



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE COMMERCIAL DIVISION

IN CHAMBERS

CLAIM NO. 2010 CD 00046

BETWEEN	FIRST GLOBAL BANK LIMITED	CLAIMANT
AND	ROHAN ROSE	1 ST DEFENDANT
AND	ANTHONY LEWIS	2 ND DEFENDANT

HEARD WITH

CLAIM NO. 2011 CD 00015

BETWEEN	FIRST GLOBAL BANK LIMITED	CLAIMANT
AND	ROHAN ROSE	1 ST DEFENDANT

Mr Michael Hylton Q.C., Ms Karlene Larmond and Mr Kevin Powell instructed by Michael Hylton and Associates for the Claimant.

Mr Bert Samuels and Ms Jacqueline Wilcott instructed by Knight Junor Samuels for the 1st Defendant.

Civil Procedure – Specific disclosure- Request for reports prepared by central bank – Whether disclosure inimical to the public interest – Banking Act, s. 45 – Bank of Jamaica Act s. 34D and 47 (1) - CPR rr. 28. 7 and 28.15

31 March and 19 August 2011

BROOKS J

[1] Mr Rohan Rose was, for a number of years, employed to First Global Bank in several different senior posts. He rose to the post of Vice-President –

Treasury and Investment. That employment was terminated in August 2009 in controversial circumstances.

[2] The termination is, however, not sufficient for the bank; it wants more. It has, therefore, filed this claim by which it seeks to recover US\$ \$8,242,737.64 and J\$6,152,063.94 respectively, from Mr Rose. According to the bank, Mr Rose, during the course of his employment, fraudulently and/or negligently carried out certain transactions which caused it to lose those sums. The bank also seeks to recover the sum of US\$148,298.93 from Mr Anthony Lewis, who is said to have improperly benefited from Mr Rose's dealings with the bank's resources.

[3] Mr Rose has denied the bank's allegations. He has asserted that the transactions, about which the bank has complained, were normal trading and investment transactions and that some of them resulted in genuinely incurred losses. Mr Lewis has also denied the bank's assertions, but the details of his position are not relevant for these purposes.

[4] In the present application, Mr Rose seeks an order for the bank to disclose the Bank of Jamaica's Audit Reports in respect of the bank, for the years 2002 to 2009. Mr Rose asserts that the information is required in order for him to properly prepare and present his defence to the claim. The bank has resisted the application, stating that not only does the central bank, the Bank of Jamaica, object to releasing the information, but that the report contains information concerning customer's accounts and other sensitive information, the revelation of

which would ordinarily be an offence. It insists that Mr Rose does not need to have the report in order to prepare his defence.

[5] The issue for the court to decide is whether the objective of properly identifying all the issues which are relevant to the claim, require the information to be provided to Mr Rose. In resolving the question, the provisions of rule 28.7 of the Civil Procedure Rules 2002 (the CPR) must be considered and contrasted with any risks to the public interests that disclosing this information may pose.

The relevant law

[6] Rule 28.7 requires that a court, when deciding whether to make an order for specific disclosure, must consider whether such “disclosure is necessary in order to dispose fairly of the claim or to save costs”. The emphasis of the rule is that the court must weigh the benefits of the disclosure against the cost of providing that disclosure.

[7] Other provisions of part 28 of the CPR, also allow for a party to withhold disclosure or inspection of documents which it claims are privileged or which may damage the public interest. Where such an assertion is made, the court, upon the application of the party requiring disclosure, “must make an order that the document be disclosed unless it is satisfied that there is a right to withhold disclosure (see rule 28.15 (6)).

[8] In determining whether there is a right to withhold disclosure, the court in the instant case, must also consider the provisions of section 45 of the Banking Act. That section prohibits any banker from revealing any information about the details of any account of any customer of the bank. The Act provides certain

exceptions to the operation of section 45. One such exception is where the disclosure is required by virtue of an order of the court.

