JONES v. FINANCIAL SERVICES COMMISSION

SUPREME COURT (Kneller, C.J.): October 10th, 1995

Financial Services—Financial Services Commission—disclosure of information—court ordering disclosure of information identifying individual without his consent to weigh potential harm to public interest from breach of confidentiality against detriment to applicant if access denied

Constitutional Law—fundamental rights and freedoms—extent of application—European Convention on Human Rights, art. 6 and Gibraltar Constitution, s.8 confer rights only on persons under actual authority of colony—no application in Gibraltar to defendant in foreign criminal proceedings

Injunctions—Anton Piller order—conditions of availability—inappropriate if no existing or intended proceedings against respondent and no risk of removal of documents sought

The plaintiff applied for an order that the defendant Commission produce to the court all files and documents in its possession relating to a person whose business affairs the Commission had investigated.

The plaintiff was charged with others in an English Crown Court, *inter alia*, with conspiracy to defraud two Gibraltar loan companies of a large sum of money. Her defence was that the companies were established for dishonest purposes and had in fact defrauded her and her co-accused of a substantial proportion of the intended loans. Her application to the Commission for disclosure of information which it had accumulated whilst investigating the owner of the two companies (who had not been charged in the English proceedings) was refused on the ground that the contents of the file were confidential and, under the Financial Services Ordinance, 1989, could not be disclosed. Neither the English police nor the Crown Prosecution Service intended to pursue this line of inquiry, and the trial judge in the Crown Court had ruled that he had no power to order them to do so. It transpired that the relevant companies were not in fact registered in Gibraltar.

The plaintiff submitted that (a) the court had power to direct that the Commission make disclosure of information in its possession for any reason, including those outlined in s.58(2)(a)–(d) of the Financial Services Ordinance and s.6(2)(c) of the Financial Services Commission Ordinance; (b) the Commission had wrongly refused to exercise its discretion to give disclosure, since under s.58(2)(b) it could properly assist her in the interests of the prevention or detection of crime by

bringing to light the unlawful activities of the person under investigation; (c) since, under s.58(2)(c), it was empowered to give disclosure in connection with the discharge of an international obligation to which Gibraltar was subject, the Commission could act in recognition of her right under the European Convention on Human Rights, art. 6(1) and (3)(*b*) to a fair hearing and adequate time and facilities to prepare her defence; (d) furthermore, under s.6(2)(c) of the Financial Services Commission Ordinance, the Commission had a duty to protect the public from financial loss arising from the dishonesty and malpractice of those engaged in the finance business in Gibraltar; (e) the material sought was so crucial to her defence and to her future liberty that the court must find the frustration of the administration of justice to be more damaging to the public interest than any risk to the security of the financial institutions of Gibraltar, which risk the Commission had failed to prove either by affidavit evidence or the production of a Minister's certificate; and (f) nor would the success of her application open the way to a large number of similar claims which might threaten financial security more seriously, since the circumstances of her case were clearly unusual.

The Commission submitted in reply that (a) the plaintiff had no grounds for requesting *Anton Piller* relief in the absence of an existing cause of action against it and when there was no doubt as to the security of the documents; (b) the Commission's obligation to disclose information under the Financial Services Ordinance, 1989, s.58(2)(e) in compliance with an order of the court was limited to the context of an action for negligence or breach of statutory duty against the Commission itself, and certainly did not apply when there was no cause of action in the Gibraltar courts at all; (c) nor was it justified in disclosing the information under any of the other provisions of s.58(2) of the Ordinance or under s.6(2)(c) of the Financial Services Commission Ordinance, since its duties under those provisions were to the public of Gibraltar and not to a foreign national engaged in a "fishing expedition" for material to use in proceedings outside the jurisdiction; (d) in particular, the court need only interpret those provisions in accordance with the rights of individuals under the European Convention on Human Rights if the complainant was under the actual authority of Gibraltar, which the plaintiff was not; and (e) moreover, an order for disclosure would harm the public interest by damaging potential investors' confidence in the confidentiality of information, which was essential to the success of an offshore financial centre such as Gibraltar.

