

24.7.84

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
CAUSE NO. 269 of 1984

BEFORE THE HON. SIR JOHN SUMMERFIELD CBE., Q.C., J.P., CHIEF JUSTICE

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

- AND -

IN THE MATTER OF THE CONFIDENTIAL
RELATIONSHIPS (PRESERVATION) AMENDMENT
LAW 1979 LAW 26 of 1976

- AND -

IN THE MATTER OF CONSENT DIRECTIVES
EXECUTED PURSUANT TO ORDERS OF FOREIGN
COURTS

- AND -

IN THE MATTER OF AN APPLICATION BY
ABC LTD. UNDER THE CONFIDENTIAL RELATIONSHIPS
(PRESERVATION) (AMENDMENT) LAW 1979.

JUDGMENT

This Summons was heard in Chambers but in view of the importance of the issues raised, it is ordered that the judgment be delivered in open court with all references to any party or to any confidential information omitted. To that end, the name of the applicant in the title is referred to/ABC LTD., instead of by its proper name. The Cause Book will be amended accordingly. All information in the Court file or otherwise relating to the proceedings remains confidential and protected and may not be divulged except by order of this Court.

The Summons seeks an order in one or more of the following terms:

1. A Direction as to whether or not the applicant can disclose confidential information to a foreign Governmental agency pursuant to a consent signed in compliance with an order and/or Direction of a foreign Court or Tribunal.
2. A declaration that "a Consent Directive" signed by anyone pursuant to an order or directive of a foreign Court or Tribunal which can impose penal sanctions for disobedience of the compelling order or directive is not a consent sufficient to negative the application of the Confidential Relationships (Preservation) Law as amended.
3. Alternatively a declaration that "a Consent Directive" signed by anyone pursuant to an order or directive of a foreign Court or Tribunal which can impose penal sanctions for disobedience of the compelling order or directive is "a consent" sufficient to make the provisions of the Confidential Relationships (Preservation) Law as amended inapplicable

4. A declaration as to the meaning of the word "consent" in Section 3 (2)(b) (i) of the Confidential Relationships (Preservation) Law as amended.

5.

The application is made in consequence of a majority decision of the United States Court of Appeals 11th Circuit No. 84 - 3101, United States of America, Plaintiff - Appellee v. Lawrence L. Ghidoni, Defendant - appellant, decided on 2nd May, 1984 and reported in U.S. Tax Cases. In that case the unsuccessful appellant was held to be in contempt of court for refusing to comply with an order of the district court compelling him to sign a "consent directive" in the following terms:

I, LAWRENCE L. GHIDONI of the State of Florida in the United States of America do hereby direct any bank or trust company at which I have a bank account of any kind or at which a corporation has a bank account of any kind upon which I am authorized to draw specifically including The Bank of Nova Scotia and The Bank of Nova Scotia Trust Company (Cayman) Limited and its officers, employees and agents, to disclose all information and deliver copies of all documents of every nature in your possession or control which relate to the said bank accounts to any attorney of the United States Department of Justice, and to give evidence relevant thereto in the case of the United States of America v. Lawrence L. Ghidoni, Case No. TCR 83-07016, now pending in the United States District Court for the Northern District of Florida, and this shall be irrevocable authority for so doing. This direction has been executed pursuant to that certain order of the United States District Court for the Northern District of Florida in the aforesaid case, dated December 30, 1983. This direction is intended to apply to the Confidential Relationships (Preservation) Law of the Cayman Islands, and shall be construed as consent with respect thereto as the same shall apply to any of the bank accounts for which I may be a relevant principal.

The applicant, engaged in the business of banking and the management of Companies and trusts and , in that capacity, in possession and control of confidential information relating to the affairs and business of many clients, apprehends that the precedent set in Ghidoni's case may lead to an extensive use of the same process and wishes to clarify its position in relation to its own clients if one or more is or are compelled by a foreign court to sign such a consent directive. The indications are that the same process has been invoked in other courts in the United States of America.

One can begin by emphasising the obvious, to avoid any misunderstanding, and that is that what follows relates solely to the position in this jurisdiction.

Several observations may usefully be made at this stage.

The applicant's obligation and duty is to its client. The applicant might just as well be liable in damages to its client for not giving effect to a client's lawful instructions as for wrongly giving effect to them or for any other misfeasance.

So far as the terms of the consent directive under examination are

concerned, the applicant would be under no obligation to the United States Department of Justice or any attorney thereof. Such a consent directive would give rise to no legal or other relationship so as to create any such obligation on the part of applicant. Neither would such a consent directive give rise to any rights in the United States Department of Justice or any attorney thereof as against the applicant. No enforceable right would be created in favour of the United States Department of Justice or any attorney thereof. The client would retain authority over the disposition of the confidential information relating to him.

