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**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**



14-5-12

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CAUSE NO. FSD: 54 OF 2012 AJEF

IN THE MATTER OF THE EVIDENCE (PROCEEDINGS IN OTHER JURISDICTIONS) CAYMAN ISLANDS ORDER 1978

AND IN THE MATTER OF A REQUEST FOR INTERNATIONAL JUDICIAL ASSISTANCE FROM THECOURT IN THE REPUBLIC OF ARGENTINA

AND IN THE MATTER OF CRIMINAL PROCEEDINGS NOW PENDING BEFORE THE COURT IN THE REPUBLIC OF ARGENTINA

Coram: The Hon. Mr. Justice Angus Foster

Appearances: Ms. Dawn Lewis and Ms. Anne-Marie Rambarran Crown Counsel of the Attorney General's Chambers

Heard: Friday, 11 May 2012

RULING

1. This concerns an Ex Parte application by the Attorney General pursuant to Order 70, rule 2 of the Grand Court Rules and the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978 ("the Order"), which is a statutory instrument extending the Evidence (Proceedings in Other Jurisdictions) Act 1975 of the United Kingdom ("the Act") to the Cayman Islands, subject to the adaptations in the Schedule to the Order. In fact the provisions of the Schedule to the Order are identical to the provisions of the Act which are relevant to this application.

2. By virtue of the Order the Grand Court has power to give effect to applications on behalf of foreign courts or tribunals for evidence to be obtained in the Cayman Islands, which is to be used in legal proceedings before the foreign court or tribunal concerned.

1 3. The application before me is made following the issue of a "Letter Rogatory" in Spanish
2 but accompanied by an English translation issued on 8th August 2011 (i.e. 9 months ago)
3 by the Judge of CourtArgentina ("the Request").

4 4. It is clear from the Request that proceedings have been issued before theCourt in
5 Buenos Aries claiming defamation of the plaintiffs by the defendant in the action. The
6 claim is brought by 7 individuals, who are all directors of either "A" or "B" banks, in
7 respect of a paid newspaper notice placed by the defendant in 2 of Argentina's national
8 newspapers in October 2006. The defendant is one "M" who is the president of 2
9 Argentine companies which are minority shareholders of "A" Bank. It is also made clear
10 in the Request that, in terms of the Argentine Criminal Code, the legal proceedings
11 concerned are criminal proceedings with criminal penalties for the defendant if the
12 defamation is established.

13 5. According to the Request, the newspaper notice concerned, which the plaintiffs contend
14 is defamatory, makes specific reference to "*entities domiciled abroad*" and, although the
15 Request does not specifically state that one of those entities is "A" Bank in Cayman,
16 the Request requests information to be produced by "A" Bank in Cayman and
17 consequently the Request has been directed to this court.

18 6. Section 2 of the Order is one of the provisions of the Act which is expressly extended to
19 the Cayman Islands. Section 2 (4) of the Order accordingly provides:

- 20 (4) *An order under this section shall not require a person –*
- 21 (a) *to state what documents relevant to the proceedings to which the*
22 *application for the order relates are or have been in his*
23 *possession, custody or power; [my emphasis] or*
- 24 (b) *to produce any documents other than particular documents*
25 *specified in the order as being documents appearing to the court*
26 *making the order to be, or likely to be, in his possession, custody*
27 *or power. [my emphasis]*



1 7. It is well established both in the United Kingdom and in the Cayman Islands that the
2 effect of these provisions is that such a request for evidence by a foreign court or
3 tribunal must specify particular identified documents which are required for the trial of
4 the foreign proceedings. The Note to O.70 of the Rules of the Supreme Court (“RSC”),
5 which was at the time the relevant rule of court in England equivalent to the current rule
6 in this jurisdiction (GCR O.70), specifically provides at paragraph 70/6/6, which is
7 headed “*Distinction between evidence for trial or for pre-trial purposes*” refers
8 expressly to the distinction between evidence in the nature of proof to be used for the
9 purposes of the trial and evidence in the nature of pre-trial discovery to be used for the
10 purposes of leading to a train of enquiry which might produce direct evidence for the
11 trial. The Note confirms that:

