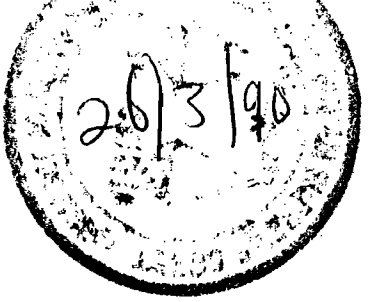

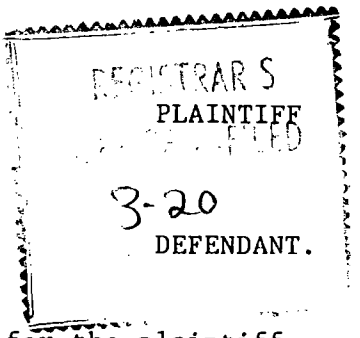

SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

1988, NO: 340

BETWEEN

DR. MAURICE ROBERTSON PLAINTIFF

AND

CANADIAN IMPERIAL BANK OF COMMERCE DEFENDANT.

Mr. Emery Robertson, Mr. Mark Williams with him for the plaintiff.

Mr. Charles Asquith Phillips Q.C. of the Barbados Bar, Mr. L.A. Douglas Williams with him for the Defendant.

(March 19, 20, 22, 1990)

JUDGEMENT

SATROHAN SINGH J.

In this matter the Plaintiff claims:

(a) A declaration that the defendant is not entitled to divulge or disclose the plaintiff's bank account to any third person without due authority or the consent of the plaintifff.

(b) An injunction to restrain the defendant whether by itself or its manager, or by its agent or servant or other and howsoever from divulging and/or disclosing the plaintiff's account at the defendant's bank by photocopying and distributing same or by any other means.

(c) Damages for breach of contract and/or negligence.

(d) Punitive damages in the sum of $100,000.

(e) Costs.

(f) Further or other relief.

/2.....

The allegation of the plaintiff is, that there is an implied term of the contract between the defendant and its customer, the plaintiff, that the defendant will not divulge to third persons without the plaintiff's consent any of the plaintiff's transactions with the defendant. Alternatively, there is an implied term of secrecy from the relation of banker and customer which existed between the defendant and the plaintiff with a corresponding duty of confidence flowing from the banker-customer relationship.

The plaintiff contends that the defendant, in breach of its fiduciary duty and/or of contract on or about April 18, 1988, wrongfully divulged the plaintiff's bank account to third parties without the plaintiff's knowledge and consent.

The plaintiff describes this act of the defendant as amounting to reprehensible behaviour which wounded the feelings and injured the pride of plaintiff in that the credit of the plaintiff depended very largely upon the strict observance of that confidentiality.

The plaintiff also in the alternative alleges negligence in the defendant in divulging the Plaintiff's bank account prior to April 18, 1988 and gave the following particulars of negligence.

(a) Acting in total disregard of and/or in defiance of the duty of confidentiality.

(b) Photocopying the defendant's account and disclosing same.

(c) Failing to consult with and seek the plaintiff's consent for the disclosure.

(d) Destroying the privacy of the plaintiff's account.

The defence as filed admits that the plaintiff is a customer of the defendant. The defence also admits the plaintiff's contention in

/ 3.....

the plaintiff's Statement of Claim of the implied term not to disclose and of secrecy in a banker/customer relationship. However, the defence contends that it is not liable to the plaintiff in its claim as they must comply with any process issuing out of any Court of competent jurisdiction. The defence denies that it did anything wrong and that it is liable to the plaintiff for any damages.

This suit is an aftermath of Suit No. 356 of 1987. It therefore behoves this Court to briefly mention what 356 of 1987 was all about in order that the present suit can be fully understood.

In 356 of 1987 a Magistrate Olin Dennie obtained Judgement against Lawyer Emery Robertson, the plaintiff's lawyer in this matter, for $15,000: being monies lent to Emery Robertson to assist Emery Robertson to pay off a loan of $15,000 he took from Maurice Robertson, his brother and plaintiff herein. In his defence in that suit Emery Robertson denied the loan transaction in its entirety and refused to take part at the hearing of the matter by himself and his lawyer Mr. O.R. Sylvester Q.C. most unprofessionally and irresponsibly walking out of the Court as the hearing was about to begin. The facts as found by the Court showed that at Emery Robertson's request, Olin Dennie issued the $15,000 cheque directly to Maurice Robertson on the understanding from Emery Robertson that that loan was Emery Robertson's loan and that he was responsible for the repayment of same.

