

*Schedule - whether person compelled to reveal any information
reg. any particulars of a customer's account. Originating Summonses*

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
dismissed. Held Bank obliged to disclose.
IN EQUITY

Case referred to p12 ✓comp

SUIT NO. E 163 of 1993

BETWEEN GREGORY MAYNE PLAINTIFF
AND THE ATTORNEY GENERAL FIRST DEFENDANT
AND DOUGLAS FOLKES SECOND DEFENDANT

SUIT NO. E 169 of 1993

BETWEEN TROY MEGILL PLAINTIFF
AND THE ATTORNEY GENERAL FIRST DEFENDANT
AND TREVOR LAWRENCE SECOND DEFENDANT
AND LLOYD CHITO THIRD DEFENDANT

Legal Drafting and Interpretation

DR. R.B. MANDERSON JONES FOR PLAINTIFF

MR. DOUGLAS LEYS AND MISS MICHELE HENRY INSTRUCTED BY DIRECTOR
OF STATE PROCEEDINGS FOR THE FIRST NAMED DEFENDANT

MR. JOHN VASSELL AND MR. FRANK WILLIAMS INSTRUCTED BY DUNN
COX AND ORRETT FOR THE SECOND NAMED DEFENDANT

MR. OSWALD HARDING AND MR. PHILPOTTS BROWN FOR THE SECOND
AND THIRD DEFENDANTS

HEARD JUNE 30, JULY 1 & 2, OCTOBER 1, 1993

JUDGMENT

ZACCA, C.J.:

These two Originating Summonses were consolidated
and heard on the 30th June, 1st and 2nd July, 1993. Both
summonses were dismissed and I promised to put my reasons
into writing. This I now do.

Each Plaintiff sought declarations in similar
terms. Twelve identical declarations were sought save
and except for a reference to different defendants in
the case of number 12 in each case. The most relevant
declarations are set out hereunder :

Declaration (1):

That the provisions of the Fourth Schedule
of the Act do not compel any person to divulge
or reveal any information regarding the money
or other relevant particulars of the account
of a customer ;

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Declaration (3):

That it is not an offence under the Act for any person to refuse to divulge or reveal information regarding the money or other relevant particulars of the account of a customer in any case where a person is permitted to divulge or reveal such information under the 4th Schedule of the Act.

Declaration (4):

That the Act and the 4th Schedule thereto do not confer any power on the Minister to direct anyone to disclose, divulge or reveal any information regarding the money or other relevant particulars of a customer's account with his bank.

Declaration (5):

That in the case of paragraph F of the Fourth Schedule of the Banking Act, the disclosure must be made under the provisions of a law for the time being in force requiring such disclosure for the purpose of investigation or prosecution of a criminal offence.

Declaration 11:

That the directive contained in the letter from the Minister ... to the Manager ... requiring him to divulge or reveal information to the police pertaining to the Plaintiffs' account with that bank was invalid, unlawful and of no legal effect for the reasons that

..... (2) There was no written direction of the Minister to the Police or to a Public Officer pursuant to Paragraph F of the 4th Schedule and the disclosure was not made on such written direction ;

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- (3) The written direction of the Minister was not made under the provisions of any law for the time being in force which requires such disclosure for the purpose of the investigation or prosecution of a criminal offence
.....

Declaration (12):

Disclosure of the Plaintiffs' account to the police by the Defendant(s) on the basis of the Minister's letter would be contrary to s. 45 of the Act, and unlawful.

By two letters, both dated March 23, 1993, the Minister of Finance and Planning, the Honourable Hugh Small, Q.C., M.P. (now the Minister of Finance), issued to the Managers of both Mutual Security Bank Ltd. and Eagle Commercial Bank Ltd., two similar written directives under Paragraph F of the Fourth Schedule of the Banking Act (hereinafter called "The Act"). The directives required them, or relevant officers of their Banks, to disclose to Detective Inspector Maurice Goodgame and/or such other Police Officers as were assisting him, information in respect of certain accounts and transactions of Gregory Mayne and Troy Megill respectively, the Plaintiffs herein.

