

ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO ANUHCV 2005/0600

BETWEEN:

HILROY HUMPHREYS

Claimant

And

ANTIGUA COMMERCIAL BANK

Defendant

Appearances:

Mr. Septimus Rhudd and Ms. Gail Pero for the Claimant
Mr. Hollis Francis Jnr for the Defendant

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2007: March 26th
June 20th
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JUDGMENT

[1] **Blenman, J:** This is a claim for breach of contractual and fiduciary duties.

Background

[2] Mr. Hilroy Humphreys (Mr. Humphreys) is a former Member of Parliament and a well known businessman. He contends that he has been a customer of the Antigua Commercial Bank Ltd (the Bank) for several years. He says that he held a safety deposit box and a savings deposit account with the Bank.

[3] Mr. Humphreys further contends that in or around February 2003, the Government of Antigua and Barbuda, acting through the offices of the Director of Public Prosecutions, the Commissioner of Police and the Office of National Drug and Money Laundering Control Policy (referred to also as ONDCP), conducted certain investigations relating to, among other things, his banking relationship with the Bank. In accordance with the provisions

contained in the Banker's Book (Evidence) Act, Cap 39 and the Banking Act, Cap. 40 it was a requirement that any dissemination of information to a third party in respect of a customer's relationship with a banking institution could only be done pursuant to an order made by the Court. In or around February, 2003, and in response to a request from the Government's investigators, information relating to his Bank account held with the Bank, was provided by the Bank to the investigators. At the time the information was provided by the Bank, the appropriate Court Order had not been obtained by the investigators. The Bank was aware, or ought to have been aware of this. The information was subsequently used by the Government in an affidavit executed by one Elaine Malone, who described herself as being a member for the Metropolitan Fraud Squad, New Scotland Yard. That affidavit was filed in or around 20th February 2003, in support of an application made by the Director of, Public Prosecutions for a Production Order (the Order) pursuant to the Money Laundering Prevention Act 1996, as amended. The application was made in Claim No. ANUHCV 2003/0093 in which the Director of Public Prosecutions was the Applicant and the Claimant was the Respondent. The application was heard by the Honourable Madam Justice Rita Joseph-Olivetti on March 4, 2003 who then made the Order. In making the Order, the Court relied on the contents of the affidavit sworn to by Ms. Malone.

- [4] Mr. Humphreys further contends that on or around November 5, 2003, pursuant to an application made by him, the Honourable Mr. Justice Ian Donaldson Mitchell vacated and set aside the Order earlier made by the Honourable Madam Justice Rita Joseph-Olivetti; this was done on the basis that the information had not been procured by the Government in accordance with the provisions of the Banker's Book (Evidence) Act, the Banker's Act and that the manner of the said procurement violated his constitutional right to privacy.
- [5] He further contends that the Bank in failing to ensure that the Government investigators had procured the appropriate Court Order prior to the releasing of the information to the said investigators, had breached its fiduciary duty to him and violated his rights to privacy as implied in the Banker/Customer relationship.

- [6] Mr. Humphreys alleges that by virtue of the Bank's breach he has suffered pecuniary loss and damages. Further, he alleges that as a consequence of the Bank's breaches he has suffered loss. Accordingly he seeks to have the damages to which he claims to be entitled assessed.
- [7] In its defence the Bank denies that it has breached its fiduciary or contractual duty that it owed to Mr. Humphreys.
- [8] The Bank avers that the Banking Act Cap 40, provides for instances when a financial institution or its employees and officers may disclose to a third party, information concerning a customer of the financial institution. The Bank has upheld the highest level of confidentiality and secrecy in respect of the banking affairs of all its customers, including Mr. Humphreys. The Bank maintains, however, that any information used in the Affidavit of Ms. Malone, as alleged, was not obtained from the Bank. The Bank contends further that the information which Mr. Humphreys alleged was provided by the Bank is not information which was within its exclusive knowledge of that of its employees, officers and or agents.
- [9] Further, the Bank denies that it provided the material information improperly or unlawfully, as alleged by Mr. Humphreys. The Bank further denies that it breached its fiduciary duty to Mr. Humphreys and violated his rights to privacy as alleged or at all.

Issue

- [10] The issue that arises for the Court's determination is as follows:

Whether the bank has breached either its fiduciary or contractual duty that it owed to Mr. Humphreys.

Evidence

- [11] Mr. Humphreys filed a witness statement on his own behalf and tendered several documents into evidence. On behalf of the Bank, Ms. Jacqueline Mannix filed a witness statement. The Bank also relied on several documents in its defence. Both witnesses were cross examined at length.

Mr. Humphreys' Evidence

[12] In his witness statement Mr. Humphreys said:

"I have been a customer of the Bank for approximately twenty-seven years. I am the holder of a savings account and a safety deposit box.

In or around February, 2003, the Government of Antigua and Barbuda through the Office of National Drug Control Policy (ONDCP) conducted investigations into my banking relationship with the Bank.

The Bank in response to inquiries made by the said Government investigators, provided information relating to my banking relationship without my consent and without any prior notice to me.

