

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. 2009 HCV 05137
IN CHAMBERS

BETWEEN	WILLIAM CLARKE	APPLICANT
AND	THE BANK OF NOVA SCOTIA JAMAICA LIMITED	1 ST RESPONDENT
AND	PAVEMENT AND STRUCTURES LIMITED	2 ND RESPONDENT
AND	THE CYBERCRIMES INVESTIGATIONS & RESEARCH UNIT	3 RD RESPONDENT
AND	CABLE & WIRELESS JAMAICA LIMITED	4 TH RESPONDENT
AND	ATTORNEY GENERAL OF JAMAICA	5 TH RESPONDENT

Mrs. M. Georgia Gibson-Henlin and Ms. Sherian McDonald instructed by
Henlin Gibson-Henlin for Applicant

Miss Cindy Lightbourne instructed by Dunncox for the 1st Respondent

Mr. Stephen Shelton instructed by Myers, Fletcher and Gordon for the 2nd
Respondent

Mrs. Denise Kitson instructed by Grant, Stewart Phillips for the 4th
Respondent

Mr. Nigel Gayle instructed by the Director of State Proceedings for the 5th
Respondent

**Civil Practice – Pre-Claim Application for discovery – Whether Court has the
jurisdiction to grant – Whether party required to disclose may claim privilege that
disclosure may incriminate them - Principles guiding court- CPR rr. 8.1, 11.12, 17.1,
17.2, 25.1, 27.9, 28.6**

26th January and 23rd February 2010

BROOKS, J.

The name William “Bill” Clarke has been a household name in Jamaica for many years. Associating that name with less than honourable activity is therefore likely to draw attention and comment. Mr. Clarke alleges that such an association has, in fact, been, wrongfully made. The problem is that he does not know who has perpetrated the act. It was done between April and July 2009, through a medium known as “Facebook”, which is a social networking website on the Internet. Mr. Clarke alleges that a false profile of him was created on “Facebook”. He says that some of the content of that profile defames him.

He has brought this application to have the court order the discovery, preservation and inspection of information relevant to the use of the profile. This information, he says, is likely to reveal the identity of the perpetrator so that he can institute a claim against that person or entity.

In this preliminary application he has sought relief against five entities. The first is his former employer Bank of Nova Scotia Jamaica Ltd. (BNS). The second is Pavement and Structures Ltd. an engineering and construction company. These two entities have been identified by their internet service provider, Cable and Wireless Jamaica Limited (C & W), (the 4th entity) as having been assigned Internet Protocol (IP) addresses which

have actually accessed that “Facebook” site. The Cybercrimes Investigations and Research Unit of the Jamaica Constabulary Force (the 3rd entity) has, on Mr. Clarke’s complaint, seized equipment and copied data belonging to Pavement and Structures. The 5th entity, The Attorney General for Jamaica is joined because of the involvement of the Cybercrimes Unit.

In deciding whether to grant Mr. Clarke’s application, the questions to be answered are:

1. Does this court have the jurisdiction to order discovery, preservation and inspection of the Respondents’ equipment and property prior to a claim being filed against them or any of them?
2. Does the fact that Mr. Clarke has made a complaint to the police about the false profile entitle BNS and/or Pavement and Structures to refuse inspection on the basis that information might be discovered which incriminates them or either of them?
3. Does the subsequent filing of a claim by Mr. Clarke affect the current application?

Before dealing with those questions it may be of assistance in understanding the context of the case, to repeat an outline of the origin and proliferation of the use of “Facebook” as given by Richard Parkes QC at

paragraph 2 in *Applause Store Productions Ltd. and another v Raphael* [2008] EWHC 1781 (QB):

“...the popular social networking site, Facebook, which was started at Harvard several years ago, spread to university networks on both sides of the Atlantic. migrated from the universities as its users graduated...”

Does this court have the jurisdiction to order discovery, preservation and inspection of the Respondents’ equipment and property prior to a claim being filed against them or any of them?

