THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT
(CIVIL)
A.D. 2016

CLAIM NO. SKBHCV2015/0283

BETWEEN:

MOHAMMAD SADEK ATASSI
(by his Attorney Malek Atassi)
1st Claimant/Applicant

and

CHIRIN ATASSI
(by her Attorney Malek Atassi)
2nd Claimant/Applicant

AND

RAGHED MURTADA
1st Defendant

AND

LIVE NEVIS DEVELOPMENT LIMITED
2nd Defendant

AND

THE BANK OF NEVIS LIMITED
Respondent

Appearances:-

Mrs. M. Angela Cozier of Cozier and Associates with Ms. Emily Prentice for the Applicants
Ms. Cindy Herbert for the Respondent.

2016: December 13th

JUDGMENT

[1] **WARD, J**.: By application filed on 28th July, 2016, supported by evidence on affidavit, the applicants seek the following orders against the respondent Bank of Nevis Limited:

(i) An order that the respondent be added as a party, namely, the 3rd defendant to these proceedings pursuant to **CPR** 19.2 and 19.3;

(ii) An order for the respondent to produce for the purpose of tracing the applicants' funds all and any account mandates with regard to account number 296150 held at the respondent bank in the name of the 2nd defendant; all or any documentation related to credit and debit advices with regard to account number 296150 in the name of the 2nd defendant between 14th October, 2013 to date showing the persons, whether natural and/or corporate, who are signatories to said documents; the names and addresses of all recipients of all transfers of money out of the said account between 14th October, 2013 to date;

(iii) An order that the respondent be compelled to recall the sum of US$804,593.60 which it wilfully and negligently permitted the 2nd defendant to withdraw and convert to its own use from the account numbered 296150 held at the respondent bank.

(iv) Costs in the application herein.

Background

[2] By claim form and statement of claim filed on 14th December 2015 the applicants/claimants commenced proceedings against the second named defendant for damages for fraudulent misrepresentations made by the 1st defendant, as sole shareholder and director of and for the benefit of the 2nd defendant, embodied in various correspondences with the applicants between May and October 2013. The applicants claim that in reliance on these misrepresentations, they acted to their detriment by transferring the sum of 590,000 EUR (US $804,593.60) into the 2nd defendant's bank account, number 296150, held at the respondent bank on 14th October 2013.These funds were said to be for the construction of

a villa by the 2nd defendant pursuant to two separate purchase and sale agreements entered into between the applicants and the 2nd defendant on the 18th September, 2013. The applicants allege that these funds were made subject to an escrow agreement which was executed almost one year later on 10th September, 2014.

The Respondent's Involvement

[3] To fully appreciate the circumstances that ground these applications, it is necessary to briefly rehearse the chronology of certain salient events regarding the respondent bank's involvement in this matter.

[4] On 15th July 2015, solicitors for the applicants wrote to the manager of the respondent bank placing the respondent on notice that it considered that the funds held in the said account belonged to the applicants because the applicants had wired the funds into the 2nd defendant's account for the purpose of purchasing a villa in Nevis under the Citizenship by Investment Real Estate option. The letter explained that the villa had not been constructed and that attempts to secure the return of the deposited funds had been futile. The letter therefore advised the respondent that legal proceedings were imminent against the 1st and 2nd named defendants and enjoined the respondent not to permit any further withdrawals of funds from the account.

[5] On 5th August, 2015, as foreshadowed in the letter of 15th July, the applicants commenced proceedings against the 2nd defendant for rescission of both the purchase and sale agreement relating to the villa and the said escrow agreement made between the applicants and the 2nd defendant on 10th October, 2014 relating to the funds deposited into the 2nd defendant's account with the respondent bank, as well as for recovery of the purchase price of the villa.

[6] On 12th August 2015, Carter, J. granted the applicants a freezing order ("D.C.7"), freezing the sum of USD $450,000.00 that had been removed by the 2nd defendant from the said account and deposited into an escrow account in the St. Kitts-Nevis-Anguilla National Bank Trust Company Ltd. The order also froze the sum of USD $354,000.00 which represented the remaining balance in the 2nd defendant's account with the respondent

bank. On 14th August, 2015 the applicants' solicitor served a copy of the freezing order on the respondent bank.