The information provided by the Bank was then used in an Affidavit sworn to by a Ms. Elaine Malone, an investigator of New Scotland Yard in the United Kingdom in support of an Application made by the Director of Public Prosecution. The Application was made in on or around February 20, 2003 for an Order to inspect and take copies of my banking records by the bank. As a customer of the Bank, I reasonably expected that my dealings with the bank would be kept confidential and details would not be disclosed without my knowledge or consent.

By providing the information to the Government investigators prior to a Court Order requiring the release of the information, the Bank breached its fiduciary and contractual duties owed to me as a customer of the bank.

On or around March 4, 2003 an Order was made by Madam Justice Rita Joseph-Olivetti authorizing the inspection of my various bank accounts held with the Bank, among others. I subsequently made an application to the Court for that Order to be vacated and set aside.

My application was heard by Mr. Justice Ian Donaldson Mitchell, QC on or about the 9th day of October 2003. The Judge, having heard Counsel appearing on my behalf ruled that the Order of March 4, 2003 should be vacated and set aside.

The Bank's unauthorized disclosure to the said Government investigators resulted in a breach of the Bank's duty to maintain my privacy and the confidentiality of my personal banking information in light of my relationship with the Bank as a customer."

[13] During cross examination, by learned Counsel Mr. Hollis Francis Jnr, Mr. Humphreys admitted that in a previous matter Ms. Malone in an affidavit stated that she had obtained

the information from the ONDCP. He was forced to admit that by her statement in the affidavit he had felt that Ms. Malone had obtained the information in relation to his account that he held at the Bank, from the ONDCP. He nevertheless maintained the account which he held at the Bank has been dormant for over 20 years. He had not utilized the safety deposit box for several years. He was adamant that only he and the Bank would have had knowledge about the safety deposit box that he held at the Bank. He was sure that the bank had divulged his bank details to the ONDCP.

Ms. Mannix's Evidence

[14] I am of the view that it is necessary to produce Ms. Mannix witness statement in some detail. In her witness statement Ms. Mannix stated as follows:

"I have been employed by the Antigua Commercial Bank ("the Bank") since 1st May 1981 and I currently hold the post of Compliance Officer which post I have held since December 2004.

As part of my responsibilities I am charged with the duty of overseeing and monitoring the Bank's Anti-money Laundering and Compliance Programmes.

The Bank is aware of its obligations of secrecy under the Banking Act 1991 and the Bankers Book (Evidence) Act Cap 39. Each employee of the Bank is required to execute a declaration of secrecy on appointment which is renewed annually.

The Bank's records do not reveal that any employee or officer of the Bank was compelled to produce any information relating to Mr. Humphreys in any legal proceeding and as such the bank has not breached its obligations under the bankers Book (Evidence) Act.

In paragraph 15 of the Affidavit of Special Constable Malone referred to in Mr. Humphreys' statement of claim Ms. Malone indicated that the information she believed to exist in relation to Mr. Humphreys' account was sourced and received from the Office of National Drugs and Money Laundering Control Policy ("ONDCP"). The Money Laundering Prevention Act 1996 (MLPA) vests specific jurisdiction in the ONDCP as the regulatory authority for financial institutions such as the Bank. This jurisdiction includes but is not limited to the right of inspection.

Further, the Bank's records do not reveal any disclosure made by any employee or officer of the Bank of any information relating to Mr. Humphreys' accounts held with the Bank in breach of the banking Act or

further that any request for such information was made from the Government of Antigua and Barbuda as alleged which would result in a breach of the bank's obligations under the Banking Act.

That prior to the filing of the claim the Bank has made requests from Mr. Humphreys' attorney for particulars of the Bank's alleged breach of its obligations to Mr. Humphreys. That since the filing of the claim, the Bank has also filed and served on Mr. Humphreys a request for information. Mr. Humphreys has not provided any particulars of the alleged breach by the Bank."

[15] During cross examination by learned Counsel Mr. Septimus Rhudd, Ms. Mannix said that she is the Bank's sole compliance officer however some of the compliance duties are delegated to supervisors and other staff who do not necessarily work under her supervision, but some of whom have been dealing with compliance matters long before her. Mrs. Janice Francis was her predecessor as the compliance officer. Ms. Mannix was adamant that the Bank has implemented effective measures to ensure that its banker/client's confidentiality is not breached while at the same time adhering to the dictates of the Money Laundering Legislation. She searched the Bank's records and there was no evidence that any officer of the Bank had responded to any request for information in regard to Mr. Humphreys' accounts. Checks were made of both the Manager's file, the Bank's files including the Legal Officer's file. In addition, members of the legal department have carried out searches with a view of ascertaining whether any employee/officer of the Bank had improperly divulged Mr. Humphreys' bank details.

