SAINT VINCENT

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 4 of 1990

BETWEEN:

DR. MAURICE ROBERTSON - Appellant

and

CANADIAN IMPERIAL BANK OF COMMERCE - Respondent

Before: The Honourable Sir Lascelles Robotham - Chief Justice
The Honourable Mr. Justice Moe
The Honourable Mr. Justice Byron

Appearances: O. Sylvester, Q.C., and M. Williams for the Appellant
A. Phillips, Q.C. and D. Williams for the Respondent

1991: March 26,
July 15.

JUDGMENT

BYRON, J.A.

Both the appellant and the respondent have appealed against the findings of Singh J. who ruled that the respondent was in breach of the implied term of confidentiality in the contract of banking between themselves and the appellant when they disclosed the accounts of the appellant to the Court, and, that the said breach occurred as a result of the negligence of the respondent in not obtaining the consent of the appellant before indulging in the disclosure and in not claiming the privilege afforded the appellant in the banker/customer relationship when asked to disclose the appellant's account to the Court. The Judge, however, went on to rule that the respondent was protected by an absolute privilege because the disclosure was made in the witness box and dismissed the action which the appellant had brought.

The appellant has appealed against the ruling that the privilege entitled the respondent to judgment and the respondent has appealed against the findings of breach of contract and negligence.

/The facts

THE FACTS

A Magistrate Olin Dennie had proceedings against lawyer Emery Robertson, the brother of the appellant herein, for the recovery of $15,000.00 which he alleged he had loaned him to repay a debt due to his brother the appellant. In his defence Emery Robertson denied the loan transaction in its entirety. In order to assist in the proof of his case, Olin Dennie, through his solicitor, had issued out of the Court a subpoena duces tecum to the respondent to compel the production in Court of the bank records of the appellant to show the payment in to them of the sum of $15,000.00. The respondent, through its acting manager Mr. Ernest DeFreitas, appeared in Court in obedience to the subpoena and produced in evidence the appellant's bank records for the month of August 1985. These records contained more information than was necessary for the proof of Olin Dennie's claim, and the appellant alleges that he has suffered loss and damage because the statements produced in evidence revealed that his account was overdrawn. As a matter of interest the Judge found that the case against Emery Robertson was proved.

The appellant thereupon sued the respondent for damages for breach of contract and/or negligence on the basis that by making that disclosure in the way it did, the respondent had failed to observe the duty to keep confidential details of his banking records, which is implied in the contract of banking.

The trial Judge found that the defendant did not obtain the consent of the plaintiff to make the said disclosure nor was there any Court order to compel him to adduce the evidence. The Judge found that the defendant was negligent in not notifying the plaintiff that the subpoena had been served, and in the absence of the plaintiff's consent, in not claiming the privilege of non-disclosure in Court, and that amounted to a breach of the banking contract between the parties. However he gave judgment to the defendant on the ground that the disclosure having been made in the course of legal proceedings in Court, it could not be the basis of any legal liability.

The main questions raised by the parties to this appeal can be summarised as follows:

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.....

the plaintiff's cause of action was barred by the privilege attending disclosure in the witness box?

The appellant had argued that the Judge was wrong to consider the issue of privilege at all because it was not specifically pleaded. I have to agree with Counsel for the respondent who relied on the well established principle that the issue being a matter of law, and not being one of the exceptions to the general rule, does not have to be specifically pleaded. See Ind. Auto Sales v Knowles (1962) 2 All E.R. 27. The Judge was clearly entitled to consider whether the principles of law relating to the privilege of witnesses applied to the facts he had found.

The respondent had urged that the Judge's finding of negligence against it should be set aside because he had also found that it had made efforts to contact the plaintiff and it had consulted its solicitor before going to Court. The Judge concluded that the defendant's breach was therefore merely inadvertent and not malicious. I do not agree with Counsel that these findings are inconsistent with each other because inadvertence is not a defence to negligence nor is malice a necessary ingredient.

