JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 47/93

COR: THE HON MR JUSTICE WRIGHT J A
THE HON MR JUSTICE DOWNER J A
THE HON MR JUSTICE WOLFE J A

BETWEEN	TROY MEGILL	PLAINTIFF/APPELLANT
A N D	THE ATTORNEY GENERAL	1ST DEFENDANT/RESPONDENT
A N D	TREVOR LAWRENCE	2ND DEFENDANT/RESPONDENT
A N D	LLOYD CHITO	3RD DEFENDANT/RESPONDENT

SUPREME COURT CIVIL APPEAL NO. 48/93

BETWEEN	GREGORY MAYNE	PLAINTIFF/APPELLANT
A N D	THE ATTORNEY GENERAL	1ST DEFENDANT/RESPONDENT
A N D	DOUGLAS FOLKES	2ND DEFENDANT/RESPONDENT

R B Manderson-Jones for the appellants Troy Megill & Gregory Mayne

Douglas Leys & M Michelle Henry instructed by The Director of State Proceedings for the Attorney General

Dr Lloyd Barnett & Lawrence Phillpotts-Brown instructed by Oswald Harding & Co for the respondents Trevor Lawrence & Lloyd Chito

John Vassel & Frank Williams instructed by Dunn Cox & Orrett for the respondent Douglas Folkes

2nd, 3rd, & 28th February 1994

DOWNER J A

In this consolidated appeal, the appellants are Troy Megill and Gregory Mayne. They had accounts at Eagle Commercial Bank and Mutual Security Bank respectively, and they are challenging the order of Zacca C J made in the Supreme Court. That order confirmed that the bankers for the appellants, were obliged to release information concerning their accounts to the police on a direction pursuant to paragraph (f) of the Fourth Schedule of the Banking Act.

The Minister of Finance, the Honourable Hugh Small Q C gave the direction, so the Attorney General in accordance with section 13(2) of the Crown Proceedings Act responds on behalf of the Ministry. Trevor Lawrence and Lloyd Chito are officers of Eagle Commercial Bank, while Douglas Folkes is the Managing Director of Mutual Security Bank. These are the other respondents to the appeal.

Did the affidavits of the Minister of Finance establish that the disclosure of details of the appellants' accounts were required for the investigation or prosecution of a criminal offence ?

The crucial paragraphs from the Minister's affidavits set out the circumstances which gave rise to the investigation of criminal offences in which the appellant Troy Megill might have been involved. They read thus:

> "4. I am informed by the said Inspector Goodgame that a foreign exchange draft of U.S.$2.9m was sold to the BOJ by one Oneil Dunn, and Jamaican Cheques to cover this amount were issued by the BOJ to several persons, at the request of the said Oneil Dunn, some of whom investigations have revealed are fictitious. Investigations have also revealed that that said draft was obtained from Dextra Bank and Trust Company Limited (Dextra Bank) situated in Grand Cayman. Dextra Bank has since alleged that it has not been paid for this draft and has sued the BOJ on a Promissory Note purportedly issued by the BOJ to cover this amount. It is believed that a substantial part of the sums paid by the BOJ at the request of the vendor to the fictitious persons were eventually lodged to the account of the Plaintiff.
>
> 5. I am further informed by the said Inspector Goodgame and do verily believe that the Plaintiff operates a foreign exchange account at the National Commercial Bank, the Half-Way-Tree Branch. A foreign exchange draft was drawn on Barclays Bank of 75 Wall Street, New York, and sold to the BOJ. The BOJ paid for this draft. Before the said draft could be cleared through the international banking system the Plaintiff placed a stop order on the same. It is believed that the proceeds paid by BOJ was lodged to the account No. 101053130 of the Plaintiff at the Eagle Commercial Bank.

> It is important for the police to know whether the said cheques paid by the BOJ was lodged to this account, and whether it was the Plaintiff who stopped payment."

Against this background it was necessary for the Minister to request details of the appellant Megill's account to investigate or prosecute Megill and others for conspiring to defraud the Bank of Jamaica of a sum in excess of US$2.9m.