12 *This distinction was in the mind of the draftsman of the Act of 1975 and was*
13 *made the subject of an express declaration by her Majesty’s Government when*
14 *ratifying the Hague Convention that the United Kingdom “would not execute*
15 *letters of request issued for the purpose of obtaining pre-trial discovery of*
16 *documents.*

17 *Accordingly, the English Court will refuse to make an order in aid of a foreign*
18 *request for evidence if it appears or to the extent to which it appears that that*
19 *evidence is required, not for the purpose of proof at the foreign trial, where it is*
20 *admissible and relevant to the issues in those proceedings, but for the purpose of*
21 *discovery, something in the nature of a roving enquiry in which a party is seeking*
22 *to “fish out” some material which might lead to obtaining admissible evidence at*
23 *the trial, even though the procedure of the foreign court permits such a practice*
24 *[and the Note then refers to that practice in the United States of America and*
25 *Canada by way of example]. On the other hand, if the foreign request is for*
26 *evidence in the nature of proof to be adduced at the trial, the English Court will*
27 *give effect to such request and it may do so subject to modifications as to the*
28 *disallowances of certain witnesses or documents”.*



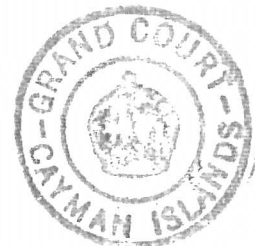
1 And the Note then makes reference to the leading authority from the House of Lords in
2 England: Rio Tino Zinc Corporation v Westinghouse Electric Corporation [1978] A.C.
3 547.

4 8. The Note from the RSC referred to above continues at paragraph 70/6/8 and makes
5 reference to Section 2(4) (b) of the Act (which is the same as Section 2(4) (b) of the
6 Schedule to the Order as follows:

7 *Moreover, in applying this provision of the Act, the Court is limited to ordering*
8 *the production of “particular documents specified”, i.e. individual documents*
9 *separately described, together with replies to letters where replies must have been*
10 *sent (per Lord Diplock and per Lord Wilberforce respectively in Rio Tino Zinc*
11 *Corporation v Westinghouse Electric Corporation* (above). *General words like a*
12 *request for “any memoranda, correspondence or other documents relevant*
13 *thereto” or “any memoranda, correspondence or other documents referred to*
14 *therein” are far too wide and will be struck out....*

15
16 *The House of Lords has explained in Re Asbestos Insurance Coverage Cases*
17 *[1985] 1 W.L.R 331 that (1) “particular documents” means individual documents*
18 *separately described; a compendious description of several documents (e.g.*
19 *“monthly bank statements for August to December”) may be used provided that*
20 *the exact document in each case is clearly indicated. (2) A second test of*
21 *“particular documents” is that they must be actual documents shown by evidence*
22 *to exist or to have existed. Conjectural documents which may or may not exist, or*
23 *have existed, do not satisfy this test.*

24 9. The principles outlined above derived from the Rio Tino Zinc case have been adopted and
25 followed in the Cayman Islands by the Cayman Islands Court of Appeal: see United
26 States v Carver and Four Others [CILR] 1980-83 297. In that case the Court of Appeal
27 considered, inter alia, the provisions of both Section 2(4) (a) and (b) of the Schedule to
28 the Order and said (at page 318):



1 *“In s.2(4)(a,) a court is prohibited from making an order for general discovery of*
2 *documents as such an order would be in the nature of a fishing expedition. The*
3 *two sub-sections [i.e. Section 2(4)(a) and Section (4)(b)] must therefore be read*
4 *together to discover the true intention of the legislature as to the documents in*
5 *respect of which an order for production may be made.”*

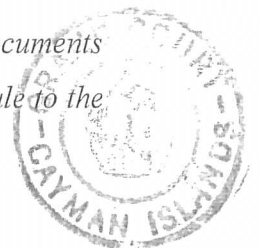
6 And the Court of Appeal then referred to the Rio Tino Zinc case (ibid).