It was accepted by both parties that the law is clearly established that a banker is under a legal duty not to make disclosure of his customers accounts except under certain conditions. This duty has been held to arise from contract and is a duty implied by law into the dealings between a banker and his customer. The duty is not absolute but is qualified. The law on this subject was laid down in the leading case of Tournier v. National Provincial and Union Bank of England (1924) 1 K.B. 461 in the classic judgment of Bankes L.J. After stating that there is such a duty derived from contract but it is not absolute but qualified he described the qualifications at 473 thus:

> "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."

Counsel for the respondent submitted that in this case the respondent in obeying the subpoena duces tecum acted under compulsion by law in making the disclosure and was therefore not in breach of its banking contract with the plaintiff. Counsel for the appellant submitted that the said subpoena was not a court order and it did not

/compel......

compel disclosure but merely attendance to make the disclosure.

In Tournier's case, supra, Bankes L.J. said that an example of compulsion law was the duty to obey an order under the Banker's Book Evidence Act. The Bankers Book Evidence Acts were passed to give relief to Bankers so as to make it unnecessary for them to attend court with their books when proof of their contents were required. This was explained in <u>Emmott v Star Newspaper Co. (1892) 62 LJQB 77</u> by Coleridge L.J. at 78:

> "What was the duty of a banker in regard to the supplying of evidence at the time when this Act was passed? It was the same as any other person. He was obliged to attend under a subpoena with his books if their contents were receivable in evidence............. The Act, or rather the original Act of 1876, which the Act of 1879 repeals, and for which it is substituted, was passed to give a sensible and reasonable relief for this particular class of persons, but not to alter the whole of the rules of evidence so as to place bankers in a different position in regard to giving evidence from any other subjects of the Queen.
>
> Bankers are not to be so differently treated, nor was any such change intended. They remain bound at common law to attend and to produce their books under subpoena, except in so far as the inconvenience may be modified by the statute."

In **Tournier's** case Scrutton L.J. at 479 dealt with the proposition by asserting that there is no absolute contract to be implied that a bank should not disclose its customer's account to anybody. He said:

> "There is clearly no privilege to abstain from answering in a Court of justice questions as to a customer's account: <u>Loyd v. Freshfield</u> per Abbott C.J.; and the bank can disclose the state of the account by bringing an action to recover overdraft."

The other member of the Court in that case Atkin L.J. at 486 expressed his view that:

> "It is plain that there is no privilege from disclosure enforced in the course of legal proceedings."

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.

/The Legal......

The legal effect of a subpoena is described in 4th Ed Halsbury's Laws of England Vol. 37 para. 453 as follows:

> "A writ of subpoena, whether it be ad testificandum (to testify as a witness) or duces tecum (to produce documents), or a combination of both, is a common law writ which cannot be abolished by rules of court. Its objects are to compel a person who is or may be otherwise unwilling, unco-operative, or even merely neutral, to attend the specified court at the specified date and time to give oral evidence or to produce material documents or both. It is coercive in its operation, since disobedience to a subpoena amounts to contempt of court and obedience to it can be enforced by committal, even if the disobedience is not wilful."

The authorities clearly show that there is a distinction between a writ of subpoena duces tecum and a court order compelling a witness to produce documents or give evidence.

Haughton v Haughton (1965) 1 O.R. 481 (S.C.) a case from the Supreme Court of Ontario demonstrated the distinction between a subpoena and an order of the Court. The plaintiff had brought a motion for interim alimony and was seeking to establish the worth of the defendant by examining his bank manager. In dealing with the objection of the witness to give the evidence the Master said:

> "Counsel for the witness also objected to the witness answering any questions or producing any bank records relating to the affairs of a customer without the approval of the customer or without a Court order. In this case the customer did not consent, and Counsel for the witness was right in arguing that a Court order is necessary before the witness can answer the questions asked by the plaintiff herein."

