

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

HCVAP 2007/021

BETWEEN:

ANTIGUA COMMERCIAL BANK LIMITED

Appellant

and

HILROY HUMPHREYS

Respondent

Before:

The Hon. Mr. Hugh A. Rawlins

Chief Justice

The Hon. Mde. Janice George-Creque

Justice of Appeal

The Hon. Mde. Indra Hariprashad-Charles

Justice of Appeal [Ag.]

Appearances:

Sir Clare Roberts, with him Ms. Kamilah Roberts for the Appellant

Mr. Septimus Rhudd, with him Ms. Gail Pero for the Respondent

2008: November 27;

2009: March 25.

*Claim for damages for breach of contractual and/or fiduciary duty against a bank – whether the bank disclosed information relating to claimant's accounts to a third party – whether judge erred in holding that the Bank could not have lawfully disclosed the information - whether the judge erred in finding the claim proved on the evidence – the **Money Laundering (Prevention) Act 1996** - the **Banker's Book (Evidence) Act, Cap 39** of the 1992 Revised Laws of Antigua and Barbuda - the **Banking Act, Cap 40** of the 1992 Revised Laws of Antigua and Barbuda*

The respondent, Mr. Humphreys, claimed damages against the appellant bank for breach of contractual and/or fiduciary duty. He alleged that in response to a request from the office of National Drug and Money Laundering Control Policy (ONDPCP), the bank provided government investigators with information relating to a dormant account and a safety deposit box that he held with the bank, without his consent and without first obtaining a court order pursuant to the **Money Laundering (Prevention) Act**. The bank insisted that

it did not disclose the information. The bank contended that, in any event, it was lawfully entitled to disclose the information without obtaining Mr. Humphreys' consent or an order of the court. The trial judge held that, on the evidence adduced, Mr. Humphreys proved his case that the bank disclosed the information. She also held that the bank was not lawfully entitled to disclose the information without Mr. Humphreys' consent or an order of the court. She gave judgment for Mr. Humphreys, with damages to be assessed and costs to be determined at the assessment hearing, if not agreed. The bank appealed.

Held: allowing the appeal, with costs to the appellant bank to be assessed, if not agreed:

1. The trial judge was correct in her decision that the Bank was not lawfully entitled to disclose any information relating to Mr. Humphreys' accounts to a third party without his consent or an order of the court.
2. The trial judge erred in holding that Mr. Humphreys proved his claim on the evidence that was adduced in the trial.

JUDGMENT

[1] **RAWLINS, C.J.:** This is an appeal against a judgment in which a High Court judge gave judgment for the respondent, Mr. Humphreys, against the appellant bank for damages for breach of contract/fiduciary duty to be assessed and costs to be determined at the assessment hearing, if not agreed. Mr. Humphreys' claim alleged that in 2003 the bank disclosed to government investigators information relating to a dormant savings account and a safety deposit box that he held with the bank, without his consent or a court order pursuant to the **Money Laundering (Prevention) Act**.

Background

[2] The government of Antigua and Barbuda, acting through the offices of the Director of Public Prosecutions (DPP), the Commissioner of Police and the National Drug and Money Laundering Control Policy (ONDCP), conducted certain investigations into the alleged misuse of the money of the government's medical benefits scheme by Mr. Humphreys. The ONDCP was constituted pursuant to the **National Drug and Money Laundering Control Policy Act, 2003**. The ONDCP was subsequently appointed as the Supervisory Authority for investigating and

reporting on money laundering matters under section 10 of the **Money Laundering (Prevention) Act, 1996** as amended. For this purpose, the ONDCP is empowered to enter the premises of financial institutions to inspect business transaction records; take copies of such records; send information derived from the inspection to law enforcement authorities and seek the assistance of any government department or public body to facilitate any investigation that may arise.

