IN THE MATTER OF ZAKAY

SUPREME COURT (Schofield, C.J.): April 30th, 1996

Evidence—assistance to foreign court—examination of documents and witnesses—test of relevance—where relevance of requested evidence to foreign proceedings disputed, court to be satisfied that prima facie case of relevance, safeguarding third party rights

Evidence—assistance to foreign court—examination of documents and witnesses—confidentiality—importance of confidentiality to Gibraltar financial industry to be balanced against public interest in assisting foreign court—may restrict disclosure of documents to legal advisers to protect third parties' right of confidentiality

The English High Court submitted a letter of request to the Supreme Court seeking the examination of a witness and the disclosure of certain documents in connection with a financial provision in divorce proceedings.

The petitioner, in support of the application for financial provision in English divorce proceedings, alleged that her husband, the respondent, had an interest in a company the assets of which were administered by a Gibraltar trust company of which the applicant was a director. She accordingly sought evidence of this interest and on the basis of evidence provided to it, the High Court issued a letter of request to the Supreme Court of Gibraltar seeking the examination of the applicant as a witness and the disclosure of certain information to which he allegedly had access, to reveal the beneficial ownership of that company's shares. The Supreme Court (Pizzarello, A.J.) made an order granting the request.

The applicant then made the present application to set aside that order, submitting that (a) the information sought regarding the ownership of the shares was not relevant to the English proceedings since the petitioner had no interest under the trust fund by which those assets were administered and the court should not therefore order disclosure of any information concerning the trust fund; (b) in any case, the request was improper since it clearly amounted to a "fishing expedition," the petitioner's legal advisers being unable to describe precisely which documents they required or of what information they sought proof; and (c) to grant the request would be contrary to public policy since it was in the interest of Gibraltar as a financial centre that the confidentiality of financial relationships should not be breached and in the present case, acceding to the request would compromise the confidentiality of a number of third parties.

The petitioner gave an undertaking that any information provided under the letter of request alleged by the applicant to relate to the confidentiality of third parties would be seen only by her legal practitioners (with liberty to apply for the restriction to be lifted or varied) and submitted in reply that (a) since the relevance of the information sought was in issue, it was the duty of the court to examine the evidence itself to determine whether it was *prima facie* relevant to the English proceedings, which in the present case it clearly was; (b) the request was no "fishing expedition" since it amounted to a specific question, namely, whether the respondent had an interest in the trust and on the basis of the evidence available at present, that information could be provided by the applicant and was contained in the documents at his disposal; and (c) it was in the public interest that the court should provide information in aid of foreign courts whenever possible, despite the general desirability of protecting the confidentiality of investors in Gibraltar institutions.

Held, refusing the application:

(1) Although it could be assumed that the requesting court would only ask for evidence relating to civil proceedings in its jurisdiction, in the face of an assertion that it was not in fact relevant and should not therefore be disclosed, the Gibraltar court would consider the evidence itself to determine whether a *prima facie* case of relevance had been made out, taking great care to protect the rights of third parties. In the present matter, a *prima facie* case had indeed been made out that the respondent had an interest in the assets held by the Gibraltar trust; and this question was clearly relevant to the English proceedings (page 288, line 26 – page 289, line 40).

(2) Furthermore, it could not be said that the request amounted to a "fishing expedition," since the evidence sought was narrowly confined to the single issue it was aimed to support, and the relevant documents were likely to be in the possession of the applicant and were readily identifiable, although the petitioner could not be expected to know the specific identity of individual documents (page 290, lines 5–33).

(3) Nor could acceding to the request be said to be contrary to public policy on the ground of breaching confidentiality. Although the confidentiality of fiduciary relationships was clearly of great importance to a financial centre such as Gibraltar, this had to be balanced against the public interest in ensuring that matters in dispute were investigated fully, if necessary by assisting a foreign court to obtain evidence. In the present case, the applicant's concerns could adequately be met by limiting the disclosure of any of the relevant documents alleged by the applicant to contain information compromising the confidentiality of third parties to the petitioner's legal advisers, with liberty to apply for this limitation to be lifted or varied. The order for disclosure would therefore stand, subject to an amendment to that effect (page 291, line 14 – page 292, line 26).

Cases cited:

(1) *B* v. *B (Matrimonial Proceedings: Discovery)*, [1978] Fam. 181; [1979] 1 All E.R. 801, *dictum* of Dunn, J. considered.