Held, dismissing the application:

(1) Under the Financial Services Ordinance, 1989, s.58(2), the Commission was bound, except in certain circumstances, to refuse to disclose information without the consent of those who could be identified thereby. The discretion to pass on information, *inter alia*, in the interests of promoting criminal justice or complying with international obligations, lay with the Commission and it had chosen to decline to do so. However,

under s.58(2)(e), the Commission was obliged to comply with a direction of the court (which would balance the competing interests affected by disclosure) to disclose information (page 131, line 18 – page 132, line 22).

(2) In the present case, the public interest to be served by an order for disclosure did not outweigh the potential harm to the Colony's economic future, since the plaintiff already had information supporting her defence, and the Commission's failure to take any action against the person it had investigated or his companies suggested that any further information contained in its files would not assist the plaintiff greatly. Furthermore, it was open to the plaintiff to make a submission to the trial judge in England that the continuation of proceedings there would be an abuse of the court's process or that he should direct the jury on the matter at the proper time (page 134, lines 3–17).

(3) Moreover, although the court's interpretation of the Financial Services Ordinance, 1989, s.58(2) and the Financial Services Commission Ordinance, 1989, s.6(2)(c) would ordinarily have to take into account the rights accorded to individuals as treaty obligations under the European Convention on Human Rights, the plaintiff could not rely on her right to a fair and public hearing and adequate time and facilities for the preparation of her defence under arts. 6(1) and (3)(*b*), since she was not under the actual authority of Gibraltar but was rather a foreign national seeking assistance in proceedings outside the jurisdiction. For the same reason, the provisions of s.8 of the Gibraltar Constitution did not apply to her (page 132, line 23 – page 133, line 7).

(4) Since the Commission did not claim to be exempt from any obligation to disclose the documents on the basis of public interest immunity, it was unnecessary for it to produce a Minister's certificate. Nor did its submissions on the public interest need to be set out in affidavit form, since the status of Gibraltar as a financial centre dependent on the confidence of investors was a matter of which judicial notice would be taken (page 134, lines 18–21).

(5) The plaintiff's application for an *Anton Piller* injunction was inappropriate since there were no existing or intended proceedings between the parties and no danger of the disappearance of the relevant documents (page 134, lines 22–26).

Cases cited:

(1) *Air Canada* v. *Trade Secy. (No. 2)*, [1983] 1 All E.R. 910.
(2) *Anton Piller KG* v. *Manufacturing Processes Ltd.*, [1976] Ch. 55; [1976] 1 All E.R. 779.
(3) *Arche Treuhand A.G.* v. *Att.-Gen.*, 1995–96 Gib LR 18.
(4) *Birdi* v. *Home Secy.* (1975), 119 Sol. Jo. 322; *The Times*, February 11th, 1975.

(5) *Conway* v. *Rimmer,* [1968] A.C. 910; [1968] 1 All E.R. 874, *dicta* of Lord Reid applied.
(6) *Cyprus* v. *Turkey (Applications 6780/74 & 6950/75)* (1975), 2 D & R 125; 4 E.H.R.R. 482; 18 YB 82.
(7) *Hess* v. *United Kingdom (Application 6231/73)* (1975), 2 D & R 72; 18 YB 146.
(8) *Norwich Pharmacal Co.* v. *Customs & Excise Commrs*., [1974] A.C. 133; [1973] 2 All E.R. 943.
(9) *Ofner* v. *Austria (Application 524/59)* (1960), 3 YB 322.
(10) *R.* v. *Chief Immigration Officer, Heathrow Airport, ex p. Bibi*, [1976] 1 W.L.R. 979; (1976), 120 Sol. Jo. 405.
(11) *R.* v. *Principal Immigration Officer, ex p. Bold*, 1995–96 Gib LR 103.
(12) *X* v. A*ustria* (Application 2291/64) (1967), 24 Coll. 20.

Legislation construed:

Financial Services Commission Ordinance, 1989, s.6(2)(c): The relevant terms of this paragraph are set out at page 131, line 44 – page 132, line 3.

Financial Services Ordinance, 1989, s.58: The relevant terms of this section are set out at page 131, lines 20–24; lines 26–40.

Gibraltar Constitution Order 1969 (Unnumbered, S.I. 1969, p.3602), Annex 1, s.8(2)(*c*): The relevant terms of this paragraph are set out at page 133, line 4.