[7] On 25th August, 2015, the applicants filed a claim in the St. Christopher Circuit of the High Court against the 1st and 2nd defendants for the return of the purchase price and for damages (Claim No. SKBHCV2015/0173).

[8] On 2nd December, 2015, Carter, J. discharged the freezing order. Solicitor for the applicants wrote to the respondent putting it on notice of its intention to appeal Justice Carter's order and informing that a request for default judgment had been filed in relation to the claim then in existence.

[9] On 11th December, 2015 solicitor for the applicants wrote to Counsel for the respondent bank enclosing a draft notice of discontinuance, a draft of a new claim, a draft application for a fresh interim order and a draft affidavit in support.

[10] On 14th December, 2015, the applicants discontinued the said claim and filed the present claim.

[11] On 17th June, 2016, the applicants obtained an order from the court compelling the respondent to disclose all statements of account related to any and all accounts held by the 2nd defendant at the respondent bank whether in United States or Eastern Caribbean currency, from 14th October, 2013 to the date of the order ("D.C.11").

[12] Pursuant to the said order, the respondent bank disclosed records which revealed, *inter alia*, that on 24th December, 2015, the 1st defendant had re-deposited the sum of USD $450,000 that had previously been withdrawn from the 2nd defendant's account and placed in an escrow account at the St. Kitts-Nevis-Anguilla National Bank Trust Company Ltd. And further, that on the 31st January, 2016 the respondent bank, on instructions, wired the sum of USD $804,593.60 from the 2nd defendant's account to the 1st defendant's bank account in Dubai in the United Arab Emirates.

[13] It is this discovery which prompted the applicants to seek to add the respondent bank as a party to these proceedings, to seek further orders for disclosure and for the "recall" of the funds wired to the 1st defendant's Dubai account.

[14] In support of the application, (originally without notice) the applicants filed an affidavit on 28th July, 2016 sworn to by Dwight Cozier, Compliance Officer for solicitors for the applicants and a further affidavit in reply filed on 2nd September, 2016.

[15] In short, the applicants contend that the respondent bank should be added as a party because, in light of the history of communication and events as set out at paragraphs 4 -11 above, the respondent willfully and negligently allowed the applicants' money to be wired to the 1st defendant's Dubai account. For this, it is said, they are liable as constructive trustees since they must have known that the funds deposited into the 2nd defendant's account were held on a constructive trust for the applicants. The respondent is therefore obliged to return the funds.

The Respondent's Affidavit in Opposition

[16] Pursuant to directions given by Williams, J. via telephone conference, the applicants were ordered to serve notice of the application on the respondent bank. Filing schedules were set for the exchange of affidavits and written submissions.

[17] Pursuant to those directions, on 26th August, 2016 the respondent bank filed an affidavit in opposition to the application to be added as a party and for further discovery. The deponent was its Operations Manager, Ms. Sonia Bowen-Tuckett.

[18] The respondent opposes the application to add on the basis that the claim form and statement of claim disclose no issue for resolution between the parties such that it is desirable to join the respondent as a defendant. In particular, in answer to the applicant's assertions of fact, it avers as follows:

(i) It denies that the 2nd defendant's account held with it was designated an escrow account. The respondent asserts that it was a Chequing Account in the sole name

of the 2nd defendant. It further contends that the purported escrow agreement relating to the funds in the 2nd defendant's account was executed almost one year after the funds were wired into the account and, further, that the respondent was not named as a party to the agreement nor had they been served with said escrow agreement. Further, the respondent bank was not made aware of its existence prior to the instant application. Accordingly, the respondent owed no fiduciary obligations to the applicants and did not hold the funds as constructive trustee for the applicants.

(ii) The respondent further averred that during the operative currency of the freezing order obtained by the applicants, the respondent bank dutifully complied with its terms. Upon the freezing order being discharged on 2nd December, 2015, there was no lawful impediment to the 2nd defendant dealing with the funds standing to his credit in the said account and the respondent bank would have been liable had it sought to prevent the 2nd defendant from dealing with the funds.