(2) *Norway (State) Application (No. 1), In re*, [1990] 1 A.C. 723; [1989] 1 All E.R. 745, *dictum* of Lord Goff of Chievely considered.

(3) *Panayiotou* v. *Sony Music Entertainment (UK) Ltd*., [1994] Ch. 142; [1994] 1 All E.R. 755.

(4) *Wadman* v. *Dick*, 1993 JLR 52, *dicta* of Frossard, J.A. applied.

Legislation construed:

Evidence Ordinance (1984 Edition), s.9: The relevant terms of this section are set out at page 288, lines 12–23.

H. Licudi for the applicant;
N. Mostyn and *J.J. Neish* for the petitioner.

SCHOFIELD, C.J.: I have adjourned delivery of this judgment into open court. On August 17th, 1995, a letter of request was issued by the Senior District Judge of the Family Division sitting at Somerset House in the Strand, London, requesting the assistance of this court in the matter of Sarah Ruth Zakay v. Saul Zakay which is pending in that Registry. Mrs. Zakay ("the petitioner") claims against her husband ("the respondent") a decree of divorce, an order for maintenance pending suit, an order for periodical payments and secured periodical payments for herself, a lump sum payment for herself and the child of the family and a property adjustment order. The English court has sought an order, *inter alia*, that Mr. Robert Guest of Credit Suisse Fides Trust Ltd., a trust company registered in Gibraltar, be examined and be asked the following question: "What person, persons, company or other entity is the true beneficial owner of Topland Group PLC?" The second part of the request, so far as the applicant is concerned, requires him to produce all documentation and correspondence within his custody, possession or power touching, demonstrating or otherwise evidencing the true beneficial ownership of Topland Group PLC (to which I shall refer as "Topland").

On December 20th, 1995, Pizzarello, A.J. made the orders sought and Mr. Guest ("the applicant") now comes before me on his application to set aside the orders so far as they relate to him. The applicant has sworn two affidavits. In the first, he says that he is a director of Credit Suisse Fides Trust Ltd. ("the company"), which provides, *inter alia*, trustee services and in such capacity it may hold assets either directly or indirectly under the terms of settlements, including discretionary settlements, established under Gibraltar law. The company holds certain shares in Topland and to the best of his knowledge, information and belief, Topland owns the totality of shares in various subsidiary companies and has the majority ownership of two companies by the name of Silversome Holdings Ltd. and Riverland Holdings Ltd. He goes on to say:

"I confirm that the Topland shares in the name of the company are held by it under trusts in which Mr. Saul Zakay does not have any beneficial interest whatsoever. Accordingly, Mr. Saul Zakay has no entitlement to any income or capital, nor does he have any contingent, present or future interest in the Topland shares or in any of the various subsidiary shareholdings held through the Topland shares.

In the circumstances it would appear that the beneficial ownership of the Topland shares is not material to the proceedings before the Family Division of the High Court of England and Wales between Sarah Ruth Zakay and Saul Zakay."

Mr. Neish, acting for the petitioner, responded to that affidavit by producing a number of documents to support the request and by pointing out that although the respondent may not be a direct beneficiary under the trusts under which the Topland shares are held, that does not mean the respondent does not have an interest in the trusts through a nominee beneficiary, some other vehicle or perhaps through an informal arrangement with a third party. The applicant's second affidavit is to the effect that the company, as trustee, owes its duty primarily to the beneficiaries and so must be aware of the identity of any person or entity that may have a direct or indirect interest in the trust. He confirms that the respondent has no beneficial interest whatsoever, direct or otherwise, under the trust in the settlement which holds the Topland shares.

There have been a number of interlocutory applications in this case before the English Family Division. On February 6th, 1996, Mr. D.R.L. Bodey, Q.C., sitting as a Deputy High Court Judge, dealt with six applications in this matter and made directions on a pre-trial review. Although the present application was not among those dealt with by Mr. Bodey, he did deal with applications in respect of the provision of further and better replies to a questionnaire of the petitioner and in consideration of those summonses provided a useful summary of matters which are relevant to the application before me, particularly with reference to the respondent's interest in Topland's shares.

The marriage of the parties lasted just over one year and a child was born of the union. The petitioner looks after the child and does not work. She receives £7,800 per annum maintenance from the respondent for herself and the child. Because, no doubt, of the short length of the marriage, her claims are relatively modest, for maintenance and a small home which she values at about £150,000.

