Privy Council Appeal No. 18 of 1993

Dr. Maurice Robertson *Appellant*

v.

Canadian Imperial Bank of Commerce *Respondent*

FROM

THE COURT OF APPEAL OF SAINT VINCENT AND THE GRENADINES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 6TH OCTOBER 1994

Present at the hearing:-

LORD TEMPLEMAN
LORD BRIDGE OF HARWICH
LORD GOFF OF CHIEVELEY
LORD SLYNN OF HADLEY
LORD NOLAN

*[Delivered by **Lord Nolan**]*

This is an appeal by leave of the Eastern Caribbean Court of Appeal (Saint Vincent and the Grenadines) against a decision of that court dated 15th July 1991 dismissing the appeal of the appellant against a decision of Satrohan Singh J. dated 22nd March 1990. The facts which gave rise to the appeal are these.

In 1987 Mr. Olin Dennie brought an action in the High Court of Saint Vincent and the Grenadines claiming the repayment of a loan alleged to have been made by him to Mr. Emery Robertson, the brother of the appellant. Olin Dennie claimed that Emery Robertson had borrowed the money for the purpose of repaying a debt owed by him to the appellant, and that Olin Dennie had made the loan by handing to Emery Robertson a cheque payable to the appellant.

In his defence Emery Robertson denied that there had been any such loan. In order to prove the receipt of the money by the appellant Mr. Dennie obtained a subpoena duces tecum against the respondent Bank, of which the appellant was a customer at the time. The subpoena ordered the Bank to attend the trial, which was to begin on Monday, 18th April 1988, and to "give evidence on behalf of the Plaintiff and to produce the bank statements of Maurice Robertson for the months of August, and September, 1985".

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The subpoena was issued and served on the Bank on Thursday, 14th April 1988. Mr. Ernest De Freitas, the Bank's acting manager, consulted the Bank's lawyer by telephone and was given certain advice. The judge found that:-

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

The ledger sheet or bank statement showing the transaction in issue was the statement for the month of August 1985. The statement for September 1985 does not appear to have been admitted in evidence.

In his statement of claim in the present case the appellant asserted that the Bank had been guilty of breach of contract and/or negligence. The breach of contract was said to have occurred on the basis that it was an implied term of the contract between the Bank and the appellant that the Bank would not divulge to third persons without the appellant's consent any of the appellant's transactions with the Bank. The claim in negligence was put forward on the basis that the Bank had acted in disregard and in defiance of its duty of confidentiality, by photocopying and disclosing the appellant's account, failing to seek the appellant's consent for its disclosure, and destroying the privacy of the appellant's accounts. The relief claimed by the appellant included damages for breach of contract and/or negligence, and also punitive damages in the sum of $100,000. The claim for punitive damages was not pursued before their Lordships' Board.

The substance of the appellant's complaint, as it emerged in evidence and in argument, arose from the fact that the bank statement for August 1985 which was produced by the Bank not only showed a number of transactions besides the receipt of the $15,000 in dispute but also revealed that the appellant was overdrawn at the end of that month in the sum of $5,405. The production of the statement in April 1988 had been followed by a telephone call to the appellant from an unidentified person who spoke of the various items shown by the account, including the final debit balance of $5,405. The judge summarised the appellant's reaction to the breach of confidentiality by the Bank in these words:-

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

Thus, although the appellant's case as pleaded was based simply upon the disclosure by the Bank of his bank statement, his substantial complaint appears to have been based upon the disclosure of the items other than the receipt of the $15,000, and in particular the overdraft, these being, of course, irrelevant to the action brought by Olin Dennie against the appellant's brother. No particulars were given, however, of any damage suffered by the appellant as a result of the disclosure.

The Bank for its part admitted that it owed a duty of confidence to the appellant but claimed that it was liable to comply with any process issuing out of a court of competent jurisdiction. Accordingly, the Bank denied that it was in breach of contract or that it had acted negligently in obeying the subpoena. The Bank contended that further, and in any event, the evidence given by Mr. De Freitas and the production by him of the appellant's bank statement at the trial of the action brought by Olin Dennie was protected by the absolute privilege which applies to the testimony of a witness.

Upon the first of these issues Satrohan Singh J. decided in favour of the appellant. Having referred to a number of authorities, he dealt with the matter in these terms:-

"Where a banker is served with a subpoena to attend a Court of competent jurisdiction, and to produce the bank accounts of a customer who is not a party to the proceedings then being investigated, he is bound to obey the subpoena to attend the Court and to take with him the accounts or documents requested. Before he does so he is under a duty to notify his customer as to what is happening to his accounts and to seek his consent to the disclosure of same. However, having obeyed the subpoena to attend, he is then under a duty to his customer not to disclose the business of customer whether to the Court or otherwise unless he had first obtained the consent of his customer or, in the absence of such a consent, an order of the Court to disclose. A subpoena as aforementioned, to my mind, cannot be and is not such an order."