In the case of Mutual Security Bank the disclosure directed by the Minister was made to the Police. Eagle Commercial Bank failed to make any disclosure although not contending that the Minister had no authority under the Banking Act to direct such disclosure.

Both Plaintiffs upon their discovery of their Banks' action, retained the same counsel to represent them. A series of letters were exchanged between counsel for both Plaintiffs and the respective Banks, and between the said counsel and the Minister of Finance and Planning. The

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letters from counsel took issue with the actions of the Minister and the Banks, and questioned the authority under which such actions were taken. The Plaintiffs then commenced legal proceedings.

The central focus of the Plaintiffs' joint submissions concerned the interpretation of the Fourth Schedule to the Act and in particular Paragraph F of that Schedule. S. 45 of the Banking Act, 1992 states :

(1) Subject to subsection (2), no official of any bank and no person who, by reason of his capacity or office has by any means access to the records of the bank, or any registers, correspondence or material with regard to the account of any customer of that bank shall, while his employment in or, as the case may be, his professional relationship with the bank continues or after the termination thereof, give, divulge or reveal any information regarding the money or other relevant particulars of the account of that customer.

(2) Subsection (1) shall not apply in any of the circumstances specified in the Fourth Schedule.

(3) Any person who contravenes subsection (1) shall be guilty of an offence. "

The Fourth Schedule reads :-

"Section 45(1) shall not apply in any case where -

"(f) the disclosure is made on the written direction of the Minister to the police or to a public officer who is duly authorised under the provisions of any law for the time being in force which requires such disclosure for the purpose of the investigation or prosecution of a criminal offence, ... "

It was contended by the Plaintiffs that the main clause of the Fourth Schedule is "Section 45(1) shall not apply", and that the relevant adverbial clause in Paragraph (F) is "Where the disclosure is made on the written direction of the "Minister"".

The Plaintiffs also raised the issue of what was the object of the qualifying phrase in Paragraph F, that is, whether the phrase "under the provisions of any law

for the time being in force which requires such disclosure for the purpose of the investigation or prosecution of a criminal offence", qualifies in Paragraph F the words (a) "duly authorised"; (b) "direction"; or (c) "disclosure". The Plaintiffs contended that either the direction or the disclosure must be authorised by some law which requires such disclosure for the investigation or prosecution of a criminal offence.

Based on the above interpretation of the paragraph, the Plaintiffs' submissions were as follows :

1. The Minister was not empowered by Paragraph F to give written directions, but had to be empowered by some other law ;
2. That the written directions when given under that other law were to be directed to the police or to a duly authorised public officer ;
3. That the disclosure, where directed on the authority of some other law, must be for the purpose of the investigation or prosecution of a criminal offence; and
4. That the paragraph is only permissive and not mandatory since the Act did not make it an offence if the Bank Official failed to comply with the Minister's written directions. The permissiveness operated to empower the Bank Official, to disclose information where the Minister by the provisions of some other law gives written directions requiring such disclosure.

Counsel for the Plaintiffs contended that the whole purpose of s. 45(1) of the Act was to protect the customers' right of confidentiality and secrecy and to preserve the fiduciary relationship between banker and

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customer. Therefore, any statutory provision which did not in clear terms take away this right, could not be interpreted to do so, as such an interpretation would fly in the face of the Constitution, which guarantees privacy.

The defendants on the other hand submitted that Paragraph F of the Fourth Schedule is an enabling part of the legislation and therefore there is no need to look at any other laws. In their view, in enacting this Schedule, it was the clear intention of Parliament that on the written direction of the Minister to the Bank, the police would be able to obtain information for the purpose of the investigation or prosecution of a criminal offence, which information they would otherwise have been unable to obtain.

In response to the Plaintiffs' submissions regarding the non-compellability of the Bank Official to comply with the direction, due to the lack of a statutory sanction for such non-compliance, the defendants submitted that there was in fact a sanction for such non-compliance. This was based on the view expressed in Bennion's Statutory Interpretation 2nd Ed. at page 22, that there is a clear common law rule dating back three hundred (300) years, that every failure to obey a statutory command is, in the absence of a specific provision making it an indictable offence, at common law a misdemeanour.