After citing the headnote of Tournier v National Provincial Union Bank of England (1924) 1 K.B. 461 he went on:

> "The plaintiff has argued that the subpoena is the Court order that is required. I do not agree. The witness was within his right to refuse to answer the questions until either the consent of the customer or a Court order was obtained."

The case of XAG and Others v A Bank (1983) 2 All E.R. 464 demonstrates the same proposition. When the plaintiff refused to produce certain documents, to courts in the United States of America, on the ground that they were not subject to the jurisdiction of the United States courts, a subpoena was served on the bank to produce all documents relating to any accounts maintained by the plaintiffs at the bank's London branch. The bank declared its intention to comply with the subpoena, whereupon the plaintiffs sought and were granted injunctions in the High Court to restrain the bank from producing the

/documents,.....

documents, on the ground that if the bank were to produce the documents it would thereby be in breach of the duty of confidentiality it owed to the plaintiffs. An order was then obtained in the New York District Court, ex parte and in camera, requiring the bank to comply with the subpoena but Leggatt J. decided that the injunctions should continue. In defining the duty of the bank he said at 470:

> "There is no dispute that the bank is subject to a a duty of confidentiality. Apparently the nature of the duty is no different in New York from the duty to which it is subject in London. For convenience, I would describe the duty as arising from an implied term in the contract governing the relationship of banker and customer and as being that, subject to certain qualifications which it may be material to consider, a banker shall not without the consent of the customer disclose to any other person any document or other information obtained by the bank in the course of that relationship."

The Judge went on to consider the effect of the subpoena.

> "The fact is that confidentiality is not rendered illegal by a subpoena requiring the disclosure, which is to be contrasted with some form of legislation to that end: and I have in mind in particular that from the terms of the relevant procedural rule failure to produce the documents may be excused if the excuse be adequate...... It seems to me that there is no analogy for present purposes between a judgment and a subpoena and, in particular, there is no suggestion whatever that the obtaining of this subpoena or the order which has subsequently indorsed it has involved any form of hearing on the merits. Certainly it has not as yet involved any form of hearing inter partes."

In both of these cases application had been made to the Court for orders to enforce the duty of confidentiality before there had been any disclosure. In both cases the customer did not consent and there had been no court order compelling the disclosure. In both cases the issue related to whether the disclosure should be compelled and not with any question relating to liability after disclosure in a court of justice.

On the other hand Barclays Bank plc v Taylor (1989) 3 All E.R. 563 is a case where there was a Court order compelling the Bank to make the disclosure to the police under the Police and Criminal Evidence Act 1984 and the customer had sued for damages for loss sustained as a result of the evidence having been adduced in court. The customer argued that the bank was wrong to make the disclosure because, inter alia, (a) the orders may have been improperly made and (b) the bank ought to have resisted the making of the orders and notified them that the applications were pending. Lord Donaldson of Lymington M.R. dealt with these arguments at 565:

/"In the....

"In the instant case the banks made disclosure to the police under compulsion of law, namely in compliance with the orders made by a circuit judge under s.9 of and Sch. 1 to the 1984 Act. Counsel for Mr. and Mrs. Taylor submits that this is too simple an answer, because it assumes that the orders were properly made. I do not agree with this submission. The only assumption which I make is that they were made by a circuit judge and that they were orders which fell within his jurisdiction. Whether any or all the conditions precedent to the making of such an order were satisfied and whether, in the exercise of his judicial discretion, he should have made them is wholly irrelevant, because a court order which is valid on its face is fully effective and demands compliance unless and until it is set aside by due process of law.

It follows that there was no breach of the bank's obligation of confidence."

And at 568:

"I have dealt with these objections to the police letters to the banks, because counsel voiced them. However, I do not think they are material to the question which we have to consider, namely: did the banks owe a duty to Mr. and Mrs. Taylor to attend the hearing of the application and either object to the making of the order or at least probe the evidence placed before the circuit judge in support of the application? Further or alternatively, did they owe a duty to Mr. and Mrs. Taylor which required them to disregard the request by the police that there should be no contract with account holder regarding the application?"

