TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCVAP 2011/063

BETWEEN:

PQ

Appellant

and

[1] RS
[2] SPARROWHILL TRADING LIMITED
(By Order dated 5th December 2011)

Respondents

Before:

The Hon. Mde. Janice M. Pereira — Justice of Appeal
The Hon. Mr. Don Mitchell — Justice of Appeal [Ag.]
The Hon. Mde. Louise Blenman — Justice of Appeal [Ag.]

Appearances:

Mr. Malcolm Arthurs, Mr. Daniel Wise with him, for the Appellant
Mr. Mark Hapgood, QC, Ms. Tana'ania Small-Davis of Farara Kerins with him, for the 1st Respondent, Trident Trust Company (BVI) Limited
Mr. John Carrington for the Intervenor / 2nd Respondent

2011: December 5, 6.

Supplemental disclosure – Norwich Pharmacal Order – Norwich Pharmacal / Bankers Trust information – Challenges to findings of fact made by the learned trial judge – Whether the learned trial judge erred in finding that the first respondent had requested from its Professional Introducer everything that it was entitled to request in accordance with the order dated 14th September 2011 – Whether the trial judge erred in finding that the first respondent had asked the right questions in seeking to obtain information for the appellant

On 14th September 2011, the learned trial judge granted the appellant's application for a Norwich Pharmacal order against the first respondent, Trident Trust Company (BVI) Limited ("Trident"). This order ("the September 14th Order"), required Trident to disclose information that it had in its possession relating to the company Sparrowhill Trading

Limited ("Sparrowhill"), for which it acted as registered agent. Trident duly disclosed all documents which it had in its possession with regard to Sparrowhill. Trident also wrote to its Professional Introducer, Abacus Ltd. ("Abacus"), asking them to provide "full due diligence" on Sparrowhill, "including the full due diligence on [Sparrowhill's] beneficial owner". The information received from Abacus however, contained no transactional data, which may be said to have been required under paragraph 7(a) of the September 14th Order.

Trident asserted that it had complied by providing all documentation which it had in its possession, as well as information obtained from Abacus. The appellant however, was not satisfied with the manner in which Trident had made its request to Abacus, and made a further application to the court ("the October Application"), in which it sought supplementary disclosure. The learned trial judge refused to grant this application. The appellant appealed his decision.

Held: dismissing the appeal with costs to the 1st and 2nd respondents to be assessed if not agreed within 21 days of today's date, that:

1. The fact that the evidence in the record discloses that Abacus may have more information of a transactional nature cannot be translated to a claim that Trident had not done all that it was required to do under the September 14th Order.

2. From all that was before the learned trial judge, it was within the wide ambit of his discretion for him to have concluded that Trident had complied with the September 14th Order and that there was no need for another order in the same terms. This was a proper exercise of his discretion; the appellant has not surmounted the hurdle warranting this court's interference with that exercise.

3. The trial judge was also correct in dismissing the October Application insofar as it asserted the necessity for this information for the purpose of pursuing proceedings in the United States under the US Securities Exchange Act, given that he had already formed the view, so far on the evidence adduced before him, that the threshold test for Norwich Pharmacal relief had not been satisfied. He was not satisfied that the appellant could show that there was wrongdoing in relation to it.

ORAL JUDGMENT

[1] BLENMAN J.A. [AG.]: This is the judgment of the Court. This is an appeal from the decision of Bannister J. dismissing an application by the appellant in which it sought, among other things, supplemental disclosure against Trident Trust Company (BVI) Ltd. ("Trident") by providing additional Norwich Pharmacal/

Bankers Trust information and documentation to the appellant and, among other things, "all information and documentation which [the Respondent] has, or is able to call in, by virtue of any out sourcing agreement which the Respondent is party to, or otherwise, of the source and payment of US$108,000,000.00 apparently loaned by Sparrowhill Trading BVI ("Sparrowhill") to Forrielite Limited pursuant to a loan agreement apparently dated 3rd June 2011."[1]

[2] On 14th September 2011, Bannister J. granted a Norwich Pharmacal order against Trident ("the September 14th Order") which required it to:[2]