[9] It is to be noted that the prohibition continues to bind a banker, even after the termination of his or her employment or professional relationship with the bank, whose records afforded the access to the customer's details.

[10] The confidence with which the details of customers' accounts must be treated is also extended to the banks themselves. The Bank of Jamaica Act also requires confidentiality from every officer and servant of the Bank of Jamaica. Those persons must "preserve and aid in preserving secrecy with regard to all matters relating to the affairs of any commercial bank, or of any customer of any such bank", which may come to the attention of that officer or servant (see section 47 (1)).

[11] Indeed, where the information on the operations of a commercial bank is secured by an officer of the Bank of Jamaica as a result of its supervisory role as the central bank, that officer is prohibited from disclosing the information thus gleaned, except to specific persons (see section 34 D of the Bank of Jamaica Act). It is of significance that the persons and entities privileged to receive the information do not include the bank, about which the information is garnered.

[12] The restrictions on supervisory officers are even more stringent than the general restrictions imposed by section 47, referred to above, in that section 34 D makes no specific reference to disclosure by order of a court. Section 47 (2) does allow an officer to give evidence, concerning information coming to his attention during the course of his duties, if the court so directs.

[13] Despite those provisions, however, if the Bank of Jamaica provides a report, even arising from its supervisory duties, to a commercial bank, the fact that the Bank of Jamaica claims that the report is confidential, and remains its possession, does not preclude the court from ordering it to be disclosed by the bank, for the purposes of litigation. That is, so long as the report is relevant (see *Alfred Crompton Amusement Machines Ltd v Commissioners of Customs and Excise (No 2)* [1973] 2 All ER 1169 at page 1184 d).

Application to the instant case

[14] In considering whether Mr Rose should have access to the Bank of Jamaica's reports in respect of the bank, it is important to note that identification of the issues at an early stage of the case is one of the duties which the court must undertake in discharging its duty to actively manage cases (see CPR r. 25.1 (b)). The issues which have been raised by the contending statements of case do not obviously involve any breach of any Bank of Jamaica directives or of the Banking Act. The averments concern whether or not transactions conducted by Mr Rose, in the course of his employment, were within the scope of his duties and were within the bank's policy directives. Why, therefore, are the Bank of Jamaica's reports on the bank relevant?

[15] Mr Rose, in his affidavit in support of the application for the information, did not specifically address the report from the Bank of Jamaica. To be fair to him, the report was only one of many items for which he sought specific disclosure. His general reason for the disclosure was that he needed those

items in order to complete his witness statement and to ensure that he had a “fulsome defence and evidence in chief” placed before the court.

[16] In addressing the issue of confidentiality, Mr Samuels, appearing for Mr Rose, submitted that the information sought “is not in relation to customer information but more so for the information concerning trading as well as operational activities of the [bank]”. That submission was made in response to the contents of an affidavit by an official of the Bank of Jamaica; Mr Robin Sykes.

[17] In his affidavit Mr Sykes, deposed that the reports were examination reports which were prepared pursuant to the supervisory duties of the Bank of Jamaica. He stressed that those were statutory reports and were intended for providing information to the Minister of Finance. Mr Sykes exhibited, as an example, a copy of a letter (written in 2008) sending a copy of one such report to the bank. It stressed the confidentiality of the subject matter and ended with the following paragraph:

“The Report of Examination remains the property of the Bank of Jamaica and contains confidential information which should not be disclosed except to designated persons. The report once read by the Directors should be returned to management and maintained in a secure file. We again ask that this report be dealt with on a **strictly confidential basis.**” (Emphasis as in original)

[18] Mr Sykes deposed that the reports also contained information other than that relating to customers’ accounts. He deposed that the reports covered the central bank’s assessment of several areas of the bank’s operation and “specifically, the areas of deficiencies in their (sic) operations which are uncovered by the examination” (paragraph 5). He stated that the release of sensitive information on the operations of a commercial bank could impact

negatively on the operations of the bank and result in instability, not only of the bank but the wider financial system.