European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, November 4th, 1950; U.K. Treaty Series 71 (1953)), art. 6: The relevant terms of this article are set out at page 132, lines 35–36.

K. Azopardi for the plaintiff;
G. Licudi for the defendant.

KNELLER, C.J.: Has the Supreme Court of Gibraltar the power to give directions that the Financial Services Commission ("FSC"), by its proper and duly authorized officer, must give discovery of any file, correspondence, reports, notes or other documentary information in its possession to the plaintiff, Carol Jones, her solicitors and counsel? If so, should this court give such directions in the circumstances of this application? Mr. Azopardi for Miss Jones submits that the answer to each question is "Yes" and Mr. Licudi for the FSC urges the court to say "No" on each issue.

Miss Jones is English and is one of four defendants named in an indictment on which she is due to stand trial in the Teesside Crown Court at Middlesbrough on October 16th, 1995. There are six counts laid against her to which she has pleaded not guilty and the most serious one alleges that she conspired with others to obtain fraudulently over US$1m.

from Gibraltar Trust Ltd. ("GTL") and Mutual Security Guarantee Trust Gibraltar Ltd. ("MSGT"). A Mr. Geoffrey Dennis Lucraft of Line Wall Road, Gibraltar, and Marbella, Spain is the *alter ego* of those companies. Lucraft, GTL and MSGT have been investigated by the FSC, so it has a file on them and that is what her local lawyers want to examine, but on May 18th, 1995 the FSC refused them permission to do so because the contents of the file are confidential and subject to the provisions of the Financial Services Ordinance, 1989. It could have added the Financial Services Commission Ordinance, 1989.

The English police and Crown Prosecution Service have declined to ask the FSC for permission to study the file or to inquire as to the result of the FSC's investigation. Mr. Lucraft will not be called by the Crown or the defendants. The learned trial judge in the Crown Court at Middlesbrough has decided he has no power to order the police officer investigating the case there to look into the file and has indicated that this (and presumably the FSC's refusal to let Miss Jones's Gibraltar solicitors do so) might be grounds for a successful application to stay proceedings based on an abuse of process.

Miss Jones's English counsel, Mr. Richard Nayes, in his advice for her forthcoming trial at Middlesbrough, declared that Miss Jones's defence is that GTL, if it ever existed, was a dishonest organization which never had the means or intention of lending any moneys to her. Miss Jones and the other defendants had to pay a commitment fee of US$20,000 and 20% of the total amount which they wished to honour, which was US$2,342,000. Miss Jones's defence is that the fraud was by GTL upon her and the others. GTL would have received the commitment fee and 20% of the proposed loan which would never have been advanced by GTL. Miss Jones and her co-defendants have a great deal of information to support that defence. They want to see and copy the FSC's report on GTL and Lucraft. Mr. Nayes advised that it seemed to him to be of critical importance that Miss Jones, her solicitors and he, her counsel, obtain "information upon the probity and genuineness of GTL." He concluded that "there will be no difficulty in the extension of legal aid for his instructing solicitor to gain access to this report."

On September 27th, 1995, Companies House (Gibraltar) Ltd. faxed Miss Jones's Gibraltar solicitors with the bleak news that GTL was not registered there. Baulked by the FSC's refusal to let her local solicitors see the report, Miss Jones issued a writ of summons against FSC and applied by summons in chambers dated October 2nd, 1995 for simple discovery and, alternatively, *Anton Piller* relief (see *Anton Piller KG* v. *Manufacturing Processes Ltd.* (2)).

It will be noticed that Miss Jones asks for discovery as a plaintiff beyond this court's jurisdiction for the purpose of her defence in criminal proceedings also outside the jurisdiction. An order *subpoena duces tecum* for disclosure of documents before the commencement of proceedings in

actions and claims for personal injuries under O.24, r.7A or under O.38, rr. 13 and 19 is not available to her. Nor is there any help for her in the Evidence Ordinance. Relief other than simple discovery has been added by her, namely, for an *Anton Piller* order. The proceedings may be brought by writ: see O'Hare and Hill, *Civil Litigation*, 4th ed., at 348 (1986). It is a pre-action application, so a cause of action is unnecessary. And if there had been a failure to comply with the requirements of the Rules of the Supreme Court 1965, O.2 would be applied and directions for dealing with the proceedings given.