Learned counsel for BNS, Miss Lightbourne, submitted that this court has no jurisdiction to make the orders sought by Mr. Clarke. She submitted that, unlike the provisions of the relevant statutes and rules in England, our statutes and rules do not provide the authority for the court to make these orders. The submission, as I understand it, may be summarized as follows:

- a. The court does not have the inherent power to order pre-action disclosure. There is also no statute or rule of procedure which gives this court the jurisdiction to order pre-action disclosure.
- b. The Civil Procedure Rules 2002 (the CPR) delimits the circumstances in which an application may be made for an interim remedy. The relevant provision is rule 17.2. Mr. Clarke’s case does not fall within the provisions of that rule. The overriding objective does not permit the court to grant

an order for pre-action disclosure because there is no substantive rule which may be interpreted, or substantive power which may be exercised, in that way.

- c. The pre-action procedure utilised to secure information in cases such as *Norwich Pharmacal Co. v Customs and Excise Commissioners* [1971] AC 133 applies to innocent third parties and is not for alleged wrongdoers. It is not relevant.

The Judicature (Supreme Court) Act

It is important to note that certain provisions of the Judicature (Supreme Court) Act grant to this court the power to exercise the authority once belonging to the Court of Chancery. Section 48 (a) of that Act requires this court to give to an applicant, who claims equitable relief founded upon a legal right, “such and the same relief as ought to have been given by the Court of Chancery before the passing of [the] Act”. Section 49 (h) authorises this court to grant injunctions and similar types of relief. It does not place a restriction on the time at which the court may grant that relief.

Lord Denning M.R. in *Anton Piller KG v Manufacturing Processes Ltd. and Others* [1976] 1 Ch 55, made it clear that the Court does have an inherent jurisdiction to order entry and inspection of a party’s premises

especially after a hearing where both parties are present. (See pages 60 H – 61 B) He went on to say that the order may also be made without notice:

“It seems to me that such an order can be made by a judge *ex parte*, but it should only be made where it is essential that the plaintiff should have inspection so that justice can be done between the parties: and when, if the defendant were forewarned, there is a grave danger that vital evidence will be destroyed, that papers will be burnt or lost or hidden, or taken beyond the jurisdiction, and so the ends of justice be defeated: and when the inspection would do no real harm to the defendant or his case.”

The broad jurisdiction having been established, it may now be determined whether any rules of procedure provide a restriction. I shall, therefore, examine the relevant provisions of the CPR.

The Relevant Provisions of the Civil Procedure Rules

The relevant provisions of the CPR may be considered in two separate contexts; within and outside of the provisions of Part 17. I first consider those outside of Part 17.

Rule 8.1 (5) allows an application for a remedy before proceedings have started, that is, before a claim form has been filed. It specifies that the remedy must be sought by way of an application made under Part 11.

Part 11, in addition to stipulating the form and procedure concerning applications, also gives guidance as to the way the court may deal with such applications. For these purposes, it is relevant to point to rule 11.12 (4). The latter rule authorises the court to exercise any power which it might exercise at a case management conference.

It is beyond question that at a case management conference the court has many powers. These include identifying the essence of the case and bringing it to a state to allow an efficient trial. It is appropriate to point out that rule 27.9 (1) (a) obliges the court, at a case management conference, to consider whether to give directions for standard disclosure and inspection. Rule 28.6 (2) allows a court to order specific disclosure on or without an application. Finally, rule 28.6 (3) allows an application for specific disclosure to be made at a case management conference.

Apart from the powers of case management mentioned above, rule 25.1 (m) requires the court to ensure that no party gains an unfair advantage by reason of that party's failure to give full disclosure.

My assessment of these rules is that they, when considered in the context of this application, give jurisdiction to this court to make orders for discovery even before a claim has been filed.

Miss Lightbourne submitted that Part 28 of the CPR "does not make provision for pre-action disclosure". It is true that the majority of the provisions of Part 28 are placed in the context of parties making one act or another and rule 2.4 defines a "party" in the context of a claim. Apart from that inference, I would observe that if my outline of the progression as set out above is correct, then Part 28 would not exclude pre-claim discovery.