[3] Mr. Humphreys' case is that pursuant to the **Banker's Book (Evidence) Act**¹ and the **Banking Act**² a bank may only disclose the banking information of a customer to a third party with the consent of the customer or a court order. Mr. Humphreys alleged that the bank, knowingly and without his consent or a court order, disclosed to ONDCP investigators that he had a savings account and a safety deposit box at the bank. The information was subsequently used by the government in an affidavit executed by one Elaine Malone, a member of the Metropolitan Fraud Squad, New Scotland Yard. Ms. Malone's affidavit was filed in February 2003, in support of an application by the DPP, for a production order in proceedings related to the investigations into the medical benefits scheme. The application sought an order mandating the bank to produce the particulars of the banking information of a number of persons, including Mr. Humphreys. Ms. Malone's affidavit identified "a savings account and safety deposit box" that Mr. Humphreys held at the bank among other accounts for which the order was sought.³

[4] The bank's defence, on the one hand, was that the laws of Antigua and Barbuda do not preclude it from disclosing the type of information which Mr. Humphreys alleged that it disclosed. On the other hand, the bank denied that it disclosed the information. The bank maintained that any information used in Ms. Malone's affidavit was not obtained from the bank. That information, said the bank, was not

¹ Cap 39 of the Revised Laws 1992 of Antigua and Barbuda, section 6.

² Cap 40 of the Revised Laws 1992 of Antigua and Barbuda, section 31(a).

³ See paragraph 15 of the affidavit.

in the exclusive knowledge of its employees, officers and or agents.

- [5] The judge made two findings in her judgment, which are challenged in this appeal. One finding was that the bank disclosed the existence of the account and the deposit box. No direct evidence was adduced at the trial to prove that the bank actually made the disclosure. Ms. Malone stated in her affidavit that the information on the account and deposit box was obtained from the office of the ONDCP. The judge's finding that the bank disclosed it was made on inferences, which she drew from the evidence of Ms. Jacqueline Mannix, who was the only witness for the bank, and from Mr. Humphreys' evidence. In the second place, the judge found that the bank's disclosure of the information was unlawful because it was done without Mr. Humphreys' consent and without a court order.

The appeal

- [6] In its appeal, the bank sought an order setting aside the whole judgment on some 10 grounds. In grounds 1 to 9, the bank seeks to impeach the finding of fact by the judge that Mr. Humphreys proved his claim on the evidence. The bank questions the judge's treatment of the evidence.
- [7] The 10th ground of appeal, which I shall consider first, states that the judge erred by not holding that the bank was authorized to disclose the information in any event, by virtue of the **Money Laundering (Prevention) Act**, without obtaining Mr. Humphreys' consent or an order of the court.

A right to disclose – ground 10

- [8] At first blush, the question as raised in this ground of appeal, appeared to me to invite an exercise in semantics. This defence seemed to be incompatible with the bank's primary defence that it did not disclose Mr. Humphreys' banking information to the ONDCP. However, the bank pleaded its right to disclose as an alternative defence. The trial judge decided the question based on statutory interpretation while finding that the bank had unlawfully disclosed the information to the ONDCP.

Ground 10 therefore raises a legitimate ground of appeal for consideration.

The judge's reasons

[9] The judge stated her reasons for her decision on the matter of the unlawfulness of the bank's disclosure as follows:⁴

"[53] ... 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 the 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] ... 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 (sic) 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."

⁴ In paragraphs 53-56 of the judgment.

Submissions

- [10] Ms. Roberts, learned counsel for the bank, submitted that the judge should have held that the bank was authorized to disclose the information without first obtaining Mr. Humphreys' consent or an order of the Court. Counsel contended that although the **Banker's Book (Evidence) Act** and the **Banking Act**, to which the judge referred, preclude the disclosure of the information, there are provisions in the **Money Laundering (Prevention) Act** which permit it. Counsel submitted that the learned trial judge would have realized this, had she considered sections 11, 25 and 26 of the **Money Laundering (Prevention) Act**.
- [11] On the other hand, Mr. Rhudd, learned counsel for Mr. Humphreys, submitted that the decision was correct on the authority of sections 11(iv) and 13(2) of the **Money Laundering (Prevention) Act** and the case of **Hilroy Humphreys v First Caribbean International Bank (Barbados) Limited**.⁵

Is there a right to disclose?

- [12] Section 11 of the **Money Laundering (Prevention) Act** states:

"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;
- (iv) shall send to the law enforcement authorities any information derived from an inspection carried out pursuant to paragraph (iii) of this section if it gives the Supervisory Authority reasonable grounds to believe that a money laundering offence is being, has been, or is about to be committed;"

⁵ Claim No. ANUHCv2006/0601 (Chong J (Ag) 13 June 2007).