(iii) Further, at no time after the freezing order was discharged did the applicants furnish the respondent bank with any indication that it had obtained a stay or appealed the freezing order or obtained a fresh order. The onus was on the applicants to obtain a freezing order in relation to the account. In the absence of such an order, the respondent cannot be said to have been negligent in permitting the 2nd defendant to wire funds from his account to the 1st defendant's account in Dubai.

(iv) As it relates to the application for further discovery, the respondent opposes it on the basis that the application is extremely wide and, in any event, should have formed part of the initial application for discovery.

(v) The respondent submitted finally that the application for recall of the funds was unrealistic, impractical, and without legal authority to support such a remedy.

(vi) For all of the foregoing reasons, Ms. Herbert submitted that the applicants have not identified any issue that the respondent bank is required to help resolve. Accordingly, the application to add the respondent as a party should be dismissed.

The Hearing of the Application - Oral Submissions

[19] The application was heard on 7th October, 2016 when the parties made oral submissions to the Court.

[20] The Court invited Counsel for the applicants to identify the issue to be resolved that made it desirable that the respondent be added as a party.

[21] Counsel for the claimants, Mrs. Cozier, submitted that the respondent's wrong doing lay in facilitating the wire transfer of USD $804,593.60 to the Dubai bank account of the 1st defendant when the respondent had been put on notice that the funds belonged to the applicants, especially since the Operation Advice and Invoice, which formed part of the original wire transfer, (Exhibit "D.C. 2" - Certificate of Exhibits filed 2nd September, 2016), showed the express purpose for which the funds were wired to the 2nd defendant's account.

[22] Counsel submitted that the 2nd defendant held the money on a constructive trust for the benefit of the applicants. When, therefore, the respondent bank permitted the wire transfer out of the account in January 2016, it must have been obvious that the intended recipient was not the applicants, who had wired the funds in the first place, but the 1st defendant whom the respondent knew was a defendant in an action for fraudulent misrepresentation. Therein, it is said, lies the respondent's complicity and the justification for adding it as a party to these proceedings.

[23] It was further submitted that the respondent was negligent and in breach of its duty to raise a suspicious activity report under the **Proceeds of Crime Act,** Cap 4:28 (hereafter "POCA"), given the information which Counsel for the applicants had supplied as early as July 15th, 2015 and continuing through December, 2015.

[24] In its oral submissions in response, Counsel for the respondent, Ms. Herbert, took a preliminary objection to the admissibility of the affidavits sworn by Mr. Dwight Cozier on behalf of the applicants. It was contended that, on the face of his affidavits, it is apparent that he does not have direct and personal knowledge of the applicants, their attorney (by power of attorney) or to the matters referred to in the documents constituting the exhibits. It

was further submitted that it was apparent that the source of his information does not come directly from the applicants and the deponent has not sufficiently identified the source of his information and belief. The affidavit therefore offends against sections 55 and 69 of the **Evidence Act** No. 30 of 2011.

[25] This point can be dealt with shortly. Section 75 of the **Evidence Act** provides that the 'hearsay rule' does not prevent the admission or use of evidence adduced in interlocutory proceedings if the party who adduces it also adduces evidence of its source.

[26] The Court has closely examined the affidavit of Mr. Cozier. He has clearly stated that he is the Compliance Officer of the applicants' solicitor and was authorized to swear the affidavit. On a proper reading of his affidavit and the exhibits referred to therein, it is plain that when not speaking to matters within his personal knowledge, the sources of his information and belief are instructions from the applicants' solicitor and his review of case file material provided to him by Counsel for the applicants.

[27] Accordingly this preliminary submission does not find favour with the Court.

[28] As it relates to the application to add the respondent as a party, Counsel for the respondent bank submitted that in determining the issue joined between the parties, the Court must be guided by the claim form and statement of claim and the evidence filed in support of the application to add a party. Counsel submitted that a review of these documents reveals that the applicants' action against the 1st and 2nd defendants sounds in contract for damages for fraudulent misrepresentation. Such a claim, it is argued, does not and cannot fix the respondent with notice of alleged criminal activity. Thus, the provisions of **POCA** were never engaged. In any event, the applicants never supplied their documents to the respondent.

