IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW

CLAIM NO. 2005 HCV 00120

BETWEEN	**NOEL KING**	**1ST CLAIMANT**
AND	**DAVID CHIN**	**2ND CLAIMANT**
AND	**WAYNE CHIN**	**3RD CLAIMANT**
AND	**COMMISSIONER OF CUSTOMS**	**1ST DEFENDANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**2ND DEFENDANT**

IN CHAMBERS

Lord Anthony Gifford, Q.C. instructed by
Gifford, Thompson and Bright for the Claimants

Miss Tasha Manley instructed by
Director of State Proceedings for the Defendants

HEARD MAY 11, & JUNE 19, 2006

McDONALD-BISHOP, J (AG)

INTRODUCTION

This case focuses attention on some critical issues pertinent to the application of Part 34 of the Civil Procedure Rules, 2002 (CPR) that governs requests for information. At the same time, it has raised an interesting point of pleadings within the context of the CPR that I consider to be of some jurisprudential

importance worthy of note. For this reason, I have undertaken to reduce its terms into writing.

THE APPLICATION

Upon Case Management Conference held on the 11th May, 2006, the claimants, by an application without notice, sought an order pursuant to Rule 34.2 of the CPR in the following terms:

> *"The Defendants do provide the information requested by the claimants by letter from their Attorneys-at Law dated 26th May, 2005 on or before 11th May, 2006."*

On June 19, 2006 on an adjourned hearing, counsel for the defendants, after an initial objection to the application and a review of the cases cited by Lord Gifford, conceded that she could not resist the application on the strength of the authorities cited. I accepted that concession as one rightly made in the circumstances and accordingly, after paying due regard to the provisions of Part 34 of the CPR, I granted the order sought by the claimants.

In order to promote a clear understanding of the legal issues raised on the application, I have deemed it prudent to first provide a synopsis of the factual background from which the request for information and the instant application have emanated.

THE BACKGROUND

On 24th October, 2004, in the purported execution of a special warrant issued pursuant to section 203 of the Customs Act, officers of the Contraband Enforcement Unit, acting as servants and/ or agents of the first defendant went to Caribatic Boat Yard, Rock Harbour, Trelawny where boats and other equipment in the ownership and/or the possession of the claimants were kept. There they proceeded to issue notices of detention in respect of various boats and equipment found on the said premises on grounds of suspected breach of the Customs Act.

Arising from this action of the Contraband Enforcement Unit, the claimants, by Claim Form dated 13th January, 2005, brought a claim against the defendants for:

> *"1. Delivery up of various boats and equipment removed by the servants and agents of the First Defendant from the Caribatic Boat Yard, Rock Harbour in the parish of Trelawney (sic) on the 24th day of October, 2004;*
>
> *2. Orders for the revocation of notices of detention issued on behalf of the First Defendant in respect of various boats and equipment;*
>
> *3. Damages for unlawful detention;*
>
> *4. Interest*
>
> *5. costs "*

In response, the defendants, by Draft Defence dated March 15, 2005, averred, in so far as is relevant to the instant proceedings, that:

> *"6. Save that it is admitted that on the 24th of October, 2004 officers of the Contraband Enforcement Team entered upon the Caribatic Boatyard in Trelawny pursuant to a search warrant obtained under section 203 of the Customs Act, and that Notices of Detention were issued in respect of the boats and equipment referred to in paragraphs 1-5 of the Claimant's Particulars of Claim, paragraph 9 is not admitted...*
>
> *9. Save that the boats and equipment referred to in paragraph 14 of the Particulars of Claim have remained the possession and control of the First Defendant, paragraph 14 is denied. The Defendants will say that the said boats and equipment were lawfully seized pursuant to section 203 of the Customs Act and that the Claimants have failed to provide the First Defendant with satisfactory proof that the said boats and equipment are not uncustomed goods.*
>
> *10. Paragraph 15 is not admitted. The Defendants will say that the First Defendant lawfully continues to detain the boats referred to in paragraphs 15 of the Particulars of Claim and further that despite*

repeated requests, the Claimants have failed to furnish the First Defendant with satisfactory proof of the customs duties in respect of the boats "Dread Knots' and 'Knot Easy' and proof of local acquisition or import entry documents in respect of 'kokoknots..."