The learned judge added:-

"From the admissible evidence I have before me, I would also find that the breach occurred as a result of the negligence of the defendant in not obtaining the consent of the plaintiff before indulging in the disclosure and, in the absence of consent by the

> defendant (sic), not claiming the privilege afforded the plaintiff in the banker/customer relationship, on behalf of the plaintiff, when asked to disclose the plaintiff's account to the Court."

Upon the second issue, however, the judge ruled in favour of the Bank. In the light of the relevant authorities he concluded that the testimony of Mr. De Freitas, including the disclosure of the appellant's bank statement, was covered by the plea of absolute privilege, and that the appellant's action was accordingly misconceived.

In the Court of Appeal the main questions raised by the parties, as summarised by Byron J.A., were these:-

> "(1) Was the subpoena duces tecum an order of the Court compelling the disclosure?
>
> (2) Was the finding that the defendant was negligent before it made the disclosure inconsistent with the ruling that the plaintiff's cause of action was barred by the privilege attending disclosure in the witness box?"

The court answered the first of these questions in the affirmative. After referring to the judgments of the members of the Court of Appeal in *Tournier v. National Provincial and Union Bank of England* [1924] 1 K.B. 461, the court concluded:-

> "It would seem therefore, that each member of the Court in that case indicated that the duty of confidentiality did not impose any duty on a bank to abstain from answering questions in a court of Justice as to a customer's account. This proposition completely sweeps the ground from under the feet of the appellant, because it necessarily involves the conclusion that there could be no cause of action where the wrong, complained of, was the answering of, or response to questions in a court of justice as to a customer's account."

So far as the second of the two questions formulated by the Court of Appeal was concerned, the appellant contended in that court as before their Lordships that his claim was supported by acts of negligence prior to the giving of evidence by Mr. De Freitas. These acts were summarised by the Court of Appeal, by reference to the judge's findings, in terms that:-

> "... the defendant was negligent in not notifying the plaintiff that the subpoena had been served, and in absence of the plaintiff's consent, in not claiming the privilege of non-disclosure in Court ..."

Before their Lordships' Board the appellant's complaint upon this aspect of the matter was rephrased to the effect that:-

> "... the appellant's cause of action was rightly based, in addition, on the failure to consult him or obtain his consent to the disclosure, and on the actions of the Bank preparatory and/or ancillary to the disclosure, including e.g. its photocopying of his account. The Bank also failed to make any objection to its disclosure to the Court, and apparently, to inform the Court that such disclosure was being made without the appellant's consent."

Disposing of that complaint, and, in effect, upholding the judgment of Satrohan Singh J. upon the second issue in the case, Byron J.A. said:-

> "In the instant case the distinction that the appellant seeks to draw is that the witness omitted to do certain things before making the disclosure in court and these omissions were in breach of duty. The cause of action reflected that by claiming for breach of contract and negligence. But the actual wrong for which redress is sought is the revelation of the appellant's bank records during legal proceedings as a witness."

In argument before their Lordships' Board, the appellant attacked the decision of the Court of Appeal upon both the first and the second of the issues in the case, and sought to support the decision of Satrohan Singh J. upon the former. The arguments put forward by Mr. James Guthrie Q.C., for the appellant, were to the following effect.

It was common ground that a contractual duty of secrecy is implied in the relationship between banker and customer, subject to the qualifications set out in the judgment of Bankes L.J. *Tournier v. National Provincial and Union Bank of England (supra)* at page 473 of the report. In this passage of his judgment Bankes L.J. said:-

> "On principle I think that the qualifications can be classified under four heads: (a) where disclosure is under compulsion by law; (b) where there is a duty to the public 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 the light of this statement of principle, submitted Mr. Guthrie, Satrohan Singh J. was right in holding:-

> "... that where a bank acts under compulsion of law to disclose, there is a duty on the part of the bank to inform its client of the application unless to do so would prejudice the proceedings being investigated ..."

In the present case, continued Mr. Guthrie, there could have been no possible prejudice to the proceedings brought by Olin Dennie against the appellant's brother if the appellant were informed by the Bank of the subpoena. Had the appellant been so informed, he could have sought the assistance of the court so as to ensure that only the receipt of the $15,000 into his account was disclosed in evidence, thus avoiding the irrelevant and damaging disclosure of his overdraft. The Bank, it was said, had failed its duty to the appellant by depriving him of this opportunity.