The husband claims he does not have the financial resources to meet his wife's claims, putting his net assets at £28,000 and his income at £50,000 per annum, which includes £30,000 per annum as director of Topland. He puts his outgoings as exceeding his income. I think to complete the background I can do no better than recite this passage from the judgment of Mr. Bodey, Q.C. of February 6th, 1996:

"Underlying this superficial summary lies a complex ancillary relief case involving numerous companies; foreign trusts, encompassing much dispute as to their beneficial interests; quite complex business affairs; and gross figures running into many millions. There are reciprocal allegations of deceit and non-disclosure; for not only does the wife say that the husband is wilfully suppressing his real assets and is really worth many millions of pounds, but also the husband says that she has undisclosed moneys, held for her by nominees, in England and Israel. For example, he asserts that she told him during the marriage that she had about £150,000 held for her in Israel. It is a case which has already generated about l5 lever-arch files of court bundles, together with copious acrimony, bitterness and mistrust between the parties themselves.

In more detail, the core question amongst many others concerning the husband's alleged business/commercial affairs, is whether he is beneficially interested in any way in Topland Group PLC, a valuable group of companies of which, as is common ground, the husband and his brother Eddie are the only two directors. He says, not at all, whereas the wife says he is so beneficially interested. She invites the court to draw what she says are irresistible inferences to that effect. If the husband is beneficially interested in Topland through the relevant trust, to which I refer below, then, says the wife, depending upon the other beneficial interests, he is a man of considerable wealth, the net asset value of Topland being approximately £14m., as per its balance sheet at March 31st, 1994. . . . Its total turnover for the year was £2,884,000 and its profit on ordinary activities after taxation £855,500. . . . Retained profit for the year was £633,000."

It will be seen that Mr. Bodey puts as "the core question" whether the respondent is beneficially interested in any way in Topland. It is against that background that we must consider this application.

Mr. Licudi, for the applicant, founds his application on three grounds. First, he says, having regard to the applicant's affidavits, the information sought is not sufficiently relevant to the English proceedings to give this court jurisdiction. Secondly, the documents requested are not sufficiently particularized. Thirdly, the court ought to exercise its discretion to refuse the application on grounds of confidentiality and the public interest. Mr. Licudi acknowledges that, where possible, the Supreme Court of Gibraltar ought to give assistance to a foreign court in the manner requested by the Family Division of the High Court in this case. He acknowledges the general principle as set out in 1 *The Supreme Court Practice 1995*, para. 70/1-6/2, at 1211 and the cases quoted therein:

"The general principle which is followed in England in relation to a request from a foreign Court for assistance in obtaining evidence for the purpose of proceedings in that Court is that the English Court

will ordinarily give effect to such a request so far as is proper and practicable and to the extent that is permissible under English law."

None the less, says Mr. Licudi, for the three reasons given above, I ought to set aside the order of Pizzarello, A.J. so far as it relates to his client. Let me deal with his three grounds in turn.

Relevance

I do not think there is any doubt that a request will only be granted in respect of evidence which is relevant to the proceedings in which it is sought to be tendered. Section 9 of the Evidence Ordinance reads:

"Where an application is made to the court for an order for evidence to be obtained in Gibraltar and the court is satisfied—

(*a*) that the application is made in pursuance of a request issued by or on behalf of a court or tribunal ('the requesting court') exercising jurisdiction in a country or territory outside Gibraltar; and

(*b*) that the evidence to which the application relates is to be obtained for the purposes of civil proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated,

the court shall have the powers conferred on it by the following provisions of this Ordinance."

In its reference to "evidence for the purposes of civil proceedings," the section obviously means evidence relevant to the issues in civil proceedings. I think the court can assume that a requesting court will only ask for relevant evidence. But what is the court to do in the face of an assertion, as in this case, that the evidence is not relevant to the issues in the proceedings of the requesting court? Here we have a situation in which this court should only order an examination if the evidence of the witness and the production of documents by him can be shown to be relevant, whereas we will only know the relevance of the evidence and the documents once the examination and production has taken place. Mr. Bodey, Q.C. in the English proceedings had to wrestle with a similar problem when considering the respondent's application to vary an order requiring the respondent to give further and better replies to the petitioner's questionnaire on discovery. He was specifically dealing with the question of beneficial ownership of the Topland shares. He concluded:

"In the circumstances, I agree with Mr. Mostyn's submission that the court's approach should be to look to see whether a *prima facie* case has been made out that the respondent is or may very well be beneficially entitled in the relevant entity. Realistically, I can see no other way in which justice could be achieved between the parties before the court, although obviously in such circumstances great care would have to be used to ensure that the rights of third parties were

not adversely affected, or only as little as possible, consistently with getting the necessary documents before the court."

