

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV2013/0200

BETWEEN:

**DEBBIE ALMA JACOBS also known as
DEBBIE JAMES by her agent and representative
COSBERT SARGEANT**

Claimant

and

**ROYAL BANK OF CANADA
Formerly RBTT CARIBBEAN LIMITED**

Defendant

APPEARANCES:

Mrs. Kivinee Knight-Edwards for the Claimant

Ms. C. Debra Burnette appearing with Ms. Mandi Thomas for the Defendant

2020: March 24th
June 25th

JUDGMENT

- [1] **ROBERTSON, J.:** The Claimant, through her agent and representative, Mr. Cosbert Sargeant, claims that the Royal Bank of Canada formerly RBTT Caribbean Limited [the “**Bank**”] acted both in contravention of the law and contravention of its fiduciary duties and/or contractual obligations when the Bank declined to conduct business with Mr. Cosbert Sargeant on the 2nd January, 2013. This court has determined that the claimant has not proven that the Bank has contravened the law and this court has dismissed this claim.

The Facts

- [2] Mr. Sargeant was arrested and charged for certain ammunition and later charged with drug related and money laundering offences and was remanded into Her Majesty's Prison. A directive to freeze all property owned or controlled by Cosbert Sargeant was issued on the 24th October, 2012 by the Supervisory Authority and Director of the Office of National Drug and Money Laundering Control Policy [ONDCP] under the provisions of section 19(9) the **Money Laundering (Prevention) Act 1996**, as amended [the Act]. Directives issued under the provisions of section 19(9) of the **Act** remain operational for a period up to seven days. The directive of 24th October, 2012 was addressed to all financial institutions including the Bank and it also directed that the Bank freeze all properties (including funds) in its possession which were owned or controlled by three persons one of whom was Mr. Cosbert Sargeant. Mr. Sargeant held a beneficiary authorization instrument¹ which permitted him to transact business on an account held in the name of Debbie Jacobs-James also called Debbie James [the claimant]. The account, which is now the subject of this litigation, is Supreme Savings Account ending with the numbers (35762).
- [3] On the 31st October 2012, the Supervisory Authority obtained an order of the court indicating that all rights and interests of Mr. Sargeant in any property listed within the order be frozen. This order made specific reference to the property that was to be frozen. Specifically, reference was made to certain real property, chattel (including vehicles, money in certain bank accounts at the Bank and in other financial institutions) and business interests. The order listed fifteen bank accounts which were to be frozen under the provisions of the order, however the supreme savings account which is the subject of this litigation was not included within the terms of the order.
- [4] On the 12th November, 2012 a production order was issued requiring the Bank to produce to the ONDCP certain documents relating to the records of Cosbert Sargeant and one of his business interests. The Bank indicated that upon service, the Bank complied with the terms of the production order.
- [5] Mr. Sargeant presented to the Bank on the 2nd January, 2013 and requested a cash withdrawal in the sum of EC\$50,000.00. This request was denied. The representatives at the Bank informed Mr. Sargeant that the account was frozen and referred him to the ONDCP to obtain further information on the matter. Mr. Sargeant, the agent and representative for the claimant contends that the request was lawful and that the Bank was in breach of its fiduciary as well as its contractual duties by its refusal to honour the request. Further, Mr. Sargeant contends that the Bank was in breach of its fiduciary and contractual duties since the Bank communicated with the ONDCP subsequent to his withdrawal request. This communication precipitated the issuance of the directive of the 2nd January, 2013 to freeze the supreme savings account as well as a subsequent application to the court that the supreme savings account and other accounts be frozen. Mr Sargeant contends that he has suffered loss and damages as a result of the actions of the Bank.

¹ Power of Attorney executed by Debbie James also called Debbie Jacobs-James on 10th January 2012 and the Bank's authorization instrument of the 20th December, 2011.