[16] During further cross examination by Mr. Rhudd, Ms. Mannix stated that she never met Ms. Malone and was unaware as to whether Ms. Malone had ever visited the Bank. Ms. Mannix said that in 2004 she was not a member of the compliance department and had no personal knowledge of Mr. Humphreys. However, after the Bank had commenced its investigations, based on Mr. Humphreys' allegations of breaches, she found no evidence of any Bank officials having divulged information to the ONDCP in relation to his bank details. She was also aware that the other departments of the Bank had not unearthed any correspondence that the Bank sent to the ONDCP in that regard, despite their investigations.

[17] However, Ms. Mannix admitted that she could not say definitively that all of the records in relation to Mr. Humphreys' accounts were searched even though she knew that the Bank had caused searches of its records to be carried out in order to ascertain whether any of its employees/officers had divulged Mr. Humphreys' bank details to the ONDCP. She did not agree that it is possible that the material information could have come from the Bank's staff. Under vigorous cross examination by Mr. Rhudd, Ms Malone agreed that the information that was contained in Elaine Malone's affidavit was "too similar to that possessed by the Bank and could not be a mere coincidence". Next she said that the information that Ms. Malone had was so similar to the information the Bank had that it could not be a mere coincidence. She also agreed that the information that Ms. Malone possesses must have come from the Bank.

[18] In re-examination by learned Counsel Mr. Francis, Ms. Mannix stated that the ONDCP could not have received the information without the Bank having provided it to that department.

Law

[19] At this juncture, I find it convenient to deal with the relevant law. The relevant Acts are the Banker's Book (Evidence) Act Cap 39 Laws of Antigua and Barbuda, the Banking Act Cap 40 Laws of Antigua and Barbuda (the Banking Act) and The Money Laundering (Prevention) Act 1996 as amended (The Money Laundering Act).

[20] Firstly, I propose to address the Banker's Book Act.

Section 7 of the Banker's Book Act states:

"On the application of any party to a legal proceeding, a Court or Judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceeding. An order under this section may be made either with, or without, summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed, unless the Court or Judge otherwise directs."

[21] In addition, section 11 of the Money Laundering Prevention Act states as follows:

"The Supervisory Authority-

- (i) shall receive the reports issued by the financial institutions pursuant to the provisions of section 13(2);
- (ii) shall send any report to the law enforcement authority if, having considered the report, the Supervisory authority also has reasonable grounds to believe that a money laundering offence is being, has been or is about to be committed;
- (iii) or a person authorized by the Supervisory Authority, may enter into the premises of any financial institution during normal working hours to inspect any business transaction record kept by that financial institution pursuant to section 12(1) and ask any questions relevant to such record and to make any notes or take any copies of the whole or any part of any such record;

[22] Section 15 of the Money Laundering Act provides as follows:

"Upon the application by the Supervisory Authority, a Judge of the High Court, upon being satisfied that there are reasonable grounds for believing that a person (referred to in this section as "the defendant") is committing, has committed or is about to commit a money laundering offence or has engaged or is about to engage in money laundering activity, may make an order-

- (i) That any person reasonably believed to be in possession or control of any document relevant to
 - (a) Identifying, locating or quantifying any property of the defendant; or
 - (b) Identifying or locating any document necessary for the transfer of any property of the defendant,

be required to deliver the document forthwith to the Supervisory Authority or other law enforcement agency,

- (ii) That a financial institution forthwith produces to the Supervisory Authority or other law enforcement agency all information obtained by the financial institution about any business transaction conducted by or for the defendant with the financial institution during such period before or after the date of the order as the Judge directs."

[23] Section 25 of the Money Laundering Act states:

"Subject to the provisions of the Constitution, the provisions of this Act shall have effect notwithstanding any obligation as to secrecy or other

restriction upon the disclosure of information imposed by any law or otherwise.”

[24] Section 26 of the Money Laundering Act stipulates:

“26(1) It shall not be unlawful for any person to make any disclosure in compliance with this Act.

(2) The Supervisory Authority may share any information relating to suspicious transactions reported to it in a suspicious activity report submitted by a financial institution, with any governmental agency or regulatory authority in or outside Antigua and Barbuda for the purpose of assisting such agency or authority in conducting criminal investigations or prosecutions.”

[25] Section 31 of the Banking Act which states as follows:

“(1) No person who has acquired knowledge in his capacity as director, manager, secretary, officer, employee or agent of any financial institution or as its director, officer, employee or agent of the Central Bank, shall disclose to any person or governmental authority the identity, assets, liabilities, transactions or other information in respect of a depositor or customer of a financial institution except:

- (a) With the written authorization of the depositor or customer or of his heirs or legal personal representatives; or
- (b) For the purpose of the performance of his duties within the scope of his employment in conformity with the provisions of this Act; or
- (c) When lawfully required to make disclosures by any court of competent jurisdiction within Antigua and Barbuda; or
- (d) Under the provisions of any law of Antigua and Barbuda, or agreement among the participating Governments;

but nothing herein shall prevent a financial institution from providing to a person, upon legitimate business request, a general credit rating, a summary of which will be provided to the depositor or customer upon request.

(2) Every person who contravenes the provisions of subsection (1) commits an offence and is liable on summary conviction to a fine of fifteen thousand dollars or to imprisonment for a term of two years or to both such fine and imprisonment.”