In Order to assist in the proof of his case, Olin Dennie, through his Solicitor, had issued out of the Court, a Subpoena Duces Tecum to the defendant in this case to produce in Court the bank records showing the payment in to them on this $15,000 to the account of Maurice Robertson.

The defendant herein, through its acting Manager Mr. Ernest Defreitas, appeared in Court in obedience to the subpoena and produced in evidence

/4.....

the bank statement of the Plaintiff herein for the month of August, 1985.

These facts from those proceedings show that the defendant herein, upon a Subpoena Duces Tecum disclosed to the Court a bank statement of the plaintiff herein when the plaintiff herein was not a party to those proceedings. Hence the advent of these proceedings.

In the pleadings it is agreed on all sides that in the business of banking there is a banker/customer contractual relationship which has as one of its implied terms the rule of confidentiality and secrecy of the customer's business by the banker.

And, both sides, agreed that from the pleadings two issues arise to be determined.

1. When the defendant disclosed the plaintiff's account to the Court in Suit No. 356 of 1987 in obedience to the Subpoena Duces Tecum did the defendant breach this implied term of this contractual relationship and/or was he negligent.

2. If there was such a breach or negligence what damages if any would flow therefrom.

The two witnesses who testified in this matter are the plaintiff Maurice Robertson and on behlaf of the defendant, its Assistant Manager Ernest Defreitas. Having seen and heard them I make these findings of facts.

The defendant herein having received the Subpoena Duces Tecum from the Court to appear as a witness for Olin Dennie in Suit No. 356 of 1987, consulted with the defendant's lawyer Mr. L.A. Douglas Williams over the telephone by reading the subpoena to him and he was given legal advice. Acting on that advice he obeyed the subpoena, attended Court

/5.....

and testified as a witness for Olin Dennie. During this testimony he was asked by the Court if he had the records from the bank showing the transaction in issue in that matter, he answered in the affirmative and produced them in evidence. What he produced was a ledger sheet which showed not only the transaction in issue but transactions before and after that transaction which were not really relevant to those proceedings. I find as a fact that upon receiving the subpoena and consulting his lawyer, the defendant attempted to consult with the plaintiff but did not succeed and so proceeded to disclose to the Court the plaintiff's banking business without the consent of the plaintifff.

May I state here that upon a reading of the Statement of Claim filed in this matter I share the view of Mr. Asquith Phillips Q.C. that the cause of action of the plaintiff is based on this one act of the defendant's alleged breach of confidentiality and this is disclosed in para 5 therein which reads as follows:-

> " On or about the 18th April, 1988 the Defendant wrongfully and in breach of its fiduciary duty and/or contract divulged the plaintiff's bank account without the plaintiff's knowledge and consent to third parties."

I do not agree with Mr. Robertson that what is stated in paragraph 6 is the second limb of the cause of action. My view, and which view I again share with Mr. Phillips, is that what is stated in para 6 is put in there to show previous conduct of the defendant and relevant only to the question of damages. Para 6 of the Statement of Claim reads as follows:

> " Prior to the 18th April, 1988, the plaintiff was forced to make complaints to the defendant with regard to the lack of secrecy surrounding his

/6.....

account at the Defendant."

In any event, I do not think it takes the case for the plaintiff anywhere because, my finding of fact from the evidence is, that upon the plaintiff telling the defendant what he said someone is alleged to have told him, the defendant did not have a clue what he was talking about, and upon the defendant requesting of him certain particulars e/g/ the name of the person who told him so, the plaintiff refused to give any details and the defendant had to leave it at that. What is significant about this is that after this incident the plaintiff continued his business with the defendant until the incident in Suit 356 of 1987 when he terminated his banking transaction with the defendant except for the servicing of the loans he had from the defendant. Also, I can find no admissible evidence to prove a breach of confidentiality as pleaded in para 6 of the plaintiff's Statement of Claim.

Mr. Robertson is of the view that the conversation between the ~~plaintiff~~ Plaintiff and Ernest Defretias together with the particulars given by the plaintiff in this suit is evidence to prove this alleged act of breach. I do not agree. My view is that the plaintiff's evidence as to this conversation is only admissible to show that he had this conversation with Ernest Defretias. It cannot be and is not evidence as to the truth of what someone else told him in the absence of the defendant. Also, particulars, perse, given by one party to another during the preparation of a suit can never be evidence in that suit.