[6] Specifically, the Claimant claimed:

- i. A declaration that at all material times in January 2013, the Bank was under a duty to the claimant to engage in and to conduct lawful business transactions with the claimant and/or with her representative pertaining to supreme savings account.
- ii. A declaration that the Bank was on the 2nd day of January, 2013 under a duty to transact lawful business with Cosbert Sargeant, the representative of claimant, the holder of supreme savings account by virtue of a Power of Attorney executed by Debbie James on 20th December, 2011 authorizing Cosbert Sargeant to operate the said account.
- iii. Damages for breach of fiduciary duty and damages for breach of contract since, the Bank in breach of its fiduciary duty, wrongly refused and/or without lawful justification refused to transact and permit or conduct lawful business relating to the account through the claimant's representative, Cosbert Sargeant when Mr. Sargeant presented himself to the Bank on the 2nd January 2013.
- iv. Damages for breach of contract for wrongly refusing to permit and allow the claimant and/or her representative to transact and conduct lawful business on the 2nd January, 2013 pertaining to supreme savings account held with the Bank over which the Cosbert Sargeant had a lawful Power of Attorney and/or Administration dated 20th December 2011.

The Evidence

[7] Mr. Cosbert Sargeant provided evidence for the claimant and Efiab Charlemagne-Norbert gave evidence on behalf of the Bank.

[8] It is accepted between the parties that Mr. Cosbert Sargeant held an authorization document to transact business with the Bank for the account held in the claimant's name. It is also not in dispute that Mr. Cosbert Sargeant presented to the Bank on the 2nd January, 2013 and requested a cash withdrawal of EC\$50,000.00 which was not honoured.

[9] The relevant evidence of Cosbert Sargeant is summarised hereunder:

- i. Mr. Sargeant was arrested and remanded to Her Majesty's Prison sometime on or about 24th October 2012. While on remand, Mr. Sargeant, accompanied by police officers, visited the Bank to request a withdrawal from one of the accounts held at the Bank. He required funds to meet certain family and legal expenses. When he presented to the Bank he was informed that supreme saving account was frozen and he was shown the freezing instrument, a directive dated 24th October 2012.
- ii. On the 24th December 2012, Mr. Sargeant was able to secure his bail and after his release he proceeded to the Bank with the intention of transacting business. However, at the time Mr. Sargeant's arrival, the Bank was closed.

- iii. Mr. Sargeant returned to the Bank on the 2nd January 2013 at approximately 8:30 in the morning and attempted, without success, to make a cash withdrawal in the sum of EC\$50,000.00. This witness stated that at the time he presented to the Bank to make the cash withdrawal he was informed that the account was frozen by the teller, the supervisor and the bank manager. He indicated to the supervisor and to the manager of the bank that the freezing order of the court dated the 31st October 2012 did not cover the funds in the account in question. He further indicated to the bank manager that he was aware of the directive of the 24th October 2012 and that this directive would have long expired. Mr. Sargeant further contended that from his perspective there was no basis for the bank to deny the requested transaction. Mr. Sargeant had a copy of the order of 31st October 2012 in his possession which he showed both the Supervisor and the Bank Manager as evidence that the funds in the account were not frozen.
- iv. Cosbert Sargeant indicated that he was referred to the ONDCP and that he requested, without success, to be shown the instrument which froze the funds in the account. The teller, the supervisor and the manager of the bank each repeated to Mr. Sargeant that the account in question was frozen and referred him to the ONDCP to address any questions related to the frozen account. In the words of the Mr. Sargeant, the Manager *'...advised me that the bank was served with a Freeze Order which in effect froze all accounts in my name and/or in my control and consequently the bank will be in violation of the order if she were to permit my request for a withdrawal. She further advised that I should direct my concerns to the ONDCP since there is nothing the bank can do to assist me'*².
- v. Mr. Sargeant asked the Bank Manager to confirm the Bank's position regarding the requested transaction in writing. This the Bank Manager agreed to do at a later time after she consulted with the Bank's attorney-at-law.
- vi. At approximately 4:30-4:40 in the afternoon of the 2nd January 2013 Mr. Sargeant indicated that he received a call from Manager of the Bank requesting that he visits the Bank to receive a document. This he did and it was on this occasion he received a copy of a directive dated 2nd January, 2013. This directive froze the funds in the account in question.
- vii. The claimant contends that when he approached the bank on 2nd January 2013 to transact on the account the Bank was not in possession of the directive of the 2nd January 2013. The Bank was therefore neither acting under the authority of a directive from the Supervisory Authority nor was the Bank acting under the authority of any other order.
- viii. This witness further contends that having visited the Bank, having made the request for the funds and having pointed out to the Bank that the order (of the 31st October 2012) did not cover the funds in the particular account, the Bank communicated with the Supervisory Authority. This communication to the ONDCP prompted the issuance of the directive by the ONDCP later in the day which froze the account.

