Delcy v Camille
(2003) SLR 42

Francis CHANGSAM for the Plaintiff
Philippe BOULLE for the Defendant

Ruling delivered on 30 April 2003 by:

PERERA J: By a praecipe for summons dated 14 February 2003, the Attorney for the Defendant moved for summons on the Manager, Barclays Bank (Seychelles) Ltd, "to give evidence on behalf of the Defendant and to produce statement of Accounts regarding Account number 4215173 in the name of Mrs Anicette Delcy for the years 1997 to date". Accordingly, Mr Andrew Bonne, a Manager of the said bank appeared on summons and produced photocopies of the relevant entries of the Plaintiffs account, extracted from the Bankers books. Mr Chang Sam, Learned Counsel for the Plaintiff objected to the production of these documents, mainly on three grounds.

First, that these documents had not been listed with the defence, as required under Section 77 of the Code of Civil Procedure.

Secondly, that in terms of Section 38(1) of the Financial Institutions Act (Cap 79) any Director, Manager, Officer, Employee or Agent of a Financial Institution was prohibited from disclosing any information to any person or Governmental authority as regards the identity, assets, liabilities, transactions or other information.

Thirdly, on the ground of relevancy. It was submitted that the settled pleadings in the case, concerns only an account of the Plaintiff with Banque Nationale de Paris Internationale, at Reunion, and that hence account particulars with the Barclays Bank in Seychelles were not relevant, especially as no evidence of any transaction was adduced in the case.

As regards the 1st ground, copies of the statements were furnished to Learned Counsel for the Plaintiff, and an adjournment was granted to examine them. Hence the failure to list the documents with the defence, has been cured within the provisions of Section 81 of the Code of Civil Procedure.

As regards the 2nd ground, Mr Chang Sam contended that, as the bank acted through its directors and officers, the prohibition contained in Section 38(1) of the Financial Institutions Act (Cap 79) applied. He emphasised on the Banker's Duty of Secrecy, and submitted that any derogation must fall within the exceptions set out in Subsection (b), (i) to (iv) of Section 38(1). The exception relevant to the present case, as contained in Subsection (iii) is as follows:

> When lawfully required to make disclosure by any Court of competent jurisdiction in Seychelles.

In the case of *Tournier v National Provincial and Union Bank of England* (1924) 1 KB 461, Bankes LJ stated thus in regard to the Banker's Duty of Secrecy:

> At the present day, I think it may be asserted with confidence that the duty is a legal one arising out of contract, and that the duty is not absolute, but qualified. It is not possible to frame any exhaustive definition to classify the qualification, and to indicate its limits..... On principle I think that the qualifications can be classified under four heads: (a) where disclosure is under compulsion of law; (b) where there is a duty to the pub lie to disclose; (c) where the interests of the bank require disclosure; (d) where the disclosure is made by the express or implied consent of the customer.

In Seychelles, the first head of classification is covered by Subsection (iii) of Section 38(1) aforesaid which specified the legal exception. The Evidence (Banker's Books) Act (Cap 75) contains provisions which are similar to the provisions of the Banker's Books Evidence Act 1879 of the United Kingdom. The UK Act was applicable prior to the enactment of the local Act in 1968.

Section 3 of the Evidence (Banker's Books) Act provides that "a copy of an entry in a Banker's Book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transactions and accounts therein recorded." Sections 4 and 5 stipulate the conditions under which such copy shall be admitted in evidence under Section 3. Provision has now been made to produce computerized documents, in which case, they must be proved in the manner set out in Section 5(3) (a) to (c).

Section 6 provides that:

> A Banker or Officer of a bank shall not, in any legal proceedings to which the bank is not a party, be compellable to produce any Banker's Book the contents of which can be proved under this Act, or to appear as a witness to prove the matters transactions and accounts therein recorded, unless by order of a judge made for special case.

Therefore, an order of a judge for special cause is needed for the production of the whole Banker's Book.

The issue that arises for consideration is whether the Banker's Duty of Secrecy, which is zealously guarded by Section 38(1) of the Financial Institutions Act and Section 6 of the Evidence (Banker's Book) Act, can be breached by compelling a Bank Officer to produce and disclose particulars of entries of the Banker's Books of an adverse party, upon serving a witness summons under Section 152 of the Code of Civil Procedure, or whether it could only be done upon a proper motion being filed with notice to that adverse party, and an order being obtained from a judge, on cause being shown. It must be stated that the Evidence (Banker's Books) Act contains special provisions in the general law of evidence, due to the Banker and customer relationship that exists in

respect of Banker's Books. Those provisions must however be read subject to Section 38(1) of the Financial Institutions Act.

Mr Boulle maintained that the Defendant has summoned the Manager of Bank to produce a copy of an entry in the Banker's Book, pursuant to the provisions of Section 4 of the Evidence (Banker's Books) Act, and submitted that such procedure did not require an order of a judge. He stated that the legislature has required such an order only in cases where it was necessary to produce the Banker's Books (not merely copies), and when a Bank Officer is required to appear as a witness to prove matters, transactions and accounts in such books, as envisaged in Section 6, and also for the purpose of inspecting and taking copies of any entries in the Banker's Books for the purposes of a legal proceeding, as provided in Section 7 and also, under Section 8 by means of a warrant, for the purpose of a Criminal Investigation. He also referred to the procedure of obtaining of an order of the Court, before summoning an adverse party on his personal answers, as another contra distinction to the procedure, which he stated was not required when a Bank Officer is summoned under Section 4.