> "disclose … to the [Appellant's solicitors], Martin Kenny & Co. Solicitors ("MKS"), legible copies of all documents in their possession or control relating to Sparrowhill Trading Limited ("Sparrowhill") for which it acts as registered agent, (whether in hard copy or in dematerialised form) which:
>
> a. Identify or point to the source of funds, use and transmittal of US$108,000,000.00 advanced by Sparrowhill to an entity called Forrielite Limited ("Forrielite") pursuant to a Loan Agreement made between Sparrowhill and Forrielite dated 3 June 2011;
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> b. Identify or point to the true underlying beneficial owners of Sparrowhill; or
>
> c. Identify or point to the management of Sparrowhill and the person(s) or entity(ies) who control it including the identity of the person(s) and/or entity(ies) which the Respondent is entitled or required to take its instructions from, together, ("the Documents")."

[3] Paragraph 11 of the Order contained a definition of "control" as follows:

> "For the avoidance of doubt "control" shall include any documents, correspondence, records or other material relating to Sparrowhill and the entities in Schedules "A" which the Respondent is obliged to maintain, keep or be in a position to demand by any statutory requirements, including, but not limited to, the BVI Money Laundering Regulations 2008 and Guidance Notes."

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[1] See p. 2 of appellant's Notice of Application dated 11th October 2011.
[2] See para. 7 of the Order of Bannister J. dated 14th September 2011.

[4] Paragraph 12 of the Order contained a gagging provision:

> "Without prejudice to the generality of the foregoing, where such material is held outside the Territory of the BVI, but pursuant to an outsourcing agreement under which the Respondent is entitled to retrieve the material, the Respondent shall exercise such rights, without delay and without alerting the recipient of the said retrieval request to the existence of these proceedings, this Order, and/or of any of the materials or information set out therein."

[5] The upshot of this Order when served on Trident prompted a letter from Trident dated 16th September 2011, pointing out certain concerns given the nature of the gag provision in the Order, to which the appellant responded by letter dated 20th September 2011, referring to the Anti-Money Laundering and Terrorist Financing Code of Practice, 2008[3] ("the AML Code") indicating that the information which was required was information which either Trident had in its possession or was required to keep or to be in a position to call in. The appellant further indicated that the AML Code required any request for information to be made pursuant to any agreement between Trident and its Professional Introducer being Abacus Ltd. ("Abacus"), a Cypriot company. The solicitor for the appellant reiterated that the request could be made without any reference to the proceedings and the Order, and in essence, ended by saying, that Trident should request the information from the Cypriot company pursuant to the Order and that a request made pursuant to the Order cannot be regarded as a breach of the Order.

[6] Trident disclosed all documents which they of themselves had in their possession with regard to Sparrowhill. In relation to Abacus, Trident sent a letter dated 21st September 2011, the relevant part of which reads as follows:

> "In accordance with the above mentioned Professional Service Client Agreement and in keeping with our obligations as a Registered Agent under the Anti-Money Laundering and Terrorist Financing Code of Practice (2008), we hereby require that you provide us with full due diligence on Sparrowhill Trading Limited including the full due diligence on the beneficial owner."

[3] Statutory Instrument 2008 No. 13, Laws of the Virgin Islands.

[7] Abacus furnished information which in essence satisfied paragraphs 7(b) and (c) of the September 14th Order. This information contained no transactional data which may be said to have been covered or required under paragraph 7(a) of the September 14th Order. As a consequence, and following further correspondence between the appellant and Trident, Trident asserted that it had complied by providing all documentation which it had in its possession as well as information obtained from its Introducer, Abacus. This prompted the appellant to make the 2nd application of 11th October 2011 ("the October Application") to the Court, in which it sought supplementary disclosure. This application was heard on 14th October 2011 and a decision given the same day, in which the Court refused to grant the appellant the Order sought. As a consequence of that, the appellant has moved this court seeking to have the decision of the learned trial judge overturned.

[8] In support of the appeal, the appellant complains that the learned trial judge erred in making a number of findings of fact, including a finding that Trident had requested from the Professional Introducer everything that it was entitled to request in accordance with the September 14th Order. The second challenge was that the trial judge erred when he held as a matter of fact that Trident had asked its Professional Introducer in Cyprus the right questions in accordance with the Order. Further, the appellant complains that the trial judge erred in finding that the respondent as a matter of law was not obliged to indicate to his Professional Introducer that information and documents on the loan for the US$108 million should be included in the disclosure being requested.