It is with these aspects of the defendants' pleadings that the claimants have taken issue and which prompted the requests for information under review.

THE REQUESTS FOR INFORMATION

The first request for information was filed on April 12, 2005 to this effect:

> *"The Claimants request information from the Defendants, namely:*
>
> *In relation to the allegation made in paragraph 6 and 9 of the Defence that the officers acted pursuant to section 203 of the Customs Act, stating each and every fact or matter on the basis which is alleged that the said officers had reasonable cause to suspect that the boats and equipment which they seized were uncustomed or prohibited goods."*

There was no reply to this request and so by letter dated May 26, 2005, a further request for information was made by the claimants in the following terms:

> *"Pursuant to Rule 34.1 of the Civil Procedure Rules we request the following information in relation to your client's Defence:*
>
> *Under Paragraph 9*
>
> *In relation to the allegation that the boats and equipment referred to in paragraph 14 of the Particulars of Claim were lawfully seized pursuant to section 203 of the Customs Act, stating, in respect of each and every boat and piece of equipment:*
>
> *(1) Whether it is alleged that the first defendant had reasonable cause to suspect that it was uncustomed goods; and*
>
> *(2) If so, stating what facts and matters are relied on as grounds for the same suspicion.*
>
> *Under Paragraph 10*

In relation to the allegation that the boats referred to in paragraph 15 of the Particulars of Claim were lawfully seized, stating in respect of each and every boat:

(1) Whether it is alleged that the first Defendant had a reasonable cause to suspect that it was uncustomed goods;

(2) If so, stating what facts and matters are relied on as grounds for the said suspicion."

Again, the defendants failed to respond in any form or manner to the requests made a year ago and no explanation was advanced at case management conference for the failure to do so. I pause here to register my disapproval with such conduct on the part of the defence. I find this as rather unfortunate and unacceptable in the circumstances of this case where there are expressed allegations of the wrongful exercise of state power.

In my view, given the power and resources of the state vis-à-vis its citizens, the state, as a party in litigation, ought to be held at a higher standard of responsibility to the administration of justice than the ordinary citizen. This responsibility should always be to ensure that the rules of fairness are preserved and that justice prevails in the end. This responsibility, I believe, should at all times guide its conduct in litigation.

It was against this background and in an effort to give effect to the overriding objective to deal with cases justly that I proceeded to hear the application notwithstanding that no notice of the application was filed and served on the defendants. Miss Manley, however, was granted an adjournment to further instruct herself to respond to the application, particularly, in light of the authorities cited by Lord Gifford.

THE LEGAL BASIS FOR THE APPLICATION

The request for information by the claimants derives its legitimacy from rule 34. 1 of the CPR that reads:

"34.1 (1) This Part contains rules enabling a party to obtain from any other party information about any matter which is in dispute in the proceedings.

(2) To obtain the information referred to in paragraph (1) the party seeking the information must serve a request identifying the information sought on other party."

Similarly, the legal basis for the application for the order of the court inheres in rule 34.2 (1) that states:

> *"Where a party does not give information which another party has requested under rule 34.1 within a reasonable time, the party who served the request may apply for an order compelling the other party to do so."*

There is no dispute that a request for information was made pursuant to rule 34.1. There is also no question that the defendants have failed to furnish the information requested within a reasonable time- the request having been made a year ago. The claimants, therefore, have the legal right to make the application for an order within the ambit of Part 34 of the CPR.

THE SUBMISSIONS

The thrust of Lord Gifford's submission in support of the application may be encapsulated thus: where there is an issue raised on pleadings as to whether a party has reasonable grounds or cause to suspect, the court should, on request, order that party to give particulars as to the grounds for that suspicion or belief.

