**[1999–00 Gib LR 53]**

# TOMBACK (as Receiver of INTERCAP FOREX BROKERAGE INCORPORATED), INTER-CAPITAL BROKERAGE USA INCORPORATED and TOMBACK (as Receiver of the assets of SCHINDLER) v. INTERCAP FOREX BROKERAGE INCORPORATED and FIVE OTHERS

SUPREME COURT (Schofield, C.J.): February 19th, 1999

*Civil Procedure—discovery—use of information obtained—financial information disclosed by bank for purpose of fraud action not normally to be used to found claim for knowing assistance against bank itself—no release from undertaking not to use information in other proceedings unless unjust to deprive plaintiff of remedy against bank*

The plaintiffs applied for discovery of financial information by the sixth defendant bank.

The plaintiffs brought proceedings against the first to fifth defendants for fraudulent activities in relation to investment services. In aid of their tracing claim they obtained an order for discovery of documents against the defendants' bank. As a condition of that order they undertook not to use any information obtained other than for the purpose of the proceedings before the court or in support of such applications to foreign courts as the Supreme Court specifically authorized.

The plaintiffs now applied to be released from the undertaking to allow them to use the information for the purpose of bringing a further claim against the bank itself for knowing assistance in breach of trust.

**Held,** dismissing the application:

In the absence of exceptional circumstances in which it would be unfair to deny the plaintiff a remedy against the bank, the court would not release the plaintiffs from their undertaking. Since they wished to allege against the bank a new cause of action entirely different to those alleged against the other defendants, it would not be in the interests of justice to accede to the application. Furthermore, it was against public policy to permit financial institutions to be exposed to civil actions for complying with orders for discovery in existing proceedings, as this would encourage them to be selective in their future compliance (paras. 11–14).

**Cases cited:**

(1) *Crest Homes PLC* v. *Marks*, [1987] A.C. 829; [1987] 2 All E.R. 1074, applied.

(2) *Home Office* v. *Harman*, [1983] 1 A.C. 280; [1982] 1 All E.R. 532, applied.

(3) *Riddick* v. *Thames Board Mills Ltd.*, [1977] Q.B. 881; [1977] 3 All E.R. 677, *dicta* of Lord Denning, M.R. applied.

(4) *Sybron Corp.* v. *Barclays Bank PLC*, [1985] Ch. 299; (1984), 128 Sol. Jo. 799, distinguished.

*D. Whitmore* for the plaintiffs;
*A.E. Dudley* for the sixth defendant.

1 **SCHOFIELD, C.J.:** There are various applications by and against the sixth defendant in this action, Jyske Bank (Gibraltar) Ltd. ("Jyske Bank"), but the result in all of them rests upon my decision on the plaintiffs' application that they be released from an undertaking given by them in an order of this court of March 26th, 1998. The order, made by consent of the plaintiffs and Jyske Bank, related to discovery of documents in the possession of the bank. The undertaking was as follows:

> ". . . [T]hat the plaintiffs without the leave of the court, [are] not to use any information obtained as a result of this order other than—
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> (a) for the purposes of these proceedings; or
>
> (b) in support of such application to courts of other jurisdictions as they are advised are proper."

The plaintiffs now seek leave to use material disclosed as a result of the order for discovery to found a claim, which was not part of the original claim, against Jyske Bank for knowing assistance in breach of trust and breach of fiduciary duty.

2 It is common ground between the parties that the use now sought to be made of the information obtained on discovery is not for the purpose of the proceedings as they were framed at the time the order for discovery was made, and therefore leave is required to make use of the information for that purpose. It is also common ground that without such material being available to them the plaintiffs cannot mount their claim against Jyske Bank.

3 In very brief terms, the claim, as presently framed, is this: A man called Christian Schindler, who has in the past been imprisoned for fraud, set up the second plaintiff, Inter-Capital Brokerage USA Inc. ("ICBU"), and the first defendant, Intercap Forex Brokerage Inc. ("ICFB"), amongst other entities in the United States, and engaged them in advising investors for profit and in trading in various commodities. Mr. Schindler decamped with the moneys he had received from investors, has only recently been traced to Latin America, and is now in the hands of the US Federal law enforcement authorities.

4 One of the regulating authorities which supervised the business of ICBU and ICFB in the United States was the Securities & Exchange Commission, which commenced an action in the US District Court for the Southern District of New York. In that action, Andrew Ernest Tomback, the first plaintiff, was appointed a receiver of ICFB and also a receiver of the assets of Christian Schindler.

5 The fifth defendant, Sergio Cardona Krumholz, is believed to be resident in the Malaga area of Spain. He is alleged by the plaintiffs to be an associate of Mr. Schindler and as such he set up two companies in Gibraltar, Iberconsult Asesores Ltd. ("IAL") and Forex Trading Ltd. ("FTL"), the fourth and fifth defendants, as a means of furthering the fraudulent scheme outlined above. Mr. Krumholz caused the share capital of IAL to be held by the nominees under the control of Jyske Bank. Both IAL and FTL are alleged to be participants in the fraudulent enterprise.

6 Jyske Bank provided banking services to Mr. Schindler, ICFB and FTL and so, as part of a tracing exercise, was brought into these proceedings as a result of which the order for discovery of March 26th, 1998 was obtained.