With regard to the appellant Gregory Mayne, here is how the Minister introduced the matter by naming the investigator and refers to the specific money drafts in respect of which further information was required:

> "3. I am informed by Inspector Goodgame and do verily believe that he is investigating several cases involving the sale of foreign exchange to the Central Bank i.e. Bank of Jamaica (BOJ) by several persons and the Plaintiff is one of these persons.
>
> 4. I am further informed by the said Inspector Goodgame and do verily believe that the Plaintiff sold two (2) drafts to the Bank of Jamaica (BOJ) numbered 035380 and 035277 in the sum of US$100,000.00. These drafts were drawn on the Bank of New York of 48 Wall Street, New York U.S.A. The BOJ paid for these drafts and before the same could be cleared through the international banking system payment on these drafts were stopped."

Then the Minister shows how further investigation depends on an examination of the appellant's accounts and the extent of the criminal fraud which might have been perpetrated against the Bank of Jamaica. Here are his exact words:

> "5. I am further informed by the said Inspector Maurice Goodgame and do verily believe that his investigations would be greatly assisted if he were able to determine whether the draft sold by the Plaintiff to the BOJ came from the Plaintiff's account with the Bank and whether the Plaintiff was responsible for the stop order which was placed on the said cheques. It would also be of assistance to him to ascertain whether the sums paid by the BOJ for these drafts went back to any of the accounts held by the Plaintiff with the Bank.

> 6. The whole system of the purchase and sale of foreign exchange by the Central Bank was the focus of public attention in the month of February, 1993 and still continues to be so. The Governor General had ordered a Commission of Enquiry into the matter which has ended and its findings reported to him. The reputation of the Central Bank is at stake, the BOJ has suffered losses in excess of J$97m, the several instances of fraud if proved to be true would be the biggest ever perpetrated in this country. It is therefore of immense importance that this matter be thoroughly investigated and under the powers vested in me by the Banking Act 1992 I issued the directions."

As regards the appellant Mayne, it is to be observed that the officers of Mutual Security Bank have complied with the Minister's directive. In this instance, the circumstances show an allegation of larceny by trick: see section 44 of the Larceny Act. The Minister's affidavit was a response to the affidavits of the appellants which supported the Originating Summons. It is now necessary to examine the appellants' affidavits to determine the substance of their complaint.

Turning to the affidavit of the appellant Troy Megill, the substance of his original affidavit reads:

> "15. I do not believe that any criminal offence is being investigated and I have not been guilty of any criminal offence. Nor am I charged for any criminal offence."

It is sufficient to say that his belief in this regard is insufficient to displace the positive steps which the Minister has stated have already been taken, and those which are proposed. Concerning the appellant's further affidavit in response to that of the Minister, this was even more unhelpful. The Minister requested details of his account to investigate or prosecute a criminal offence. The appellant Megill replies that the Minister ought to prove the very areas he wishes to investigate. Two paragraphs are typical.

> "5. Paragraph 4 of Hugh Small's affidavit simply states that 'It is believed that a substantial part of the sum paid by BOJ at the request of the vendor to the fictitious persons were eventually lodged to the account of the Plaintiff.' The source of the belief is not stated. No indication is given of the amount, if any, paid by BOJ for the alleged draft. No indication is given of the basis for the belief that any part of those funds entered the Plaintiff's account. There is no substance whatsoever to the allegations being made. No draft or BOJ cheques have been exhibited and there is no affidavit from BOJ itself or from Dextra Bank And Trust Company Limited or from Oniel Dunn himself."

Then he continues in the same strain of expecting the Minister to have details of that which he sought to investigate:

> "6. Paragraph 5 of Hugh Small's affidavit is even more nebulous than its preceding paragraphs. No details of the alleged foreign exchange draft have been provided. No evidence of payment by BOJ has been provided. No evidence of any stop order has been provided. The source of the belief that the proceedings of the alleged draft have been lodged to my account has not been provided. The number, date, payee, drawee and amount of the alleged foreign exchange draft and also of the payment for it have not even been provided."

It is now appropriate to turn to the evidence on which Gregory Mayne relied to institute proceedings by Originating Summons. As in the case of the appellant Megill, he also sought a declaration that the request by the Minister was ultra vires, so that there would be no obligation for the Bank to comply with the ministerial direction. To reiterate, in the case of Mayne, the officers of Mutual Security Bank supplied the information requested. In the case of Eagle Commercial Bank, the respondents Lawrence and Chito have not yet supplied the information, but they are not opposing the request. The unusual manner in which the vital details of the Minister's direction was revealed to the appellants who are suspects, will be detailed later.