Within this context, he argued that the defendants have alleged justifiably taking the claimants' property on the basis of reasonable suspicion that they are uncustomed. According to him, the claimants ought to be told the basis on which the defendants had proceeded to detain their property and so particulars as to the grounds for the officers' suspicion should have been pleaded. This, he said, could, *inter alia,* assist the claimants to see the case that they would have to meet.

Let me state at this juncture that the basis of Lord Gifford's submission derives its relevance and validity from the wording of section 203 of the Customs Act on which the defendants seek to rely in defence of the claim. In an effort to illuminate the merit of the submission, I will now recite the relevant portions of this statutory provision which reads in part:

> *"(1) If any officer has reasonable cause to suspect that-*
>
> *(a) any uncustomed or prohibited goods;*
>
> *(b) any books or documents relating to uncustomed or prohibited goods;*
>
> *(c) any computer equipment that he reasonably believes to have been used in connection with and to contain evidence relating to the importation or attempted importation, landing,... of any uncustomed, prohibited or restricted goods,*
>
> *are harboured, kept or concealed in any house or other place in the Island, the officer may apply to a Resident Magistrate or Justice of the Peace for a special warrant in relation to such goods, books, documents or computer equipment.*
>
> *(2) Where in relation to an application under subsection (1) the Resident Magistrate or Justice of the Peace is satisfied that the issue of a special warrant is justified, he may grant the special warrant authorizing the officer to –*
>
> *(a) enter and search the house or other place referred to in his application by day or night...*
>
> *(c) seize and carry away any uncustomed, restricted or prohibited goods, or any books or documents relating to such goods, or any such computer equipment as may be found therein."*

It is expressly stated by the defendants in their pleadings that they are using the authority bestowed on them by section 203 as legal justification for their action. This pleading of justification in reliance on that provision, by necessary implication, means a pleading of the existence of reasonable cause for suspicion

on the part of the officers who obtained the warrant. It is this aspect of the defence that forms the gravamen of the application and of Lord Gifford's submissions that the facts forming the grounds for suspicion in the mind of the relevant officer should have been disclosed in the pleadings; hence his request for information in the terms stated.

In an initial response to these submissions, Miss Manley contended, on behalf of the defendants, that given that the pleadings do not constitute evidence, the information being requested by the claimants would fall as a matter of evidence and so would be properly disclosed when witness statements are exchanged. As such, she maintained that there is no obligation on the defendants to provide such information in the pleadings and so the order ought not to be granted. She cited no authority.

Lord Gifford sought to counter this argument by maintaining that the information requested in the circumstances of this case ought properly to be provided at the point of pleadings and that the claimants ought not to await witness statements from the defendants before requesting such information. He strongly argued that to furnish such information at the point of pleadings would not be premature. In support of his proposition he relied on the principles enunciated in three English cases: **Alman v Oppert** [1900-3] All E.R. (Rep), 281, **Stapeley v Annetts & Another** [1969] 3 All ER, 1542 and **Green v Garbutt & Others** [1912] TLR, 575.

ANALYSIS

Before proceeding to examine the authorities relied on by Lord Gifford, I must point out that the submission of Miss Manley in this regard, simple as it may seem and made at the time without any authority cited in support, has nevertheless managed to raise one of the most important questions for my contemplation in these proceedings. Consequently, I took it as incumbent on me to closely examine the question as to the proper stage at which such a request

for information should be made. It is to an examination of this question that I now turn.

Should the Information Requested be Disclosed in the Pleadings or Ought Properly to be Requested After the Exchange of Witness Statements?

