

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. HCV 002294/2006

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| BETWEEN | JOY DOUGLAS | 1ST CLAIMANT |
| AND | MARLENE DOUGLAS | 2ND CLAIMANT |
| AND | JACKLYN DOUGLAS | 3RD CLAIMANT |
| AND | IVAN DOUGLAS | 4TH CLAIMANT |
| AND | BARCLAYS BANK PLC | 1ST DEFENDANT |
| AND | NATIONAL COMMERCIAL BANK JAMAICA LIMITED | 2ND DEFENDANT |

Ms. Marsha White instructed by Bennett Beecher-Bravo for the Claimants.

Heard: 28th November 2006, 30th March and 26th July 2007

Campbell, J.

(1) The Applicants are the 1st, 2nd and 4th Claimants who filed an application seeking a reversal of the Order of Anderson, J in which he refused an application for a Search Order to be issued to allow the Claimants to inspect the books on the 1st Defendant.

(2) The Notice states as follows:

1. That the Order made by the Honourable Mr. Justice Roy Anderson on the 4th September 2006, that is:
“Fixed Date Claim Form with date of hearing to be served on the Defendants” be reversed.
2. That the cost incidental to and occasioned by this Application be awarded to the Claimant to be agreed or taxed; and
3. That the said costs are to be borne by the Defendants solely without reimbursement to the trust; and

4. Such further and other relief as this Honourable Court seem just.

(3) The grounds on which the Applicants are seeking the order are as follows:

1. The ex parte application, by the Claimants as beneficiaries, that was before the Court on the 4th September, 2006 was for a search order on Trust document in possession of the Defendants. That sufficiently good reasons were made in support of the application to warrant the grant of the ex parte orders sought.
2. That at the time the order was made none of the parties involved were present.
3. That the order itself is defective as it does not identify who it is to serve the Defendant or by when.
4. To uphold the Order will cause great prejudice to the Claimants.

(4) In her affidavit in support of the Fixed Date Claim Form, Joy Douglas states, inter alia;

Paragraph 34 That during the months May to December, I again made request of the Defendants regarding an accounting and information of the trust.

Paragraph 35 I was invited into the office of the 1st Defendant and met with Mr. Patrick Hylton, Patrick Rousseau among others where I saw and copied a few interim financial statements and a barrage of correspondence included those directed at my mentally ill mother demanding rent or advising my family that there was no money.

Paragraph 36 In the process of that interchange I came across information that was never know to me prior to that time and were not contained in any correspondence or report transmitted to my late mother by either Defendants.

Paragraph 37 That non-responsiveness of the Defendants in providing proper explanations increased my suspicions that the Defendant's committed either fraud and/or negligence in the management of the trusts.

Paragraph 38 My suspicions were further heightened when the 2nd Defendant, its agents and/or servants made an application in this Honourable Court under section 25(1) of the Trustees Act and section 9 of the

Trustees, Attorneys and Executors (Accounts and General) Act to transfer the said trust and other trusts to West Indies Trust Company.

(5) The affidavit exhibits two letters referred to as the “Troupe Letters”, written by the 1st Defendant to itself (local branch to Head Office in London) as confirmatory of the “improper conduct” of the 1st Defendant. Complaint is also raised in respect of valuations of the trust property. I find both letters innocuous.

The letter dated 24th February 1970 appears to be an attempt at construing the phrase “outside children” which appears in the Will of the testator in an attempt to see if they meet the settlers terms in the Trust Fund, which states at paragraph 3, “for such of my children of whom I am reputed to be the father who are under the care and protection of my said wife...”

(6) The letter then continues to indicate that the Bank is not familiar in running the company. This, to my mind, is quite understandable. No adverse inferences can be drawn against the Bank for so stating. The letter next examined the marketability of the company. Importantly, there are references to indicate that the Directors of the company recommendations were being considered.

(7) Accounting matters are dealt with in the letter by the bank in settling the deceased Loan Account with the Company, the subject of the Trust. The letter then explains the reason the value of the company is marked down to what may be regarded as an unrealistic value. Even if there is disagreement as to validity of that reason, it is a great leap from that point to allege that there is a risk that the Bank would seek to destroy relevant records in order to cover any lack of skill or expertise on their part. The letter

ends with a discussion as to the relevance of a charge of a special management fee, because of the complexity of the matter.

(8) The Claimant has not adduced evidence to say that it constitutes improper conduct to charge such a fee. This correspondence is on the local bank's letterhead and addressed to the Trustee Manager at the Head Office London. The Claimant has failed to prove by the production of that letter any nefarious conduct on the part of the Bank.