[9] The order which the appellant seeks on the appeal is an order that Trident comply with the September 14th Order and supplement its disclosure provided under the Order in the following terms:[4]

[4] See Amended Notice of Appeal filed 11th November 2011 found at tab 1 of the Core Bundle.

"i) The Respondent be ordered to comply with the Order of 14 September 2011 and supplement the disclosure provided under the Order by providing additional Norwich Pharmacal Bankers Trust information and documentation to the Applicant, and in particular all information and documentation which the Respondent has, or is able to call in, by virtue of any out sourcing agreement which the Respondent is party to, or otherwise, of the source and payment of US$108,000,000.00 apparently loaned by Sparrowhill Trading Limited BVI ("Sparrowhill") to Forrielite Limited pursuant to a loan agreement apparently dated 3 June 2011."

[10] It is noteworthy that even though the question of Trident's alleged non-compliance engaged the attention of the trial judge, this was not a live issue before the trial judge on the application as framed. It was rather that the appellant was utilising this allegation to buttress its application for further disclosure. For example, at paragraph 10 of the October Application the appellant asserted that the September 14th Order required Trident to call in the information relating to the alleged US$108 million loan and that there was nothing to suggest that it had attempted to do that. In any event, the trial judge clearly dealt with the issue as to whether he considered Trident to have complied, and also whether or not there should be a further Norwich Pharmacal Order.

[11] The trial judge formed the view that when Trident sought "full due diligence" from Sparrowhill and received back certain documents, that was sufficient to comply with the September 14th Order, and so his view was that Abacus having responded and said that was all they had in relation to that matter, it could not be said that Trident had not given all the documents in its possession or that it had not called in all the information in accordance with the September 14th Order. The appellant complained essentially that Trident's letter was not specific enough and that it was worded in such a way, by making reference to beneficial owner, that the due diligence sought related only to beneficial ownership. In essence, the suggestion from the appellant is that Abacus having received the letter in those general terms and with reference to "beneficial owner" may not have addressed its

mind to providing information on transactional data. We do not know. But, what is clear is that Trident asked, by reference to the AML Code and its agreement with Abacus, for full due diligence on Sparrowhill. Had the letter stopped there with no reference to beneficial owner, that would have sufficed. But, it did not stop there. The letter went on to say "including the full disclosure on the beneficial owner". The question was whether the inclusion of those words detracted from the request for full due diligence. The judge answered that in the negative. In coming to that conclusion, the judge also had the emails passing between Trident and Abacus of 27th September 2011, in which Abacus responded to Trident in these terms:

> "Further to the email below please find attached scanned copies of the following documents related to the completion of the due diligence requirements and kindly note that for the companies Sparrowhill Trading Limited, Moorlock Assets Limited, and Alfa Finance Holdings S.A., the certificate of incorporation and Memorandum & Articles of Association are not attached, since Trident Trust should have these documents in their records based on the their capacity as agent…"

This clearly tends to suggest that Abacus was saying to Trident that this was all the due diligence information which they had in relation to Sparrowhill. The fact that the evidence in the record discloses that Abacus may well have more information of a transactional nature cannot be translated to a claim that Trident had not done all that it was required to do under the Order.

[12] There is also the question whether or not the judge ought to have made a further disclosure order as requested, bearing in mind that what was sought in the October application was really a mirror of what had already been granted by the September 14th Order. The trial judge found that Trident had made a proper request in accordance with the Order and had furnished information with a response from Abacus. The judge refused to make any further disclosure order, having concluded that Trident had already complied. From all that was before him it was within the wide ambit of his discretion for the learned trial judge to have concluded that Trident had complied with the Order and that there was no need for another order in the same terms. We consider that this was a proper exercise of

his discretion, and the appellant has not surmounted the hurdle warranting this court's interference with that exercise.

[13] The trial judge was also correct in dismissing the October Application insofar as it asserted the necessity for this information for the purpose of pursuing proceedings in the United States under the US Securities Exchange Act, given that he had already formed the view, so far on the evidence adduced before him, that the threshold test for Norwich Pharmacal relief had not been satisfied. He was not satisfied that the appellant could show that there was wrongdoing in relation to it.

[14] Accordingly, we dismiss the appeal with costs to the 1st and 2nd respondents to be assessed if not agreed within 21 days of today's date.