CASE 4–9

Touche Ross and Company v. Bank Intercontinental, Ltd.

The Cayman Islands, Grand Court, 1986.
The Cayman Islands Law Reports, vol. 1986–87, p. 156 (1986–87).

Touche Ross & Co., a firm of accountants practicing in the Cayman Islands, carried out audit work in the Cayman Islands for the Bank Intercontinental, Ltd., a company incorporated under Cayman law. The Bank brought suit in Florida alleging professional negligence against a firm named as Touche Ross & Co., maintaining that it was a multinational partnership of accountants with offices in Florida, New York, the Cayman Islands, and worldwide. Individuals alleged to be partners in this multinational firm, who were resident in Florida and various other parts of the world, were joined as defendants in the suit.

Touche Ross & Co., a firm of accountants constituted under the laws of New York, then initiated a suit in the Cayman Islands seeking to restrain the Bank from continuing to prosecute the Florida suit. The New York firm (the plaintiff) argued that the audit work had been carried out exclusively by the Cayman firm of the same name according to the terms of a contract between that firm and the defendant that was governed by Cayman law. It urged the court to hold that the proper forum for the trial of the Bank's suit was the Cayman Islands, since the suit had no real connection with Florida and the Bank only alleged that Touche Ross & Co. was a single worldwide partnership (with partners resident in Florida) so that it could bring the suit there.

This court initially granted an ex parte *injunction*[143] *based on the plaintiff's allegations that the Florida proceedings appeared to be an attempt to cloak Touche Ross & Co. in a multinational mantle with connections to Florida as a pretext for suing there. The court gave the defendant leave to apply to discharge the injunction and the defendant did so. The court's decision on that application follows.*

[143] "*Ex parte*" is Latin for "away from a party." An *ex parte* injunction is one that is granted following a hearing at which one of the parties was not present.

MAP 4–8 □ The Cayman Islands (1986)

HULL, JUDGE:

. . . Mr. Foster [counsel for the plaintiff] submitted that the evidence supporting his application showed that the bank was a Cayman company and that the Florida action related to audit work performed by chartered accountants in the Cayman Islands and in substance alleged professional negligence. He said that the work had been performed by "Touche Ross & Co.," a Cayman firm of chartered accountants, pursuant to a contract between that firm and the bank. The evidence showed that the contract was to be interpreted in accordance with the law of the Cayman Islands, and that the plaintiff in Cayman (i.e., "Touche Ross & Co. of New York") was a separate entity from the Cayman firm and had in no way been connected with the contract or with any audit work undertaken by the Cayman firm for the bank. The Cayman Islands were the proper forum for the action. The matter had no real connection with Florida. The bank had alleged that the defendant in the Florida action was one worldwide firm in order to bring the action there. Mr. Foster said that he had to satisfy me that it [i.e., the bank] was acting in bad faith; he submitted that the evidence showed that the allegation was specious. [In support of his contention, Mr. Foster submitted the evidence of several witnesses, including that of Mr. Surgeson and Mr. Davidson.] . . .

In his affidavit, Mr. Surgeson stated that Touche Ross & Co. in the Cayman Islands was an entirely separate and different legal entity from the partnership known as "Touche Ross & Co. of New York." He deposed that the firms had separate partners, that neither had any proprietary or other interest in the other, that they determined independently the conduct of their respective businesses, and that the Cayman firm had no offices or records in the United States. He also deposed that to the best of his knowledge and belief the New York firm did not have offices or operate here, nor were any of its partners or employees authorized to practice as accountants here, and that none of the partners or employees in the Cayman firm were authorized to practice public accounting within the United States.

Mr. Surgeson said that the only relationship between the two firms was that they were both affiliated to a Swiss *verein*[144] known as "Touche Ross International," which was an association made up of various firms throughout the world to enhance professional cooperation and cooperation between its affiliates. These firms however remained separate entities and none was subject to control by any of the others. They determined separately which clients they would serve and were individually responsible for their own obligations to their clients' affiliates. The *verein* did however undertake so far as possible to assist other affiliates by providing services on request within its own jurisdiction. The bank, Mr. Surgeson said, had been a client of the Cayman firm which had audited its accounts for the years 1980, 1981 and 1982. This work was done at the request of the bank. The New York firm had not been involved in any way in that work, nor to the best of his knowledge or belief had the bank ever been its client or had professional services provided by it.

Mr. Davidson deposed that he was the New York attorney for the New York firm. . . .