After stating that he was advised by his attorney-at-law, that the Minister was not empowered to issue a directive to the officers of the Bank, the appellant stated:

> "13. No indication has been given to me by the Minister or the police or the bank or anyone at all of what criminal offence is being investigated as alleged in the Minister's letter to the bank and I verily believe that there is no criminal offence involving or relating to the money in my account or to my account with the bank or at all and that no investigation is taking place of any criminal offence."

Here again on a factual basis, the Minister's evidence is to be preferred. So the real issue to be determined is whether the Minister was empowered to seek the information about the accounts as Mr. Leys for the Attorney-General contended. It is however, convenient to deal with an issue expressly raised by the appellant Mayne. At paragraph 4 of his initial affidavit he stated:

> "4. I discovered that in April, 1993, my bank and its manager the Second Defendant had given, divulged and revealed to the police information regarding my accounts without any prior notification to me and without my consent."

There is no requirement to notify the appellant, though the affidavit of Megill states that Eagle Commercial Bank informed him of the Minister's request. Here is how he reveals it:

> "5. By letter dated April 26, 1993, a copy whereof is exhibited herewith marked 'TMI' for identification, Eagle Commercial Bank Limited wrote to me and my wife forwarding a letter dated March 25, 1993 from the Minister of Finance & Planning directing officers of the bank to disclose to the police information concerning account #101053130 which happens to be my account aforesaid. The reason given in the Minister's letter was that the disclosure was required for the purpose of investigating a criminal offence."

Such information could be used to the appellant's advantage at a delicate stage of an investigation of a conspiracy to defraud. It could also create the impression that the Bank was

ill-advisedly warning conspirators of the investigations. Both officers of the Eagle Commercial Bank, Lawrence and Chito admitted that they informed the suspect Megill of the Minister's direction in paragraph 4 of their respective affidavits. Each reads thus:

> "4. That in respect of paragraphs 2, 3, 4 and 5 of the Plaintiff's Affidavit, I admit the matters set out therein."

Then in paragraph 8 of their affidavits state:

> "... I make no admissions but further state neither I nor the Second defendant made any disclosure of the Plaintiff's Account to the Police whether as alleged or at all and the said allegation is denied."

If these respondents doubted that they had a duty to disclose on receipt of a ministerial direction, they ought to have sought a declaration from the courts as was done in **Royal Bank of Canada v Inland Revenue Commissioners** [1972] 2 W L R 106. The Bank's (Eagle) stance was surprising in view of the correspondence with its legal advisors. Here is the letter from Eagle's legal advisors to Mr. Manderson-Jones, attorney-at-law for Troy Megill:

> "May 4, 1993
>
> Dr. R. B. Manderson-Jones
> Attorney at Law
> 60 Knutsford Boulevard
> Kingston 5
>
> Dear Sir:
>
> Re: The Banking Act
> Mr. & Mrs. Trout Megill
> Current Account # 101053130 -
> Eagle Commercial Bank Limited
>
> We act on behalf of Eagle Commercial Bank Limited in respect of the abovementioned matter.
>
> Our client has referred to us your letter of 27th April, 1993 addressed to it.
>
> Our client takes the view that its responsibility to the governmental authorities governing the financial concerns of the Country and the banking community is at least equal to the duty it owes to your clients.

> It therefore has instructed us to inform you that it will provide such information required of it by the Minister as it is able unless you serve upon it within 5 days of the date hereof an order of a competent court restraining it from so doing.
>
> Yours faithfully
> NUNES SCHOLEFIELD DeLEON & CO"

The respondents Lawrence and Chito were then even more emphatic in their letter of April 26 to the appellant Megill. It reads:

