BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.24 OF 2005

BETWEEN:

MORGAN & MORGAN TRUST CORPORATION LIMITED

Appellant

and

[1] FIONA TRUST & HOLDING CORPORATION
[2] FIONA MARITIME AGENCIES LIMITED
[3] TAM ENTERPRISES INC.
[4] FILI SHIPPING COMPANY LIMITED
[5] PRESNIA SHIPPING COMPANY LIMITED
[6] POLIANKA MARITIME COMPANY LIMITED
[7] SOKOLNIKI SHIPPING COMPANY LIMITED
[8] OSTANKINO SHIPPING COMPANY LIMITED
[9] GLEFI SHIPPING V COMPANY LIMITED
[10] GLEFI SHIPPING VII COMPANY LIMITED
[11] GLEFI SHIPPING VIII COMPANY LIMITED

Respondent

Before:

The Hon. Mr. Brian Alleyne, SC	Chief Justice [Ag.]
The Hon. Mr. Denys Barrow, SC	Justice of Appeal
The Hon. Mr. Hugh A. Rawlins	Justice of Appeal

Appearances:

Mr. Samuel J. Husbands for the Appellant
Ms. Hazel Ann Hannaway for the Respondents

2006: January 16;
April 3.

JUDGMENT

[1] BARROW, J.A.: The appellant is the discovery respondent against whom a disclosure or Norwich Pharmacal order was obtained in High Court proceedings. On this appeal the appellant seeks to challenge the jurisdiction of the court to make that order. The appellant filed its notice of appeal one day late and applied

to this court to extend the time for filing its notice of appeal. However, the respondent filed a notice of application to strike out the notice of appeal on the ground that it is an interlocutory order that the discovery respondent has purportedly appealed, for which leave was required, and no leave was obtained. It is common ground that the court has no jurisdiction to entertain an appeal for which leave is required and not obtained.[1]

[2] No leave was required, says the appellant, because the disclosure order was not an interlocutory but a final order in that it finally disposed of the litigation between the discovery respondent and the claimant. Such an order may be appealed as of right, without the need to obtain leave, in the appellant's submission. In addition, the appellant says that the disclosure order is an injunction and no leave is required to appeal it. For both limbs of the contention that leave is not required the appellant relied on s 30 of the West Indies Associated States Supreme Court (Virgin Islands) Act[2] which states in subsection (4):

> "(4) No appeal shall lie without leave of the judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a judge except in the following cases –
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> (i) where the liberty of the subject or the custody of infants is concerned;
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> (ii) where an injunction or the appointment of a receiver is granted or refused;
>
> (iii) …
>
> (iv) in such other cases, to be prescribed by rules of court, as may in the opinion of the authority having power to make such rules of court be of the nature of final decisions."

[3] The contention as to the nature of the instant order requires an examination of the nature of an order for disclosure of information that a court may make against a person who is not initially a party to litigation but who, because he possesses information belonging to one of the principal parties to litigation, is himself made a party to litigation, for the limited purpose of being compelled to produce information. The party so joined is called the 'discovery respondent'. The order

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[1] See the concluding observations of Sir John Donaldson M.R. in White v Brunton [1984] 1 Q.B. 570 at 573 H.

[2] Cap 80 of the Laws of the British Virgin Islands; renamed the Eastern Caribbean Supreme Court (Virgin Islands) Act

gets its name from the House of Lords case of Norwich Pharmacal Co v Customs and Excise Commissioners[3] that settled the question whether the court has jurisdiction to make such an order.

[4] The issue whether a Norwich Pharmacal order for disclosure in aid of foreign proceedings was an interim order or a final order arose directly for decision before the Court of Appeal for Gibraltar in Secilpar SL v Fiduciary Trust Limited.[4] The argument advanced was the same as was advanced before us by counsel for the discovery respondent: once the information was given that was the end of the litigation between the claimant and the discovery respondent and that made it a final order. The Gibraltar Court of Appeal upheld the decision of the Chief Justice who reasoned as follows:

> "However, I am satisfied that this is interim relief. It does not conclude the proceedings. It is ancillary to proceedings ongoing in another jurisdiction and is in no way final in the sense that it determines liability or concludes those proceedings."[5]

[5] That conclusion is confirmed by referring to the terms of the disclosure order itself. That order was initially made at a hearing without notice to the discovery respondent, and that very fact made the order incapable of being a final order; without notice orders are by definition subject to further hearing, on notice. In the instant case, on a second hearing, this time with notice to the substantive defendants, the duration of the order was extended to a further date. On a third hearing, at which the discovery respondent was represented by counsel, directions were given to the discovery respondent as to compliance with the disclosure order and the matter was adjourned until a further date "for report or further order." It is the antithesis of a final order that it should be expressly made subject to further order. It is, therefore, clear that the disclosure order was by its very nature as well by its express terms nothing more than an interlocutory order.

[6] The discovery respondent's other submission, that a disclosure order is an injunction, is a completely novel one. Counsel was unfazed by his inability to find

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[3] [1974] A.C. 133
[4] Civil Appeal No. 5 of 2004 (24 September 2004) (unreported).
[5] See paragraph 26 of the judgment of the Court of Appeal.

any judicial decision or academic writing that supported his view and easily offered the suggestion that basic propositions were frequently assumed without discussion. It was a fleet response. A Norwich Pharmacal disclosure order is a highly specific type of order. It compels the production of information to enable a party to put forward his case. An order for disclosure does not become an injunction because it commands a person to do something. If that were so all orders that commanded persons to do things would be injunctions. An order for specific performance compels a person to do the thing he had promised to do, but that does not make it an injunction. Similarly an order for an account compels a party to do something but it is not an injunction. The reason why these other orders are not called injunctions is because they are not injunctions. In the Sepilcar case, in addition to the disclosure order, the court had also granted an injunction restraining the respondents from disclosing the disclosure order. In the instant case the very order purportedly appealed contained, in addition to the disclosure order, a freezing order or injunction. It is because a disclosure order is not an injunction that, in these cases, the court found it necessary to grant an injunction as a separate order.

[7] In summary, the disclosure order against which the appellant purportedly appealed was an interlocutory order in terms of s.30 of the Supreme Court Act and could only have been appealed if leave to appeal had been obtained. That order did not fall within the exceptional class of interlocutory orders for which leave is not required because it is not an injunction. Accordingly, I would strike out the purported appeal as nugatory, with costs to the claimant/respondents in the sum of US$3,000.00.

Denys Barrow, SC
Justice of Appeal

I concur.

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Hugh A. Rawlins
Justice of Appeal