² See: Witness statement para. 23.

- ix. Mr. Sargeant noted that on the 8th January 2013 an application was filed by the ONDCP to the High Court to freeze the account in question. The application referred to Mr. Sargeant's visit to the Bank on January 2013 and the fact that he sought to withdraw funds from the account and this disclosure on affidavit is evidence that there was communication between the Bank and the ONDCP about his visit on the 2nd January 2013.
- x. The evidence of Mr. Sargeant is that he suffered losses as a result of the refusal of the Bank to conduct business upon his request. Specifically, he indicated that since he was not permitted to make the cash withdrawal he was unable to meet certain financial obligations such as the payment of the outstanding rent for his home and his business premises. As a result of the inability to pay rent he lost the rented premises for his business and the business he held with the claimant, most of his merchandise (approximately 90%) he held in the clothing business he operated with claimant, furniture, fixtures and fittings on business premises.
- xi. On cross-examination Mr. Sargeant noted that he was able to arrive at a settlement with the landlord as it related to the clothing business. As it related to sums owed to the landlord Mr. Sargeant noted that he did not recall the precise sum owed but he was able to liquidate the sum owed by permitting the liquidation of certain fixtures.

The Defendant's Evidence

[10] The relevant evidence of Ms. Charlemagne-Norbert, the Country Manager for the Bank, is summarised hereunder.

- i. Ms. Charlemagne-Norbert indicated that prior to January 2nd there were orders and directive received in relation to the account in question.
- ii. Mrs. Charlemagne-Norbert was not present at the time when Mr. Sargeant presented at the bank on 2nd January 2013 but it came to her knowledge that he was present on the day in question and that he attempted to make a cash withdrawal from the account. Mr. Sargeant's request for the withdrawal was not granted and he was informed that the account was frozen. He was also directed to the office of the Supervising Authority. Mrs. Charlemagne-Norbert further indicated that it was not the practice of the Bank to either show or to provide the customer with a copy of the Directive or the Order freezing the funds in the account.
- iii. On the 2nd January 2013 the Bank was served with a Directive from the ONDCP to freeze all "property including funds in its possession or under its control in any accounts owned or controlled by, the said Cosbert Sargeant".
- iv. By January 2013 the account in question was designated as a dormant account since there was no customer-initiated activity for a period in excess of two years. The last recorded transaction was in September 2010 when there was a withdrawal of \$8,000.00. Ms. Charlemagne-Norbert was challenged on the dormancy of the account in cross-examination. She noted that while she contended that the account was

dormant she agreed that the statement on the account reflected no dormancy fee deduction. It is a normal practice for the specific fees to be taken from dormant accounts.

- v. Mrs. Charlemagne-Norbert noted that "...the Bank was aware that the said Cosbert Sargeant was charged with several counts of money laundering, the same having been reported in the print and voice media and confirmed when Mr. Sargeant attended the Bank whilst on remand at Her Majesty's Prison and accompanied by the Police in October, 2012. The Bank, having been served with a directive to freeze as well as an order of court to freeze, was then liable to comply with the same as well as to regard the request for withdrawal of \$50,000.00 on a dormant account as suspicious activity pursuant to the provisions of the Money Laundering (Prevention) Act, 1996. The Bank is required to have in place a system of compliance and reporting of suspicious activity and must at all times act within the confines of the law. If the Bank reported the attempted transaction by Mr. Sargeant as a suspicious activity, the Bank would have acted within its rights under the said Act. In fact, where a request for cash in excess of \$10,000.00 is made, the Bank's internal procedures require that a large cash transaction report be made both to its head office and the regulatory body"³.

