Cyprus case law; Bank's duty of confidentiality reaffirmed

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It is widely accepted that the bank secrecy has been under scrutiny during the past few years. According to Cyprus law, this matter is regulated by the Banking Law (66(I)/97) which contains an exclusive part with provisions concerning bank secrecy.

Bank confidentiality in Cyprus is guaranteed by section 29(1) of the Credit Institutions Law of 1997 (Law 66(I)/97). According to Section 29(1) it is prohibited for any member of the administrative body of the management body, chief executive, director, manager, officer, employee of a bank who has by any means access to the records of a bank, with regard to the account of any individual customer of that bank, while his employment in or professional relationship with the bank, as the case may be, to give, divulge, reveal or use for his own benefit any information whatsoever regarding the account of that customer.

Paragraph (2) of section 29 provides for various exemptions for lifting banking confidentiality, among which is the provision of information imposed for reasons of public interest as is the case where an order of the Court for disclosure of information has been issued (*Norwich Pharmacal* type orders).

Without such order, disclosure is not possible, unless of course it falls under another exemption of section 29(2) of Law 66(I)/97 and section 22(4) and (5) of the law of Evidence, Cap. 9. Having as main purpose the protection of all information that could be originated by the accounts of a bank's customers, this section applies to any bank licensed in Cyprus or any branch of a bank of an EU member state established in Cyprus.

With a recent judgment of the Supreme Court of Cyprus in **Civil Appeals Nos.182/2012** and **184/2012** the principles within the context of Norwich Pharmacal (disclosure) proceedings and issues of breach of bank confidentiality were strongly reaffirmed, our firm acting for one of the Appellants. Both appeals were filed against an interim decision of the District Court of Nicosia, by virtue of which a *Mareva* type injunction was issued freezing bank accounts. Both Appellants filed against the said order claiming it is wrong at first instance.

The Appeal was largely grounded on the following arguments:

(1) Wrongly and in breach of the constitutional rights of the Appellants the Court of first instance issued a freezing injunction based solely on the affidavit of an employee of a Bank submitted in the Court's file without a disclosure order been ever issued.

(2) Despite the fact that the Court of first instance acknowledged that an order for disclosure of the accounts and transactions of one of the Appelants was never issued and that, for an unknown reason the order drafted was irregularly used and delivered by the Respondents to

the Bank the Court of first instance took into consideration information illegally submitted in breach of the Appellants' privacy rights.

(3) The Court of first instance wrongly commented that the bank institution complied with the order served upon it, not knowing that in fact this order was never issued.

(4) Based on the judgment at first instance, it transpires that the evidence derived from the affidavits and the exhibits accompanying the application was very general and insufficient to satisfy prima facie the two provisions of section 32 of the Courts Law and therefore the freezing orders should not have been issued, let alone become absolute.

(5) Despite the fact that the Court of first instance ascertained that the evidence was general, it failed to ascertain in particular that the evidence supporting the ex parte application consisted of:- (a) a fabricated anonymous letter drafted three years after the first Appellant ceased to work for the Plaintiffs.

Proceeding to the essence of the grounds of the appeal, the Supreme Court highlighted the Bank Confidentiality in Cyprus with particular emphasis on Section 29 of the Credit Institutions Law and the various exemptions. According to the Supreme Court it is obvious that confidentiality is a cornerstone of the bank-customer relationship. Having regard issues of confidence and credibility, the protection of bank-customer secrecy relation remains very important. Cyprus legal system provides such protection under the relevant legislation and only with the appropriate judicial formalities disclosure order can be secured.

In this case, the Judges considered that the evidence disclosed by the affidavit of the employee of the Bank should not have ever been taken into consideration as a relevant order of the Court was never actually issued. It became obvious that the Court of first instance, even though locating the mistake in the drafted order, subsequently it was not concerned not taking into consideration the affidavit for the purposes of examining the continuance in force of the temporary freezing order. The accidental inclusion, by the Registrar, of a disclosure provision in the drawn up gagging order in no way makes the former legal. Therefore, the finalization of the freezing order was based on evidence that was illegal and without the Appellants being given the opportunity to be heard on matter.

Furthermore as the Respondents during the procedure did not proceed with clean hands, the Appellants were not given the chance of a fair trial therefore there was no other choice than cancelling the freezing order in question. Judges of the Supreme Court went on to discuss the Respondents' lawyers' behaviour as follows:

> ***"The second point we would like to comment upon is the duty of the lawyer for the Respondent as an officer of the Court. He ought to have seen in good time that, additionally to the gagging order, the drafted order incorrectly contained an order for disclosure, the issue of which, even though sought by the application, was not requested by him, and therefore he ought not to have proceeded with serving the order to the Bank but instead ought to have brought this fact to the attention of the Registrar or the Court. We cannot understand why the lawyer for the Respondents could not in this case fulfill his duty towards the Court.***
> ***In our opinion, the mistake should have been seen at a second stage, when the Bank presented a sworn statement of disclosure. The lawyer for the respondents, knowing that he did not request the issue of such an order from the Court, should***

have realized his mistake immediately and brought the fact to the attention of the Court. Instead, he continued to present the facts, even in an Affidavit that a disclosure order had been issued."

Orders for disclosure may be issued as auxiliary orders in cases where the real wrongdoers are not known to the plaintiff or for policing purposes of the freezing order, so that the plaintiff knows which assets exactly the defendant holds in his possession at the given time in order to be able to check at a subsequent time whether there was compliance with the freezing order.
In England, the right to disclosure exists before the filing of the action (pre-trail orders). In Cyprus however, due to the provisions of section 32 of the Courts Law no regulations have been issued allowing the issue of auxiliary interlocutory orders for the purposes of bringing an action. However, on the basis of equity, the filing of an action against a person indirectly involved in a wrongdoing or who possesses information which may assist the plaintiff subsequently filing a second action against the persons who breach his rights is not excluded.

In this case, the identity of the persons against whom the Respondents wanted to act, was known to them. What they wanted was, after filing the action against the persons who had allegedly wronged them, was to "fish" for information though an auxiliary disclosure order. The appropriate was to simultaneously request a discovery order to assist and police the freezing order they were seeking. However, because it was requested directly against a Bank, the auxiliary disclosure order was possibly not needed, since the issue of an order for the freezing of assets against the Appellants and a simple notification of the order to the Bank would be enough to block the transfer of money from the accounts under dispute. Any possible assistance by the Bank to breach the freezing order would constitute a contempt of Court. In the words of the Supreme Court: "...The lawyers for the Respondents, in our opinion, followed an unorthodox procedure under the present circumstances. They pursued a gagging order without the prior issue of a disclosure or search order, in which case the gagging order would have some meaning. The court of first instance did not endeavour to point out this fact to the lawyers for the Respondents...."

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