Miss Jones's summons was supported by the affidavit, dated October 2nd, 1995 of Kenneth Berry, her English solicitor's senior law clerk, who is authorized to make it on her behalf. He swears that all the matters deposed to in his affidavit are to his own knowledge true and, if not within his own knowledge, are true to the best of his own knowledge, information and belief. Throughout his affidavit he is careful to name the sources of his information and the grounds of his beliefs, so his affidavit is not flawed.

Under s.58(1) of the Financial Services Ordinance, 1989 ("the Ordinance")—

> "save as may be provided by any other Ordinance, any information from which an individual or body can be identified which is acquired by the [FSC] in the course of carrying out its functions shall be regarded as confidential by the [FSC] and by its members, officers and servants."

The report and other documents in the MSGT, GTL and/or Lucraft files would, I am sure, lead to their identification. By s.58(2)—

> "save as may be provided by any other Ordinance, no such information . . . shall be disclosed, without the consent of every individual who, and every body which, can be identified from that information, except to the extent that its disclosure appears to the [FSC] to be necessary—
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> (a) to enable the [FSC] to carry out any of its statutory functions; or
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> (b) in the interests of the prevention or detection of crime; or
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> (c) in connection with the discharge of any international obligation to which Gibraltar is subject; or
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> (d) to assist, in the interests of the public, any authority which appears to the [FSC] to exercise in a place outside Gibraltar functions corresponding to those of the [FSC]; or
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> (e) to comply with the directions of the Supreme Court . . . ."

This is similar to the terms of s.14 of the Companies (Taxation and Concessions) Ordinance.

Under s.6(2)(c) of the Financial Services Commission Ordinance, 1989 the FSC is also charged with the duty of seeking, "through the provision of effective services for the supervision of finance business to protect the

public against financial loss arising out of dishonesty, incompetence or malpractice on the part of persons engaged in finance business in Gibraltar." The FSC, by refusing discovery to Miss Jones's Gibraltar solicitors, clearly considers it unnecessary to do so under s.58 of the Financial Services Ordinance or s.6(2)(c) of the Financial Services Commission Ordinance and, by its counsel, respectfully submits that this court cannot make it give discovery or make an *Anton Piller* order, especially in favour of a foreigner fishing for material for her defence in a forthcoming trial in a different jurisdiction. It limits the necessity to comply with the directions of the Supreme Court to directions for, say, discovery or interrogatories in a civil action against it for breach of duty or negligence.

I do not accept that narrow construction of s.58(2)(e) of the Ordinance. If that were correct it would have been easy to make it plain. It could even have been set out in a preclusive clause (see, *e.g. R.* v. *Principal Immigration Officer, ex p. Bold* (11)). I hold that in a proper case the Supreme Court has jurisdiction to direct the FSC to give discovery. There is no need, therefore, to decide whether this court has an inherent jurisdiction to order the FSC to give discovery or an extension of the principles in *Norwich Pharmacal Co.* v. *Customs & Excise Commrs.* (8) and, in any event, there is no evidence that the FSC has committed or been involved innocently or otherwise in any wrongful act or acts.

The Convention on Mutual Assistance in Criminal Matters 1956 does not apply to Gibraltar (see *Arche Treuhand A.G.* v. *Att.-Gen.* (3)). The Convention for the Protection of Human Rights and Fundamental Freedoms of November 4th, 1950 was ratified by the United Kingdom in 1951 and extended to dependent territories including Gibraltar. Obligations accepted under it are treaty obligations, so legislation is required for them to become a part of domestic law. The Convention does not have the force of an Ordinance here but it must be taken into account when interpreting an Ordinance and rules made under it (see *Birdi* v. *Home Secy.* (4) (119 Sol. Jo. at 322, *per* Lord Denning, M.R.) and *R.* v. *Chief Immigration Officer, ex p. Bibi* (10)). Articles 6(1) and (3)(*b*) declare that everyone charged with a criminal offence has the minimum right to have "a fair and public hearing within a reasonable time" and "adequate time and facilities for the preparation of his defence." Restrictions placed on the defendant's right to examine documents may be a violation of this right (see *Ofner* v. *Austria* (9) and *X* v. *Austria* (12)). This right, like all the rights and freedoms in the Convention, is to be accorded to all persons under the actual authority of a state, whether exercised within its own territory or abroad (see *Cyprus* v. *Turkey* (6) and *Hess* v. *United Kingdom* (7)).