[29] Counsel for the respondent further submitted that there is nothing in the claim form, statement of claim or any of the correspondence sent to the respondent by Counsel for the applicants that fixes the respondent with notice that any crime had occurred or was being alleged or that there was a contravention of the **POCA**. Accordingly, there is no warrant for the applicants' submissions that it was under a duty in the circumstances known to it to raise a suspicious activity report under **POCA** or that it was negligent in failing so to do.

[30] It was also submitted that, in light of the fact that the respondent bank had been notified by the applicants that the interim freezing order had been discharged on 2nd December 2015, and, no steps having been taken by the applicants to obtain any further freezing orders, there was no lawful basis upon which the respondent bank could prevent the 2nd defendant from dealing with the money in the account.

ISSUES

[31] The essential issues for resolution in the application before me are:

(i) whether it is arguable that the respondent is liable as a constructive trustee and, thus, a necessary party if the Court is to resolve the real issues in dispute or an issue involving the respondent that is connected thereto.

(ii) Whether the respondent bank is liable to the applicants for their loss and should therefore be ordered to "recall" the sum of USD $804,593.60 which was wired out of the 2nd defendant's account held with the respondent bank to the 1st defendant's Dubai bank account;

(iii) Whether the respondent bank should be ordered to produce the banking records of the 2nd defendant which the applicants seek in order to trace the applicant's funds.

DISCUSSION

(a) The Application to Add

[32] The applicants invoke the Court's jurisdiction to add a party pursuant to **CPR** 19.2 and 19.3(2). So far as material these rules provide:

> *"19.2(1) A claimant may add a new defendant to proceedings without permission at any time before the case management conference.*
> *(2)The claimant does so by filing at the court office an amended claim form and statement of claim, and Parts 5 (service of claim within jurisdiction), 7 (service of court process out of jurisdiction), 9 (acknowledgment of service and notice of intention to defend), 10 (defence) and 12 (default judgments) apply to the amended claim form as they do to a claim form.*
> *(3) The court may add a new party to proceedings without an application if –*
> *(a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or*

(b) there is an issue involving the new party which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the court can resolve that issue.
(4) The court may order any person to cease to be a party if it considers that it is not desirable for that person to be a party to the proceedings.
(5) The court may order a new party to be substituted for an existing one if the –
(a) court can resolve the matters in dispute more effectively by substituting the new party for the existing party; or
(b) existing party's interest or liability has passed to the new party.
(6) The court may add, remove or substitute a party at the case management conference.
(7) The court may not add a party (except by substitution) after the case management conference on the application of an existing party unless that party can satisfy the court that the addition is necessary because of some change in circumstances which became known after the case management conference."

And

"19.3 (2) An application for permission to add, substitute or remove a party may be made by –
(a) an existing party; or
(b) a person who wishes to become a party."

[33] Thus, the essential question for the Court when met with an application to add is whether the respondent is a necessary party if the Court is to resolve the real issues in dispute or to which the respondent is connected.

[34] In resolving this question the Court must have regard to the nature of the pleaded case, the evidence in support of the application and the overriding objective of the **CPR**.

[35] Based on the pleadings, it is beyond dispute that the applicants' case against the 1st and 2nd defendants is indeed grounded in contract. The substantive reliefs sought by the applicants are rescission of various agreements and damages for fraudulent misrepresentation.

[36] Based on the pleadings, the issues to be resolved between the applicants and the 1st and 2nd defendant relate to representations made to the applicants by the defendants between January and October 2013. The facts and matters necessary for the resolution of these issues are free standing and unrelated to the actions of the respondent bank in its subsequent dealings with the money in the 2nd defendant's bank account.

[37] The addition of the respondent can shed no light on the matters necessary to resolve the issues between the applicants and the defendants as it relates to the claims for damages for fraudulent misrepresentation and for rescission of the purchase and sale agreement and the escrow agreement.

[38] While the Court is prepared to accept that the applicants can legitimately desire to trace the funds in the event that it prevails in its case, this can be achieved without the need to add the respondent as a party to these proceedings.