Mr. Francis' Submissions

- [26] Learned Counsel Mr. Francis submitted that Mr. Humphreys has not adduced any evidence detailing the alleged release of information which he claims has caused him loss and damage. Notwithstanding numerous requests for information regarding the nature and circumstances of the alleged release of information, Mr. Humphreys has not established how the Bank released information regarding his accounts held at the Bank. In the absence of this, Counsel submitted, that there exists no factual foundation upon which the Court could arrive at the conclusion that that the Bank breached its fiduciary and contractual obligations to Mr. Humphreys. Mr. Humphreys' evidence in chief is deprived of such factual foundation which could establish the breach as alleged or at all. Mr. Francis maintained that Mr. Humphreys has failed to substantiate his claim of unlawful or improper release of information because there was infact no improper release of information by the Bank of Mr. Humphreys' banking information.
- [27] Further, Mr. Francis stated that, Mr. Humphreys, in rebuttal, has argued that as the information as to the identity of the officer, employee or agent of Bank who released the information is within the exclusive knowledge of the Bank, he does not have the responsibility of identifying the representative of the Bank who facilitated or participated in the disclosure. Mr. Humphreys contends that he needs only to show that certain information which was exclusively within the Bank's knowledge and or possession was released to a third party without his proper authorization. Mr. Francis disagreed with Mr. Humphreys' position and submitted that the fact that information regarding Mr. Humphreys' account with the Bank is in the public domain does not without more amount to a breach of secrecy by the Bank. Rather, Mr. Humphreys must show that the information is out in the public domain as a result of the proven unlawful and improper release of same by the Bank. Mr. Francis further posited that Mr. Humphreys has not provided the factual foundation upon which this Court could determine that there was a release of information by the Bank which amounted to a breach of its obligation of secrecy to Mr. Humphreys.
- [28] Mr. Francis stated that Mr. Humphreys merely asserts that there was a breach of secrecy by the Bank in that Ms. Malone was able to use information she said was received from

inquiries made through the Office of National Drugs and Money and Money Laundering Control Policy in an Affidavit which was filed in support of an application by the Director of Public Prosecution (DPP) for an Order to inspect and take copies of records in respect of Mr. Humphreys. Ms. Malone in paragraph 15 of her Affidavit stated:

"That inquiries made through the Office of National Drugs and Money Laundering Control Policy have revealed and I verily believe that the following financial institutions hold the following accounts relevant to this application, to which the above named have an interest or are signatories."

[29] Learned Counsel, Mr. Francis submitted that the clear inference to be drawn from the said Statement of Ms. Malone is that the information regarding the number of accounts held by Mr. Humphreys was obtained from the Office of National Drugs and Money Laundering Control Policy (ONDCP); confirmation of this was provided by Mr. Humphreys under cross examination when he indicated that he believed Ms. Malone meant she received the information of the types of account he held at the Bank from the aforesaid Government Department. There is no other information which Mr. Humphreys alleges was released by the Bank except that relating to the types of accounts. The fact that information could have been obtained from the Office of National Drugs and Money Laundering Control Policy is neither unusual nor suggestive of any breach by the Bank of its obligations of secrecy to Mr. Humphreys.

[30] Next, Mr. Francis referred the Court to the Banking Act section 32(1) provides as follows:

"No person who has acquired knowledge in his capacity as director, manager, secretary, officer, employee or agent of any financial institution or as its auditor or receiver or official liquidator or as director, officer, employee, or agent of the Central Bank, shall disclose to any person or Governmental authority the identity, assets, liabilities, transactions or other information in respect if a depositor or customer of a financial institution except.

- (a) With the written authorization of the depositor or customer or of his heirs or personal representatives; or
- (b) For the purpose of the performance of his duties within the scope of his employment in conformity with the provisions of this Act; or

- (c) When lawfully required to make disclosure by any Court of competent jurisdiction within Antigua and Barbuda; or
- (d) Under the provisions of any law of Antigua and Barbuda or agreement among the participating Governments."

The effect of this provision, Mr. Francis argued, qualifies the duty of secrecy of the Bank and all other financial institutions in Antigua and Barbuda, thereby permitting disclosure in limited instances. As indicated, section 32(1) (d) permits disclosure once such disclosure is authorized under the provisions of any existing law in Antigua and Barbuda.

[31] Next, Mr. Francis referred the Court to section 11 of the Money Laundering Act 1996 (as amended) in section 11 outlines the powers of the Supervisory Authority (i.e. the Director of the Office of National Drug and Control Policy (ONDCP)). Section 11 provides, inter alia:

The Supervisory Authority:-

Or a person authorized by the Supervisory Authority, may enter into the premises of any financial institution during normal working hours to inspect any business transaction record kept by the financial institution.

Pursuant to section 12(1) and ask any questions relevant to such record and to make any notes or take and copies of the whole or any part of any such record:"

Mr. Francis also adverted the Court's attention to sections 25 and 26(1) of the said Money Laundering (Prevention) Act 1996 as amended which provide:

"25. subject to the provisions of the Constitution, the provisions of this Act shall have effect notwithstanding any obligation as to secrecy or other restriction upon the disclosure of information imposed by any law or otherwise.