[13] It is seen that section 11(1) of the **Money Laundering (Prevention) Act** cross-references section 13(2) of the said Act. Section 13 of the Act provides for the reporting of suspicious transactions by financial institutions. Section 13(1) requires financial institutions to pay special attention to complex, unusual or large business transactions from countries that have not adopted a comprehensive anti-money laundering programme. Section 13(2) requires a financial institution to promptly report any reasonably suspicious transaction observed under section 13(1) to the Supervisory Authority. Section 13(2A) provides that the question whether a reasonable suspicion should have been formed is to be determined objectively having regard to all of the facts and circumstances.

[14] Section 25 of the **Money Laundering (Prevention) 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.”

[15] Section 26 of the **Money Laundering (Prevention) 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.”

[16] The judge referred to section 15 of the **Money Laundering (Prevention) Act**. I think that it is necessary to set out the relevant provisions of this section in order to provide a more complete perspective of the anti-money laundering regime. The relevant provisions of section 15 state:

“15. 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 produce 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."

[17] These provisions relate to a specific specie of financial activity – suspicious transactions. Section 25 of the **Money Laundering (Prevention) Act** expressly permits the disclosure of a customer's banking information notwithstanding any obligation that a bank has as to secrecy under any law or otherwise. This is an exception to section 31 of the **Banking Act**, which prohibits a bank from disclosing a customer's information.

[18] Section 31 of the **Banking Act** 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."

[19] Additionally, a court is empowered by section 7 of the **Banker's Book (Evidence) Act**, to issue an order to a party to legal proceedings to inspect entries in a banker's book for the purpose of the proceedings. The section 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."

[20] These provisions show that, under the laws of Antigua and Barbuda, a bank cannot disclose the banking information of a customer unless the disclosure falls within one of the exceptions provided by section 31(1)(a)-(d) of the **Banking Act**.

[21] Counsel for the bank did not contend that disclosure was made under section 31(1)(a)-(c) of the **Banking Act**. Section 31(1)(d) contemplates disclosure under a law. Counsel for the bank contended that, a bank may disclose information to a third party, without the consent of the customer or a court order, pursuant to the provisions of a law, to wit, the **Money Laundering (Prevention) Act**. It is clear, however, that a bank may only disclose a customer's banking information to a third party if the customer consents, or in accordance with the specified procedures, pursuant sections 11,13,15,25 and 26 of this Act, in particular, which govern the disclosure process and culminate in the issue of an order of a court.

[22] This court noted the allegation that the bank merely disclosed that Mr. Humphreys had a savings account and a safety deposit box, but disclosed no particulars of the accounts. The learned judge held that the bank had no authority to disclose even that information, insignificant though it may seem.⁶ I agree with this finding. The disclosure provisions make no exception as to the type of customer information which a bank should not disclose. The result, in my view, is that the bank was not entitled to disclose any information whatsoever in relation to the customer's account unless the procedures specified by the statute for disclosure were met, if

⁶ In paragraph 46 of the judgment.

the bank did so.

- [23] In the foregoing premises, I would dismiss ground 10 of the appeal, and proceed to consider grounds 1-9, which seek to impeach the judge's finding that Mr. Humphreys proved his claim.

The appeal on the fact-finding

- [24] As stated earlier in this judgment,⁷ the learned trial judge's finding that Mr. Humphreys proved his case was made on inferences.

- [25] It is settled principle, that this court would rarely impeach and set aside a judge's decision from findings of facts, where the decision is based on an assessment of the credibility between witnesses for the parties. Learned counsel for the bank, however, relied on the principle which Ola Mae Edwards JA [Ag.], as she then was, stated in **Dane Abbott v Sonia Hodge**⁸ as follows:

"Where the trial judge's decision on an issue of fact was on inference drawn from primary facts and depended on the evidentiary value he gave to a witnesses' evidence and not on their credibility and demeanor, the appellate court is just as well placed as the trial judge to determine the proper inference to be drawn and is entitled to form its own opinion thereon."

This is the principle against which this court will determine whether the judge's decision that the bank disclosed Mr. Humphreys' banking information is impeachable on this appeal.

The treatment of the evidence

- [26] Only two persons gave evidence in the trial. Mr. Humphreys gave evidence on his own behalf and Ms. Jacqueline Mannix gave evidence on behalf of the bank. Mr. Humphreys filed a witness statement and tendered several documents into evidence. He was cross-examined. Ms. Mannix filed a witness statement and was cross-examined. The bank also relied on several documents.