Mr. Davidson's evidence was that the New York firm was legally a separate entity from the Cayman firm. They were not authorized in law to practice in each other's jurisdiction. The Cayman firm had no officers in the United States, the bank was a Cayman company, the firm which had done the work in issue was Caymanian, and the papers and the witnesses were located here. The alleged injury occurred here and involved issues of Cayman law.

In support of its application to discharge the injunction, the bank filed two affidavits. One was by Mr. George Cassidy, stating that he was the chairman of the board of the bank and that he was authorized to make the affidavit. The other was sworn by Mr. Stephen Martin Zukoff, who deposed that he was an attorney-at-law licensed to practice in the states of New York and Florida and the District of Columbia, and that he was one of the attorneys representing the bank in the action in Florida. Each affidavit contains argument and even invective. Leaving that aside, they assert the following matters of fact.

Mr. Zukoff said that there had been over 120 pleadings and extensive hearings in the Florida action. All the matters which Mr. Davidson raised in this court had been heard and determined in Florida. . . .

Mr. Cassidy's affidavit contains various statements relating to the state of the action in Florida. . . .

The plaintiff in Cayman, Mr. Cassidy stated, failed to inform this court of the case of *Armour Intl. Co. v. Worldwide*

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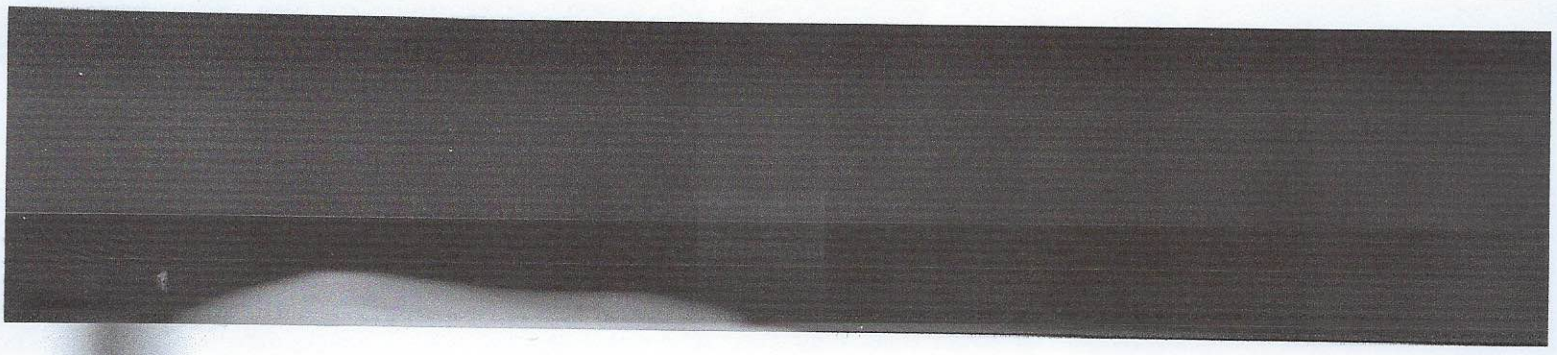
[144] "*Verein*" is German for "association."]



Cosmetics Inc.[145] He exhibited various documents filed in that case. One is an affidavit by Mr. C. Eugene Surgeson, stating *inter alia*—(a) that he is a partner of Touche Ross & Co. "a firm of certified public accountants with offices in Chicago"; and (b) that the "Touche Ross & Co. Tokyo Office" conducted audit examinations of a Japanese company.

Mr. Cassidy also exhibited various documents which, the bank contends, indicate that the defendant in Florida held itself out as a worldwide multinational firm, ready to perform international services and to handle work anywhere in the world, and that it allowed all of its offices to be listed as one firm. He also deposed that the bank was ready, on advice, to have the Florida action tried without "the work papers," and that all current officers and directors of the bank resided in the United States.

As I now see the matter, it is essential for the determination of this case to have a clear understanding of the bank's allegations as to the nature and extent of the entity that it is suing in Florida, and to distinguish those allegations from the ones put forward by the present plaintiff here as to the nature and extent of its own identity. Although it may seem a little pedantic at times, it is for those reasons that I have used the expressions "the plaintiff in Cayman" and "the defendant in Florida" in contra-distinction.

The bank in the Florida action is averring that the defendant there, which is admittedly a firm practicing accountancy in the United States, is in fact a multinational firm that also practices in these Islands and elsewhere. A central issue in the present application is whether or not this is a specious assertion, made in bad faith. . . .