26. (1) It shall not be unlawful for any person to make any disclosure in compliance with this Act.

He argued that the effect of sections 11, 25 and 26(1) of the Money Laundering Act is therefore to qualify the duty of secrecy imposed on all financial institutions. Mr. Humphreys only basis for alleging breach of secrecy by the Bank is that Ms. Malone deposed in her Affidavit that she received information regarding the accounts held by him at the Bank from enquiries made through the Office of National Drugs and Money Laundering Control Policy. The fact that the Office of the National Drug and Money

Laundering Control Policy could have obtained said information from the Bank under the provisions of the Money Laundering Act 1996 does not, Mr. Francis submitted, make out a case of unlawful or improper release of information by the Bank.

[32] Mr. Francis further advocated that while Mr. Humphreys bases his claim on the contents of the Affidavit of Ms. Malone, in his own application and Affidavit in support filed in Claim No ANU HCV 2003/0093, Mr. Humphreys describes the affidavit of Ms. Malone as “based substantially on Hearsay Evidence, Opinions and Allegations and other matters that the Affiant is not competent to testify to, and other inadmissible evidence and as such are insufficient to support the application”. Ironically, however, it is the same Affidavit of Ms. Malone on which Mr. Humphrey now bases his claim against the Bank; further, he asks that the Court should find that the Bank has breached its obligations of secrecy solely on an affidavit which he (Mr. Humphreys) in other proceedings described as “made with Hearsay allegations and opinions that are inconsistent with the Rules of the Civil Procedures of the Court.”

[33] Next, Mr. Francis emphasized that the Bank at all times has maintained that there has been no unlawful or improper release of information as alleged by Mr. Humphreys. Mr. Rhudd through cross examination of the Bank’s sole witness, Ms. Mannix suggests that the Bank failed to carry out a comprehensive search for information which, supposedly, would have revealed that there was a release of information regarding his account held with the Bank; Mr. Francis submitted that this contention should be rejected by the Court. Mr. Francis posited that in the absence of a factual foundation on which Mr. Humphreys claim is grounded, the Court is being asked by Mr. Humphreys find that the Bank has not conducted a thorough search and/or investigation into allegations of breach of secrecy, the particulars of which Mr. Humphreys has not presented or established. What document, for example, is this Court being asked to conclude was not discovered from the Bank’s search of its records, asked Mr. Francis; what specific circumstances or particulars of a verbal release of information could the Court infer from the failure of the Bank to conduct a thorough inquiry as alleged by Mr. Humphreys? Mr. Francis reiterated that Mr. Humphreys has not adduced any or any sufficient factual evidence on which adverse findings to the Bank could and should be made.

[34] Learned Counsel Mr. Francis further submitted that the fact that the information regarding the types of accounts held at the Bank was in the possession of the Office of National Drugs and Money Laundering Control Policy is not conclusive that the said information was obtained from the Bank. While Mr. Humphreys in his rebuttal submissions filed May 31, 2006 contends that the said information was exclusively within the Bank's knowledge and or possession, Mr. Francis submitted that Mr. Humphreys has not established this to be so. Mr. Humphreys in his affidavit in **Claim No ANU HCV 2003/0093** states in paragraph 5 in reference to the Affidavit of Special Constable Elaine Malone: *"That the said Affidavit contains evidence adduced at a Commission of Inquiry held...pursuant to the Commissions of Inquiry Act, Cap 91."* Therefore his claim against the Bank fails and should be dismissed.

Mr. Rhudd's Submissions

[35] Learned Counsel, Mr. Septimus Rhudd urged the Court to find the following facts. In or around December, 2002, the Director of Public Prosecutions (DPP) of Antigua and Barbuda commenced an investigation, into alleged criminal misconduct by Mr. Humphreys and other persons with whom he was supposedly affiliated. In conducting his investigation, the DPP solicited, and received, assistance from the Metropolitan Police Force Fraud Squad of New Scotland yard in the United Kingdom. Ms. Malone was a member of the Metropolitan Police Force Fraud Squad.

[36] On or around February 20, 2003, the DPP made an application pursuant to the provisions of Section 7 of the Banker's Book (Evidence) Act, Cap. 39 of the Laws of Antigua and pursuant to the provisions of Section 15(ii) of the Money Laundering Prevention Act, for a Production Order allowing his office to inspect and copy bank account information relating to Mr. Humphreys and other persons named in the application. The application was supported by an Affidavit, sworn to by Ms. Elaine Malone on the 19th day of February, 2003 and filed on the 20th day of February, 2003. In paragraph 15 of her Affidavit, Ms. Elaine Malone disclosed that the Office of National Drug and Money Laundering Control Policy ("ONDPC"), a division of the Government was in possession of pertinent private and confidential bank account information about Mr. Humphreys' account held with the Bank.