(9) The response from Head Office dated 5th March 1970, indicates the supervisory role that Head Office exercised over the local branch. The letter cautions that the bank should not depend wholly on the most likely purchaser, but should "play all interested parties along if possible" and to ensure that a Bank Report is done on the "most likely prospect". The beneficiaries ought not to complain about that direction. The letter explains the unease that Head Office feels about the procedure of transferring the assets on a depreciated value to the company, as it may be construed as being outwith the terms of the will.

(10) At paragraph 51 of Joy Douglas' affidavit, the Claimants state;

I verily believe that if this Hounorable Court does not grant the Orders sought, the Defendants, motivated by the desire to avoid liability in either fraud, negligence and/or public embarrassment as financial institutions, will destroy the documentation needed to pursue the claims.

(11) Stuart Sime in his Practical Approach to Civil Procedure, Seventh Edition, page 389, says;

"Search Orders are obtainable only against Defendants who are likely to destroy relevant evidence if an application on notice were to be made."

The Claimants here bears the responsibility of making full and frank disclosure.

(12) The principles that are relevant on an application for a Search Order were enunciated by Ormrod L.J in the Court of Appeal in **Antons Pillar KG V Manufacturig Processess Ltd.** (91976) Ch. 55.

- (1) There must be a strong prima facie case on the merits.
- (2) The Defendants' activities must be proved to result in a very serious potential or actual harm to the Claimants' interest.
- (3) There must be clear evidence that incriminating documents or materials are in the Defendants' possession.
- (4) There must be a real possibility that such items may be destroyed before any such application on notice can be made.

(13) Lord Denning M.R in his judgment says at page 58;

“But at the outset I must state the facts, for it is obvious that such an order can only be justified in the most exceptional circumstances. It is clear that there must be very clear evidence to support the application.”

Brightman J. who had refused the application at first instance had said there was strong prima facie evidence that the Defendant was engaged in seeking to copy the Plaintiffs' components for its own financial profit to the great detriment of the Plaintiffs and in breach of the Plaintiffs' rights.

(14) In the **Anton Pillar** case that evidence consisted of the statements of two defectors who had been engaged in the copying and transmitting of copyright information to the Defendants. Their statements were corroborated by incriminating documentary evidence. The Defendants were sending drawings and arranging for inspection of the Claimant's machines. There is no such strong prima facie case made out in the instant case.

(15) Also of note is the urgency that **Anton Pillar** case demanded, as noted in Lord Denning M.R's Judgment in which he quoted from Brightman J's judgment at first instance. The Defendants were engaged at the time of the application in the activity that threatened the Claimants, who were in the process of launching a new product and feared that the Defendants would make copies of it and ruin their market. The Claimants in this case can raise no such urgency, the wrongs that she complains of occurred decades ago.

(16) Lord Denning says of the Search Order sought, that it should only be made in two circumstances. Firstly, where it is essential that the Plaintiff should have inspection so that justice can be done between the parties, and *when if the Defendants were forewarned, there is a grave danger that vital evidence would be destroyed, that papers will be burnt or lost or hidden or taken beyond the jurisdiction, so the ends of justice be defeated; and when the inspection would do no real harm to the Defendant or his case* (emphasis mine).

(17) The very nature of the allegations against the Defendants in the **Anton Pillar** case suggest that the breaches were so grave that it is likely that the Defendants would destroy the evidence of their wrongdoing. The judgment recognizes the difficulty of adducing cogent evidence of a Defendant who is likely to destroy evidence, but allows that inference to be drawn when the activity of the Defendant is nefarious. In this case the Claimant has failed to prove that the Bank is engaged in any such conduct or activity that would allow for this Court inferring that the Bank is unlikely to obey the Order of the Court. See Oliver J's judgement in **Dunlop Holdings Ltd v Staravia Ltd.** (1982) Com. LR.3.

(18) The Claimant has not provided the Court here with a title of evidence of any breaches by the Trustees. There is no evidence of a likelihood of the Defendants, a reputable banking institution, taking steps to destroy evidence. The affidavit evidence before me does not support any such contention. Lord Denning M.R.'s second essential precondition for the grant of the Search Order is when the inspection would do no real harm to the Defendant or his case. The Applicant has not adduced any evidence to satisfy the Court, the Bank or its case is unlikely to be harmed by the inspection.

(19) On the other hand the 1st Claimant was afforded access to the Bank's Managing Director and allowed to examine several relevant documents. There was no complaint that any document requested was not shown to the Claimant. Although fraud is alleged, there is no specific pleading made to detail such fraud. Far from being specific fraud is pleaded in the alternative to negligence. The gravamen of these Search Orders is the real risk that documents will be destroyed. No such evidence is forthcoming in this case. The document to which the Claimants have been granted access to date erodes the Claimant's ability to successfully argue that such a risk is real. I have nothing before me to indicate that NCB is unlikely to obey an Order of this Court for discovery.

The application is refused.