7 10. The United States v Carver (ibid) case concerned a request by a court in the United States
8 of America for the production by two Cayman Islands’ banks of correspondence,
9 ledgers, account books etc. relating to accounts held by two specific companies at the
10 banks. In the end of the day the Court of Appeal allowed the request on the basis, inter
11 alia, that the documents requested were said to relate to particular transactions made on a
12 particular day on a particular account and that the banks concerned would be able to
13 identity directly such records and that accordingly the description in the request
14 concerned was sufficiently particularized to satisfy the statutory requirement of
15 *“particular documents etc. in Section 2(4) (b)”*. The court said (page 320):

16 *“It was clear from the whole tenor of the request that the US Government was*
17 *not seeking an oversight of all the accounting transactions of the two entities*
18 *named in the request. Their concern was as to particular sums emanating from*
19 *particular sources, which were transmitted to the banks on particular dates in*
20 *specified forms and credited to particular accounts. Indeed, the supporting*
21 *evidence was that the returned cheques were in the possession of the US*
22 *Government”*.

23 11. The principles established in the Rio Tino Zinc case (ibid) as followed in this jurisdiction
24 by the United States v Carver (ibid) case have been consistently followed in several
25 subsequent cases in this court. In Voluntary Purchasing Group Inc. v. Insurco
26 International Ltd [1994-95] CILR 84 Smellie J (now Chief Justice Smellie) said (at page
27 97):

28 *“In order to preclude “fishing expeditions”, the words “particular documents*
29 *specified in the order” as they appear in Section 2(4)(b) of the Schedule to the*



1
2 *Order are to be strictly construed. The test to be applied in relation to the*
3 *production of documents is whether “particular documents” were specified, that*
4 *is individual documents separately described, although it is permissible to have a*
5 *compendious description of several documents, provided that evidence of the*
6 *actual documents is produced to satisfy me that they do exist or at least have*
7 *existed....”*

8 This summary was referred to and followed *In re Canton of Berne’s Request* [1996]
9 CILR 179. Reference was made in that case to another English case by way of
10 example, *Panayiotou and Others v Sony Music Entertainment (UK) Ltd* [1994] Ch.142,
11 in which it was said:

12 *“The court should be astute to see that what is essentially a discovery exercise,*
13 *whereby the applicant is seeking production of documents with a view to*
14 *ascertaining whether they may be useful rather than with a view to adducing them*
15 *in evidence as proof of some fact, is not disguised as an application to produce*
16 *particular documents”.*

17 12. In *First American Corporation v Zayed* [2000] CILR 57 Smellie J (now Smellie CJ) said
18 at page 66:

19 *“What is nonetheless to be noted here is that although full faith and credit is to*
20 *be afforded the request of a foreign court, the objective determination of whether*
21 *a request satisfies the legal requirements of the [Hague] Convention and of*
22 *domestic law are for the requested court to resolve by reference to all the relevant*
23 *circumstances. As a matter of domestic law, effect will not be given to a letter of*
24 *request whose function is shown, after objective assessment by the requested*
25 *court, to be merely exploratory or investigatory, rather than intended to seek*
26 *evidence for use at the trial in the foreign court. This is the oft-cited prohibition*
27 *against “fishing”.*



1 Smellie J. continued (at page 72):

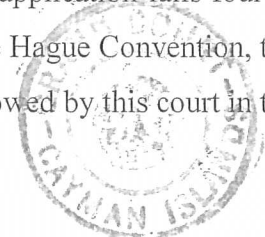
2 *“The power to order the taking of evidence pursuant to a letter of request is*
3 *statutory. In the Cayman Islands it is contained within the evidence (Proceedings*
4 *in Other Jurisdictions) (Cayman Islands) Order 1978 (“the Evidence Order”).*

5 *The Evidence Order adopts with modifications, the UK legislation which gives*
6 *effect to the Convention. The Convention was acceded to by the United Kingdom*
7 *and Colonies (including the Cayman Islands) with certain reservations which*
8 *reflect, among other things, settled common law principles. These principles*
9 *require that requests in aid of the process of pre-trial discovery (very familiar to*
10 *the US courts) may not be accommodated.*

11 *The Cayman public policy against granting such foreign requests is embodied in*
12 *s.2(3) of the Schedule to the Evidence Order. That provision precludes the courts*
13 *from making an order in aid of foreign proceedings which it could not make in*
14 *aid of its own proceedings. The policy is also reflected in the further limitations*
15 *imposed by s.2(4) of the Schedule which stipulate the need for specificity in*
16 *request for documentary evidence. These general principles and limitations are*
17 *already recognized within the local case law see [the Voluntary Purchasing*
18 *Group Inc. case (supra)]. As our enabling legislation is based on the English*
19 *Evidence Act of 1975, these provisions are in common with those applied in*
20 *England and Wales: [the Rio Tino Zinc case (supra)].*