In the circumstances I will only deal with the legal position in so far as it relates to the alleged breach of confidentiality in the defendant disclosing the plaintiff's business in a Court of Law pursuant to a Subpoena Duces Tecum in proceedings in which the plaintiff was not a party and to which disclosure he did not give his consent.

/7.....

It is an implied term of the contract between a banker and his customer that the banker will not divulge to third persons, without the consent of the customer express or implied, either the state of the customer's account, or any of his transactions with the bank, or any information relating to the customer acquired through the keeping of his account, unless the banker is compelled to do so by order of a Court, or the circumstances give rise to a public duty of disclosure, or the protection of the banker's own interests requires it. At the present day it may be asserted with confidence that the duty is a legal one arising out of contract and that duty is not absolute but qualified. A bank may disclose the customer's account and affairs to an extent reasonable and proper for its own protection, as in collecting or suing for an overdraft or when ordered to answer questions in the law courts. There is no privilege from disclosure enforced in course of legal proceedings: Tournier v. National Provincial and Union Bank of England (1923) 1KB 461.

In Barclays Bank Plc v. Taylor (1989) 1 WLR 1066 it was held in the Court of Appeal of England that since the banker's duty of confidentiality to his client was qualified by the exception of disclosure under compulsion of law, the banks were not in breach of their duty to the defendants in complying with the orders to give the police access to the defendant's account.

I would also hold that where a bank acts under compulsion of law to disclose, there is a duty on the part of the bank to inform its client of the application unless to do so would prejudice the proceedings being investigated but there is no duty in those circumstances to obtain his consent.

In this matter the line taken by the defence is two fold. They

are admitting the disclosure alleged but are excusing liability for a breach of the implied term on the ground of compulsion of law and or absolute privilege afforded a witness testifying before a Court of competent jurisdiction. I intend first to deal with the issue whether when the defendant disclosed, he did so under compulsion law. This involves a determination of the isue whether disclosure in obedience to a Subpoena Duces Tecum is disclosure under compulsion of law.

In Paget's Law of Banking, 9 Ed. 1982, the Learned authors share the view that compulsion of law is confined to the exercise of proper authority deriving from statute or an order of the Court. They feel that casual enquiries by the police or government departments for instance, place no obligation on a bank such as does an order under the Bankers' Books Evidence Act or a requisition by the Law Society under the Solicitors Accounts Rules.

Diplock L.J. in Parry- Jones v. Law Society (1969) 1 CH.1 at P9 had this to say on this question of the privilege of confidentiality:

> " So far as Mr. Parry-Jones' point as to privilege is concerned, privilege, of course, is irrelevant when one is not concerned with judicial or quasi-judicial proceedings because, strictly speaking, privilege refer to a right to withhold from a Court, or a tribunal exercising judicial functions, material which would otherwise be admissible in evidence. What we are concerned with here is the contractual duty of confidence, generally implied though sometimes expressed, between a solicitor and client. Such a duty exists not only between solicitor and client, but, for example, between banker and customer, doctor and patient, and accountant and client. Such a duty of confidence is subject to and overridden by, the duty of any party to that contract to comply

/9 .....

> with the law of the land. If it is the duty for such a party to a contract, whether at common law or under statute to disclose in defined circumstances confidential information, then he must do so, and any express contract to the contrary would be illegal and void. For example, in the case of banker and customer, the duty of confidence is subject to the overriding duty of the banker at common law to disclose and answer questions as to his customer's affairs when he is asked to give evidence on them in the witness box in a Court of Law. I think that similar provisions as to disclosure apply to doctors under the National Health Act.

A writ of subpoena, whether it be ad testificandum or duces tecum or a combination of both is a common law writ. Its objects are to compel a person who is or may be otherwise unwilling, uncooperative, or even merely neutral, to attend the specified court at the specified date and time to give oral evidence or to produce material documents or both. It is coercive in its operation, since disobedience to a subpoena amounts to a contempt of Court and obedience to it can be enforced by committal, even if the disobedience is not wilful.

Mr. Asquith Phillips Q.C. contends that the Subpoena Duces Tecum served on this defendant in case 356/1987 was the legal compulsion under which the defendant acted when he disclosed the plaintiff's accounts to the Court. Mr. Robertson contends to the contrary and submits that before the defendant can justify compulsion by law he must show that he acted under an order of the Court and that a subpoena ~~Ducues~~ DUCES Tecum is not an order of the Court.