I now examine the relevant provisions of Part 17. This part deals specifically with interim remedies. In assessing Miss Lightbourne's submission concerning Part 17, I note that that rule 17.1 allows the court to grant an interim remedy by way of an order for "the detention, custody or preservation of relevant property" (r. 17.1 (c) (i)). Other clauses in that rule permit orders for the taking of samples and the carrying out of experiments on relevant property. I find that this rule authorises the inspection, detention and preservation of relevant property, by way of interim remedy.

Rule 17.2 referred to by Miss Lightbourne needs closer attention. It speaks to the time when an order for an interim remedy may be made. I therefore quote it in full:

- (1) An order for an interim remedy may be made at any time, including -
 - (a) **before a claim has been made;** and
 - (b) after judgment has been given.
- (2) However -
 - (a) paragraph (1) is subject to any rule which provides otherwise;
 - (b) **the court may grant an interim remedy before a claim has been made only if -**
 - (i) **the matter is urgent;** or
 - (ii) **it is otherwise desirable to do so in the interests of justice;**
 - (c) unless the court otherwise orders, a defendant may not apply for any of the orders listed in rule 17.1 (1) before filing an acknowledgement of service in accordance with Part 9.
- (3) Where the court grants an interim remedy before a claim has been issued, it must require an undertaking from the claimant to issue and serve a claim form by a specified date.
- (4) **Where no claim has been issued the application must be made in accordance with the general rules about applications contained in Part 11. (Emphasis supplied)**

On my reading of the rule, it seems plain that pre-claim orders may be made in respect of matters of the inspection, detention and preservation of relevant property. The urgency and/or desirability of the order are the criteria to be met to determine if the order may be granted. The obligation to meet those criteria is, obviously, placed on the applicant. The rule, however, does not seem to be as restrictive as Miss Lightbourne submits it to be.

The relevance of Norwich Pharmacal Co. v Customs and Excise Commissioners

Norwich Pharmacal Co. v Customs and Excise Commissioners mentioned above, is authority for the proposition that courts of equity will assist applicants who seek discovery of information to enable them to bring a claim against the party which has caused them wrong.

Miss Lightbourne's submission in respect of the case was terse:

"As the *Norwich Pharmacal* principle applies to third parties and not wrongdoers, and [Mr. Clarke's] case is that [BNS] is in fact a wrongdoer, such a disclosure remedy cannot be used against [BNS] in the instant case."

I do not agree with the submission. My reading of the case does not lead me to the conclusion at which learned counsel has arrived. In that case The House of Lords granted *Norwich Pharmacal* an order that the Excise Commissioners should provide it with the names of persons who had imported a product, the patent for which *Norwich Pharmacal* were the owners and licensees. Although a claim had been filed against the

Commissioners for complicity in the importation, it was accepted by the time the case had reached the House, that that claim would not have been pursued. Their Lordships however, did not conclude that the pre-claim discovery could not be used against tortfeasors. It was very much the opposite. Lord Reid, at page 175E-D, said:

“I am more inclined to reach this result [in favour of Norwich] because it is clear that if the person is mixed up in the affair has to any extent incurred any liability to the person wronged, he must make full disclosure even though the person wronged has no intention of proceeding against him. It would I think be quite illogical to make his obligation to disclose the identity of the real offenders depend on whether or not he has himself incurred some minor liability.”

Their Lordships reiterated the principle, said to be “of very considerable antiquity”, that discovery was “not obtainable from a mere witness” (*per* Viscount Dilhorne at page 185 F). The review of the cases by their Lordships demonstrates, among other things:

- a. That in the Court of Chancery “a bill of discovery may be brought when the object of the discovery is to ascertain who is the proper party against whom a suit should be brought” (*per* Lord Cross of Chelsea at page 193 C). That principle remained in place after the fusion of the courts of law and equity.
- b. Someone involved in the transaction, about which the applicant complains:

“...is not a mere witness. If he could be sued or even if there is no intention of suing him, he is not a mere witness...and it matters not that the involvement or participation was innocent and in ignorance of the wrongdoing.” (*per* Viscount Dilhorne at page 188 B)

Viscount Dilhorne cited, with acceptance if not approval, the case of *Orr v Diaper* (1876) 4 Ch.D. 92; 25 W.R. 23. He said at page 185 C:

“As I read the reports of [the judgment of Hall, V.-C. in *Orr*] he based his conclusion on two grounds; first, that the defendants were not mere witnesses and, secondly, on the fact that in his opinion they could themselves have been sued.”