> "April 26, 1993
>
> Mr. & Mrs. Troy Megill
> 5 South Avenue
> P.O. Box 221
> Kingston 8
>
> Dear Clients:
>
> RE: CURRENT ACCOUNT # 101053130
> EAGLE COMMERCIAL BANK LIMITED
>
> Photocopy of letter dated April 1, 1993, from the Ministry of Finance and Planning concerning the captioned Current Account is enclosed for your information.
>
> Under the relevant section of the new Banking Act, as described in the letter aforementioned the Bank is mandated to conform with the request from the Ministry.
>
> Yours truly,
> EAGLE COMMERCIAL BANK LIMITED
>
> /Sgd/ TREVOR LAWRENCE
> ASST. MANAGER, CREDIT
>
> /sgd/ E LLOYD CHITO
> ASST. G. M. &
> BRANCH MANAGER"

This letter must be read in contrast to their affidavits referred to above which was dated 8th June 1993. Also it was the unusual legal opinion from Nunes, Scholefield, DeLeon & Company which disclosed what was afoot between the Bank and the Minister which enabled the appellants to challenge the Minister directly before disclosure. The usual course as illustrated in **Rossminster** [1980] A C 953 is that the challenge is subsequent to the search and if the search and seizure are unlawful then redress in the form of compensation, is available.

In Mayne's case, it is appropriate to refer to the correspondence which tells the story. The opening shot on April 4, 1993 was Mr. Manderson-Jones' letter to the Bank stating that the Bank

had allowed access to his client's account by third parties. If this were true, he would have had a right of action against the Bank. The Bank's reply by letter dated April 14, was that they had received a direction from the Minister pursuant to the Banking Act. Then the letter from the legal counsel of the Bank must be quoted. It reads:

> " April 23, 1993
>
> Mr. R.B. Manderson-Jones
> Attorney-at-Law
> 60 Knutsford Boulevard
> Kingston 5
>
> Dear Sir:
>
> ACCOUNT - GREGORY MAYNE
>
> We refer to your letter of April 15, 1993 which has been referred to the undersigned and apologise for the delay in responding to you.
>
> Enclosed is a copy of the Direction from the Ministry of Finance and Planning. The Bank disclosed information about, and provided copies of the documents relating to, the purchase of the two original drafts, the two stop orders and indemnities, the recredit of the proceeds of the two drafts, and the two final debits and purchase of the two drafts which closed the account.
>
> We wish to assure you that the Bank guards the confidentiality of its customers' business and only divulges information without the consent of the customer when compelled by law.
>
> Yours truly
>
> /sgd/ Lenworth A Burke
> Legal Counsel"

For completeness, the enclosed Direction from the Minister in Mayne's case dated 28th March 1993, but signed by the Minister from March 21 1993 is exhibited. The Direction to Megill of the same date was signed April 1 1993. These were surprising disclosures to Megill and Mayne when it was clear from the Minister's direction that its purpose was to investigate criminal offences.

"

THE BANKING ACT

DIRECTION ISSUED UNDER PARAGRAPH (f)
OF THE FOURTH SCHEDULE

The Manager
Mutual Security Bank Limited
18 Trafalgar Road
KINGSTON

WHEREAS I am advised that for the purpose of investigating a criminal offence it is necessary for the Police to obtain information from your Bank (including any of its branches) in respect of certain accounts operated at your Bank and/or certain transactions undertaken thereat, and that such information is to be found in the records, registers, correspondence or other documents of your Bank;

I HEREBY DIRECT YOU and/or the relevant officers of your Bank to disclose to Detective Inspector Maurice Goodgame and/or such other police officer(s) as shall be assisting him, all such information in respect of those accounts and transactions referred to in the Schedule below as he may require and which is to be found in the said records, registers, correspondence or other documents of your Bank."

Then the schedule lists a specific account in each case and sought information concerning any other account from which funds were transferred to the specific account. Eagle Commercial Bank ought to have obeyed the directive or challenged it in court. Alternatively, the Ministry of Finance, through the Attorney General, on the Bank's failure to comply, ought to have sought a declaration and mandatory injunction forthwith. In these days of electronic transfers of money and laundering of funds, coupled with the abolition of exchange control, promptitude in these matters is essential where the loss is of the magnitude alleged in this case.

Some support for this stance of not disclosing the direction to the appellants, comes from **Barclays Bank plc v Taylor** [1989] 3 All E R 563 where Lord Donaldson M R made some useful comments in the context of an application by the police to the bank concerned where the hearing would be before a circuit judge.