⁷ In paragraph 5.

⁸ Antigua and Barbuda High Court Civil Appeal No. 2005/012 (25th February 2008), at para. [7].

Mr. Humphreys' evidence

[27] Mr. Humphreys stated as follows in his witness statement:

"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."

[28] In essence, Mr. Humphreys' evidence is that without his consent or a court order, the bank disclosed that he held the existence of the account and the deposit box in his name at the bank to the ONDCP. In turn, Ms. Malone obtained the information from the ONDCP. There is no direct evidence that the bank disclosed the existence of the account and deposit box. However, Mr. Humphreys was adamant that only he and the bank would have had knowledge about the account

and the safety deposit box. The bank must have disclosed them since he did not.

The judge's reasons for decision

[29] The judge stated her reasons for holding that the bank disclosed Mr. Humphreys' information to the ONDCP as follows:⁹

"[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

⁹ At paragraphs 49-53 of the judgment.

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."

[30] In short, the judge found that the evidence established that the bank disclosed the account and the deposit box to the ONDCP unlawfully; the ONDCP passed the information to Ms. Malone who put it into the public domain in her affidavit.

Ms. Malone's affidavit

[31] Ms. Malone's affidavit¹⁰ was deposed on 19th February 2003, to support an application to the court in the medical benefits proceedings for the production order under section 15(ii) of the **Money Laundering (Prevention) Act**. The DPP thereby sought leave to inspect and take copies of entries contained in books and accounts belonging to Mr. Humphreys and other persons, which were held at a number of banks, including the Antigua Commercial Bank. Ms. Malone referred to Mr. Humphreys' account and deposit box at the bank but gave no details of them. A production order was issued on 27th February 2003, but it was set aside by Donaldson Mitchell J on 9th October 2009 on Mr. Humphreys' application.

The evidence for the bank

[32] Ms. Mannix stated as follows in her witness statement on behalf of the bank:

"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

¹⁰ This is exhibited and is at page 56 of the Record of Appeal.

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."

- [33] In cross-examination, Ms. Mannix stated that she is the bank's sole compliance officer, but that compliance duties are delegated to supervisors and other staff who do not necessarily work under her supervision. She said that the bank implemented effective measures to ensure that its banker/client's confidentiality is not breached, but adheres to the provisions of the Money Laundering Legislation. She saw no evidence that any officer of the bank responded to any request for information in regard to Mr. Humphreys' accounts. In addition, searches were done by members of the legal department. These steps were taken to ascertain whether any employee/officer of the bank had improperly divulged Mr. Humphreys' bank details.

[34] According to Ms. Mannix, she never met Ms. Malone. She was unaware as to whether Ms. Malone had ever visited the bank. She found no evidence that any bank officials divulged any information of Mr. Humphreys' bank accounts to the ONDCP. 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 accounts to the ONDCP, but she could not say definitively that all of the records in relation to Mr. Humphreys' accounts were searched. In cross-examination she stated, however, that the information that was contained in Ms. Malone's affidavit was "too similar to that possessed by the bank and could not be a mere coincidence". She concluded that the information that Ms. Malone possesses must have come from the bank and stated, in re-examination, that the ONDCP could not have received the information without the bank having provided it to that department.

Grounds 7 and 8

[35] The bank complains, in these grounds of appeal, that the judge misdirected herself in failing to hold as she had done on substantially the same facts in **Hilroy Humphreys v RBTT Bank Caribbean Limited**¹¹ that Mr. Humphreys did not provide any positive, credible or reliable evidence to support his allegation that it was the bank that disclosed his banking information to the ONDCP. With respect, however, the exercise in a case such as this requires the court to consider the facts in the case which is before us rather than to compare it with cases that may have similar facts. I would therefore dismiss these grounds of the appeal.

Grounds 1-6 and 9

[36] In essence, the bank contends in these grounds of appeal, that the evidence adduced at the trial was insufficient to prove, even inferentially, that the bank disclosed the existence of Mr. Humphreys' account and deposit box.

¹¹ Claim No. ANUHCv 2005/0602 (30th April 2007).