[39] Indeed, the affidavit evidence in support of the application reveals that, though a number of applications were made to the Court relating to the respondent, the extent of the applicants' interest in the respondent bank lay in seeking orders for discovery in an apparent attempt to trace the funds said to belong to the applicants. While this is a legitimate pursuit, it does not appear that the applicants then considered the respondent to be a necessary party in order to achieve that objective. The applicants seemed content for the respondent to provide information by a process of court order disclosure, that would allow them to identify into whose hands the funds were delivered.

[40] The applicants' position changed, however, once they discovered that the respondent had permitted the funds to be wired to the 1st defendant's bank account in Dubai in January 2016.

[41] The question for the Court is whether this materially affects the issues for resolution between the parties such that it is desirable or necessary to add the respondent as a party to the proceedings.

[42] In an effort to persuade the Court that this development was indeed a game changer, Counsel for the applicants submitted that since the respondent bank had full knowledge of the purpose for which the applicants had wired the funds to the 2nd defendant by virtue of the operation advice accompanying the original wire transfer instructions of October 2013 (Exhibit "DC 2") and given further that the applicants' solicitor had put the respondent on notice that it considered the funds in the account were held on trust for the applicants, the respondent bank must be deemed a constructive trustee for the sums that it wilfully and

negligently caused to be wired to the 1st defendant's Dubai account because by so doing it assisted the defendants to dispose of the funds in an unauthorized manner.

[43] Thus, it is argued, there is a live issue whether the bank is liable for the funds as a constructive trustee. The resolution of this issue requires that the respondent be added as a party to these proceedings.

[44] In considering these submissions, the Court thinks it right to make some preliminary assessment whether there is a good arguable case against the respondent bank on an issue that is connected with the disputed subject matters of the instant claim. That will assist in determining whether there is an issue involving the respondent that makes it desirable to add it as a party to these proceedings.

[45] The question arises whether the actions of the respondent bank renders it a constructive trustee of the funds in the account and thus liable to account for it, as submitted by Counsel for the applicants.

Constructive Trust

[46] Liability for assisting in a breach of trust is fault based. To fix a defendant with liability as a constructive trustee on the basis of accessory liability/dishonest assistance it must be established that the defendant had actual knowledge of the arrangements constituting the trust and, in particular, that the principal was not entitled to deal with the funds entrusted to him as he had done or was proposing to do. Secondly, the defendant must possess a dishonest state of mind. This means that the defendant must have known that his conduct transgressed ordinary standards of honest behaviour.

[47] Put another way, before there can be a finding of dishonesty it must be established that the defendant's conduct was dishonest by the ordinary standards of reasonable and honest people and he himself realized that by those standards his conduct was dishonest: **Twinsectra v Yardley[1]; Royal Brunei Airlines Sdn Bhd v Tan[2]**.

[1] [2002] UKHL 12
[2] [1995] 2 AC 378

[48] In formulating the principle in **Brunei**, Lord Nicholls made it plain that mere knowledge of the facts which make the conduct wrongful will not suffice as seemed to have been previously thought. [3]

[49] Lord Nicholls stated at page 392 F-G:

> *"Drawing the heads together, their Lordships' overall conclusion is that dishonesty is a necessary ingredient of accessory liability. It is also a sufficient ingredient. A liability in equity to make good resulting loss attaches to a person who dishonestly procures or assists in breach of trust or fiduciary obligation…Knowingly' is better avoided as a defining ingredient of the principle, and in the context of this principle the Baden [1993] 1 WLR 509 scale of knowledge is best forgotten".*

[50] The House of Lords subsequently confirmed this proposition in **Twinsectra**. Lord Hutton referred to the passage quoted above and stated at paragraph 36:

> *"It would be open to your Lordships to depart from the principle stated by Lord Nicholls that dishonesty is a necessary ingredient of accessory liability and to hold that knowledge is a sufficient ingredient. But the statement of that principle by Lord Nicholls has been widely regarded as clarifying this area of the law and, as he observed, the tide of authority in England has flowed strongly in favour of the test of dishonesty. Therefore, I consider that the courts should continue to apply the test and that your Lordships should state that dishonesty requires knowledge by the defendant that what he was doing would be regarded as dishonest by honest people, although he should not escape a finding of dishonesty because he sets his own standard of honesty and does not regard as dishonest what he knows would offend the normally accepted standards of honest conduct."*

[51] Thus, these cases stand as firm authorities for the proposition that dishonesty, and not merely knowing assistance, on the part of the third party must be established to fix him with accountability as a constructive trustee.