In this case notice had to be given to the bank so that it could be heard. The police took the precaution of asking the bank not to inform the customer of the proposed hearing. Here are His Lordship's words at p. 569:

> " There is no doubt that the banks were free to ignore the request not to inform Mr and Mrs Taylor of the application. However, I should have been surprised and disappointed if they had done so in the context of a criminal investigation unless they were under a legal duty to do so. There is a public interest in assisting the police in the investigation of crime and I can think of no basis for an implied obligation to act in a way which, in some circumstances, would without doubt hinder such inquiries."

Croom-Johnson L J in the same case said at p. 570:

> " The hearing before the judge is inter partes: see Sch I, para 7. It is now settled that the 'parties' are the police and the bank. The customer of the bank does not have a right to be heard: see **R v Crown Court at Leicester, ex p DPP** [1987] 3 All E R 654, [1987] 1 W L R 1371. Indeed, as was pointed out by Watkins L J in that case, it is often desirable that the people whose affairs are about to be investigated should be kept in ignorance of the fact (see [1987] 3 All E R 654 at 656, [1987] 1 W L R 1371 at 1374)."

Mr. Vassell for the respondent Folkes of Mutual Security Bank helpfully cited **Inland Revenue Commissioners v Rossminster Ltd** [1980] A C 953. Both Lord Wilberforce and Lord Diplock at pp 999 and 1012 respectively, cited with approval the following passage:

> " ' The police are carrying on an unending war with criminals many of whom are today highly intelligent. So it is essential that there should be no disclosure of anything which might give any useful information to those who organise criminal activities. And it would generally be wrong to require disclosure in a civil case of anything which might be material in a pending prosecution: but after a verdict has been given or it has been decided to take no proceedings there is not the same need for secrecy.' **Conway v Rimmer** [1986] A C 910 at 953-954."

There seems to be some hostility to the Banking Act so it is pertinent to cite another passage from another House of Lords case. In **Attorney General v. Guardian Newspaper (No 2)** [1990] A C 109 at p. 269 Lord Griffiths said:

> "In certain circumstances the public interest may be better served by a limited form of publication perhaps to the police or some other authority who can follow up a suspicion that wrongdoing may lurk beneath the cloak of confidence."

Mr. Vassell cited **Rossminster** to show the safeguard of interposing the judiciary to grant the warrant for entry to premises where it is suspected that a tax fraud had been planned. However, be it noted that, once entry is gained, the statute confers on the investigator the power to seize and remove potential evidence. Also there was no judicial authority interposed between Revenue authority and the taxpayer in **Royal Bank of Canada I R C** (supra). There are variations in the legislative provisions so as to make the safeguard appropriate. It must be acknowledged that the entry to search and seize clients' files recording their income tax proposals as in **Rossminster** (supra) is a much greater invasion of privacy than an examination of a bank account.

The upshot of all this is that the Minister's affidavit established that he required the information in the accounts so that the police could investigate criminal offences. His Direction was therefore valid.

The true construction of the relevant sections of the Banking Act 1992

Section 45(1) and the exceptions in the Fourth Schedule of the Banking Act enact and extend the common law as adumbrated in **Tournier v Nat Prov & Union Bank of England** [1923] All E R Rep 550 as regards the confidential relationship between a banker and customer and the circumstance when disclosure is permitted. Section 45(1) reads:

> "45.—(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) ...
>
> (3) Any person who contravenes subsection (1) shall be guilty of an offence."

Then 45(2) which is the legislative reference to the exceptions, reads:

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

It is relevant to cite also, paragraph (f) of the Fourth Schedule, which authorises the Minister's direction. It reads:

> " FOURTH SCHEDULE
>
> Circumstances in which information on customer's accounts may be disclosed
>
> (f) the disclosure is made on the written direction of the Minister to the police or to a public officer who is duly authorized 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;"

Paragraph (f) ought to be analyzed as follows:

> "the disclosure is made on the written direction of the Minister to the police ... which requires such disclosure for the purpose of the investigation or prosecution of a criminal offence."
>
> and
>
> "the disclosure is made on the written direction of the Minister ... 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."