Application to the instant case

Based on the above analysis of the relevant law, I find that this court is entitled to grant Mr. Clarke an order for the detention, inspection and preservation of the relevant information, the subject of his application.

1. He has established that his name has been linked to this Facebook site, which, he says, is false and contains images which are defamatory of him. Images of “dancehall culture” and references to him as “a villain” are some of the matters of which he complains.

Based on that, his case cannot be said to be frivolous or vexatious.

2. He has provided evidence that computers at both BNS and Pavement and Structures have accessed the Facebook site. There is, therefore, the likelihood that information exists on the computer systems of these entities which may be relevant to his case.

3. He has met the requirement of urgency in that he has deposed that the information is in digital form and without a preservation order it is likely to be deleted. The risk is not necessarily that of deliberate deletion. It may be accidental; that is, in the normal course of the management of a computer system.

Mrs. Gibson-Henlin, for Mr. Clarke, in emphasising urgency, submitted that information in digital form is also subject to obsolescence. In this submission, learned counsel quoted Stephen Mason, the general editor of *Electronic Evidence: Disclosure, Discovery and Admissibility* (1st Ed.). The editor postulates that changes in computer hardware and software over time may well make information rapidly unavailable. This is because the equipment required to convert the information to a form legible and intelligible to human beings is replaced by newer technology (paragraph 2.07).

It is necessary, that in granting an order for the detention, inspection and preservation of the information, the process used must be above reproach. It must meet at least two criteria. Firstly, converting the present information to a form legible to humans must be done in a manner which is transparent and does not create an evidential “side-show”, especially if a jury is the selected tribunal of fact. Secondly, the privacy of sensitive

information belonging to BNS and Pavement and Structures (unconnected with the present enquiry) should not be compromised.

To achieve these aims an expert in the field, independent of the parties, ought to be commissioned to carry out the inspection, conversion and preservation of the data.

Does the fact that Mr. Clarke has made a complaint to the police about the false profile entitle BNS and/or Pavement and Structures to refuse inspection on the basis that information might be discovered which incriminates them or either of them?

Miss Lightbourne submitted that the court should refuse Mr. Clarke's application because BNS is entitled to protection against self-incrimination. She submitted that it was very likely that Mr. Clarke would institute criminal proceedings against BNS and in such circumstances it should not be bound to answer any question or produce any document, if the answer or production would have a tendency to expose it to any criminal charge being proffered against it. Learned counsel also submitted that the principle extended to cases involving prosecution for libel. She relied on *Blunt v Park Lane Hotel Ltd.* [1942] 2 KB 253, *Triplex Safety Glass Company Ltd. v Lancegaye Safety Glass (1939) Ltd.* [1939] 2 KB 395 and *Rank Film Distributors Ltd. v Video Information Centre* [1982] AC 380 HL. Mr. Shelton, on behalf of Pavement and Structures, adopted these submissions.

There are number of instances in England of statutory limitation to the privilege but no local ones have been brought to my attention.

To succeed on this submission, BNS and Pavement and Structures must show that there is a very real possibility that they would be prosecuted should the information be produced. They have not done so. Our law has lagged behind the developing technology and no attempt has been made by these respondents to show under what law they could be exposed to prosecution. The Cybercrimes Act has only, this month, been passed in Parliament. That Act allows for sanctions to be brought against persons who criminally misuse computer systems or make illicit electronic transactions. Whether it would apply to the case of mounting a false profile on “Facebook” is left to be seen. It certainly could not be applied retroactively.