Counsel's argument that the banks did owe such a duty was based on a contention that the bank's duty to maintain confidentiality was all-embracing, subject to the four exceptions set out in Tournier v National Provincial Union Bank of England (1924) 1 KB 461 at 473, (1923) All E.R. 550 at 554. From this it followed, so he submitted, that there was an implied obligation to do everything possible to prevent the application of the exceptions. I do not agree. The duty to maintain confidentiality is not all-embracing, subject to exceptions. It does not exist in the four exceptional circumstances and it is no part of the duty of confidentiality to seek to avoid disclosure under compulsion by law.

The real question is whether in order to give business efficacy to the relationship of banker and customer, there must be an implied obligation to contest a s.9 application or to probe it or inform its customer. Since the responsibility for deciding is firmly placed on the circuit Judge, and such an order cannot be made by consent of the parties, I can see no reason for implying an obligation to contest the application unless the bank knew something

/relevant....

relevant to it or might not be known to the police. The primary purpose of the notice being given to the bank is to enable it to safeguard its own interests by, for example, pointing out that it did not hold the accounts to which the application related.

One of the questions raised in this appeal was whether the bank had a duty to notify the customer that the subpoena had been served and whether in the absence of the customer's consent to make the disclosure the bank had a duty to offer resistance to answering or responding to the questions put to it about the customer's account. Lord Donaldson of Lymington M.R. seems to have an answer. He stated that:

> "The duty to maintain confidentiality is not all-embracing, subject to exceptions. It does not exist in the four exceptional circumstances and it is no part of the duty of confidentiality to avoid disclosure under compulsion by law."

It is significant that the order of the Court was that the claim did not disclose a cause of action. The Courts have consistently refused to attach civil liability in circumstances where the wrong complained of was in poursuance of giving evidence in a court of law. An example of this is to be found in Soul v Inland revenue Commissioners (1963) 1 All E.R. 68. A statement of claim was dismissed as disclosing no cause of action because it claimed damages for the issue of subpoenas without leave of the court and thereby improperly brought witnesses before the court. In dismissing the appeal Lord Denning, M.R. explained that these subpoenas are issued as a matter of course and leave was not required. He went on to say that:

> "Even if the subpoenas were irregularly obtained, the evidence having been given, it would not give rise to a cause of action."

The principle of a witness' immunity from suit has been expressed in Halsbury's Laws of England 4th Edition, Vol. 17 at page 1182 as follows:

> "A witness is protected from civil proceedings in respect of evidence which he gives in judicial proceedings and in respect of things said or done in the course of preparing evidence for such proceedings. The protection is against actions of any sort, and is not limited to actions for libel or slander."

In the leading House of Lords case the Earl of Halsbury L.C. said in Watson v. McEvan (1905) A.C. 481 at 486:

/"By complete.....

> "By complete authority including the authority of this House, it has been decided that the privilege of a witness, the immunity from responsibility in an action when evidence has been given by him in a Court of Justice, is too well established now to be shaken."

In that case the court ruled that an action for defamation would not lie against a witness for statements made to the party on whose behalf he was being called as a witness and his legal advisers before coming to court and giving evidence. The Earl of Halsbury explained:

> "It is very obvious that the public policy which renders the protection of witnesses necessary for the administration of justice must as a necessary consequence involve that which is a step towards and is part of the administration of justice - namely, the preliminary examination of witnesses to find out what they can prove. It may be that to some extent it seems to impose a hardship, but after all the hardship is not to be compared with that which would arise if it were impossible to administer justice, because people would be afraid to give their testimony."

This case demonstrates that the absolute privilege that a witness enjoys against liability for his evidence in court extends to steps taken in preparation for court. In my opinion I can see no difference in principle between wrongs of commission and of omission.