Miss Jones is not under the actual authority and responsibility of the City of Gibraltar either here or abroad. The FSC is not asking for the right to have adequate facilities to prepare its defence. Hess failed in his

application to the European Court of Human Rights because he and the administration of Spandau Prison in Berlin were not within the jurisdiction of the United Kingdom. Miss Jones would have the same right to "adequate time and facilities for the preparation of [her] defence" under s.8(2)(*c*) of the Gibraltar Constitution if she were charged with a criminal offence within the jurisdiction. She does not have it if she is without the jurisdiction and charged with a criminal offence abroad.

The FSC claims that in this case it is in the public interest that Miss Jones's application should fail, and she and her counsel here submit that it is in the public interest that it should succeed. There is a balancing exercise for the court to undertake. Lord Reid in *Conway* v. *Rimmer* (5) said ([1968] A.C. at 910):

> "It is universally recognised that there are two kinds of public interest which may clash. There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done."

This was cited with approval in *Air Canada* v. *Trade Secy. (No. 2)* (1) ([1983] 1 All E.R. at 914). Miss Jones's counsel submits that the administration of justice here in Gibraltar and in Middlesbrough, England will be frustrated if discovery is not given. She may be convicted and sentenced to a long term of imprisonment if the report and other relevant documents are not produced at the trial or used by counsel to cross-examine prosecution witnesses. This would be a travesty of justice. Disclosure will not affect detrimentally the security of Gibraltar or its public policy.

Counsel for the FSC acknowledges that it will probably not affect the City's security but claims it will affect its economic future which could amount to the same thing. The Commission is bound by the Ordinance and the Financial Services Commission Ordinance to preserve confidentiality. This attracts people with money to spare and serves the growth of Gibraltar as an attractive offshore financial centre in competition with Bermuda, the Cayman Islands, Guernsey, Jersey and so on. The people and the money will go elsewhere if this confidentiality is breached and then Gibraltar's economic future is bleak. Furthermore, he argues, granting Miss Jones's application for discovery will lead to a flood of similar applications. The FSC's sources of information will dry up and its regulatory work will be made impossible.

Miss Jones's counsel dismisses the "open floodgates" point. He asks how many foreign defendants in a criminal trial will ask for discovery to facilitate their defence? And how would it affect the ease with which the FSC collects information? When it has powers to do so, surely the FSC should give discovery in its quest "to seek through the provision of effective services for the supervision of finance business to protect the public against financial loss arising out of dishonesty, incompetence or

malpractice on the part of persons engaged in finance business in Gibraltar"?

It seems that the FSC has not taken any action against Lucraft, GTL or MSGT in any jurisdiction. That might be an indication that the report and file documents will be of little or no help to Miss Jones's defence. The material for her defence, namely that GTL does not exist and never had the means or the intention of lending the money, is already available to her from Mr. Berry's investigations and sources. Likewise, the defence that Miss Jones and her co-defendants were likely to be defrauded because they were supposed to pay US$20,000 and 20% of a loan which could not be made. Discovery would, in my view, be unlikely to assist Miss Jones further. If that is wrong, her counsel in England may persuade the learned trial judge that it would be an abuse of process to let the trial proceed or add it to his address to the jury if the trial reaches that stage. On the other hand, confidentiality is enjoined on the FSC by the laws here and so it is a matter of public policy. I find that, in this case, harm would be done to the public service by disclosure of these documents.

The FSC does not claim Crown privilege, so a minister's certificate is not appropriate. The submissions on public interest were matters of which judicial notice could be and were taken so there was no call for them to be set out in an affidavit.

The application for *Anton Piller* relief is inappropriate. There is no evidence that an order is necessary for the security of the report and files of documents in an action between Miss Jones and the FSC. It cannot be granted to one party for proceedings in another jurisdiction against a non-party to those proceedings.

The upshot is that in the discretion vested in this court, I reject Miss Jones's application.

Application dismissed.