It is my view that an apt starting point in examining this issue would be to heed the words of advice proffered in **Blackstone's Civil Practice, 2004,** at paragraph 30.2 that:

> *"The doctrine of proportionality and the more "utilitarian" approach to statements of case generally, should mean that requests for further information should be used with some caution. Although they can be used to advantage some claims, considerable care must be taken in selecting areas to be investigated by a request and in formulating the questions to be put. Experience has shown that the CPR have been effective in severely curtailing, if not extinguishing altogether, the use of the request for further information for tactical purposes and requests for information appear to be employed much more rarely than the old request for further and better particulars."*

It is interesting to note that although Miss Manley cited no authority for her submission, her argument is not without some merit and has, indeed, received legal validation from Lord Woolf, MR In **McPhilemy v Times Newspapers Ltd**. [1999] 3 All ER 775, 792,793, where he stated:

> *"The need for extensive pleadings, including particulars, should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies together with copies of that party's witness statements will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties (emphasis mine)."*

Lord Woolf, MR, in his wisdom, further pointed out that excessive particulars can obscure the issues rather than providing clarification and that after disclosure and the exchange of witness statements, pleadings frequently become of historic interest.

Interestingly too, Miss Manley's submission also obtains similar support from the dictum of Sir Thomas Bingham, Master of the Rolls, in **Hall v Sevalco Ltd (1996) the Times**, 27 March 1996, C.A. He is reported to have said, in giving the judgment of the Court of Appeal, that:

> *"The guiding principle had to be that laid down in Order 26, rule 1(1) that interrogatories had to be necessary either for disposing fairly of the cause or matter or for saving costs. Necessity was a stringent test. It could not be necessary to interrogate to obtain information or admissions which were or were likely to be contained in pleadings, medical reports, discoverable documents or witness statements unless exceptionally a clear litigious purpose would be served by obtaining such information..... As a general statement the court would agree with that in paragraph 11.6 of the Guide to Commercial Court Practice: .."Suitable times to interrogate (if at all) would probably be after discovery and after exchange of witness statements (emphasis added)."*

There is thus, highly persuasive authority for the view that the most suitable times for requests for information to be made would [probably] be after disclosure and the exchange of witness statements. By such times, it is believed, a party would be in a position to better see what is needed to meet the case of the other. I fully accept this as the formulation of a sound and useful principle and so has given it due consideration in the circumstances of this case.

Lord Gifford, however, sought to circumvent the applicability of this principle to the instant case by arguing that the information requested in the circumstances of this case is properly to be furnished at the point of pleadings and not after witness statements have been exchanged. It is within this context that I now turn to examine the authorities on which he relied for support of his argument.

The facts of **Alman v Oppert** (supra) are as follows: The plaintiffs, holders of some mortgage debentures issued by a company, brought an action against the directors as a result of certain statements in the prospectus which the plaintiffs alleged were untrue, and on the faith of which the plaintiffs applied for the debentures. By their statement of defence, the directors alleged that when the prospectus was issued they and each of them " bona fide believed, and still bona fide believe the statements in the prospectus to be true and the defendants had reasonable grounds for such belief." The plaintiffs applied for an order directing the defendants to deliver particulars of the grounds of their belief. The judge at first instance refused the application, and the plaintiffs appealed.

In allowing the appeal and ordering that the defendants do provide the particulars requested, Henn Collins, LJ stated:

> *"In my opinion, having regard to the provisions of the Act, particulars ought to be given by the defendants. The cardinal question is whether the directors had reasonable grounds for believing the statements in the prospectus to be true. That being the question, it would be very strange that the person whose business it will be at the trial to dispute the reasonableness of the grounds of belief should not be entitled to know beforehand what those grounds were. A person who sets up as his defence that he believed a statement, and had reasonable grounds for so doing, can hardly say that it would be an intolerable burden to state the grounds of his belief, and I do not think it unfair to impose that burden on him... and if a defendant is unable to analyse the grounds of his belief he must say so"*

Stirling, LJ, in concurrence, had this to say:

> *"I agree. I do not think the task of giving these particulars is so difficult as is alleged. The object of particulars is simply to enable the opposite party to know the case which he will have to meet at the trial. In the present case the question is whether the defendants had reasonable grounds for believing certain statements to be true. It appears to me perfectly possible for the defendants, without disclosing their evidence, to state in general terms the grounds of their belief."*

In **Stapeley v Annetts & Another** (supra) there were two claims brought by the plaintiff against the defendants- one in respect of malicious prosecution and the other for false imprisonment. The court at first instance ordered that the defendants do provide reply to the interrogatories in relation to the claim for false imprisonment but not in relation to the claim for malicious prosecution. The plaintiff appealed the refusal to grant the order in respect of the malicious prosecution.

