

ROYAL COURT
(Samedi Division)

24th January, 1997.

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Before: The Deputy Bailiff and Jurat Le Ruez
and Jurat Rumfitt

Between	Claes Enhörning (Trustee in bankruptcy of Alsatia Förvaltnings Aktiebolag) (originally known as Aktiebolaget L. Bergström Finans)	Plaintiff
And	Nordic Link Limited	First Defendant
And	Kleinwort Benson (Jersey) Limited	First Party Cited And Second Defendant
And	Corporate Secretaries (Jersey) Limited	Second Party Cited And Third Defendant
And	Terence Bowman	Third Party Cited And Fourth Defendant
And	Gerrard John Watt	Fourth Party Cited And Fifth Defendant
And	Peter Whiting	Sixth Defendant
And	Anthony Charles Cooper	Fifth Party Cited
And	Niklas Bergström	Sixth Party Cited
And	Leighton Private Hotel (1987) Limited	Seventh Party Cited
And	Leighton Private Hotel Limited	Eighth Party Cited
And	Queen's Hotel (Jersey) Limited	Ninth Party Cited
And	Leeward Bearing Holding Company Limited	Tenth Party Cited
And	Kleinwort Benson International Trust Corporation	Eleventh Party Cited
And	Sten Raoul Lars Bergstrom (convened at the instance of the First to First to Sixth Defendants)	First Third Party

And Lars Kurt Magnus Bergstrom Second Third Party
(convened at the instance of the
First to Sixth Defendants)

And Lars Jonas Bergstrom Third Third Party
(convened at the instance of the
First to Sixth Defendants)

And Sven Peter Jonsson Fourth Third Party
(convened at the instance of the
First to Sixth Defendants)

And Advokatfirman Carler I Fifth Third Party
Helsingborg AB
(convened at the instance of the
First to Sixth Defendants)

Advocate N. Journeaux for the Plaintiff;
Advocate J.P. Speck for the First Defendant;
Advocate M. O'Connell for the Sixth Party Cited.

JUDGMENT

THE DEPUTY BAILIFF: This is an application by the Plaintiff for variation of an implied undertaking.

The Plaintiff is the Trustee in Bankruptcy of a Swedish company which we shall call "Alsatia" and began proceedings in Jersey by Order of Justice against a Jersey company called Nordic Link Limited, the first defendant and Niklas Bergström, the sixth party cited.

The Jersey proceedings have eleven parties cited including Kleinwort Benson (Jersey) Ltd., Corporate Secretaries (Jersey) Limited and Kleinwort Benson International Trust Corporation.

The principal creditor of Alsatia was the Swedish Bank, Gota Bank, which has assigned its claims to a new Swedish company called Retriva Kredit AB. Both of these entities are under the ultimate ownership of the Swedish government and Retriva as the principal creditor in the bankruptcy of Alsatia takes a close interest in the conduct of the Jersey proceedings.

Advokat Ingemar Josefson has been appointed Trustee in Bankruptcy of Anita Bergström. The Bergström family all have an interest in the appropriately named Nordic Link. Retriva is also the principal creditor of Mrs. Bergström, who is the mother of Mr. Niklas Bergström.

Advokat Josefson began proceedings in Sweden in the Helsingborg Court by petition dated 9th December, 1994. We have proceedings running therefore in the two jurisdictions. By an order dated 16th October, 1993, the Judicial Greffier ordered the parties to make discovery. Discovery was duly made by Nordic Link, but a later Anton Piller Order revealed further documents which will be of interest to the Swedish Court. The representor wishes to use those and other documents in Sweden.

There is no dissent from those representing the First Defendant and the Sixth Party Cited. "They rest *"à la sagesse de la Cour"*. There is, however, an implied undertaking to this Court by the Plaintiff to use documents which are discoverable in the Jersey proceedings only for the purpose of the Jersey proceedings. It was necessary to come to Court because of the way that our law appears to have developed.

The law

The "Rule" (if such it is) was first expanded by Crill, Bailiff in G.H.Bass & Company v. The Royal Bank of Scotland plc, (10th December, 1987) Jersey Unreported. The judgment is short but incisive. It reads:

"In every case in respect of an application to use documents obtained in this jurisdiction, before that is done, the leave of this Court must be obtained".

That position was clarified in Deepak Mokhandas Dalmal and others v. Rhone Company Limited, 27th April, 1988, Jersey Unreported where Commissioner Vibert repeated the rule. He then went on:

"The decision whether an application should be granted has been likened by Lord Denning MR in Riddick v. Thames Board Mills (1971) 3 AER at page 687, to holding a balance between two conflicting public interests. One is "in preventing privacy and protecting confidential information". The other is "in discovering the truth so that justice may be done between the parties". It is a matter for the judgment of the Court on the facts of each particular case, as to which of these conflicting interests should prevail."