That a ministerial direction is a source of law, is illustrated in section 59(2) of the Constitution which defines "statutory instrument" as a document which gives effect to a power exercised by a Minister in making an order. As for the lack of a criminal sanction it is true, while for a breach of section 45(1) of the Banking Act there is a criminal sanction, no such sanction is provided for breach of paragraph (f) of the Fourth schedule. The modern canon of construction is that for recent statutes there must be express words, or a necessary implication where a breach of a statutory requirement brings into play a criminal sanction. Two statements of principle by Lloyd L J in **R v Horseferry Road Justices, Ex parte Independent Broadcasting Authority** [1987] 1 Q B 54, illustrate this rule of construction. At p.65, His Lordship said:

> "... in the first place, as I have already said, when Parliament intends to create an offence, then, nowadays, it almost always says so in terms. I do not find the doctrine of contempt of statute, which as I shall hope to show later is no more than a rule of construction, of much use in construing a modern statute."

Equally important is the statement at p. 72 which reads:

> "... In the case of a mandatory duty imposed by a modern statute, enforceable by way of judicial review, the inference that Parliament did not intend to create an offence in the absence of an express provision to that effect is, nowadays, almost irresistible."

However, the common law redress of judicial review is available and is enshrined in section 1(9) of the Constitution.

The Minister's direction was mandatory. If there was a failure to comply, the Minister could probably seek mandamus and certainly a declaration and a mandatory injunction. There were cases in the 18th and 19th century which suggest mandamus would issue to a body compelled to exercise statutory or other legal powers. Examples are - **R v Barker** [1769] 3 Burr 1265 which

On the plain wording of section 45(1), one of the persons who is obliged to keep the customer's accounts secret, is a banking official. Then to test whether the construction proposed of paragraph (f) is correct, a rational explanation must also be found why disclosure may be made to an officer other than the police. In such a case, the written direction would also be to the officers of the Bank and the disclosure would be to a public officer who is duly authorised under the provision of any law for the time being in force.

The police are duly authorised both by common law and section 13 of the Constabulary Force Act, to investigate and prosecute criminal offences. Section 246 of the Customs Act authorises a custom officer to investigate and prosecute offences against the Customs Act and the Minister could direct an officer of their Bank to disclose details of an account to scuh an officer pursuant to paragraph (f). Other revenue acts afford similar examples as well as section 168 of The Companies Act.

Zacca C J resorted to a similar approach in construing paragraph (f) and he formulated a test which illustrates the error in the construction advanced by Mr. Manderson-Jones. His Lordship said:

> " 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."

It was also contended for the appellants that the fact that there was no criminal sanction if the respondent bank officers refused to disclose, was proof that the appellant's construction was correct. A further contention was that a ministerial direction was not a source of law and that in any event, the ministerial direction was in breach of section 22 of the Constitution.

concerned admission of a presbyterian minister under a trust deed; **R v London and St Catherine Dock Co.** [1874] 44 L Q B 14 which examined the mandatory statutory powers pursuant to The Companies Act and **R v Garland** [1870] L R 5 Q B 269 relating to the admission of copy-holders to a manor. But 20th century remedies in all these instances would be the declaration and the injunction, and mandamus is confined, it seems as a remedy for public authorities. These remedies are effective and further interlocutory procedures such as discovery are available. See **Vine v. National Dock Labour Board** [1957] A C 488.

Officers of banks ought to be aware that failure to obey an injunction or mandamus, could result in imprisonment for contempt of court. In England the choice between the prerogative orders on the one hand, and the declaration and the injunction on the other, no longer matters. The procedural reforms introduced by the Rules Committee provide that on an application for judicial review, any of these remedies is available. See Order 53 S.I. 1977 No. 1955. Later these provisions as amended were incorporated in the Supreme Court Act 1981 (U.K.). Our Rules Committee ought to examine these provisions with a view to amending the Civil Procedure Code. Such a reform would improve the remedies available in our administrative law. Those who drafted our Constitution recognized the reality of delegated legislation and an instance of its definition as "statutory instrument" appears in section 59(2) of the Constitution. The definition reads:

> "59.-(1) ...
>
> (2) In this section 'statutory instrument' means any document by which the Governor-General, the Governor of the former Colony of Jamaica, a Minister or any other executive authority has exercised a power to make, confirm or approve orders, rules regulations or other subordinate legislation, being a power conferred by any law enacted (whether before or after the appointed day) by any legislature

> in Jamaica, and the statutory instruments to which this section applies are all statutory instruments in respect of which it is provided (in whatever terms) that they may not come into force until approved by the Senate."