Ms. Malone further stated in her Affidavit that the information had been obtained by her based on inquiries made through the ONDCP. At the time that the information was disclosed by Ms. Malone, no prior application had been for any appropriate Court Order authorizing the Bank to release any such information to the ONDCP or to Ms. Elaine Malone. Mr. Rhudd stated that therefore Mr. Humphreys is maintaining that the information that was contained in the Affidavit of Ms. Elaine Malone was obtained from the Bank and prior to the issuance of a Production Order made by the Court on February 27, 2003, authorizing the DPP or a designated officer to inspect Mr. Humphreys' banking records.

[37] Mr. Rhudd argued that by virtue of the unauthorized release of information, Mr. Humphreys has suffered damages for which he should be compensated. Those damages arise out of the Bank's breach of its fiduciary/contractual duty to Mr. Humphreys. In addition, the Bank has breached his right to privacy as enshrined in the Antigua and Barbuda Constitution Order, 1981, and the Banker's Book (Evidence) Act, Cap. 39 and the Banking Act, Cap 40. Mr. Rhudd further submitted that Mr. Humphreys was forthright in his testimony and Counsel urged the Court to find that he was truthful. Next, Mr. Rhudd submitted that based on Mr. Humphreys' evidence, there is a high probability that the information contained in the Affidavit of Ms. Malone was provided by the Bank through one of its employees as Mr. Humphreys was not then aware that he was still registered as the holder of a safety deposit box at the Bank, this disclosure seriously undermines the Bank's contentions that the information was not divulged by the Bank.

[38] Mr. Rhudd, next urged the Court to note that the possession of a safety deposit box by a customer is not information that would, in the ordinary course of things, be known by members of the public. Accordingly, this is not information that could have mysteriously "found its way" into the Affidavit of Ms. Malone. Even if the Bank was to have contended (which it has not) that Ms. Malone had taken an "educated guess", it is highly unlikely that she would have guessed that Mr. Humphreys had a safety deposit box (about which the Mr. Humphreys had all but forgotten). The Court should find that, on a balance of probabilities, it is more than likely that this information would have emanated from the Bank; moreso, since Mr. Humphreys has testified that, until he saw the information in the

Affidavit of Ms. Malone, he had previously forgotten about his ownership of the safety deposit box.

[39] Therefore, Learned Counsel Mr. Rhudd submitted that the Court should find that, on a balance of probabilities, it is reasonable to conclude that the information contained in Ms. Malone's Affidavit was, in fact, provided by the Bank – albeit informally.

[40] Mr. Rhudd further submitted that Ms. Mannix's evidence adduced on behalf of the Bank was generally unhelpful and did not assist the Bank's case. She was evasive and occasionally seemed unfamiliar with some of the Bank's procedures and could not recall with certainty the names of other employees of the Bank who dealt the compliance matters. The Court should take cognizance of her admission that the events which prompted litigation in this matter occurred prior to her assuming responsibility for compliance and related matters. She was therefore not in a position to provide direct evidence or speak authoritatively as to what had transpired at the material time. She only became involved when litigation was commenced some months afterwards. It is important to note that the Bank failed to call any witness, such as its former General Manager, who would have been better able to provide evidence about what had transpired at the material time. In cross examination, Ms Mannix admitted that no attempts whatsoever were made to involve the former General Manager in any inquires or investigations that were carried out in relation to the release of information.

[41] Mr. Rhudd said that for the most part, the Bank's direct evidence highlighted its awareness of its obligation to maintain the privacy of its customers. He said that this related to the situation "after the fact" and does not address what exactly was done on the specific occasion on which Mr. Humphreys has alleged that there was the unauthorized disclosure.

[42] In addition, Ms. Mannix's direct evidence was that the Bank's "...records do not reveal that any employee or officer of the Bank was compelled to produce any information relating to Mr. Humphreys in any legal proceeding..." Ms. Mannix witness statement further indicated that the said records "...do not reveal any disclosure made by any employee or officer of

the bank or any information relating to Mr. Humphreys' accounts held with the Bank..." This definite position, in relation to the "Bank's records", taken by the witness strongly suggested that the Bank had carried out a comprehensive and thorough investigation, (which involved a search of all available records) in order to refute the allegations made by Mr. Humphreys. Mr. Rhudd stated, that however, during cross examination not only Ms. Mannix conceded that the allegations warranted an investigation but she was uncertain as to whether an investigation was carried out by the Bank. Whilst she admitted that she had conducted a search for 'a letter to ONDCP', she was uncertain of the extent of the search carried out by the other departments of the Bank in respect of the matter. It is noteworthy that her evidence disclosed she made no attempts to coordinate her efforts with those of the other departments in order to positively ensure that any investigation was comprehensive and that information gleaned from records were accurate.