In addition to the above, I am firmly supportive of the principle stated in more than one way in the *Norwich Pharmacal Co. v Customs and Excise Commissioners* case, that judges must strive to prevent a denial of justice. Lord Morris of Borth-y-Gest said at page 180 G-H of the report of that case:

“To prevent a denial of justice must at all times be the aim of a judge and the concluding words of Hall V.-C., 4 Ch. D. 92, 96 would surely have been regarded as wholly commendable in any court of equity:

“In this case the plaintiffs do not know, and cannot discover, who the persons are who have invaded their rights, and who may be said to have abstracted their property. Their proceedings have come to a deadlock, and it would be a denial of justice if means could not be found in this court to assist the plaintiffs.””

I now examine the final question.

Does the subsequent filing of a claim by Mr. Clarke affect the current application?

On January 25, 2010; one day before the hearing of this application, Mr. Clarke filed a claim form naming BNS and Pavement and Structures as the defendants. The Claim was filed separately from the present application.

Mrs. Gibson-Henlin submitted that the filing of the claim “does not change the colour of the application”. I agree with her on this point for two main reasons; firstly the persons who actually accessed the “Facebook” site have still not been identified to the court. No such person has been named as a defendant. At best, it has been revealed that a laptop computer used to connect to the “Facebook” site, via one of the particular IP addresses, was assigned to a named temporary BNS employee. There may be other persons involved. Secondly, the need for urgency, addressed above, demands that there be no delay of the process of securing the information while the case management process evolves in the new claim.

Conclusion

“Facebook” may be the application of new technology but the law applicable to granting relief to Mr. Clarke is old indeed. The principles relating to discovery hark back to the old Courts of Chancery. Equity filled the gap when the common law courts had no power to order discovery. This

court is empowered to exercise all the authority which the Courts of Chancery possessed.

Mr. Clarke has made out a *prima facie* case that he has been wronged by a false “Facebook” profile. He is entitled to discover who is responsible for creating the site so that he may bring his claim against that person. This court is empowered and required, to give him the remedy of discovery based on his allegations. The fact that he has instituted a claim against the corporate entities, to which the IP addresses accessing the “Facebook” site were assigned, does not disentitle him from a continuation of the search for the human actors. The continued preservation of the information in a form intelligible to humans is also critical.

BNS and Pavement and Structures are also entitled to protection against improper access to and use of, their private data which is unconnected with Mr. Clarke’s claim. For that reason an independent expert is required to carry out the inspection with a court appointed attorney at law. The orders are, therefore, as follows:

Preservation of Information and Equipment:

1. The 1st Respondent shall keep and preserve all servers in particular proxy servers, computers, laptops, access points, routers, documents, logs, files, records and information relating to IP address 72.27.28.224 from the 1st April 2009 to the 17th July 2009 limited to those that accessed the mail service under the name <billtheceo@yahoo.com> and the social networking site, Facebook;

2. The 1st Respondent shall keep and preserve its “Internet and E-mail Code of Conduct” and the “Scotiabank Group Information Security Policy” that was in existence as at the 1st April 2009 to 17th July 2009;
3. The 2nd Respondent shall keep and preserve all servers in particular proxy servers, computers, laptops, access points, routers, documents, logs, files, records and information relating to IP addresses 72.27.2.188 and 72.27.10.148 from the 1st April 2009 to the 17th July 2009 limited to those that accessed the mail service under the name <billtheceo@yahoo.com> and the social networking site, Facebook;

Entry and search of premises, vehicles and equipment and delivery of relevant information

1. The 1st and 2nd Respondents and each of them must allow the persons appointed by the procedure set out below (‘the expert’) and (‘the Supervising Attorney-at-Law’) respectively and up to two other persons being employees of the expert and/or the Supervising Attorney-at-Law, accompanying them, to enter the premises of the said respondents situated at Ellesmere Road, Kingston 10 in the parish of Saint Andrew and any vehicles under the control of the Respondents on or around the said premises and must allow them to search for, inspect, photograph, photocopy or otherwise copy, record, duplicate and/or take samples of in any manner they deem fit, all servers, in particular proxy servers, computers, laptops, access points, routers, documents, logs, files, records and information in order to preserve evidence of the use of their respective IP addresses mentioned above used to access <yahoo.com> mail service and the social networking site Facebook or otherwise associated with the Universal Resource Locator (URL) <<http://www.facebook.com/profile.php?id=1819972965&ref=nf>> from the 1st April 2009 to the 17th July 2009;
2. The 1st and 2nd Respondents and each of them must upon request provide the expert with access to the computers and other equipment and with all necessary passwords to enable them to carry out their search and cause the items they deem appropriate to be printed out.
3. The Cybercrimes Investigation and Research Unit must on or before 19th March 2010, turn over to the expert and the Supervising

