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IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

BEFORE THE HON. THE CHIEF JUSTICE

ON 3RD FEBRUARY, 1989

CAUSE NO. 72 OF 1984

BETWEEN	BANQUE COMMERCIALE (CAYMAN) LTD. (IN LIQUIDATION)	PLAINTIFF
AND	COOPERS & LYBRAND (A FIRM)	FIRST DEFENDANT
AND	COOPERS & LYBRAND INTERNATIONAL (A FIRM)	SECOND DEFENDANT

Mr. C. Quin for Plaintiff
Mr. A. Foster for Defendants

COLLETT C.J. RULING

This is an application for supplementary directions pursuant to a summons issued by the Plaintiff on 19th January, 1989. The action has already been set down for trial pursuant to an order for directions which was made on 19th October, 1987. The trial is due to commence in January 1990 with an expected length of 15 weeks.

By paragraph 1 of this summons the Plaintiff seeks an order for the exchange of experts reports on four specific issues before trial and for expert evidence to be limited to that so disclosed. The Plaintiff founds this application upon O. 38 r.38 of the English R.S.C. Counsel for the Defendant, however, drew the Court's attention to rule 29 of the Cayman Civil Evidence Rules, 1978 which is in identical language to sub-rules (1) and (2) of this English rule, also to rule 33 of those local Rules, the effect of which is to rule out the application to the Cayman Islands of any part of the English Order 38 in respect of which these local Rules provide an equivalent rule. It follows that the English rule does not apply: this application must be dealt with under the local Rule. Nevertheless this is of no practical consequence since the principles upon which the Court is to exercise its undoubted discretion are the same whichever

rule is taken to found its jurisdiction.

The major difference between these parties in regard to this Court's present exercise of discretion is whether experts reports ought to be disclosed simultaneously or sequentially, i.e. by the Plaintiff first followed by the Defendant. In Kirkup v British Rail Engineering Ltd. (1983) 3 A.E.R. 147 the English Court of Appeal approved, in a personal injuries case, of a general rule whereby experts reports should be ordered to be disclosed simultaneously although in the case before them they approved exceptionally of a direction that these be disclosed sequentially. That course was taken on account of the lack of particularity in the plaintiff's pleading which would have caused a difficulty for the defendant's expert in addressing the pertinent issues unless he had first been given a sight of the plaintiff's expert's report before furnishing his own.

The pleadings in the present case are voluminous. When the further and better particulars of the Statement of Claim which were delivered on 15th May, 1987 are read alongside the primary pleadings, it becomes apparent that the technical issues relating to accountancy and audit practice in relation to Canadian Generally Accepted Accounting Principles and Generally Accepted Auditing Standards have been identified in very considerable detail. It is unlikely, therefore, that any major unidentified issues will emerge from the Plaintiff's experts' reports and any minor ones that do so may readily be dealt with by means of the supplementary report by the Defendant's experts for which the order sought provides. I, therefore, consider that there is insufficient reason to depart from the general rule of simultaneous exchange which is founded upon principles of fairness and of mutuality. Expert reports on auditing in accordance with applicable Canadian GAAP and GAAS should therefore be simultaneously exchanged on 30th June 1989 and there will be a direction to that effect.

The Defendant's counsel has also suggested that a need for expert testimony in regard to accountancy and auditing

standards not comprised within Canadian GAAP and GAAS may arise at the trial. But he has not been able to point convincingly to any specific issue arising upon the pleadings which would call for such evidence to be given. I therefore do not regard it as appropriate to give any such further direction at the present time, although I do not rule out the possibility of a subsequent application by the Defendants for that purpose if such an issue or issues can be identified at a later stage.

In regard to the issue of Liechtenstein law the parties are agreed that expert reports should be exchanged on 30th June, 1987, simultaneously.

This leaves two further issues in dispute as to the manner of and timetable for disclosure of experts' reports. The first relates to Swiss Banking Law and auditing practice. This is an issue as to causation of damage which is crystallised by paragraph 17 of the Statement of Claim read with paragraphs 17 and 25 of the first Defendant's Defence. These pleadings give no reliable identification of the likely scope of the expert evidence which the Plaintiff may seek to adduce upon this issue and, in my view the right course is to order sequential disclosure of the experts' reports in this area, the Plaintiff to furnish its reports by 30th June, 1989 and the Defendants to furnish theirs by 30th September, 1989 with supplementary reports in this area to be exchanged by 31st October, 1989. A direction to that effect will be given.

The same approach applies to reports on the issues of Cayman Banking Principles and Banking Supervision. I leave aside any question as to the admissibility of expert evidence on the latter topic. Assuming it to be admissible, the precise areas of concern to which experts on Cayman Banking practice or banking supervision would need to address their testimony is insufficiently particularised by the pleadings to give the Defendant's experts in that field (if any) a proper indication of what detailed issues to address. In this area also sequential exchange of reports according to the timetable detailed above is

appropriate and it will be so directed.

Finally, under paragraph 1 of the Summons the Defendant's counsel has identified an issue relating to Spanish law and accountancy practice as to which expert testimony may be required. This appears in the further and better particulars supplied by the Plaintiff under paragraph 16 (3) (d) (i) of the Statement of Claim specifically at particular (iii) (a) - (e) inclusive. I therefore direct that this be added as a further issue in respect of which sequential exchange of experts reports shall take place according to the timetable mentioned above.

For the avoidance of doubt it should be made clear that the only sanction envisaged by my order for failure of a party to serve a particular expert's report as envisaged by its terms is that the party in question will not thereafter be at liberty to call expert testimony at the trial in relation to the particular issue for which no report has been furnished by that party. There is no positive obligation upon any party to furnish any particular expert's report if that party does not propose to call expert witness(s) at the trial upon that particular issue. Subject to this rider there will be an order in terms of paragraph 1 of the Summons modified as already indicated in respect of issues (ii) and (iii) and in respect of the addition of a further issue (v).

Paragraph 2 of the Summons asks for an order for the exchange between the parties of the statements of all witnesses of fact before the trial. This radical departure from the traditional practice and procedure is sanctioned in the discretion of the court by English R.S.C. O. 38 r. 2A. I am satisfied, however, that this particular English Rule has no application at present to the Cayman Islands. Section 20 (2) of the Grand Court Law enjoins application of English practice and procedure only in matters for which no provision has been made by the local Rules. This matter relates to the pre-trial discovery as a note in the 1988 White Book at p. 595 acknowledges. Rule 47 of the Grand Court Civil Procedure rules deals with pre-trial

discovery although it does so in a manner which falls short of the scope of the new English Rule. It cannot be said that no provision has been made for that matter, however. The English rule is excluded. This Court has no jurisdiction to make the order sought by paragraph 2 of the summons and that paragraph is accordingly dismissed. I would add merely that, even if the English Rule had been held to apply, I am by no means satisfied that an action in which professional negligence is alleged is an appropriate one in which to order a pretrial disclosure of each party's evidence of disputed fact. Moreover the stage at which this action is reached renders it rather unlikely that most of the objectives listed in the 1988 White Book at p.395 would be achieved if such an order could be and were to be made herein.

Finally paragraph 3 of the Summons seeks an order for supply of further particulars and further specific discovery previously requested of the Defendants by the Plaintiff by three separate letters which have hitherto gone unanswered. At the hearing, the Defendant's counsel informed the Court that answers were about to be furnished and that, in most cases, the Plaintiff's requests would be acceded to. By consent, therefore, further consideration of this paragraph was stood over to a fresh date to be fixed if necessary.

The costs of this application will be costs in the cause.

16th February, 1989.

Chief Justice.