[43] Next, Mr. Rhudd stated that despite being the Bank's sole Compliance Officer, Ms. Mannix was uncertain of the Bank's procedure for handling incoming correspondence as well as its procedure for recording a third party's verbal request for information on its customers. Similarly, she was uncertain as to whether she had seen the Affidavit of Ms. Malone although the reference to, and her comments on, the said Affidavit in Paragraph 15 of her Witness Statement strongly suggested otherwise. Mr. Rhudd next, submitted that the information proffered in the Witness Statement is untenable and the Court is urged to consider the witness' evidence unreliable. The Court should also note that the critical admission made by Ms. Mannix in respect of the similarity of the information contained in the Affidavit of Ms. Malone to those of the Bank's records in respect of Mr. Humphreys. When questioned in this regard, Ms. Mannix agreed with Mr. Humphreys' Counsel that "... the information is too similar to be a mere coincidence". In addition, the Bank agreed that the information contained in the said Affidavit must have come from the Bank.

[44] Further, Mr. Rhudd stated that during the brief re examination which took place, the witness further admitted that whilst the Bank had no records showing a disclosure of information to the ONDCP, the said entity could not have received the information without the bank providing it. This admission underscores the obviously haphazard and

inconsistent systems then in operation at the Bank. The Bank's record keeping was such that it could never accurately say whether it had, or had not, provided information to the ONDCP or to any other law enforcement body, for that matter. This fact is borne out by the witness's inability to locate or otherwise explain the whereabouts of the Court Order obtained by the DPP's office on February 27, 2004. The witness sought to suggest that it is possible that the Order might not have been served on the Bank. This suggestion is unfortunate especially when it is considered that the whole purpose and intention of the DPP applying for the Order was to allow him to access the Bank's records – something which would have necessitated the service of the Order of Madam Justice Rita Joseph-Olivetti on the Bank. For the DPP to then not serve the Order on the Bank would have been foolhardy.

[45] Mr. Rhudd further urged the Court to take note of the Bank's failure during re-examination to attempt to clarify or otherwise explain important evidence, favourable to Mr. Humphreys' case, adduced by its own witness during cross-examination. One can only reasonably conclude that the witness' evidence insofar as it was fatal to the Bank's position could not be correct. In general, the witness' responses epitomize the cavalier approach that the Bank must have adopted in its dealing with Mr. Humphreys and his relationship with them as a customer. Mr. Rhudd submitted that the same principle is applicable to the case at bar. Here, the disclosure, though prohibited until the appropriate Order had been obtained, would have been done in consideration of the Bank's obligation to assist with legitimate investigations being conducted by the State. Section 11 (VI) of the Money Laundering Act 1996, provides that:

"The Supervisory authority may instruct any financial institution or seek the assistance of any government department, statutory body, or other public body to take such steps as may be appropriate to facilitate any investigation anticipated by the Supervisory Authority following a report or investigation under this section."

The various provisions which regulate the banking sector in Antigua and Barbuda contemplate that a banking institution within Antigua and Barbuda may be required to assist or become involved in Government investigations as a part of its day to day operations. This, Mr. Rhudd submitted, further supports a conclusion that the provision of

information to government investigators is a function that is a part of the Bank's operations. Accordingly, it is an act that the Bank's employees are generally authorized to perform.

[46] On a consideration of the totality of the evidence presented to the Court, Mr. Rhudd finally submitted that, on a balance of probability, Mr. Humphreys has established his case. He has been able to show that details of his accounts held with the Bank were divulged prior to the obtaining of the appropriate Court Order, namely, in the Affidavit of Ms. Malone. That this information ended up in her Affidavit cannot be challenged. Mr. Humphreys was adamant that he did not disclose this information to any of the investigators. The Bank for its part (and though the evidence of a witness who admittedly had no direct knowledge of the sequence of events), has merely denied that it passed this information to the investigators. That witness has conceded that the information which the Bank possessed in respect of Mr. Humphreys' account is similar to the information that was contained in Ms. Malone's Affidavit at a time when she had no lawful authority to be in possession of such information. There is no doubt whatsoever that Ms. Malone had information which was known to only the Bank and Mr. Humphreys. Ms. Malone's Affidavit indicated that she obtained it from the ONDCP. At the time she made this disclosure, the Bank had no authority to disclose that information no matter how insignificant it was.

[47] Learned Counsel Mr. Rhudd stated that in addition, Ms. Mannix's admitted ignorance of the events and activities concerning the matter leave a lot of doubt and uncertainty as to whether the Bank did handle the information about Mr. Humphreys' account in a sufficiently confidential manner. Mr. Rhudd submitted that these elements of doubt, ignorance and uncertainty, together with the witness admission that the information "must have come from the bank" should result in a finding of liability against the Bank. Mr. Rhudd therefore asks the Court to find that Mr. Humphreys has made out its claim against the Bank.

Court Analyses and Findings

[48] I have reviewed the evidence that was adduced, in the case at bar, in its entirety and I have given careful consideration to the submissions of both learned counsel. This is a civil

case and the onus of proof is on Mr. Humphreys who is the Claimant. The standard of proof required of him is that of proof on a balance of probabilities.

