

3.10.84

IN THE GRAND COURT OF THE CAYMAN ISLANDS  
HOLDEN AT GEORGE TOWN, GRAND CAYMAN  
CAUSE NO. 338/84

WITNESS THE HONOURABLE MR. JUSTICE HULL, IN CHAMBERS.

BETWEEN: FERROSTAAL A.G. PLAINTIFF

AND: (1) BILLY RAY JONES  
(2) ALAMO TRADING INTERNATIONAL  
(3) EAGLE DRILLING INTERNATIONAL  
(4) EAGLE INTERNATIONAL LTD.  
(5) INTERCAY TRADING CO.  
(6) INTERCAY COMPANY DEFENDANTS

1. Mr. A. Jones of Maples & Calder for Plaintiff
2. Miss R. Irving of Truman Bodden and Co. for Defendants.
3. Mr. A. Smellie of Attorney General's Chambers - Amicus Curae

J U D G M E N T

This is an application by the plaintiff for -

- (a) discovery against the defendants remaining in the proceedings; and
- (b) inspection of banker's books in the custody or control of Barclays Bank International Limited of George Town ("Barclays").

These are the two matters remaining under the interlocutory summons filed by the plaintiff on 3rd September, 1984.

The plaintiff took out the writ of summons on 3rd September, 1984. The writ is endorsed with claims against the defendants for -

- (a) US\$1,448,587.68 claimed as due under a joint venture agreement between the plaintiff and the second defendant as nominee for the other defendants, collectively or alternatively; and
- (b) US\$450,000, being the loss allegedly suffered by the plaintiff for a breach of contract for the sale of two oil rigs, brought about by the conversion to their own use, by the first, second, third and fourth defendants, collectively or alternatively, of parts of those rigs owned by the plaintiff -

or, in the alternative, damages; and in any case compound interest to the date of judgment and thereafter simple interest until satisfaction.

In support of the interlocutory application, the plaintiff has filed an affidavit sworn by one of its vice-presidents, Michael Von Oppen, on 31st August, 1984. The facts on which it relies in seeking the present orders can be summarised as follows.

On 18th March, 1979, the plaintiff and Mr. Billy Ray Jones, made an agreement (exhibited as "MO 1" in the affidavit). Mr. Jones was to be the plaintiff's consultant initially for two years at a monthly fee of US\$9,585, with the function of introducing new "on-shore" and "off-shore" business in the petroleum industry to the plaintiff which is a substantial company engaged internationally in making and distributing oil rigs and other heavy equipment.

It was understood by the parties that Mr. Jones would operate through a nominee or nominees, and that this was to be so was indicated (inter alia) by the reference to the "X-Corp" in paragraph 5 of the agreement and the handwritten "Note" at the end of the agreement. Paragraph 5 also refers to "X" and paragraph 3 contemplates that in projects undertaken by him in partnerships with the plaintiff, Mr. Jones would have rights to include other

partners.

Mr. Jones, the plaintiff contends, owns and controls the remaining defendants, all of which are Cayman companies having no real business of their own, but formed to act as his nominees to shelter his funds for income tax purposes. The consultancy agreement was duly put into effect. Mr. Jones in fact used the other defendants as nominees through whom he acted. The plaintiff paid his fees throughout the term of the consultancy into the second defendant's account with Barclays.

Moreover, on 27th August, 1979, i.e. during the consultancy and, in effect, in pursuance of it, the plaintiff and the second defendant as Mr. Jones' nominee made a joint venture agreement ("MO 2"). Three joint ventures were undertaken. In accordance with the joint venture agreement, Mr. Jones duly received his share of the substantial profits. Two further enterprises under it were less successful, resulting in losses of which the sum of US\$1,448,587.68 fell to be borne by Mr. Jones through his nominee. He has not paid his share. It has been carried by the plaintiff. This is the first head of claim.

The plaintiff also alleges that while awaiting re-sale, the rigs from the unsuccessful ventures were left in the custody of Mr. Jones in Texas, and that he or one of his nominees "cannibalised" parts, causing the plaintiff the further loss of US\$450,000.

Mr. Von Oppen's affidavit also states that in July 1984, Mr. Jones declared himself to be bankrupt under the United States Bankruptcy Code. In paragraph 2c of his statement of financial affairs ("MO 4") Mr. Jones has stated that the only companies with which he has had business associations during the previous six years are Eagle Production and Drilling Services and its subsidiaries of Dallas, Texas. The plaintiff alleges that this shows dishonesty on Mr. Jones part; indeed that it amounts to a crime under United States law.

The corporate defendants filed, on 28th September, 1984, an affidavit by one of their directors, Mr. Frank W. Marshall of Dallas, stating that the fourth defendant has a bank account with Barclays with a balance, at 31st August, 1984, of US\$4,703.66, but that otherwise none of the corporate defendants has a bank account in the Cayman Islands. The affidavit discloses that the second defendant had a bank account at Barclays which was closed on 30th January, 1984 and that the third defendant had a bank account at Barclays which was closed on 11th November, 1983 although it does not specify the closing balances. Apart from this, it says, none of the corporate defendants has ever had a bank account in these Islands.