The Law and the Court's Findings

The Lawfulness of the Denial of the Withdrawal Request.

- [11] The account in question may be frozen through a directive issued under the provisions of the **Act** or by an order of a court. There is no evidence before the court regarding either the general contractual arrangements between the parties or any specific contractual terms which specifically relate the matters in issue before this court. The parties are in agreement that a directive dated the 2nd January, 2013 exists and that this directive has the effect of freezing the assets in the account in question. The material fact in issue is when did the Directive of the 2nd January, 2013 come into the possession of the Bank. The claimant has the legal burden in establishing this material fact that is in issue. It is important to note that there is no direct evidence on when the document was received.
- [12] Mr. Sargeant contends that the directive was received by the Bank after he left the Bank. It can be summarised and extrapolated that he bases this belief on the fact that:
 - i. He was not shown the directive despite his requests to the supervisor and the manager of the Bank;
 - ii. On a previous visit to the Bank (while he was on remand) he was permitted to view the freezing instrument;
 - iii. Despite having requested to view the freezing instrument on the morning in question, he was only given a copy of the directive at the end of the workday, sometime around 4:40.

³ See: Witness statement para. 15.

- [13] Mr. Sargeant has made an inference or formed a belief that the Bank was not in possession of the directive. In the consideration of a witness' beliefs, surmises or inferences on material facts the Court of Appeal in the case of HCVAP 2007/021 **ANTIGUA COMMERCIAL BANK LIMITED v HILROY HUMPHREYS** at paragraph 41 when referring to statements made by Ms. Mannix noted that:

"They were merely Ms. Mannix's surmises, beliefs or inferences, which are not admissible in proof of material facts. They could not therefore corroborate Ms. Humphrey's evidence to prove that the bank disclosed the information, particularly as Mr. Humphreys gave no direct evidence in proof that the bank disclosed the existence of his account and deposit box, as the learned judge found."

In the view of the Court of Appeal in that case there was insufficient evidence from which to infer that the bank disclosed the information.

- [13] Mrs. Efiar Charlemagne-Norbert contends that the Bank received the directive on the 2nd January, 2013 and the Bank complied with the directive. It is noted that the Bank offers no information as to when the document was received, however, the burden of proof does not rest with the Bank.
- [14] Ms. Charlemagne- Norbert also indicated that it was not a practice of the Bank to either show or to provide a copy of the freezing instrument to a customer whose account was frozen. In some respect this is consistent with the dialogue which Mr. Sargeant indicated he had with representatives of the Bank on the day in question. Mr. Sargeant's account in his witness statement is:

"24. I responded to Ms. Ryan by informing her that I was acutely aware of the Administrative Freeze Order which was issued on or about the 24th October 2012 and I was also aware that the Administrative order would have expired by then after a period of seven days and would have therefore have no legal effect three (3) months later.⁴

25. Further, I also brought to Ms. Ryan's attention that a Freeze Order was issued by the High Court on or about the 31st October 2012, which would have rendered the Administrative Freeze nugatory. I requested from Ms. Ryan a copy of the Freeze Order upon which she was relying and exercising her authority to deny my lawful withdrawal demand, and **she indicated that she will not discuss or disclose any such matters with me and that any request should be made to the ONDCP⁵.**" (Emphasis Added).

- [15] Mr. Sargeant further testified that:

"27.seeing that my meeting with Ms. Ryan was (*sic*) going anywhere and that I was not going to (*sic.*) allowed to withdraw the funds, I asked Ms. Ryan to confirm the Bank's position by putting same in writing and (*sic.*)provide me with a letter confirming our meeting, stating her refusal to allow the transaction and the reasons.

⁴ See: Witness Statement para. 24.