That seems to be the only practical course this court can take. We must look at all the available evidence and, taking great care to ensure that the rights of third parties are so far as possible protected, determine whether a *prima facie* case has been made out as to the relevance of the evidence and documents sought.

I do not think I need recite the evidence here. It is adequately summarized in Mr. Bodey's judgment, in which he concluded that the petitioner had made out a *prima facie* case that the respondent has a beneficial interest in the shares of Topland. It is true that he did not have before him the two affidavits of the applicant which he deposed for the purposes of these proceedings. But he did have a letter from the company, dated April 21st, 1995, stating that the respondent has no beneficial interest in the trust run or managed by the company. Rather oddly, the letter ended with the statement that the respondent is "not in any way the driving force behind Credit Suisse Fides Trust Ltd."

There is sufficient on record to demonstrate that the respondent is not assisting the court to ascertain the extent of his assets. He and his brother are the only directors of Topland. His main declared salary is from that directorship. It is a company with tangible fixed assets of a net book value of almost £50m. on March 31st, 1994. All but one of the shares were owned by a Jersey trust called the EHS Trust until they were transferred to the company. The initials "EHS" are those of the respondent and his two brothers, Eddie and Hezi. The respondent and his brother Eddie each owned 50% of the shares in a group of companies called "the Westmount Group." In March 1993, the two brothers transferred their holdings in the Westmount Group by way of gift to Topland. Although the respondent maintains that the Westmount Group was insolvent, there is evidence to show that at March 31st, 1993, its net assets were £642,516. There is evidence of other transactions which demonstrate, to use Mr. Mostyn's phrase, that the boundaries of ownership between members of the respondent's family are illusory.

In my judgment, the applicant's affidavits do not deal with the evidence which leads to the court's real fears that the respondent has an interest in the trust assets through a nominee or some other vehicle or through some understanding with a family member. It is very relevant to the English proceedings whether the respondent is beneficially entitled to the Topland shares and, in all the circumstances, it is impossible to do justice in this case without ascertaining who beneficially owns Topland.

The documents are not sufficiently particularized

The order of Pizzarello, A.J. requires production of all documentation and correspondence within the applicant's custody, possession or power touching, demonstrating or otherwise evidencing the true beneficial

ownership of the said company. Mr. Licudi argues that this is in the nature of an order for general discovery and does not particularize the documents sufficiently; the petitioner is embarked on a "fishing expedition." He points to s.10(4) of the Evidence Ordinance, which reads:

"An order under this section shall not require a person—

(*a*) to state what documents relevant to the proceedings to which the application for the order relates are or have been in his possession, custody or power; or

(*b*) to produce any documents other than particular documents specified in the order as being documents appearing to the court to be, or to be likely to be, in his possession, custody or power."

The test of particularity is not significantly different from the test applicable to domestic subpoenas to produce documents (see *Panayiotou* v. *Sony Music Ltd.* (3)).

Mr. Mostyn has argued that it is inapt to describe a request in a letter rogatory for a compendiously described class of documents as a "fishing expedition." He has cited authority for the proposition that the family courts are more relaxed in their approach to the test of particularity and that "the wife is entitled to go 'fishing' in the Family Division within the limits of the law and practice" (see *B* v. *B* (1) ([1978] Fam. at 191, *per* Dunn, J.)). However, in the light of the specific wording of s.10(4) of the Evidence Ordinance, I am uncertain whether these courts should, on a letter of request, order a "fishing expedition" even in a family matter.

Be that as it may, the documents requested for production in this case are narrowly confined to the single issue they are aimed to support. The documents are more than likely in the possession of the applicant and are readily identifiable. Of course, it is impossible for the petitioner to know the specific identity of individual documents. But the applicant is being asked a specific question and is being asked to produce the documents to prove his answers. That is not a fishing expedition in the sense of casting a line in the hope that something will be caught: the fish has been identified and the court is endeavouring to spear it.