No other affidavit has been filed in answer to the plaintiff's interlocutory application.

In these circumstances, Mr. Andrew Jones for the plaintiff seeks discovery at this stage of the proceedings. He argues that it is necessary so that he can prepare a proper statement of claim, and in order to save costs in what is expensive litigation. The existence of assets is an important practical consideration and the plaintiff needs to know which defendants it should sue and where. Mr. Marshall's affidavit, he contended, did not go nearly far enough in disclosing the position. It only related to bank accounts. But its filing showed that the second and subsequent defendants accepted in principle that some form of order should be made.

Mr. Andrew Jones relied on rule 47 of the Grand Court (Civil Procedure) Rules and Speyside Estate and Trust Co. Limited v. Wraymond Freeman (Blenders) Limited (In Liquidation) [1950] CH. D. 96 as authority for the proposition that the court may order discovery now. He also said that a Mareva injunction has already been granted in this case, and that the draft order which he intends to submit is based on the Anton Piller order which is always combined with a mareva injunction.

Miss Irving, for the second and subsequent defendants, opposed discovery at this stage, particularly in relation to assets beyond the jurisdiction. The plaintiff was a large German company with no dealings in the Cayman Islands. She contended that the events complained of in the present case had occurred over a period of time which was such that the order was inappropriate. In the Speyside case and in Anton Piller situations, the feature of urgency was always present. In the Cayman Islands, it is not common practice, she said, to order discovery at this stage.

Before dealing with the principles of discovery, I should say first that however suspicious Mr. Billy Ray Jones' action may appear from the facts as outlined by the plaintiff, I do not think that at this stage they are sufficiently cogent to make out a prima facie case of dishonesty on his part; and secondly that from the plaintiff's evidence, it appears that the specific nominees to whom money was paid under either the consultancy or joint venture agreement or who participated in joint ventures were the second defendant ("Alamo") and the third defendant ("Eagle Drilling"). Mr. Von Oppen's affidavit does not show that any of the other corporate defendants were involved in specific transactions nor in fact does it go beyond averring that they are nominees controlled by Mr. Billy Ray Jones for the purposes of acting for him in business ventures and sheltering his funds. In paragraph 6 he says that the proceeds of Ventures 11 and 111 were paid to the account of one of the defendant companies, but does not specify which one, and there is a similar reference to unspecified defendant companies in the final paragraph.

This Court has power under rule 47 to order discovery at this stage of the proceedings. The rule is discretionary in its tenor; we do not have the current English system of automatic discovery after the close of pleadings with additional powers vested in the High Court to order discovery generally or of particular documents in its discretion. But in considering whether to order discovery at this stage, this Court should follow the same principles that the High Court applies in deciding whether to exercise such a discretion.

The authorities show that in England, discovery will only be ordered before the filing of a statement of claim in very exceptional circumstances, and that the discretion to so order should be used sparingly. The reasons for this lie in the need to define the issues, fairness, and the prevention of fishing expeditions. The order was refused in Gale v. Denman Picture Houses Limited [1930] 1 K.B. 588 because the plaintiff failed to satisfy the Court that production was essential to the formulation of his statement of claim, and it was also refused in R.H.M. Foods Limited and Another v. Bovril Limited [1981] 1 W.L.R. 661 (C.A.) where the application was evidently in the nature of a fishing expedition.

I do not consider that in the present instance a case for an Anton Piller type of order has been made out.

On the other hand, discovery before filing of the statement of claim was ordered in the Speyside case. It was ordered on the ground that the plaintiff could not properly complete the formulation of his statement of claim without it. As Lawton L.J. said in the R.H.M. Foods Limited case, the clear purpose of the order was to save costs. I should also note that in Speyside, the application was for discovery of particular documents.

The present application does not in my view involve a fishing expedition. Miss Irving refrained from saying that it did. The nature of the plaintiff's case - its case in principle - is evident. The defendants can understand its thrust clearly enough. There is no suggestion that the plaintiff's purpose in obtaining early discovery is to make out a new kind of case against any of them. What it is seeking to do is to obtain discovery now to perfect the details of its pleadings against the defendants amongst themselves, and also of course to save costs.

That time and expense would be saved cannot be doubted. I also consider that in practical terms, it would be very difficult for the plaintiff to formulate with precision the detail of its claim against each defendant. The pleadings would be lengthy and complex, and are likely to require substantial future amendment. I do not consider in the circumstances of this case that it is in any way unfair to the defendants to order discovery now.

However discovery at this stage must be confined to the purposes of completing a proper statement of claim - the saving of costs and time will flow from that. Before I make an order, the plaintiff should submit a draft which should be limited to this purpose. It should be limited to those defendant corporations whom the affidavit specifically identifies as having received payments or participated in joint ventures. It need not be limited to documents within the jurisdiction. Liberty to further apply, on notice to the other parties, is given for this purpose.

On the application for an order for inspection under section 8 of the Evidence Law, 1978, Mr. Giglioli appeared for Barclays, and Mr. Smellie for the Attorney General as *amicus curiae*. I am grateful to them for their assistance.