/10....

I have read all the authorities submitted to the Court on this issue by both sides including, Marshfield v. Hutchings (1866) 32 Ch. 499, The King v. Daye (1908) 2KB 337, Lesser Antilles Tradings Co. Ltd. and others v. The Bank of Nova Scotia (1095) LRC (Comm) 39, Emmoth v. Star Newspaper (1982) 62 LJAB 77, The Bankers' Book Evidence Act 1879, Vol 3 Hals Laws of England 4th Edition Re-issue 1989 and I have come to this conclusion in the context of the instant case.

Where a banker is served with a subpoena to attend a Court of competent jurisdiction, and to produce the bank accounts of a customer who is not a party to the proceedings then being investigated, he is bound to obey the subpoena to attend the Court and to take with him the accounts or documents requested. Before he does so he is under a duty to notify his customer as to what is happening to his accounts and to seek his consent to the disclosure of same. However, having obeyed the subpoena to attend, he is then under a duty to his customer not to dislcose the business of customer whether to the Court ~~of~~ or otherwise unless he had first obtained the consent of his customer or, in the absence of such a consent, an order of the Court to disclose. A subpoena as aforementioned, to my mind, cannot be and is not such an order. I would refer also on this issue to Haughton v. Haughton (1964) Supreme Court of Ontario (1965), Ontario Reports 481. In that case the plaintiff argued that the subpoena was the Court order that was required. The Assistant Master Mr. Saunders did not agree and ruled that what was required was the consent of the customer or a court order.

Having regard to those observations I would hold that the defendants herein breached the implied term of confidentiality in the contract of banking between themselves and the plaintiff when they disclosed the accounts of the plaintiff to the Court in Suit No 356 of 1987.

/ 11.....

From the admissible evidence I have before me, I would also find that the breach occurred as a result of the negligence of the defendant in not obtaining the consent of the plaintiff before indulging in the disclosure and, in the absence of consent by the defendant, not claiming the privilege afforded the plaintiff in the banker/customer relationship, on behalf of the plaintiff, when asked to disclose the plaintiff's account to the Court.

Having so found, I now propose to examine the other issue raised by Mr. Phillips in his address to this Court.

Mr. Phillips submits that a witness is protected from civil proceedings in respect of the evidence which he gives in judicial proceedings and in respect of things said or done in the course of preparing evidence for such proceedings. He submits that this protection is against actions of any sort.

Mr. Robertson not only argued on the demerits of this submission but also objected to such an argument being raised on the ground that it has not been raised in the pleadings. Mr. Phillips agreed it has not been spelt out on the pleadings but, he calls on the inherent jurisdiction of this Court to hear and determine the issue, on the basis that what this case is all about is an action being brought against a witness who testified in a judicial proceeding before a court of competent jurisdiction, for what the witness said and did during his testimony. He submits that he does not think an amendment to his pleadings is necessary but if the Court so finds he is asking for such an amendment.

I find it strange that Mr. Robertson did not take the objection utnil when he was almost completing his reply to Mr. Phillips' arguments. He took no objection when Mr. Phillips addressed on this issue or thereafter

/ 12.....

until he Mr. Robertson reached the point in his address where he had to deal with the issue. Also, the basis of the plaintiff's case in this matter is the fact of the defendant disclosing privileged information as a witness in judicial proceedings.

In these circumstances I can see no real injustice being done to the plaintiff because of the fact that this issue was not specifically pleaded. To my mind, this plea is purely a matter of law and it is so obvious having regard to the root upon which the plaintiff has founded his case, that the plaintiff cannot be said to be taken by surprise. I do not think an amendment to the defence is necessary but if it is I would grant the application of Mr. Phillips.

In deed, the point being raised here could have been taken by Mr. Phillips as an objection in limine. I therefore do not agree with the objection taken by Mr. Robertson and it is overruled.

On this issue of absolute privilege in a witness in relation to his testimony before a Court of Law Halsbury's Laws of England 4th Edition Vol. 17 at P 1182 sets out the legal position this way.

> " A witness is protected from civil proceedings in respect of evidence which he gives in judcial proceedings and in respect of things said or done in the course of preparing evidence for such proceedings. The protection is against actions of any sort, and is not limited to actions for libel or slander.