[37] More particularly, the bank complains, in grounds 1-3 of the appeal, that the learned judge erred in her fact finding in that she made her decision on inferences which had no factual basis. The bank insists that there was no evidence upon which the judge could have found, as she did in paragraph 51 of the judgment, that Ms. Malone was able to depose to the evidence in her affidavit based on information that was unlawfully disclosed by the bank to the ONDCP.

[38] The bank complains, in grounds 4-6 of the appeal, that the judge gave undue weight to the opinion stated by Ms. Mannix, that it could be no mere coincidence in the similarity between the information contained in Ms. Malone's affidavit and that possessed by the bank. The bank further complains that the learned judge erred when she treated Ms. Mannix's evidence as supplementing the proof required by Mr. Humphreys, when she (Ms. Mannix) was not in a position to provide any direct evidence or to speak authoritatively as to whether the bank actually disclosed Mr. Humphreys banking information. The bank also complains, that the learned judge erred by failing to consider that Mr. Humphreys deposed in an affidavit in another application, that Ms. Malone's affidavit contained information that was adduced at a public hearing by the Commission of Inquiry into the medical benefits scheme.

The sufficiency of the evidence

[39] On the question whether there was sufficient evidential basis for the judge's finding that the bank disclosed Mr. Humphreys' account and deposit box, the evidence shows that their existence was put into the public domain in the affidavit of Ms. Malone. Mr. Humphreys did not consent to the disclosure and no one had obtained a court order for the disclosure.

[40] Mr. Humphreys gave no direct evidence in proof of his claim that the bank disclosed his banking information to ONDCP. He surmised that the bank must have disclosed the information on the basis that as far as he was aware only he and the bank knew of the information. In my view, this statement does not reasonably lead to a conclusion that the bank must have disclosed the information

as an inescapable inference, particularly as the disclosure was as to the existence of the account and deposit box and not any details of them. One could think of so many other possible sources for that type of information.

[41] The general tenor of Ms. Mannix's evidence is that her searches revealed nothing to suggest that the bank disclosed Mr. Humphreys' banking information to the ONDCP or to a third party. It was seen that she stated 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". She also stated that, the information that Ms. Malone possesses must have come from the bank, and that the ONDCP could not have received the information without the bank having provided it to that department. The learned trial judge referred to these statements as "admissions" that the bank disclosed the information. In my view, the learned judge erred in treating these statements as "admissions". They were merely Ms. Mannix's surmises, beliefs or inferences, which are not admissible in proof of material facts.¹² They could not therefore corroborate Mr. Humphreys' evidence to prove that the bank disclosed the information, particularly as Mr. Humphreys gave no direct evidence in proof that the bank disclosed the existence of his account and deposit box, as the learned judge found. In my view there was insufficient evidence from which to infer that the bank disclosed the information.

[42] In the foregoing premises, I would allow the appeal on grounds 1-6. It is superfluous to determine ground 9 in which the bank complains that the learned judge erred in her fact finding by shifting the burden of proof from Mr. Humphreys to the bank, and in expecting the bank to prove a negative.

Costs

[43] The trial judge awarded damages to Mr. Humphreys against the bank, to be assessed, and costs to be determined on the assessment hearing, if not agreed. The effect of allowing this appeal is that there will be no assessment hearing.

¹² See Phipson's on Evidence, 16th Edn. 2005, at paragraph 33-01.

However, having prevailed in this appeal, the bank is entitled to its costs in the High Court and in this court. The question therefore is how should these costs be quantified if the parties do not agree on them?

- [44] The claim does not fall within the fixed costs regime of rule 65.4 of **CPR 2000**. Since the claim sought damages to be assessed, it falls for quantification under rule 65.5(2)(b)(ii) of **CPR 2000**. The parties made no written or oral submissions with this in mind. Accordingly, I would invite the bank to indicate, within 7 days of the delivery of this judgment whether it would pursue costs in the event that the parties do not agree on the quantum. On that notification, directions will be given for the purpose of determining the issue.

Order

- [45] In summary then, I would allow the appeal, with costs to the appellant bank in the High Court and in this court, to be assessed if not agreed. The bank shall inform this court, within 7 days of the delivery of this judgment whether the parties have agreed costs, and, if they have not, whether it will be pursuing costs on assessment in order that the necessary directions may be issued.

Hugh A. Rawlins
Chief Justice

I concur.

Janice George-Creque
Justice of Appeal

I concur.

Indra Hariprashad-Charles
Justice of Appeal [Ag.]