The examination of the statutory provisions establishes that paragraph (f) of the Fourth Schedule of the Banking Act compels the officer of a bank to provide the police with details of an account when directed to do so by the Minister. If there is a failure to comply, the Attorney General should seek an expedited hearing to secure a declaration and injunction to compel the officer of the bank to obey the law. A leisurely approach which permits the suspect to challenge the Ministry, gives the impression that there is no seriousness in investigating what has been described as probably the biggest fraud ever perpetrated in this country.

The Constitutional Point

Mr. Manderson-Jones contended both here and below that any disclosure, pursuant to the Minister's directive, would be unconstitutional. This is how it appeared in Mayne's Originating Summons:

> "12. DISCLOSURE OF THE PLAINTIFF'S ACCOUNT TO THE POLICE BY THE SECOND DEFENDANT ON THE BASIS OF THE MINISTER'S LETTER DATED MARCH 25, 1993, WOULD BE CONTRARY TO SECTION 45 OF THE BANKING ACT, 1992, AND UNLAWFUL."

That this matter was raised below is patent. Zacca C J referred to the submissions of counsel for the appellant, thus at pp. 5 - 6 of his judgment:

> " 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 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."

If paragraph (f) was unlawful in the sense that it was unconstitutional, there would be ample authority for granting a declaration in that regard, even if it were not expressly asked for, especially where proceedings were commenced by Originating Summons. See **London v Ryder (No 2)** [1953] Ch. 423; **Harrison v Bradley Smith** [1964] 1 W L R 456 and **Boss v Smallbough** R D C [1965] Ch. 335 where proceedings were instituted by writ.

The ground of appeal raising the constitutional issue reads:

> "6. The learned Chief Justice erred in failing to recognize that section 22(1) of the Constitution protects freedom of expression, including the freedom to receive and impart ideas and information without interference. Consequently, the idea that a Minister can direct a bank official to disclose information is repugnant to the constitution amounting as it would to interference with freedom of expression."

Reference was made to **Hinds v The Queen** [1976] 1 All E R 353 at p. 369 which passage supports the "right to privacy" as guaranteed in section 22(2)(a)(ii) of the Constitution. Section 22 of the Constitution reads:

> "22.—(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purposes of this section the said freedom includes the freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence and other means of communication.
>
> (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provisions—

(a) which is reasonably required—

(i) in the interests of defence, public safety, public order, public morality or public health; or

(ii) for the purpose of protecting the reputations, rights and freedoms of other persons, or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating telephony, telegraphy, posts, wireless broadcasting, television or other means of communication, public exhibitions or public entertainments;" [Emphasis supplied]

Those who framed the Constitution recognized that fundamental rights can only be secured in an ordered society, so they drew on the experience of the existing rights guaranteed by the common law, especially those which were expressed in the European Convention of Human Rights of 1953 Cmd. 8969. They were no doubt, also influenced by American legislation and by the decisions of the United States Supreme Court both of which adapted an 18th century constitutional charter to the demands of the 20th century. It was therefore acknowledged that individual rights must be as the section 13 of the Constitution states, "be subject to respect for the rights and freedoms of others and for the public interest." In drafting the fundamental rights provisions, they also took into account section 48(1) of the Constitution which sets out the ample powers of Parliament. That section reads:

"48.—(1) Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Jamaica."

The extensive legislative powers accorded by the words "peace, order and good government" is illustrated in the decisions cited by Dr Barnett; **Powell v Apallo Candle Co Ltd** [1885] 10 App Cas 282 and **Cobb & Co Ltd v Norman Kropp** [1967] A C 141.

They demonstrate that legislatures are competent to confer power on a Minister which includes the power to give directions. The following passage in **Ibralebbe v The Queen** [1964] A C 900 at p. 923 states the principle with eloquence in relation to ceylon. Lord Radcliffe said:

> "By section 29 there is conferred upon the Parliament power to make laws for the 'peace order and good government' subject to certain protective reservations for the exercise of religious bodies. The words 'peace order and good government' connote in British constitutional language the widest law making powers appropriate to a sovereign."