7 The plaintiffs now say that documents have been disclosed which show that Jyske Bank failed to make of or in relation to Mr. Schindler the enquiries which an honest and reasonable banker ought to have made, and wish to expand their claim to include a claim against Jyske Bank for knowingly assisting in the breaches of trust and fiduciary duty of the other five defendants.

8 I have been referred to a number of cases in which a plaintiff has been released from an undertaking, express or implied, such as that given by

the plaintiffs in this case. No authority directly on point was cited to the effect that a bank, having given discovery in an action to which it was only made a party for tracing purposes, had thereby opened itself to a substantive claim as constructive trustee.

9 The nearest case cited to the present one was *Sybron Corp.* v. *Barclays Bank PLC* (4) where the facts were these: An action was commenced in 1974 against various companies and individuals in respect of a fraudulent conspiracy organized by senior employees of the plaintiffs whereby they set up a rival trading organization whilst still in the plaintiffs' employment. They allegedly made use of the plaintiffs' trade secrets and confidential information and diverted customers and business from the plaintiffs to the defendant companies. In that action the plaintiffs had obtained an order under the Bankers' Books Evidence Act 1879, pursuant to which a bank employee attended court and produced certain bank documents related to the bank accounts operated by the bank on behalf of the defendant companies. Some of those documents were referred to and read from by the trial judge in giving judgment against the defendants.

10 In reliance upon those documents, the plaintiffs commenced an action against the bank, alleging that the bank, in agreeing to provide banking services for the defendant companies, had become a party to the dishonest and fraudulent conspiracy. Those documents and further documents were disclosed by the bank in the second action. After inspection of the documents the plaintiffs decided that it was necessary or desirable to add another nine of their associated companies as plaintiffs and add certain of the bank's employees as defendants. In view of possible limitation difficulties, it was decided to commence a third action and leave was sought to use the material disclosed by the bank in the second action for the purposes of this new action. It was held that such leave was necessary and that it should be given. However, as I read the decision, it was made on the basis that the cause of action in the third action was the same as in the second action.

11 I cannot accept Mr. Whitmore's suggestion that the facts in *Sybron Corp.* were the same as in the instant case, for we are here dealing with an application to use material to found a claim of an entirely different nature to the existing claims in the action. The cause of action sought to be introduced is not the same as against the other five defendants. As was stated by Lord Oliver of Aylmerton in the House of Lords decision in *Crest Homes PLC* v. *Marks* (1) ([1987] 1 A.C. at 860):

> "Your Lordships have been referred to a number of reported cases in which application has been made for the use of documents obtained under *Anton Piller* orders or on general discovery for the purpose of proceedings other than those in which the order was made.

> Examples were *Halcon International Inc. v. Shell Transport and Trading Co.* . . . and *Sybron Corporation v. Barclays Bank Plc.* . . . I do not, for my part, think that it would be helpful to review these authorities for they are no more than examples and they illustrate no general principle beyond this, that the court will not release or modify the implied undertaking given on discovery save in special circumstances and where the release or modification will not occasion injustice to the person giving discovery. As Nourse L.J. observed in the course of his judgment [in the Court of Appeal] in the instant case, each case must turn on its own individual facts."

12 In *Crest Homes* Lord Oliver referred to the decision of *Home Office* v. *Harman* (2), in which was stressed the importance of preserving an undertaking such as that given by the plaintiffs in this case. In *Home Office* v. *Harman* ([1983] 1 A.C. at 321) the following passage from the judgment of Lord Denning, M.R. in *Riddick* v. *Thames Board Mills Ltd.* (3), was quoted with approval ([1977] Q.B. at 896):

> "The memorandum was obtained by compulsion. Compulsion is an invasion of a private right to keep one's documents to oneself. The public interest in privacy and confidence demands that this compulsion should not be pressed further than the course of justice requires. The courts should, therefore, not allow the other party—or anyone else—to use the documents for any ulterior or alien purpose. Otherwise the courts themselves would be doing injustice. Very often a party may disclose documents, such as inter-departmental memoranda, containing criticisms of other people or suggestions of negligence or misconduct. If these were permitted to found actions of libel, you would find that an order for discovery would be counter-productive. The inter-departmental memoranda would be lost or destroyed or said never to have existed. In order to encourage openness and fairness, the public interest requires that documents disclosed on discovery are not to be made use of except for the purposes of the action in which they are disclosed."

13 Although in that case Lord Denning was referring to a person making himself liable to an action for libel by diligently complying with an order for discovery, I consider the principle he stated to be applicable in the current case. If banks in this finance centre are to find themselves susceptible to an action for knowing assistance by diligently complying with orders for discovery in actions such as this, the temptation upon them to be selective in the documents they disclose will be great. It is important that the courts should have the co-operation of the banking institutions in matters of discovery, and banks are particularly vulnerable to claims of the nature of that which it is intended to lay against Jyske Bank in this case. Of course there will be cases where it would be unjust

for a plaintiff to be denied his remedy against a banking institution, but there must be special circumstances which give rise to a release of an undertaking (see *Crest Homes* (1)).

14 Having considered the written material before me and balancing the interests of the plaintiffs in pursuing their potential remedy against Jyske Bank against the policy considerations of maintaining the integrity of the plaintiffs' undertakings, in my judgment, the latter must prevail. I do not consider that it is good policy in the circumstances of this particular case to relieve the plaintiffs of their undertaking and I refuse their application.

*Application dismissed.*

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