The purported irrevocability of the consent directive is inoperative. The client could always revoke the instructions in it before effect had been given to them. Revocation might have dire consequences vis a vis the foreign court but this court is only concerned with the position in this jurisdiction of such a consent directive compelled by a foreign court.

The consent directive purports to have effect in relation to a bank account of a corporation upon which the person signing the consent directive is authorized to draw. The principal in relation to such an account is the corporation itself acting through its directors or officers empowered to give authority for disclosure. This is not necessarily an officer or employee authorized to draw on the account. A comparatively junior employee could have power to draw on the account on behalf of the corporation. Only the principal can give consent.

One can turn now to the main point and that is whether consent given pursuant to an order by a foreign court under pain of criminal penalties amounts to consent for the purpose of section 3(2) (b)(i) of the Confidential Relationships (Preservation) Law 1976 as amended. It must be stressed that the only alternative to signing the consent directive ordered by the court is punishment by way of fine or imprisonment. It is signed under compulsion backed by criminal sanctions.

I am of the view that such a consent directive does not amount to consent as contemplated by section 3(2)(b)(i) and that it is ineffective for the purposes of that provision.

In saying this I am not unmindful of the fact that this court has itself ordered directions in substantially similar terms for the purpose of enforcing an order for premature discovery and the preservation of property. Those directions were aimed at banks within the jurisdiction. It was appreciated at the time that those orders were novel and without precedent. They were not challenged - largely because they were ineffective for reasons which need not be gone into. Unfortunately the point taken in this matter was not argued when the orders were made. Had they been challenged on the grounds raised in these proceedings the challenge may have succeeded. On reflection it may well be that it would have been better, and would have achieved the same end, had the provisions of O38 R13 of the Rules of the Supreme Court 1965 been invoked

followed by an application under section 3A of the Confidential Relationship (Preservation) Law. At all events this Court was purportedly exercising its powers under the Law of England and Wales as applied by section 20 of the Grand Court Law in relation to entities within its jurisdiction. The position may have to be reviewed in the event of a similar application coming before the court.

As it is I am satisfied that in our law, where consent is a material element giving rise to a legal consequence, it must be voluntarily and freely given in ^{the} exercise of an independent and uncoerced judgment. This is a well established principle in every sphere of our law, civil and criminal, and there is no reason to give any different meaning to the expression "consent" in section 3(2)(b)(i).

To take any other view would result in allowing a foreign court to undermine and circumvent the provisions of the Confidential Relationships (Preservation) Law. This is not only important to this country where that Law exists but would be equally important in many other common law countries which respect the principle in *Tournier v. National Provincial and Union Bank of England*, 1923 ALL E.R. Rep. 550, governing the duty of a bank to maintain secrecy - see Paget's Law of Banking 8th Edition p. 166 et. seq.

Although in form the consent directive purports to be a consent and direction given by the client of the bank it is in substance a direction given by the foreign court. It is not real consent at all. In reality it is the foreign court directing the bank to disclose confidential information. In my view the Confidential Relationships (Preservation) Law does not contemplate that situation. In effect the foreign court is usurping the power to order disclosure and, in doing so, completely bypassing the section 3A procedure under that Law.

Apart from anything else, under section 3A this court can edit material that it considers should be released in the interests of justice. The editing process is an important feature in protecting confidentiality in relation to the affairs of a person in respect of whom no case for the release of confidential information has been made out.

In short, consent given under compulsion is merely submission to force and is not consent for the purposes of section 3(2)(b)(i).

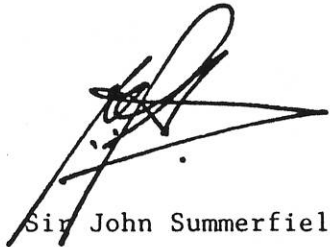
On the face of it, the consent given in Ghidoni's case is consent given under compulsion and does not amount to consent for the purposes of our law.

Accordingly, there will be a declaration in terms of paragraph 2 of the summons.

The declaration in relation to paragraph 1 is in the negative.

It follows that a declaration in relation to paragraph 3 does not arise.

The declaration in relation to paragraph 4 is implicit in those in relation to paragraphs 1 and 2.

A handwritten signature in black ink, appearing to be 'J. Summerfield', written over a horizontal line. The signature is stylized and somewhat cursive.

Sir John Summerfield

24th July, 1984.