The appellants claim that by disclosing the details of their bank accounts to the police, the officers of the Bank who disclosed without **their permission,** and the Minister who directed the disclosure, were in breach of their right to privacy as guaranteed by the phrase "preventing disclosure of information received in confidence" enshrined in section 22(2)(a)(ii) of the Constitution. Mr. Manderson-Jones prayed in aid a statement of Lord Diplock in **Hinds v The Queen** [1976] 1 All E R 353 at p. 369 to advance his contention. It reads:

> "The phrase, which also appears in s 22(2)(a)(ii) as a limitation on freedom of expression, is not directed to the physical safety of individuals but to their right to privacy, i.e. to protection from disclosure to the public at large of matters of purely personal or domestic concern which are of no **legitimate public interest.**"

When section 22 of the Constitution is read against the complaint of the appellants in this case, it will be seen that the respondent banker's freedom of expression is curtailed by section 45 of the Banking Act in accordance with the law on confidentiality recognized in the Constitution. On the other hand, the exception to the law on confidentiality in paragraph (f) of the Fourth Schedule of the Banking Act which compels the banker to disclose specific information to a police officer,

on the direction of the Minister where a crime is being investigated and prosecuted, is a power accorded to the legislature by section 22(2)(a)(ii) of the Constitution as reasonably required. It empowers the legislature or the courts at common law to make or declare laws "reasonably required in the interests of public order." The investigation and prosecution of crimes as an aspect of public order is a primary duty of any civilised government.

In such circumstances, the confidentiality between banker and customer must acknowledge the need to investigate and prosecute criminal offences.

So construed, there is no warrant for claiming that the power entrusted to the Minister in paragraph (f) of the Fourth Schedule of the Banking Act to direct that the details of the appellants' account be disclosed to the police, is unconstitutional as Mr. Manderson-Jones contends. It is a power which has been found to be reasonably required if the government is to be equipped to prevent the banking community from being the agents for laundering the proceeds of crime.

The appellants' case on this ground also fails.

Conclusion

The extraordinary feature of this case is that, at the investigating stage of what could be a serious criminal offence, the appellants who are suspects were allowed to seek some eight declarations in the Supreme Court which has hindered the investigations. In substance, the gist of their claims was that the ministerial directives were ultra vires. It is the Ministry of Finance who should have instructed the law officers of the Crown to set the pace and move the Supreme Court as a matter of urgency, once Eagle Commercial Bank delayed in complying with the Minister's direction which has the force of the law.

The Chief Justice rightly, with promptitude, dismissed the applications and his order ought to be affirmed with costs to the respondents to be agreed or taxed.

WRIGHT J A

I agree.

WOLFE J A

I agree.

Cases referred to

(1) Royal Bank of Canada v Inland Revenue Commissioners (1972) 2 W.L.R. 106
(2) Inland Revenue Commissioners v Rossminster (1980) AC 952
(3) Randag Bank plc v Taylor (1979) 3 All ER 563
(4) Attorney General v Guardian Newspapers (No 2) (1990) AC 109
(5) Tournier v Nat Prov & Union Bank of England (1923) All ER Rep 550
(6) R v Horseferry Road Justices, Ex parte Independent Broadcasting Authority (1987) 1 Q B 54
(7) R v Barker (1769) 3 Burr 1265
(8) R v London and St Katherine Dock Co (1874) 44 L R B 144
(9) R v Garland (1870) L R 5 Q B 269
(10) Vine v National Dock Labour Board (1957) AC 488
(11) London v Ryder (No 2) (1953) Ch 423
(12) Harrison v Bush Cox Smith (1964) 1 W L R 456
(13) Boss v Smallbeorough R D C (1965) Ch 335
(14) Hinds v The Queen (1976) 1 All E R 353
(15) Powell v Apollo Candle Co Ltd (1885) 10 App Cas 282
(16) Cambridge Nd v Norman Knopp (1967) AC 141
(17) Ibralebbe v The Queen (1964) AC 900