Section 7 of the UK Act of 1879, which is identical to Section 7 of our Act, came up for interpretation in the case of *Williams v Summerfield* (1972) 2 All ER 1334. In that case, Widgery CJ cited the case of *R v Bono* (1913) 29 TLR 635, which, although a criminal case, established a "working rule" civil proceedings. It was held in that case that the Courts are against the use of Section 7 as a kind of "searching inquiry or fishing expedition beyond the Ordinary Rules of Discovery". Hence documents that would not be discoverable under the ordinary Rules will not be disclosed by a "side wind" by the application of Section 7.

The words "shall, on its production" in Section 4 raise the question, "how is it produced in Court?" Obviously, it is by means of a summons served on the Manager or other official of the bank in terms of a "witness summons" under Section 152 of the Code of Civil Procedure. In English Practice, and Procedure, such summons is termed s*ubpeona duces tecum,* that is, summons to produce the documents. Such summons is issued to compel the Manager or other official to attend Court, but not to disclose the information contained in the books or the copies of the entries he had brought to Court. Such information can be disclosed only if the account holder consents, or if the judge on a consideration of relevancy, makes an order before summons is issued. In the *Tournier case (*supra), the manager of the bank, disclosed information to the employer of their customer, that his account had been overdrawn and that certain cheques passing through that account to a Bookmaker showed that he was a heavy gambler. Consequently, the employer did not renew the contract of employment. The customer then sued the bank for damages for slander and for breach of an implied term of secrecy. The Court dismissed the Plaintiffs case, but in appeal the Court of Appeal held that a Bank does owe a duty of secrecy to its customers. In the *King v Dave* [1908] 2 KB 333, the bank refused to obey a *subponena duces tecum* issued by the High Court of Justice on the ground that what they had in possession was a sealed envelope, which was deposited with them on condition that it should not be delivered to anyone without the consent of the two persons who deposited it. They contended that a sealed

envelope was not a "document". In a rule nisi for contempt issued against the bank. Lord Alvertone CJ held that the Subpoena must be obeyed and the bank had to produce the sealed envelope. The Attorney-General submitted that the envelope contained a document containing a secret formula, which should be analysed by a Chemist to maintain the Criminal charges against the two persons. The Court left that to be determined by the trial Court. Hence the requirement that the Banker's secrecy can only be breached by an order made by a Judge upon consideration of relevancy remains an established principle.

In the present case, Mr Boulle emphasised the words "without further proof" in Section 4(1) of the Evidence (Banker's Books) Act to support the view that no Court order was required, and all that was required was the serving of a summons on the Manager. With respect, that would amount to obtaining documents a party would not be lawfully entitled to hold, through an indirect process. In any event, Section 4(1) of the original Act was amended by Act no 8 of 1990, by deleting the word "shall not be received in evidence under this ordinance unless it be first proved that the book was at the time of the making of the entry one of the original books of the bank." The objects and reasons for such amendment, as stated in the bill are as follows:

> To allow the admission as evidence the contents of a document produced by a computer, without the need to call each of the persons who entered the information contained in the computer.

Hence, that is the limited meaning of the words "without further proof in the amended Section 4(1). The Evidence (Banker's Books) Act applies to both Civil and Criminal proceedings, as well as investigations. In criminal proceedings, when inspection of the Banker's Book or any other document in the custody of a bank is needed for the purpose of investigation, the Investigating Officer must obtain a warrant from a Judge under Section 8(1) of the Act. In either Civil or Criminal proceedings, the production of the Banker's Book under Section 6 or the inspection and taking copies of entries under Section 7 has to be done by an order of a Judge, or upon an order of Court. Section 3, 4 and 5 merely specify the mode of admissibility of copies of entries in a Banker's Book. Section 4 does not provide an exception to the Rule that an order of Court must first be obtained before an officer of the bank is summoned under Section 152 of the Code of Civil Procedure to produce and disclose particulars of the Bank Accounts of an adverse party.

In general therefore evidence of the Banker's Books or copies of entries thereof of the Accounts of third parties can be obtained subject to one of the exceptions in Section 38(1) (b) (i) to (iv), of the Financial Institutions Act.

As regards the third ground of relevancy, Mr Boulle submitted that he does not propose to cross-examine the Bank Manager, and that all what he would do is to ask him whether the copies he was producing were from the books in the custody of the bank and that whether they were entries made in the ordinary course of business. He further submitted that the documents are not being produced to prove any payment to the

Plaintiff. He stated that in cross-examination the Plaintiff had admitted making monetary gifts to her son, and hence he would be relying on such evidence, supported by the particulars of the Plaintiffs account to contend that just as she made such gifts to her sons, a similar gift was made to her daughter, the Defendant. On a perusal of the evidence, I find that the Plaintiff stated in cross-examination that Roy, one of her sons, did some construction work on the land and that his father, told him before his death, that the mother would give him R50,000 for such work. She stated that she honoured that promise and gave R50,000 to Roy after selling the property. She also stated that she lent some money to Roy on an agreement made before Mr B. Renaud Attorney at Law, and that he was repaying that amount in installments. Mr Renaud, in his evidence, corroborated the Plaintiff and stated that an agreement was made whereby the Plaintiff paid Roy R120,000, and that sum is being repaid through the bank on a standing order for R2500 per month. Hence there is no evidence of a "gift", as submitted by Mr Boulle.

In any event, evidence must be relevant to the pleadings. There is no averment in either the plaint or the defence to justify any consideration of gifting or at least distributing the proceeds of sale by the Plaintiff to any of her children. Hence the copies of the Plaintiffs bank statements sought to be produced are not relevant to the case.

The objections of Learned Counsel for the Plaintiff are therefore upheld.

Record: Civil Side No 55 of 2001