[49] I am of the view that on a balance of probabilities Mr. Humphreys has satisfied the Court that the Bank has disclosed his Bank detail to the ONDCP without first obtaining a Court Order. Even though, he was unable to state which specific officer of the Bank has disclosed his information to the ONDCP, I am not of the view that this is fatal to Mr. Humphreys' claim. I am of the considered opinion that all that Mr. Humphreys is required to establish as a fact that the Bank had disclosed the information to the ONDCP without his permission and without first obtaining a Court Order. I have no doubt that the ONDCP had possession of Mr. Humphreys' bank details and this was without his permission.

[50] Mr. Humphreys' claim was buttressed by Ms. Mannix's evidence. Both in cross examination and re-examination Ms. Mannix conceded that the Bank had disclosed the information in relation to Mr. Humphreys' bank details. It was passing strange that Learned Counsel Mr. Francis appearing for the Bank did not see it fit to re-examine Ms. Mannix any further with a view to clarifying her categorical admission that the ONDCP could only have obtained the details in relation to Mr. Humphreys' accounts that were held with the bank if the Bank had provided the same. I accept Mr. Rhudd's arguments that Ms. Mannix's evidence was favourable to Mr. Humphreys' case. In my view her evidence supplemented in a significant way the proof required of Mr. Humphreys.

[51] Even though, Ms. Mannix had stated earlier in her evidence in chief that the Bank did not divulge details in relation to Mr. Humphreys account when pressed under the skilful cross examination of Mr. Rhudd she said "that the information which Ms. Malone possessed was too similar to that possessed by the Bank for it to be a mere coincidence" this evidence taken with her admission that if ONDCP had the information, that it clearly did, about Mr. Humphreys' account it could not have received the information without the Bank providing that information. Her evidence assisted Mr. Humphreys claim in no small measure.

[52] Accordingly, I accept the submissions urged on the Court by learned Counsel Mr. Septimus Rhudd in preference to that advocated by Mr. Francis and I find that on a balance of probabilities Mr. Humphreys has established that it was the Bank that had disclosed his Bank details. By way of emphasis, I am satisfied and find as a fact that Ms. Malone was able to depose to the evidence she did in her affidavit based on the information which was disclosed by the Bank unlawfully to the ONDCP.

[53] As stated earlier, I am satisfied that the ONDCP passed the information that it had unlawfully obtained in relation, to Mr. Humphreys' bank details to Ms. Malone. Further, in the case at bar, I am of the respectful view that when the information was in the public domain the Court had not ordered or directed the Bank to disclose the relevant information neither did Mr. Humphreys authorize the disclosure of his details. This brings me to consider whether the Bank could lawfully disclose a customer's bank details in the absence of express authorization of the customer or an Order of the Court. In this regard, I have no doubt that conjoint effect of section 7 of the Bankers Book Act and section 31 of the Banking Act specifically precludes the Bank or its employees or officers from disclosing information in relation to a customer's/depositor's account without first obtaining either the authorization of the customer or depositor, or acting pursuant to an order of the Court; disclosure must be done in accordance with law. I therefore have no difficulty in holding that the Bank is prohibited from disclosing any information in relation to Mr. Humphreys' Bank account without first obtaining an order of Court. This, the Bank failed to do, before disclosing Mr. Humphreys' bank details and it has accordingly breached its fiduciary duty/contractual duty which it owed to Mr. Humphreys.

[54] With respect, I do not for one moment accept that the Bank is authorized to disclose information to any government department or third party without first obtain an Order of Court and this applies to the Supervisory Authority of the ONDCP. It is clear to me that even the Supervisory Authority that was created under the Money Laundering Prevention Act must first obtain a Court Order which is granted pursuant to section 15 of the Act in order for the Bank to be able to obtain the information that it did. A judge of the High Court can only grant such an order to the Supervisory Authority if he is satisfied that there are

reasonable grounds for believing that the person is committing or has committed or is about to commit a money laundering offence. With respect, I therefore do not accept Learned Counsel Mr. Francis' submissions that the Bank is authorized and can lawfully disclose Mr. Humphreys' Bank details without first obtaining an order of Court.

[55] The Bank has a duty to protect the confidentiality of its customers' accounts and banking information. The Bank cannot properly disclose those details save in accordance with law.

[56] Accordingly, in the absence of Mr. Humphreys having authorized the Bank to disclose his bank details and since the Court did not so order, I have absolutely no difficulty, in holding that the Bank has breached both its contractual and/or fiduciary duty which it owed to Mr. Humphreys. In the case at bar, I accept Learned Counsel Mr. Rhudd's submissions in preference to Learned Counsel Mr. Francis. Mr. Rhudd asked that Mr. Humphreys' damages be assessed.

[57] Accordingly, I hold that Mr. Hilroy Humphreys has established his claim for breach of contractual and/or fiduciary duties against the Antigua Commercial Bank.

Conclusion

[58] Judgment is given for Mr. Hilroy Humphreys against the Antigua Commercial Bank for breach of its contractual and/or fiduciary duties owed to Mr. Hilroy Humphreys. I order that damages be assessed if not agreed.

[59] Costs to be determined at the assessment hearing, if not agreed.

[60] I commend learned counsel for their industry.

Louise Esther Blenman
High Court Judge