⁵ See: Witness Statement para. 25

28. Ms. Ryan advised that she had no difficulty to provide me with a letter to that effect. However, at the time she was extremely busy and it would be more convenient if I leave my contact details with her for (*sic*) to call me to collect the letter before the end of the business day. She also indicated that she will need some time to consult with the Bank's attorney. I provided my contact details to Ms. Ryan."

- [16] It appears to this court that the representatives of the Bank were consistent throughout their interactions with Mr. Sargeant. Each employee treating with Mr. Sargeant indicated that the account was frozen and that Mr. Sargeant should address his concerns to the ONDCP. Ms. Ryan's actions on the morning in question, as described by the Mr. Sargeant, can also be seen as being consistent with the position stated by the Bank's representative.
- [17] This court has noted that the uncontroverted evidence of Mr. Sargeant is that on a previous occasion he was shown the freezing instrument and this court has also noted that in this instance the Bank did provide Mr. Sargeant with a copy of the instrument. The Bank has offered no explanation for the departure from what the Bank has said was its practice on not making the freezing instruments available to the customers. However, the court does not find that the actions of the Bank should change the finding of this court. The court has noted that in the circumstances of this case the Manager of the Bank committed to Mr. Sargeant that he would be provided with the written reasons for the denial of the withdrawal request after consultation with the Bank's attorneys at law. Whilst, Ms. Ryan did not issue the correspondence that Mr. Sargeant anticipated, she did present him with the basis for the denial of the transaction, the freezing instrument. This court has also noted that the evidence before the court is that it was not the 'practice' as opposed to a stated policy for the customer to be shown a copy of the instrument. Further, there is no evidence before this court that the Bank, through its practice acted contrary to an existing contractual provision between the Bank and this account holder.
- [18] Mr. Sargeant also contends that the sworn evidence from an officer of the ONDCP filed on 8th January 2013 on an application to the court for a freezing order is evidence that the Bank communicated with the Supervisory Authority after Mr. Sargeant visited the Bank on the 2nd January 2013. The specific document was an unagreed document and was not placed before the court. However, this court engages hereunder on further discussions on Mr. Sargeant's visit to the Bank.
- [19] In the instant case the time when the directive was received was a material fact in issue. There is no direct evidence on when the directive was received. Mr. Sargeant, as a result of certain interactions, believed or formed the view that the Bank did not have the directive at the relevant time. The evidence of Mr. Sargeant is insufficient to discharge the burden on the material fact in issue. In this court's view Mr. Sargeant has not discharged his burden of proof that at the material time the Bank was not in possession of the directive in question.

Whether there is a basis to assume that the Bank communicated with the Supervisory Authority in breach of the Bank's Fiduciary Duty to the Claimant.

- [20] It has been pleaded that the Bank, in breach of its duty of confidentiality and secrecy, provided information to the ONDCP which precipitated the Supervisory Authority sending out a directive to the Bank and later making an application to the High Court for a freezing order. As previously indicated herein, Mr. Sargeant's contention was based on his belief that the Bank was not in possession of the directive when he visited the institution on the morning of the 2nd January, 2013 and the fact that the Bank was able to provide a copy of the order in the afternoon of the same day. Mr. Sargeant also notes the information regarding the details of his visit to the Bank on the 2nd January, 2013 as represented in the affidavit in support of the application for the freezing order made by the ONDCP on the 8th January, 2013.
- [21] However, in this Court's view it is not a necessary inference that there was communication by the Bank in breach of its fiduciary duties. Firstly, it is noted that the information regarding the accounts held by the claimant was previously available to the Supervisory Authority. The Bank admitted that the Bank complied with a production order issued on the 12th November, 2012. Additionally, under cross-examination Mr. Sargeant agreed that the allegations of his infractions with the law were published in the media and that there were persons in the Bank, other than employees of the Bank, who may have seen him and be able to identify him. Thus, in this court's view it is not a necessary inference that the communication about the transaction request on the 2nd January, 2013 originated from the Bank.

Whether the Bank could find cover under the provisions of the Act.