Having seen the bank's affidavits and those for the plaintiff in Cayman in reply, it was clear to me that in the unsuccesful motion for dismissal by the defendant in Florida, the question whether or not it was one worldwide partnership was in issue. . . . [A]fter considering all the affidavits in the *inter partes* hearing,[146] I attached weight (which I had not previously done) to the fact that the defendant in Florida had failed to persuade the court there, summarily as it were, that the allegation of a worldwide partnership was specious. . . .

Mr. Davidson in his . . . affidavit . . . disclosed that the bank was relying on certain public relations materials. He said that none of these described Touche Ross & Co. as a "worldwide partnership" as alleged in the complaint and went on to say:

> Indeed, as stated in a publication frequently cited by BIL—*'A World of Professional Services'* . . . Touche Ross International today has unified 54 national firms into one worldwide organization. Led by respected national businessmen and professionals, the practice in each country is locally owned and managed.

Mr. Cassidy's affidavit exhibited material of this nature. One exhibit is headed, prominently, "LOCAL ATTENTION FROM A WORLD CLASS ORGANIZATION." It then continues—

> Touche Ross is one of the largest multinational accounting, tax and management consulting firms operating in 87 countries with a staff of 20,000 including 8,000 in the United States. Our professionals include CPAs, lawyers, MBAs . . . and other highly skilled individuals. There are seven offices located in Florida. . . .

Then follow profiles of the Florida partners.

Another exhibit is a brochure. It refers to "Touche Ross International." It is headed "A FIRM WITH A DIFFERENCE" and it begins:

> Having pioneered in structuring the first truly multinational professional services firm, Touche Ross International today has unified 54 national firms into one worldwide organization. Led by respected national businessmen and professionals, the practice in each country is locally owned and managed. The parties in each country are joined together through membership in Touche Ross International, a legal entity formed under Swiss law. Our national firms, the experience of our professionals, and our common standards of professional performance are assets to international clients. Universal quality control and financial responsibility apply to all work done in the Touche Ross name.

That paragraph includes the sentence referred to by Mr. Davidson: "Led by . . . locally owned and managed," Moreover, I have not quoted the whole of the exhibit. And it is talking about "Touche Ross International." Later it refers to "the member firms of Touche Ross International" (under a subheading "Our Firm Worldwide," however). Also, of course, this public relations material has to be considered in conjunction with the affidavits on the *ex parte* application describing the organization of individuals using the style "Touche Ross."

Nevertheless, I think it has to be said (whatever the "Touche Ross" label may eventually be held to mean in law in any given situation) that these materials undoubtedly convey and must be intended to convey, at first sight, the impression not only that there is a multinational entity called "Touche Ross" but also that it is one which at least has a professional relationship with its constituent elements, and more than that (because one exhibit says so in its terms) one which controls in terms of *quality* and *financial responsibility* the work done in the Touche Ross name.

The legal nature of the Swiss entity is not explained in the public relations material so exhibited. The plaintiff in Cayman has not sought to dissociate itself from this public relations material. It is very difficult to avoid the inference that those who are associated with it are holding themselves out as mem-

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[145] *Federal Reporter, Second Series*, vol. 689, p. 134 (1982).

[146] "*Inter partes*" is Latin for "between parties." An *inter partes* hearing is one held when all of the parties are present and participating.]

bers of a single worldwide entity with collective professional responsibility, or at the least that anyone who alleges this cannot be dismissed as raising a patently specious argument. The impression given by the publicity material certainly stands in marked contrast to the subsequent, detailed explanations of the precise relationship of "Touche Ross" associates given in the affidavits of . . . Surgeson. . . .

Although, as I see it, the present application does not turn solely on those exhibits, they are in my view very material. They go directly to the question whether the bank, by alleging one worldwide firm, was contriving a pretext for the Florida action. I granted the injunction *ex parte* on the strength of the affidavits of the plaintiff in Cayman as they then stood. If I had been aware of these exhibits and had had (at least as I now see it) a sharper appreciation of the failure of the defendant in Florida to have the action there dismissed on an interlocutory application, I would at least have been very much more circumspect about doing so. In any case, I have changed my initial view. . . .

The view I therefore came to, after hearing both sides, was that the submission that the allegation in Florida of a worldwide firm was patently a pretext could not be sustained.

. . . The action has already continued for some time in the United States. The court in Florida has not thrown it out. It has ordered pretrial discovery, on the evidence for the plaintiff in Cayman, to enable the bank to explore the evidence supporting its allegation of one worldwide firm. I am not familiar enough with American pretrial discovery to comment on that adversely; in any case I suspect that it may be parochial to do so. The weight of the evidence and submissions in the case in my view point clearly to the fact that a court of superior jurisdiction in the United States is seized of the matters in issue. It has not seen fit to dismiss the action. . . .