In this case, however, the cause of action was not defamation but breach of contract and negligence. The appellant argued that the wrong of the defendant was not limited to the disclosure in court but encompassed behaviour before going to Court in its failure to notify the plaintiff and its failure to obtain a court order as well as in court before making the disclosure by failing to make objection to the disclosure. This proposition is not new and it was disposed of in the leading case of Marrinan v Vibart and Another (1963) 1 Q.B 528. The plaintiff, a barrister brought an action against two police officers for conspiracy to make false statements defamatory of him in a report to the D.P.P., in evidence given by them at a criminal trial and in an inquiry before the Benchers of Lincoln's Inn. The Court of Appeal upheld a ruling that the statement of claim disclosed no cause of action. Sellers L.J. at 534 said:

> "It is quite clear, on authority which counsel for the defendants, the respondents to this appeal, cited briefly to us going back well into history, that no court would entertain an action of this character. I do not propose to review those authorities in any detail. The principles can be found in the cases already referred to in the judgment going back to Revis v Smith, through Henderson v Broomhead and down to Dawkins v Lord Rokeby, in which

/ one finds....

one finds some of the earlier authorities conveniently summarised by Kelly C.B. The Chief Baron said:

> "The authorities are clear, uniform and conclusive, that no action of libel or slander lies, whether against judges, counsel, witnesses or parties, for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognised by law. The principle which prevades and governs the numberless decisions to that effect is established by the case of Floyd v Baker (1608) and many earlier authorities......... down to the time of Lord Coke; and which are to be found collected in Yates v Lansing and Revis v Smith. These two decisions Yates v Lansing and Revis v Smith, are themselves direct authorities that no action lies against parties or witnesses for anything said or done, although falsely and maliciously and without any reasonable or probable cause, in the ordinary course of any proceeding in a court of justice......
>
> It has been sought in this case to draw a difference between the action of libel and slander, the action of defamation, and that which is set up in this case, one of conspiracy. I can see no difference in the principles of the matter at all. Whatever form of action is sought to be derived from what was said or done in the course of judicial proceedings must suffer the same fate of being barred by the rule which protects witnesses in their evidence before the court and in the preparation of the evidence which is to be given"."

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. I can see no difference in principle whether the action is framed in contract or tort or defamation or conspiracy.

I think that in closing I could do no better than refer to the words of Diplock L.J. in Marrinan's case at 598:

> "An attempt very similar to that in this case was made in 1856, in Revis v Smith. There, instead of bringing an action for defamation, an attempt was made to bring a special action on the case, analogous to malicious prosecution. As Crompton J. said in Henderson v Broomhead, "That seems to have been done in despair" - words which in my view are appropriate to this attempt in 1962.

/Yet another......

Yet another attempt was made quite recently, in Hargreaves v Bretherton, where an action was brought claiming damages against the defendants for "falsely and maliciously and without just occasion or excuse committing perjury in relation to the facts of the case. Lord Goddard C.J. in that case dealt with the authorities which have been referred to by my Lord in the present case; and there is only one passage in his judgment to which I desire to refer, for it seems to me to be apt to this case. It is a short paragraph towards the end of his judgment in which he said this:

> I hope that (counsel for the plaintiff) will not think that I have been discourteous to him if I say that it seems to me that this is an obvious 'try-on'. Attempts have been made over a period of 200 or 300 years to bring these actions, but they have universally failed. In my opinion this appeal is, as Lord Halsbury L.C. said (in Watson v M'Ewan), "absolutely unarguable"."

This immunity from suit is necessary for the protection of those who merely do their duty when compelled or required by the rules of our system for the administration of justice. It protects the witness Ernest DeFrietas and the respondent from suit for the words uttered and document produced in evidence.

I have no doubt that in the circumstances of this case the respondents could have no liability to the appellant and I would dismiss this appeal with costs.

C.M.D. BYRON,
Justice of Appeal

L.L. ROBOTHAM,
Chief Justice

G.C.R. MOE,
Justice of Appeal