In Watson v. McEvan (1905) AC HL 481 and Earl of Halsbury L.C. at P 486 had this to say on this issue:

> " The broad proposition I entertain no doubt about, and it seems to me to be the only question that properly arises here; as to

/ 13....

> the immunity of a witness for evidence given in a Court of Justice, it is too late to argue that as if it were doubtful. By complete authority including the authority of this House, it has been decided that the privilege of a witness, the immunity from responsibility in an action when evidence has been given by him in a Court of Justice, is too well established now to be shaken. Practically, I may say that in my view it is absolutely unarguable - it is settled law and cannot be doubted. The remedy against a witness who has given evidence which is false and injurious to another is to indict him for perjury; but for very obvious reasons, the conduct of legal procedure by Courts of Justice, with the necessity of compelling witnesses to attend, involves as one of the necessities of the administration of justice the immunity of witnesses from actions being brought agaist them in respect of evidence they have given. So far the matter, I think, is took plain for argument.

In Marrinan v. Vibert (1963) 1QB 528 it was held that the plaintiffs action for conspiracy was barred by the rule ~~for~~ of public policy which protected witnesses from a civil action in respect of their evidence before a Court, and in the preparation of the evidence to be given. That rule was not confined to action of defamation but applied to whatever cause of action was sought to be dervied from what was said or done in the course of judicial proceedings. Sellers LJ at P 535 opined that whatever forms of action is sought to be derived from what was said or done in the course of judicial proceedings must suffer the same fate of being barred by the rule which protects witnesses in their evidence

before the Court and in the peparation of the evidence which is to be so given.

Fry Lj in Munster v. Lamb (1883) 11 QBD 588 CA speaks of this rule of law in this manner:

> " The rule of law exists, not because the conduct of those persons ought not of itself to be actionable, but because if their conduct was actionable, actions would be brought against judges and witnesses in cases in which they had not spoken with malice, in which they had not spoken with falsehood. It is not a desire to prevent actions from being brought in cases where they ought to be maintained that has led to the adoption of the present rule of law; but it is the fear that if the rule were otherwise, numerous actions would be brought against persons who were merely discharging their duty. It must always be borne in mind that it is not intended to protect malicious and untruthful persons, but that it is intended to protect persons acting bona fide, who under a different rule would be liable, not perhaps to verdicts and judgements against them, but to the vexation of defending actions."

Sir William Brett M.R. said also:

> " inasmuch as the words were uttered with reference to, and in the course of, the judicial inquiry which was going on, no action will lie against the defendant, however improper his behaviour may have been."

./15.....

From these authorities I would hold that when Ernest Defreitas testified before the Court in Suit No 356 of 1987 what was said or done by him during that testimony is covered by the plea of absolute privilege and no action can be brought against the defenant for that disclosure.

From the evidence led in this matter, while I find that technically the defendant might have breached the confidence rule of Banker/customer relationship in not obtaining the consent of the plaintiff or an order of Court before disclosing the plaintff's account, I find that the defendant through Ernest Defreitas acted reasonably given the circumstances. Having received the subpoena, he consulted with his solicitor and acting on his solicitor's advice he testified before the court. I can find no malice, unlterior motive or unreasonableness on his part in what he did. He simply inadvertently breached the rule of confidence.

In the circumstances I do not need to go any further in this matter except to say that the plaintiff's action is misconceived and must stand dismissed with costs to the defendants to be taxed certified fit for two counsel if not agreed.

The rule of law under which I have come to this conclusion might appear to the plaintiff to be harsh and unfair in the context of this case for, here it is, a man can be at home enjoying the ultimate in conjugal bliss when unknown to him his bank manager is in the Court letting out all his financial business and he can do nothing about it because of this absolute privilege afforded to witnesses in a judicial proceeding. However, the plaintiff can rest assured that I have spent two sleepless nights doing research, using logic and reason to see how best I could go behind it but, when one sees the public policy reasoning behind the rule and the very crisp and final words of Chief Baron Kelly and Fry LJ. in the authorities aforementioned the Court is left with its hands tied.

/16.....

This rule strangulates and sacrifices the rights of a wronged citizen purely in the interest of the preservation and survival of the overall effective system of the administration of justice. The wisdom behind this rule is real. It is a rule of public policy with which I agree when the balances are weighed.

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SUPREME COURT JUDGE.