- [23] To comprehensively treat with this matter this court will address its mind to whether communication to the Supervisory Authority, if any, would have been covered under the provisions of the **Act**. Accordingly, reference will be made to the provisions of the Act as well as the provisions of the **Banking Act**.
- [24] Section 31 of the **Banking Act** provides:
- “(1) No person who has acquired knowledge in his capacity as director, manager, secretary, officer, employee or agent of any financial institution or as its director, officer, employee or agent of the Central Bank, shall disclose to any person or governmental authority the identity, assets, liabilities, transactions or other information in respect of a depositor or customer of a financial institution except:
- (a) With the written authorization of the depositor or customer or of his heirs or legal personal representatives; or
 - (b) For the purpose of the performance of his duties within the scope of his employment in conformity with the provisions of this Act; or
 - (c) When lawfully required to make disclosures by any court of competent jurisdiction within Antigua and Barbuda; or
 - (d) Under the provisions of any law of Antigua and Barbuda, or agreement among the participating Governments; but nothing herein shall prevent a financial institution from providing to a person, upon legitimate business request, a general credit rating, a summary of which will be provided to the depositor or customer upon request.”

[25] Sections 13 of the **Money Laundering (Prevention) Act 1996**. Section 13 of the **Act** provides:

“13. (1) Financial institutions shall pay special attention to all complex, unusual or large business transactions, whether completed or not, and to all unusual patterns of transactions and insignificant but periodic transactions, which have no apparent economic or lawful purpose.

(2) Upon **reasonable suspicion** that the transactions described in subsection (1) could constitute or be related to money laundering, a financial institution shall promptly report the suspicious transactions to the Supervisory Authority.

(3) Financial institutions shall not notify any person, other than a court, competent authority or other person authorized by law, that information has been requested by or furnished to a court or the Supervisory Authority.

(4) When the report referred to in subsection (2) is made in **good faith**, the financial institutions and their employees, staff directors, owners or other representatives as authorised by law shall be exempted from criminal, civil or administrative liability, as the case may be, for complying with this section or for breach of any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision, regardless of the result of the communication.

(5) Criminal offence is committed by a financial institution or its employees, staff, directors, owners or other authorised representatives who, acting as such, wilfully fail to comply with the obligations in this section, or who wilfully make a false or falsified report referred to above.

(6) Without prejudice to criminal or civil liabilities COP offences connected to money laundering, a financial institution and its employees that fail to comply with the requirement of this section shall be liable on conviction to a fine of fifty thousand dollars and in addition the licence of such financial institution to operate as such may be suspended or revoked by the competent authority.

(7) The question whether a reasonable suspicion for the purpose of subsection (2) has been formed shall be determined objectively having regard to all the facts and surrounding circumstances.” (Emphasis Added)

[26] The counsel for the Bank contends that the cumulative effect of the provisions of the Act places certain duties and responsibilities on the Bank. The evidence from the representative of the Bank is that a suspicious activity report, when appropriate, is made after the transaction or the attempted transaction. There is no admission that a suspicious activity report was issued in respect of this account. However, the Bank contends that the account in question was dormant since 2012 when the claimant presented to make a withdrawal. The dormancy of the account, the quantum of the cash withdrawal which was requested and the knowledge that the claimant was alleged to have been charged and/or involved in money laundering matters, were sufficient to trigger the transaction as a suspicious activity. A suspicious activity on the account would warrant the activity being reported to the Supervisory Authority under the provisions of section 13 of the **Act**. I accept the Bank's contention on this matter. I have also noted that the account in question would have been previously included in accounts to be frozen in the directive of the 24th October, 2012 under the provisions of the **Act**

and this was the first time there was a withdrawal on the account in question through Mr. Sargeant authorising instrument.

[27] I accept the submissions made on behalf of the Bank that the combination of matters relative to the account, even in circumstances where the account may not have incurred dormancy fees, were sufficient to raise reasonable suspicion regarding the activity on the account. There is no evidence of bad faith. If there were communication with the Authority the report would be protected under the provisions of the Act.

[29] It is ordered that:

- i. The claim is dismissed.
- ii. Prescribed costs to be paid by the claimant to the defendant.

Marissa Robertson
High Court Judge

By the Court

Registrar