not Mr. Jones' suggestion, if adopted, is better dealt with by a practice direction or by incorporating it into Rules of Court as a special procedural requirement in the Caymanian jurisdiction is a matter which may also bear some thought. In any case, I would propose to mention it to the Chief Justice.



David Hull
Puise Judge

25 August 1987.