Counsel also suggested that a failure to obey a provision of the Fourth Schedule would put the bank at risk of losing its licence by virtue of the provisions of s. 25(3) and Part B 1(b)(iii) of the Second Schedule of the Act.

The clear and unambiguous meaning of Paragraph F of the Fourth Schedule is that it empowers the Minister of Finance to give written directions to Bank Officials to disclose information relating to the accounts of

customers in certain circumstances.

It was argued that the purport of the paragraph was that the written directions of the Minister should not be addressed to the Bank Official. It is manifest that they were correctly addressed. S. 45(2) of the Act provides that in certain circumstances, including those in Paragraph F, a Bank Official may lawfully breach the rule of secrecy and confidentiality of customers' accounts, which is enshrined in s. 45(1). Clearly, therefore the directions must be given to the Bank Officials whose act of disclosure of confidential information would be authorised if it fell within Paragraph F.

If the directions were to be given to the police or a public officer duly authorised by any other law, then the Bank Officials would nevertheless be in breach of their fiduciary duty under s. 45(1) if they disclosed information to either the police or a public officer, since they would themselves have no Ministerial directions obliging them to so disclose.

Further, the only reasonable interpretation of Paragraph F is that it provides for disclosure by the Bank to :

- 1) the Police ;
- 2) a Public Officer duly authorised
by any law for the time being in
force;

where such disclosure is required for the purpose of the investigation or prosecution of a criminal offence. The phrase "public officer who is duly authorised by any law for the time being in force", refers to some public officer such as a Customs Officer who is given authority under s. 246 of the Customs Act to prosecute and conduct any information or other proceeding under the Customs Laws in respect of any offence or penalty. The police, however, ex officio are not just empowered but are duty bound to

investigate crime. Therefore, they may request information with respect to an individual's Bank account in furtherance of a criminal investigation, where, by virtue of the Minister's directive, the police's disability to investigate such confidential matters as a bank account, is removed.

In the instant cases, in accordance with the law, written directions were given by the Minister to the respective Banks, for them to disclose information relating to the accounts of each Plaintiff, to the police. As the power of the Minister to give directions is derived solely from the Act, and since the Fourth Schedule of the Act does not provide any guidelines for the Minister's actions, it is for the Court to examine the circumstances under which the written directions are given. This is necessary since there is an implication in Paragraph F that there must be reasonable grounds for the Minister's belief that the information is required for the purpose of the investigation or prosecution of a criminal offence.

The Minister swore by two Affidavits each dated June 4, 1993, one in relation to each Plaintiff. He stated that he was informed by Inspector Goodgame and did verily believe that the Inspector was investigating several cases of fraud involving the sale of foreign exchange to the Bank of Jamaica by several persons, and that in each case the Plaintiffs were involved.

In relation to the Plaintiff Gregory Mayne, the Minister also deponed that he was informed by Inspector Goodgame and verily believe inter alia the following :-

1. The Plaintiff Gregory Mayne sold two foreign exchange drafts drawn on a New York Bank, to the Bank of Jamaica
2. The Bank of Jamaica paid for these drafts, but before the drafts could be cleared through the international banking system, payment on these drafts was stopped

3. That in order for the investigation to proceed the police needed to ascertain the following

- (a) Whether the drafts sold to the Bank of Jamaica came from one particular account held by this Plaintiff at Mutual Security Bank ;
- (b) Whether the Plaintiff was responsible for the stop order placed on the drafts; and
- (c) Whether sums paid by the Bank of Jamaica for these drafts went back to any of the accounts held by this Plaintiff with the Mutual Security Bank.