It was held that on the claim for false imprisonment, wherein the defendants pleaded that there were reasonable grounds to believe that the plaintiff was guilty of theft, they were properly ordered to give particulars of that defence. However, in an action for malicious prosecution the burden is on the plaintiff to prove malice and absence of reasonable and probable cause and if the defendant denies it, it is not the practice for the court to require the defendant to give particulars of his denial. The order for the defendants to give particulars in respect of the malicious prosecution was, therefore, rightly refused. As Lord Denning, MR (as he then was) instructed: *"It is only if he puts forward a positive allegation that he should be required to give particulars of it."*

In sum, the foregoing cases are important for their illustration of the principle that where a defendant, like those in the instant case, puts forward a positive allegation of acting with reasonable cause, they should be required to give particulars of it.

Similarly, In **Green v Garbutt & Others** [1912] TLR, 575 the plaintiff sued the defendants, who were two constables in the employment of a railway company, and also the railway company for damages for false imprisonment. The plaintiff alleged that he had been wrongly arrested on a charge of theft and had subsequently been discharged. The defendants pleaded that they denied the arrest but if the acts complained of had been done, they were done by the

constables in the execution of their duty, they having reasonable and probable cause for suspicion that a felony had been committed and that the plaintiff had committed it.

The plaintiff made an application for an order to compel the defendants to provide particulars as to the alleged felony and the ground for the reasonable and probable cause for suspicion. He asked for particulars of the facts which would cause the defendants to suspect him. It was contended on his behalf that he was entitled to be told of the case which he would have to meet at the trial.

It was held that the plaintiff was entitled to an order for particulars of the alleged felony and also of the reasonable and probable cause for suspicion but not to the names of those who had given the defendants information against him.

It is clear that these cases are in strong support of Lord Gifford's contention that the information requested ought properly to be given at the point of pleadings. Miss Manley, after reviewing the authorities, conceded on this point and stated that she would no longer resist the application.

Before granting the order, however, I went further and specifically noted that the cases relied on by Lord Gifford predated the advent of the new rules (CPR) which introduced the requirements for witness statements to be exchanged before trial. It is evident, that the exchange of witness statements has the practical effect of giving a party an opportunity, before trial, to properly see the case of his opponent and to prepare his case to meet his opponent's case. As such, I have examined the principles from **Stapeley v Annett** and **Green v Garbutt** against the background of the principles stated in **McPhilemy** and **Hall v Sevalco** as to the suitable times to make requests for information.

Having done so, I conclude that even with the new rules with the provision for witness statements to be exchanged before trial, the principles enunciated in these cases cited by Lord Gifford seem to be good law and can properly be applied to cases of this nature where there is a positive allegation on the part of

the defendants of having reasonable cause for doing the act complained of by the claimants. Accordingly, I would hold that particulars of the factual basis of the defendants' defence, as distinct from the mere legal basis, should have been disclosed on their statement of case.

I am, therefore, persuaded to the view that the information requested in the circumstances of this particular case is such that it ought properly to be given at the point of pleadings and not after the exchange of witness statements.

Having accepted, therefore, that the information requested might properly be given on the pleadings, I ultimately took steps to ensure that the order sought by the claimant was one that could properly be made within the letter and spirit of the CPR. This examination was undertaken for two reasons. Firstly, although the principles in **Alman, Stapeley** and **Green,** in so far as they are relevant, are accepted on the point of pleadings, the cases were not decided within the context of rules identical to our CPR and so any question as to whether an order should be ultimately granted ought to be considered with reference to the CPR. Secondly, I have given due recognition to the duty of the court at case management conference to actively manage the case so as to ensure that time and costs are not unnecessarily wasted and that the matter is disposed of expeditiously and justly. The order sought should, therefore, comply with the provisions of the CPR.