21 *The moot point of principle which arises here is whether this prohibition against*
22 *pre-trial discovery or “fishing” is applicable to requests for evidence by way of*
23 *the oral evidence of witnesses. As “fishing” is not a term of art, I here describe*
24 *it, adopting the description most often cited in the cases; the seeking of evidence*
25 *not itself for direct and immediate use at a trial, but instead in the hope that it*
26 *might lead to a line of enquiry which might lead to such evidence.”*

27 13. In my judgment the Request which is the subject of the present application falls foul of
28 the principles to which I have referred above as established by the Hague Convention, the
29 provisions of the Act, the Order and the English decisions as followed by this court in the



1 Cayman Islands. The present Request states (on the first page) under the heading
2 “PURPOSES OF THESE PRESENTS” that the Request is issued by the court in Buenos
3 Aires:

4 *“to request Your Honour to apply for the production of pertaining evidence*
5 *reports from [“A” Bank in Cayman] in order to determine: If within 2000-2001*
6 *period any credit, subsidy and/or other financial assistance whatsoever has been*
7 *granted which might place said financial entities [which presumably refers to A*
8 *Bank in Cayman and/or A Bank in Buenos Aires and/or B Bank] as creditors of*
9 *any of the following legal and natural persons: and there then follows a list of*
10 *some thirty-five entities and individuals. [my emphasis]*

11 This clearly indicates that the Request is simply seeking the production of any “evidence
12 available” from “A” Bank in Cayman which may establish whether any financial
13 assistance has been granted to any of the thirty-five listed entities and persons which
14 might demonstrate that “A” Bank in Cayman is a creditor of any of those entities or
15 persons. There is no reference to and the Request does not identify any specific
16 transactions or particular documents; it is clearly simply a request for any documentary
17 evidence which might exist; it is not a request for specific identified documentation
18 evidencing specified transactions for use at trial.

19 14. Further, the Request goes on to state at page 2 under the heading: “MEASURES
20 REQUESTED AND THEIR CORRESPONDENCE TO THE PURPOSE HEREOF” that
21 the “Letters Rogatory” were issued:

22 *“in order to request from [“A” Bank in Cayman] the provision of pertaining*
23 *information about granting of credits, loans or any other financial assistance*
24 *whatsoever during the 2000 and 2001 years, which might position it as a creditor*
25 *of the legal or physical persons described hereinabove. It constitutes an*
26 *evidentiary stage diligence applied for by the defence...” [my emphasis]*

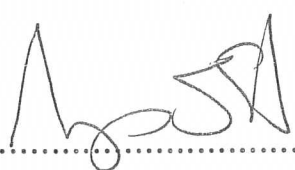
27 The Request also provides on page 3 under the heading: “STAGE OF PROCEEDINGS”
28 that “This case is on a “discussion stage””.



1 15. No evidence of any kind other than the Request itself was submitted in support of this
2 application. Indeed, no argument or submission was made on behalf of the applicant with
3 regard to the principles I have outlined above, notwithstanding my invitation at the
4 hearing to do so. In the circumstances I have had no alternative but to simply rely on the
5 specific terms of the Request. Such review, and particularly the terms to which I have
6 referred above, clearly demonstrate that the Request is part of a pre-trial discovery
7 exercise and an endeavour to ascertain whether there is in existence any evidence which
8 may be relevant available in the records of A Bank in Cayman. The Request is also
9 clearly lacking in the necessary specificity and does not accord with either Section 2(4)
10 (a) or (b) of the Order. Furthermore, no suggestion was made that the Request could
11 somehow be amended so as to comply with the statutory requirements although, even if
12 it had, I cannot see how any satisfactory amendment of this particular Request could be
13 made in any event.

14 16. In the circumstances and for the reasons set out above I refused the application.

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16 Dated this 14th day of May 2012

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20 The Honourable Mr. Justice Angus Foster
21 JUDGE OF THE GRAND COURT