[52] It is also clear from these authorities that negligence is not a sufficient condition of liability. As Lord Nicholls further stated in **Royal Brunei Airlines** at page 389 C:

> *"Further, honesty and its counterpart dishonesty are mostly concerned with advertent conduct, not inadvertent conduct. Carelessness is not dishonesty".*

[53] Applying these principles, the applicants would, at the least, have to establish some basis for saying that the respondent bank, with knowledge of the relevant facts, acted dishonestly in facilitating the wire transfer of the funds from the 2nd defendant's account.

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[3] See Baden, [1993] 1 WLR 509.

[54] To this end, the applicants rely on the case of **AGIP (Africa) Ltd v. Jackson and Others**[4]. In this case, by a writ issued on 1st March 1985 the plaintiff claimed against the defendants, for recovery of USD $518, 822.92 paid to a company in the control of the defendants pursuant to a forged payment order. Judgment was given for the plaintiff. It was held that since the defendants had assisted in the fraud about which they had been put on inquiry, they were liable as constructive trustees of the money paid by the British bank to the companies under their control.

[55] In my view, this case is distinguishable from the present case. In **AGIP**, the defendants were liable as constructive trustees because the evidence clearly established that, not only had the defendants assisted in a fraud about which they had been put on notice, but that they had acted dishonestly. Millet, J. imputed knowledge to the defendants who ought to have been aware from the circumstances of that case that they were taking the risk of laundering money on behalf of fraudsters.

[56] To assert that that situation parallels the instant case is to put a great strain on the facts in this case.

[57] Further, in the present case, it cannot be said that the respondent owed fiduciary obligations to the applicants. This is so for a number of reasons. In the first place, it is incontrovertible that the subject account stood in the sole name of the 2nd defendant and that it was designated a chequing account.

[58] Secondly, contrary to the averments at paragraphs 30 - 32 of the applicants affidavit in support filed on 28th July, 2016 as to what the respondent should have been supplied with or notified of, there is no evidence that the respondent bank was ever notified of or supplied with a copy of either the escrow agreement or the purchase and sale agreement at any stage before January 2016 when it allowed the funds to be wired to the 1st defendant's Dubai account.

[59] Additionally, the uncontradicted evidence of Sonia Bowen-Tuckett (affidavit in opposition filed 26 August, 2016) is that at all times during the subsistence of the various freezing orders the respondent bank acted with propriety and was compliant with the terms of the

[4] [1991] 3 WLR 116

freezing orders; the respondent bank was not served with any application for the stay of Justice Carter's order discharging the freezing order on 2nd December, 2015; nor had there been any further freezing order since.

[60] The Court is therefore satisfied that in transferring the funds to the 1st defendant in January 2016, in circumstances where the applicants had notified them that the freezing order had been discharged in December 2015, it cannot be said that the respondent bank acted negligently in so doing; far less that they acted dishonestly.

[61] At the stage when the funds were wired to the 1st defendant's Dubai account, the applicants were litigants in a claim yet to be resolved. Without more, mere correspondence from Counsel for the applicants to the respondent bank could impose no obligation or confer any right on the respondent bank to restrain the 2nd defendant from dealing with the funds in the account. It seems to me that if mere letters from Counsel were to have the effect contended for by the applicants then resort to the Courts for relief would be rendered otiose.

[62] The applicants were well aware of the remedies that were available to them if it were intended to further restrain the respondent bank from permitting any dealings with the funds.

[63] Taking into account what the respondent bank actually knew, I do not find that a good arguable case has been made out that its actions were dishonest according to normally acceptable standards of honest conduct.