Public policy

The last argument against allowing Pizzarello, A.J.'s order to stand is that in exercising its discretion to allow examination of witnesses on the request of a foreign court, our courts ought to be extremely cautious to protect the rights of third parties to their confidentiality. This is so, argues the applicant, particularly when one considers Gibraltar's position as a financial centre where certain confidential relationships are protected by statute. The petitioner has said that in order to protect third parties, she is prepared to submit to an order similar to that made by Mr. Bodey in the English discovery proceedings that if the applicant asserts by letter that a document is confidential to a third party and requests limitation of

disclosure to only the petitioner's lawyers, then disclosure should be so limited in the first instance but with liberty to the petitioner to apply to the court for the limitation to be lifted or varied.

I must say I am not particularly impressed with the applicant's response to this—that although he has no doubt that the petitioner's lawyers will not reveal anything to their client which is produced under a limitation as suggested, nevertheless they are bound to take any knowledge so gained with them and such knowledge may unconsciously run into any future proceedings in the case. His counter-suggestion that the production can be made to the court is unrealistic. No doubt names will be revealed and most probably those names will mean nothing to the court, whereas they may have great significance to the lawyers familiar with the case and having had their client's instructions.

Public policy demands that this court should in proper cases give effect to requests from foreign courts. I have been referred by Mr. Mostyn to a decision of the Court of Appeal of Jersey, a jurisdiction in which similar considerations of confidentiality arise in the context of its position as a financial centre. A similar argument was made in the case of *Wadman* v. *Dick* (4). In delivering the judgment of the court, Frossard, J.A. quoted the following passage from the opinion of Lord Goff of Chieveley in *In re State of Norway's Application (No. 1)* (2) ([1990] l A.C. at 810):

> "It is accepted on both sides that the question of confidentiality can only be answered by the court undertaking a balancing exercise, weighing on the one hand the public interest in preserving the confidentiality owed by the witness as bankers to their customers, and on the other hand the public interest in the English courts assisting the Norwegian court in obtaining evidence in this country."

Frossard, J.A. went on (1993 JLR at 76–77):

> "We make two observations about this balancing exercise before considering its application in this case. First, every claim to confidentiality to exclude evidence which would or might be relevant is an attempt to limit the court's ability to get as nearly as possible to the truth. One factor to be weighed in the balance, therefore, is the public interest in the power of the courts to investigate fully matters brought before them. The court carrying out the balancing exercise must bear in mind the possibility that respect for a witness's duty of confidentiality may result in disabling the court from protecting the rights of other parties. We do not believe that the English courts meant to exclude so important and so obvious a factor. It was presumably because of the peculiar features of the *State of Norway* case that the judges whose words we have quoted did not mention it expressly.
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> Secondly, it is important to appreciate the part played by public policy in the exercise. It has been submitted to us that we ought to pay particular regard to confidentiality between banker and

> customer because of the great importance to Jersey of its role as an offshore finance centre. In our view, this is not the right approach. The public significance and benefit of the finance industry depend upon considerations (economic, social and even moral) lying right outside the province of a court of law. The basis of the protection of confidentiality between banker and customer is not the public benefit of banking in this sense. It is the law's recognition that the relation between banker and customer is important for the persons involved on both sides, whose purpose cannot be achieved without confidential communication between them. It is the individual relationship, in which trust is reposed by the one party in the other, which is material. The argument before us transcends that relationship and seeks to import a generalized statement about public policy. The former, not the latter, is the court's concern."

With respect, I entirely agree with that passage. In my judgment, the applicant's concerns regarding the confidentiality of third parties will be met by an amendment to the order of Pizzarello, A.J. in the terms suggested by the petitioner.

The upshot is that I refuse the application to set aside the order of Pizzarello, A.J. of December 20th, 1995. I vary the order by inserting the following provision:

> "If Mr. Robert Guest asserts in writing that a document is confidential to a third party and requests limitation of disclosure to the petitioner's legal advisers then disclosure shall be so limited in the first instance but with liberty to the petitioner to apply to the court for this limitation to be lifted or varied."

This application was vigorously argued and has been varied only in a manner which was conceded by the petitioner's counsel. That concession was not accepted by the applicant. The petitioner will have her costs of the application.

Application refused.