Their Lordships have much sympathy with the argument thus put forward by the appellant. In the ordinary way a customer in good standing could reasonably expect, if only as a matter of courtesy and good business practice, to be told by his bank that a subpoena had been received. Mr. Malek, for the Bank, sought to counter the argument by pointing to the clear and explicit terms of the subpoena, commanding the Bank "to give evidence on behalf of the Plaintiff and to produce the bank statements of Maurice Robertson for the months of August, and September, 1985". The Bank was thus acting under compulsion of law, submitted Mr. Malek. Accordingly the first of the *Tournier* qualifications applied, and the Bank's duty of confidentiality was excluded. In their Lordships' view, this submission goes too far. Their Lordships accept that the Bank was compelled by law to produce the bank statement to the court, but it was under no compulsion to withhold knowledge of the subpoena from the appellant.

The greater difficulty for the appellant lies in formulating the precise terms of the implied duty by which the Bank is said to have been bound. It cannot be expressed as an absolute duty to inform the customer of the subpoena, if only because, as in the present case, the bank may be unable to make contact with the customer in the time available. More generally, although no such problem in fact arose in the present case, there may be difficulties in specifying the circumstances in which, by implied agreement, the bank is to be regarded as entitled in its own protection or compelled by public duty, to refrain from informing the customer. Cases such as *XAG and Others v. A Bank* [1983] 2 All E.R. 464 and *Marcel and Others v. Commissioner of Police of the Metropolis and Others* [1992] Ch. 225 illustrate the practical problems which may arise. As it seems to their Lordships, the obligation imposed upon the Bank in the circumstances of the present case could have been no more than to use its best endeavours to inform the appellant of the receipt of the subpoena. On the express finding of Satrohan Singh J. that Mr. De Freitas attempted to consult the appellant but did not succeed in doing so their Lordships conclude that no breach of this obligation was proved. The appellant accordingly cannot succeed on the ground that he was not so informed.

Was the Bank nonetheless in breach of its duty to the appellant by failing to object to the disclosure of those parts of the bank statement, such as the final overdraft balance, which were irrelevant to the action brought by Olin Dennie? Satrohan Singh J. held that in this respect also the Bank was at fault. It had been negligent in "not claiming the privilege afforded the plaintiff in the banker/customer relationship, on behalf of the plaintiff, when asked to disclose the plaintiff's account to the Court". In agreement with the Court of Appeal, their Lordships are unable to accept this view of the matter. There was simply no head of legal privilege which the appellant, or the Bank on his behalf, could claim in respect of the bank statement.

The question remains whether the Bank, when producing the appellant's bank statement to the court in obedience to the subpoena, should have explained to the judge that it had been unable to make contact with the appellant, and should have pointed out to the judge (though this was obvious from the face of the document) that the statement referred to transactions other than the receipt of the $15,000. The question is not made easier by the fact that the evidence does not disclose precisely what reference was made to the bank statement when it was produced in court, nor how it came about that the anonymous telephone caller became aware of its full content. Underlying these factual uncertainties is the difficulty, once again, of formulating an implied contractual term, or a duty of care, by which the Bank should be taken to have been bound in the situation which arose. As Mr. Malek points out, the judge trying the case must have been well aware of the possibility, to put it no higher, that the bank statement, containing as it did crucial evidence against the appellant's brother, was being disclosed without the consent of the appellant. In any event, it must have been apparent to the court, and to counsel involved in the case, that the facts and figures shown by the statement other than the receipt of the $15,000 were irrelevant and therefore inadmissible in evidence. Their Lordships suspect that the presence of these other matters in the statement was overlooked by those in court simply because no one anticipated that their disclosure would lead to the telephone call which seems to have caused the appellant such dismay.

Be that as it may, their Lordships are satisfied that the appellant has failed to prove that the omission of Mr. De Freitas to tell the court that he was producing the statement without the appellant's consent was the cause of any loss or damage to the appellant. Accordingly the appellant fails upon the first of the issues raised in the case. Their Lordships would not exclude the possibility that a particular banker/customer relationship would include some such implied term or duty of care as that for which the appellant has contended, and that damages might be recoverable as a result of its breach by the bank concerned, but this is not such a case.

In the circumstances it is unnecessary to determine the second issue, namely whether the Bank, if it had been in breach of its duty, would have been protected by the absolute immunity which attaches to the testimony of witnesses. Their Lordships were addressed upon the matter, but think it preferable to defer consideration of the questions involved until a case occurs in which the issue is squarely raised. Accordingly their Lordships have resolved to uphold the decision of the Court of Appeal on the first issue, and will humbly advise Her Majesty that the appeal should be dismissed on this ground. The appellant must pay the respondent's costs before their Lordships' Board.