Again in Guinness Plc v. Market and Acquisition Consultants Ltd., (1987-88) JLR 104 at 106 Crill, Bailiff said this:

"A number of English cases were cited by counsel for both parties and the court has endeavoured to extract from them the principles governing the exercise of its discretion in cases of this nature, and has given those cases the fullest persuasive effect."

Those principles, so far as English law is concerned, are well summarised in Matthews and Mabek "Discovery" (1992 Ed'n) where at 12.01 the following passage occurs:-

"Any party on whom a list of documents is served or to whom documents are produced on discovery or pursuant to an order of the Court impliedly undertakes to the Court that he will not use them or any information derived from them for a collateral or ulterior purpose, without the leave of the Court or consent of the party providing such discovery. This is part of the wider principle that: ".....private information obtained under compulsory powers cannot be used for purposes other than those for which the powers were conferred."

It is clear that where consent of the other side is refused (as where, for example, the document is to be used in a manner hostile to the party giving discovery) consent of the Court will be necessary.

The Court will weigh matters in a delicate balance, but the test has been set out by Scott J in Sybron Corporation v. Barclays Bank Plc (1985) 1Ch. 299 at 327-328, the commentary in Matthews and Mabek says:

"In Sybron, Scott J. rightly emphasised that whether leave ought to be granted should depend on the nature of the original action, the circumstances in which discovery was given and the nature of the proposed new action: in most cases the court will not attempt an assessment of the strength of the case, unless the proposed action is shown to be an abuse of process or is obviously unsustainable."

Mr. Journeaux, in his helpful address, also referred us to an Australian case Springfield Nominees Pty Ltd. v. Bridglands Securities Ltd. (1992) 110 ALR 685, a case which involved the possible use of a witness statement, that had come into Counsel's hands and which might have been usefully used in another action.

The Court said at 693:

"For "special circumstances" to exist it is enough that there is special feature of the case which affords a reason for modifying or releasing the undertaking and is not usually present. The matter then becomes one of the proper exercise of the court's discretion, many factors being relevant. It is neither possible nor desirable to propound an exhaustive list of those factors. But plainly they include the nature of the document, the circumstances under which it came into existence,

the attitude of the author of the document and any prejudice the author may sustain, whether the document pre-existed litigation or was created for that purpose and therefore expected to enter the public domain, the nature of the information in the document (in particular whether it contains personal data or commercially sensitive information), the circumstances in which the document came into the hands of the applicant for leave and, perhaps most important of all, the likely contribution of the document to achieving justice in the second proceeding."

There was another factor mentioned in this case which we find helpful and that is whether there is a commonality of facts between the parties.

Those are the points of law carefully trawled for us by Mr. Journeaux. The case as it has developed contains allegations, *inter alia*, against Kleinwort Benson and certain of their employees. We have to say that insofar as this application is concerned, there is nothing for which to criticise Kleinwort Benson. They have behaved very properly. However, the allegations are serious and refer to disposing of a valuable Swedish trading company in a dishonest manner to a Jersey Trust and before bankruptcy.

The Swedish proceedings allege (and this is a gloss) that the Bergströms' property Liatorp 14 has been effectively transferred at an undervalue into the Jersey Trust.

The documents seized from Mr. Niklas Bergström, Kleinwort Benson and Nordic Link under the Anton Piller Order are disturbing on their face. Three documents in particular appear to show how Nordic Link and Kleinwort Benson dealt with the Liatorp property. A few more documents were provided voluntarily on discovery by Nordic Link.

We have had a sight of all the documents. The dispute in Sweden shows that at the end of 1992 Mrs. Bergström sold the property Liatorp 14 to Nordic Link for approximately 6 million Kroner (perhaps £600,000). The question to be decided is whether the property was paid for in real terms. A mortgage of approximately 1.5 million Kroner was on the property but it is alleged by Nordic Link that Mrs. Bergstrom had an existing debt to Nordic Link of 4.5 million Kroner and that the debt was cancelled to settle the consideration. The counter argument is that there never was such a debt. To answer that Nordic Link produced promissory notes.

The first promissory note is dated 2nd January, 1992. There is a minute of the company on that day. The second promissory note is dated 9th January 1992. A meeting of the directors dated 1st

September, 1992 records that additional loan. On 15th January, 1993 the Liatorp deed of sale was executed.