In relation to the Plaintiff Troy Megill, the Minister also deponed that he was informed by Inspector Goodgame and verily believe inter alia the following :

- 1. That a foreign exchange draft was sold to the Bank of Jamaica by one O.D. and Jamaican cheques to cover this amount were issued to several persons at the request of the said O.D., some of which persons investigations later revealed to be fictitious ;
- 2. That the police believed that a substantial part of the sums paid by Bank of Jamaica, at the request of the vendor, to the fictitious persons, were eventually lodged to this Plaintiff's account at Eagle Commercial Bank ;
- 3. That this Plaintiff sold a foreign exchange draft drawn on a New York branch of Barclay's Bank, to Bank of Jamaica, and then placed a stop order

on the draft before it was cleared through the international banking system ;

4. That in order to further the investigation the police needed to find out whether cheques paid by the Bank of Jamaica for the draft, were lodged to a particular account of this Plaintiff at Eagle Commercial Bank, and whether it was the Plaintiff who stopped payment.

In the case of both Plaintiffs, the Minister also deponed that the Bank of Jamaica had suffered losses due to what was believed to be several instances of fraud which if proved to be true would be the biggest ever perpetrated in this country, and therefore with the reputation of the Central Bank at stake it was of immense importance that those matters be thoroughly investigated. It was against this background that the Minister issued the written directions to these two Banks.

In response to these serious allegations the two Plaintiffs made no denials but instead took issue with .

1. The sources and lack of completeness of the Minister's information; and
2. The issue of whether in fact the Minister had the power to issue the directions and to whom.

With regard to the latter point, I have already found that the Minister did have power to make the direction, and that they were correctly issued to the Banks.

The former can be easily disposed of, that is, it is precisely because of the inadequate source(s) and the lack of completeness in the information, why the

issuing of the directions was necessary and Paragraph F of the Fourth Schedule was tailor-made for such an eventuality. I find therefore that in all the circumstances of these two cases, I am satisfied on the Affidavit evidence that there were reasonable grounds for the Minister giving written directions to the Banks to disclose information relating to each of the Plaintiffs' accounts. I further find that as the disclosure was authorised by Paragraph F as an exception to the general rule of non-disclosure enshrined in s. 45(1), the information received upon disclosure can only be used for the purposes outlined in Paragraph F, that is "for the purpose of the investigation or prosecution of a criminal offence".

One small matter remains to be addressed. The Plaintiffs submitted that even if it were found that the Minister was empowered by Paragraph F to issue written directions to the Bank Officials, those Officials would still be in breach of their fiduciary duty to the Plaintiffs if they complied with the directions, as the lack of a sanction for their non-compliance meant that they were not obliged to obey.

The Defendant, in answer, contended that such non-compliance fell under the Second Schedule Part B 1(b)(iii) and would be punishable therefore by virtue of s. 25(3), whereby the Minister could inter alia suspend or revoke the Banks' licence in accordance with Part B of the Second Schedule. However, I am not persuaded that "any directions issued by the Minister pursuant to this Act" found in Part B 1(b)(iii) relates to directions issued under Paragraph F of the Fourth Schedule or alternatively that s. 25(3) which falls under the section headed "Regulations Against Unsafe Practices", would apply to a failure to divulge information needed to assist in a criminal

investigation or prosecution.

The question as to whether the Statute creates an offence is irrelevant to the question of the Bank's right and public duty to obey a statutory command to disclose.

Without deciding on the purport of the Second Schedule Part B 1(b)(iii) or to what s. 25(3) applies, the respective Banks may be guilty of a common law misdemeanour if they disobeyed the Minister's clear statutory direction, a position which the learned authors of Bennion's Statutory Interpretation 2nd Edition at page 22, point out has existed for the last 300 years. In any event, the mandatory duty imposed by the Act may also be enforceable by Judicial Review - Regina v. Horseferry Road Justices Ex Parte Independent Broadcasting Authority [1987] 1 Q.B. 54.

I, therefore find that the Banks were obliged to disclose the information.

On the basis of the above findings and reasons the Plaintiff Gregory Mayne's Originating Summons in E 163/93 and the Plaintiff Troy Megill's Originating Summons in E 169/93 were dismissed.

Costs of the hearing to each Defendant to be agreed or taxed. Leave to appeal granted.

Case referred to

Regina v. Horseferry Road Justices Ex Parte

Independent Broadcasting Authority (1987)

1 Q.B. 54