[64] Further, the Court agrees with the submissions of Ms. Herbert that, in the circumstances as outlined, the provisions of the **Proceeds of Crime Act** were not engaged. Even if it could be said that they were, the highest the applicants put their case is that the respondent bank was negligent in failing to make a suspicious activity report and that they willfully and negligently permitted the funds to be wired out of the account. It is noted that the applicants' case is that the respondent bank acted willfully and negligently in acting on its client's instructions to wire the funds out of the account. There is no assertion of dishonesty.

[65] As previously stated, negligence does not suffice to establish liability under the accessory liability/dishonest assistance principles in order to deem a defendant a constructive trustee.

[66] The Court is of the clear view that, on the evidence, an arguable case has not been made out for treating the respondent bank as a constructive trustee. Accordingly, I can perceive no issue to be resolved in the present claim such that the respondent is a necessary party if the Court is to resolve the real issues in dispute or to which the respondent is connected.

[67] The application to add the respondent bank as a defendant is denied.

(b) The application to recall

[68] Counsel for the applicants were unable to provide much elucidation on what was meant by the expression "recall of funds" or to develop any cogent argument in support of its contention that the court was empowered to make such an order at this stage. Though promising to furnish authorities on the point, counsel eventually indicated via letter that, having reread the authority of **Jayesh Shah and Shaleetha Mahabeer v HSBC Private Bank (UK) Limited**[5] on which they had relied in oral argument, they were content to treat with this issue under the head of constructive trust.

[69] On this basis I take the expression "recall the funds" to mean that the applicants seek to have the respondent make good the resulting loss to the applicants.

[70] However, it ineluctably follows from what is said above on the question of the respondent's liability as a constructive trustee that the application to have the respondent bank "recall" the funds must also be dismissed since the obligation to make good the resulting loss arises only where the respondent can be viewed as a constructive trustee.

(c) Application for disclosure

[71] The applicants assert that though the respondent bank made some disclosure pursuant to the order of Carter, J., dated 17th June, 2016 it was not fully compliant, specifically because it did not disclose the specific account mandates that would have allowed for the

[5] [2012] EWHC 1283

tracing of the money and to identify the signatories to the account or the person or persons who authorized the transfer of the funds in order to determine whether any other parties should be added to the proceedings.

[72] At common law, the tracing remedy attached to the recipient of the money. Equity also permitted the true owner to trace his property into the hands of others. In this case, the orders previously granted by Carter, J., and complied with by the respondent bank, permitted the applicants to learn that the sum of USD $804,593.60 had been wired to the 1st defendant's Dubai account. To that extent, the disclosure provided to date has met one of the applicants' legitimate concern.

[73] However, the Court is in agreement with Ms. Cozier's submissions that they are entitled to the further disclosure sought in an effort to identify persons who may have authorized transfers of the funds in the account held by the 2nd defendant. Such an order is justified to give effect to the applicant's equitable right to trace their money in the event that they are successful in their claim against the defendants.

[74] Given the evidence adduced in support of this application, the Court discerns no public policy considerations in the circumstances of this case that dictate a contrary course.

[75] In fairness, it should be said that Counsel for the claimant did not mount a muscular objection to this particualr application. However, Counsel did submit, that if the Court were minded to make the order, it would ask that any cost incurred be met by the applicants. The Court agrees.

CONCLUSION

[76] In the foregoing premises, the applications to add the respondent bank as a party and to order that it recall the funds wired from the 2nd defendant's bank account to the Dubai bank account of the 1st defendant are dismissed.

[77] The order of this Court is as follows**:**

a. The Bank of Nevis Limited to produce for the purpose of tracing the applicants money:

i. all and any account mandates relating to account number 296150 held at the Bank of Nevis Limited in the name of the 2nd defendant;

ii. all or any documents related to credit and debit advices with regard to account number 296150 held at the Respondent Bank in the name of the 2nd defendant between 14th October 2013 to date, showing clearly the persons, whether natural and/or corporate, who are signatories to these documents; and

iii. the names and addresses of all recipients of all transfers of money out of the said account between 14th October, 2013 to date within seven (7) days of the date of the Order herein.

b. The applicants are to defray any costs incurred by the respondent bank in providing this information;

c. The applicants to give an undertaking that the information disclosed is used for no other purpose than to trace the applicant's money.

Trevor M. Ward, QC
Resident Judge