Attorney-at-Law copies of the results of their investigation of all computer equipment, laptops, servers and/or information or documents and MAC addresses seized from the 1st and 2nd Respondents or either of them, on the 11th day of September 2009;

Restrictions on the entry and search

1. This order may only be served and carried out between 9:30 a.m. and 5:30 p.m. on a weekday;
2. This order may not be carried out at the same time as any search warrant;
3. This order must be served by the Supervising Attorney-at-Law and the entry and search carried out in his/her presence and under his/her supervision;
4. This order does not require the person served with the order to allow anyone to enter the premises who in the view of the Supervising Attorney-at-Law could gain commercially from anything he might read or see on the premises if the person served objects;
5. No item may be removed from the premises until a list of the items to be removed has been prepared, and a copy of the list has been supplied to the person served with the order and he/she has been given a reasonable opportunity to check the list;
6. The premises must not be searched and items must not be removed from them, except in the presence of a director of the respective Respondent or a person appearing to be a responsible employee of the respective Respondent and appearing to have authority to allow the search to proceed and to consent to items being removed or a person appearing to be in control of the premises and appearing to have authority as aforesaid;
7. If the Supervising Attorney-at-Law is satisfied that full compliance with these restrictions is impracticable, he/she may permit the search to proceed and items to be removed without compliance with the impracticable requirements;

Appointment of the Expert and Supervising Attorney-at-Law

The Applicant and the 1st and 2nd Respondents shall agree on the persons who are respectively to be the expert and the Supervising Attorney-at-Law to execute this order and failing agreement, they shall each submit to the Registrar of the Supreme Court, on or before 3rd March 2010, the names and particulars of two persons whom they propose to be the expert and Supervising Attorney-at-Law respectively and the Registrar shall on 5th March 2010 select from among the persons proposed an expert and a Supervising Attorney-at-Law regardless of whether any of the parties has failed to submit any names. The Registrar shall, on or before 10th March 2010, advise the Applicant in writing of the persons selected;

Reporting of the findings

The expert and the Supervising Attorney-at-Law shall promptly provide to the Applicant all the information and material which they shall take possession of and inform the 1st and 2nd Respondents of their having done so;

Duration of the right of entry

The right to enter the premises of the Respondents under this order shall remain in force up to and including the 24th March 2010, unless before then it is varied or discharged by a further order of this court;

Costs of the execution of the order

The Applicant shall bear all the costs of the expert and the Supervising Attorney-at-Law associated with executing this order. The said costs shall be considered costs in the claim in the event that the Applicant is successful in any claim filed in respect of which the use of the information procured as a result of this order is critical or deemed highly important by a taxing official;

Applicant's undertakings

1. If the Court later finds that this order or carrying it out has caused loss to the Respondents or either of them and the Respondents or either of

them should be compensated for that loss, the Applicant will comply with any order the Court may make. Further if the carrying out of this order has been in breach of the terms of this order or otherwise in a manner inconsistent with the terms of this order the Applicant will comply with any order for damages the Court may make;

2. If so advised, within thirty (30) days of the information being provided, the Applicant is to either discontinue the action he has filed in California and serve the Claim Form and Particulars of Claim filed in this Court or continue the California Proceedings by substituting the names of the persons he deems fit;

Costs of the Application

The Costs of the 3rd 4th and 5th Respondents shall be borne by the Applicant. Those costs and the costs of the 1st and 2nd Respondents shall be considered costs in the claim in the event that the Applicant is successful in any claim filed in respect of which the use of the information procured as a result of this order is critical or deemed highly important by a taxing official;

Liberty to Apply

All parties shall have liberty to apply.