[19] I find that the nature of the document and the possible effects of disclosure, as described by Mr Sykes, tips the balance in favour of refusing Mr Rose's application. The undisputed evidence that the bank was not, strictly speaking, entitled to have received a copy of the document, has assisted me in arriving at that decision. I accept that the document is not privileged in the strict sense of the term, but find that the evidence that the risks that disclosure poses to the stability, not only of the bank itself but of the entire financial system, leads me to rule against the application. I am therefore satisfied that there is a risk of damage to the public interest as is contemplated by rule 28.15 (2) of the CPR.

[20] I have relied, in part, on the dictum of Lord Cross of Chelsea, in *Alfred Crompton Amusement Machines Ltd*, mentioned above. The learned Law Lord leaned against disclosure on the grounds of the public interest. He was supported by the rest of the House of Lords on the particular point. He said at page 1185 c:

“In a case where the considerations for and against disclosure appear to be fairly evenly balanced the courts should I think uphold a claim to privilege on the ground of public interest and trust to the head of the department concerned to do whatever he can to mitigate the ill-effects of non-disclosure.”

[21] Lord Cross' reference to the discretion of the head of department could not assist in the instant case. This is because the existence of the statutory provisions prevents any official from the Bank of Jamaica from providing any

information to Mr Rose. I am, therefore, not able to make any order for any disclosure by any official at the Bank of Jamaica.

[22] I have also considered the case of *Kaufman and Others v Credit Lyonnais Bank* [1995] TLR 43 (1 February 1995). In that case the plaintiffs alleged, among other things, that the defendant bank had acted negligently and/or fraudulently and/or in breach of the rules of the Securities Association. They sought disclosure of certain reports prepared, on behalf of the defendant, for its umbrella association and for the Bank of England. The defendants resisted disclosure on the basis that the documents were prepared for confidential use and formed part of a class of documents to which public interest immunity attached as a class.

[23] Arden J did not accept that the documents were entitled to immunity from disclosure. The headnote of the report concisely states the reason for her decision:

“Confidential reports disclosed voluntarily by a banking institution to the regulatory body of which it was a member, providing full and frank accounts of the operation and management of its private client banking department, would not be entitled to public interest immunity, as a class, in respect of a claim for production of those reports by investment clients of the bank, unless it could be clearly demonstrated that there was a need to withhold such information from investors.”

[24] I find, as material, two distinctions between *Kaufmann* and the instant case. The first is that, in *Kaufmann*, the report was not prepared by the central bank and therefore was not subject to statutory strictures as were mentioned above. The second is that there is evidence, in the instant case, of the danger of disclosure. That evidence has not emanated from the bank but from the central bank, which, not being a party to this claim, is more likely to be objective. I

accept is as being reliable. For these reasons I find that *Kaufmann* is distinguishable on its facts.

[25] Despite the bank's success on this point, I would not order costs against Mr Rose, because the issue of the Bank of Jamaica reports was only one item of several, which Mr Rose had requested and was refused. The parties have subsequently arrived at consensus on all the other items and it was only on the issue of these reports that they could not agree.

Conclusion

[26] Mr Rose's request for specific disclosure would ordinarily be granted, in keeping with the principle that all parties should have access to the information that will enable them to properly present their respective cases. Where, however, the information requested has ramifications for a result that is adverse to the public interest, the court is authorised to rule against disclosure (see rule 28.15 (2) of the CPR).

[27] In the instant case, the evidence is that disclosure of the Bank of Jamaica reports could result in instability in the financial structure of the country. In the absence, therefore, of any specific aspect of the reports, to which Mr Rose can advert, even generally, as being critical to the preparation of his case, the application for specific disclosure must be refused.

The orders, therefore, are as follows:

1. The application for specific disclosure of the Reports of the Bank of Jamaica in respect of First Global Bank Ltd for the years 2002-2009 is refused.
2. No order as to costs.