Mr. Andrew Jones posed two questions:

- (a) What is the effect of the Confidential Relationships (Preservation) Law ("the Confidentiality Law") on section 8 of the Evidence Law, 1978?
- (b) If he were entitled in law to an order under section 8 of the Evidence Law, do the facts justify it?

The Confidentiality Law provides a statutory scheme for the protection of the confidentiality of certain information, including information received by a banker in relation to its clients' property. Criminal sanctions are imposed for obtaining or disclosing such information in contravention of the Law. The prohibition is couched in very wide terms but by the technique of excluding certain situations from the application of the Law, the legislature has made various exceptions.

Perhaps the most obvious one is where the client/principal consents to disclosure but that is academic in the present instance because in such a case the need for an application under section 8 of the Evidence Law would not arise.

The other two circumstances which are relevant are -

- (a) the situation contemplated by section 3(2)(a) of the Confidentiality Law, i.e. where disclosure is made in compliance with directions of this Court under section 3A; and
- (b) the situation contemplated by section 3(2)(c), i.e. where disclosure is made in accordance with the Law or any other Law.

Section 3A vests in the Grand Court a discretionary system of control of the disclosure of confidential information. The discretion is to be exercised with regard to principles laid down in the section, relating to considerations of criminal and civil justice and what I would call the practical consideration of protection of confidential interests by offers of compensation or indemnity.

Only two classes of persons have standing to apply for directions under section 3A, namely persons who intend to give confidential information in evidence in legal proceedings, and those who are being required to do so. In both cases, section 3A requires them to make application to this Court for directions (though by virtue of section 3(2)(c), it would be

possible to have a situation where some other law clearly abrogates this requirement).

The purpose of section 8 of the Evidence Law is to enable a party to proceedings in any court to obtain an order from that court authorising him to inspect and make copies of matters in a banker's book, for the purpose of the proceedings.

Section 8 is prefaced by the words "Subject to the provisions of ..... the Confidential Relationships (Preservation) Law".

It was contended in argument by Mr. Giglioli (who, I should stress, was concerned to preserve the observation of the Confidentiality Law and whose purpose was simply to assist the court in the interpretation of the Law) that section 3(2)(c) of the Confidentiality Law and section 8 of the Evidence Law create a circle, and something of a loophole in the scheme of the first law, but that as a matter of interpretation section 8 must be construed as being overriding. Mr. Jones, if I understood him correctly, supported the view that section 8 pre-dominates but in any case argued that, in practical terms, if an application under section 3A were necessary (as I think, for the reasons below, that it is) then enough had been put forward by way of submissions to justify an order being made under that last section.

With respect, I cannot accept these submissions.

I do not consider that section 8 of the Evidence Law and section 3(2)(c) of the Confidentiality Law are circular and I do not consider that the latter enactment is subordinate to section 8.

The phrase "Subject to .....", followed by a reference to some other enactment, is a common legislative formula for qualifying the scope of a section. The phrase has a meaning which is plain, and directory. The section is to be read subject to the other enactment. The effect of this may be more or less easy to follow. It may or may not be what the draftsman really intended. (In this case I see no reason to suppose that it was not). But the meaning of the introductory words is nevertheless clear and the effect must be followed through. In this respect I agree with Mr. Smellie, as I do with his interpretation of the two laws. Section 3(2)(c) of the Confidentiality Law cannot be relied on to take section 8 beyond the scope of the first law because, if I may put it this way, section 8 never achieves an independence of its own.

The consequence is not that there is a circle between the two enactments, however, because section 8 does have point, subject to procedural modifications, and, in my view, in one respect a substantive modification, by the Confidentiality Law.

If a party to proceedings in any court (including this court) wishes to obtain an order for inspection under section 8, he must first make an application under section 3A of the Confidentiality Law to this Court. The substantive modification as I see it is this, that he must have the intention of using in the proceedings the information he seeks.

This is in my view the effect of the two provisions. I do not consider that it creates cumbersome procedural requirements. The Confidentiality Law is a statement of legislature policy, in which the preservation of confidential information is, as the criminal sanctions show, held to be a weighty but not always overriding consideration, i.e. where criminal justice, or justice between parties requires otherwise, or there are alternative practical safeguards. But the legislature clearly contemplated that the process of balancing these considerations was an important one, to be determined by this Court on a particular application for this purpose; and it is for this reason that I cannot accept Mr. Andrew Jones submission that I could deal with this matter as if an application

under section 3A had been made. It should be made as a particular application so that it can be considered deliberatively in accordance with the principles of section 3A.

In The United States of America v. Roy R. Carver and Others, in 1982, the Court of Appeal considered section 7 of the Evidence Law, which is prefaced by the same qualifying words as section 8. It appears to me that the preceding interpretation of section 8 is in accordance with the reasoning given by the Court of Appeal in that decision.

For these reasons, I refuse to make an order for inspection under section 8 of the Evidence Law as sought. If it is of assistance to the plaintiff, I may add that, on the submissions I have heard so far, I was not in any case persuaded that at this stage, an order under section 8 should have been made on its own merits (that is, if that section had not been subject to the Confidentiality Law).

The costs of these applications will be costs in the cause.



Judge

3rd October, 1984