It is then that there came to light a memorandum written by the finance director of Kleinwort Benson, a Mr. Hendry, who became a director of Nordic Link about a year after the litigation commenced in Jersey. Mr. Hendry's memorandum is concise, frank and honest. But there, in the opening paragraph, is a matter of considerable interest to the representor. This is what it says:

"The "existence" of Promissory notes issued by Mrs. A. Bergstrom to Nordic Link Limited was first brought to the attention of Nordic Link Limited by a letter from Jonas Bergstrom of 11 January 1993 (copy attached) which indicated that Mrs. Bergstrom wished to transfer the property Liatorp 14 to Nordic Link Limited of two Promissory notes - one for SEK 3,000,000 and the other for SEK 1,500,000 issued to her in favour of Nordic Link Limited.

The Promissory Notes appear to have been issued on 2 January and 1 September 1992 respectively. Nordic Link Limited had no record of ever loaning money to Mrs. Bergstrom or in some other fashion her becoming indebted to the Company and there appeared to be no valid reason for the issue of these Promissory Notes. The transaction was subsequently discussed with Jonas Bergstrom as detailed in a file note of 20 January 1993 (copy attached)."

We do not intend to set out any more of the matter. We are not, after all, deciding the case or prejudging any issue.

In regard to the matter of the document, no one has sought to intervene or object. Whether the documents existed before the action is not relevant because on the face of them they could (we put no finer point on it than that) have been prepared in order to deceive. It seems right that the documents should see the light of day in the Swedish proceedings if only to allow their makers (should they wish) to put forward a valid explanation. There is no personal data nor commercially sensitive information in the documents which might support their non-disclosure. We understand that the allegation that the promissory notes are a sham has already been publicly made in Sweden - (we presume in proceedings there).

Perhaps, most importantly, is to ask whether the disclosure is going to help the justice of the case. The interests of justice are often mentioned in cases of this nature and particularly in this Court in the question of tracing orders.

The documents are alleged to show the real position of Nordic Link. Their suppression would in our view inhibit the discovery of the truth.

On the question of commonality, both the Swedish and Jersey actions are brought on behalf of Retriva Kredit and they are both brought against the same defendant. There is a strong similarity in the causes of action, that is the alleged attempt by Mr. and Mrs. Bergström to defeat the claims of creditors and in particular Retriva Kredit, which already knows the contents of the documents in its capacity as principal creditor in the Jersey proceedings. There will be no breach of confidence.

Nordic Link, in the light of the Jersey authorities, felt that the obligation of the undertaking was made to the Court and it was necessary to obtain the Court's permission even though there was no direction made to that effect. That was heightened by the fact that Nordic Link was controlled by Kleinwort Benson as discretionary trustee and was of course aware of its duty of confidentiality.

In the circumstances, we make the order accordingly. We would say this, having considered the authorities that it will not be necessary in future where all the parties consent to have to obtain leave of the Court. To that extent we can extend the authority of G.H. Bass & Company v. The Royal Bank of Scotland Plc. (*supra*).

Authorities

- Guinness Plc v. Market and Acquisition Consultants Limited (National Westminster Bank Plc, Dee, Midland Bank Plc and Charterhouse Bank (Jersey) Limited, Parties Cited) (1987-88) JLR, 104.
- Deepak Mohandas Dalamal and others v. Rhone Company Limited, (27th April, 1988,) Jersey Unreported.
- Arab Monetary Fund v. Chase Bank & Trust Company (CI) Limited, (20th April, 1989,) Jersey Unreported.
- Paramount Airways Limited v. Anser General Investments SA, (6th October, 1989,) Jersey Unreported.
- Aldor Investments AG and Global Trust Acceptances Limited v. Irving Aronson, (25th May, 1990,) Jersey Unreported.
- IBL Limited and Meridian Group (UK) Limited v. Planet Financial and Legal Services Limited, (1990,) JLR 294.
- G.H. Bass & Company v. The Royal Bank of Scotland Plc., (10th December, 1987,) Jersey Unreported.
- Matthews and Malek: Chapter 12.
- Matthews and Malek: Cumulative supplement, Chapter 12.
- E.M.I. Records Ltd. v. Spillane and others (1986) 1 WLR.
- Crest Homes Plc., v. Marks and others [1987] 2 All ER 1074.
- Sybron Corporation and another v. Barclays Bank Plc., [1985] 1 CH 299.
- Sony Corporation and another v. Time Electronics [1981] 1 WLR 1293.
- Ex p. Coventry Newspapers Ltd [1993] Q.B. 278.
- Apple Corps Limited and another v. Apple Computer Inc. and others [1992] 1 C.M.L.R. 969.
- Springfield Nominees Pty Ltd., v. Bridgelands Securities Ltd., (1992) 110 A.L.R. 685.
- O'Connor v. Mirror Group Newspapers (1986) Ltd., C.A. Unreported Judgment of the Court of Appeal of England, dated February 1 1993.
- Eagle Star Insurance Company, Ltd., v. Yuval Insurance Company, Ltd., [1978] 1 LILR 357 C.A.