THE TEST: Is the Information Requested Necessary in Order to Dispose Fairly of the Claim or to Save Costs?

It is clear from the authorities that requests for information must be kept within narrow confines and not be over- utilized. In this regard, I will adopt the words of Sir Thomas Bingham, MR in **Hall v Sevalco** and say: *requests for information "are not to be regarded as a source of ammunition to be routinely discharged as part of an interlocutory bombardment preceding the main battle."* The guiding principle in our jurisdiction must be that laid down in rule 34.2 (2) of the CPR that

an order may not be made unless "it is necessary in order to dispose fairly of the claim or to save costs (emphasis mine)" The request for information must, ultimately, satisfy this test of necessity.

In examining this issue as to necessity, I have paid due regard to the provisions of rule 34. 2 (3) that states:

> *"When considering whether to make an order the court must have regard to-*
>
> *(a) the likely benefit which will result if the information is given;*
> *(b) the likely cost of giving it; and*
> *(c) whether the financial resources of the party against whom the order is sought are likely to be sufficient to enable that party to comply with the orders."*

As already stated, I have accepted the principles enunciated in the authorities cited by Lord Gifford that where a defendant pleads a positive allegation, the burden is on him to prove it and so he must furnish particulars of this positive allegation. In this case the defendants are the ones who, by invoking section 203 of the Customs Act, are saying that the act complained of by the claimants is lawful on the grounds that they had reasonable cause to suspect that the items were uncustomed. They did not plead to this aspect with any particularity and as such they have not provided the grounds on which their suspicion was based.

The fact that the statute imports the requirement for an objective element in the state of mind of the relevant officers means that the suspicion must be based on specific and articulable facts as opposed to a mere whim or speculation. **Black's Law Dictionary** defines *"reasonable suspicion"* as *"a particularized and objective basis supported by specific and articulable facts."* From this definition, it seems clear that there ought to be a factual basis for the suspicion in the minds of the officers in this case. I, therefore, find that the request for information is relevant to a fact in issue. This provides a legitimate basis for the claimants to be given the particulars requested.

Furthermore, it is my view that the claimants should be placed in a position to prepare to meet the defendants' case on the basis of their indirect averment of reasonable cause for suspicion. I believe that if the claimants were to await the exchange of witness statements to ascertain the facts upon which the defence is based, they might be placed at a disadvantage to be able to properly evaluate the merits of their case and to properly prepare to meet the defendants' case. In this regard, I believe that a likely benefit could be derived from the request for information.

In fact, Lord Gifford made the point that if the facts upon which the suspicion is based are given, the claimant could also recognize from an early point that they will not be able to meet the defendants' case and so proceedings could be shortened. This is taken to mean, in essence, that the giving of the particulars requested may well lead to a saving of costs and a more expeditious disposal of the matter. This again, is a likely benefit that could be gained from the granting of the order.

Having regard to all the circumstances of the case, I conclude that the furnishing of the information requested in this case is necessary to dispose fairly of the claim having regard to the likely benefit which will result if the information is given. Further, there is nothing to indicate that the giving of the information will lead to additional costs to either the defendants or the claimants. I also find, in the absence of any indication to the contrary, that the financial resources of the defendants are likely to be sufficient to enable them to comply with the order. The stringent test of necessity is, therefore, satisfied by the claimants.

CONCLUSION

In the final analysis, I have concluded that this is an appropriate case for the information requested to be furnished as part of the pleadings and that the order compelling the defendants to comply with the request is necessary to fairly

dispose of the claim and also likely to save costs. Accordingly, order granted in terms, to wit:

> *"The defendants to provide the information requested by the claimants by letter from the claimants' attorneys- at - law dated 26th May 2005 on or before 31st July 2006."*