

GRENADA

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO. GDAHCV 2010/0098

BETWEEN:

**IN THE MATTER OF THE SUPREME COURT ACT
CAP 336 OF THE REVISED LAWS OF GRENADA 1990**

AND

**IN THE MATTER OF AN APPLICATION FOR A DECLARATION BY
THE FIRST CARIBBEAN INTERNATIONAL BANK (BARBADOS) LIMITED
APPLICANT/CLAIMANT**

Appearances:

Mrs. Shireen Wilkinson for the Applicant
Mr. A. Olowu and Mrs. K. Marrast-Victor for the Respondent

2010: May 27th

DECISION

- [1] **HENRY, J. :** The applicant seeks a declaration that it is not entitled to divulge any information whatsoever to any private or public institution or authority pertaining to the account or accounts of customers of the applicant without an Order of Court or the written authority of the customer in whose name an account or accounts are held, or in the event that the applicant has filed a suspicious Activity Report in relation to a specific transaction in relation to a specific account.
- [2] By letter dated 28th November 2007, a request was made by the Financial Intelligence Unit (FIU) of First Caribbean International Bank (the Bank) for the production of records in relation to an account or accounts held in a specific name.

- [3] By letter dated 10th January 2008, the Bank informed FIU that it was unable to accede to the request made citing the decision of the Eastern Caribbean Supreme Court, Claim No. ANUHCv 2006/061 **Hilroy Humphreys v First Caribbean International Bank**. The Bank stated that it would be guided by an Order of the High Court authorising it to divulge the information requested.
- [4] Subsequently, a further request for information regarding another account was made by letter. The Bank responded in similar terms. By letter dated 10th October 2008, FIU wrote to the Bank advising that it had obtained an opinion from the office of the Attorney General of Grenada and forwarding same to the Bank. The Bank responded that it could not embrace the opinion by the Attorney General and was therefore constrained to provide information to FIU only in support of previously submitted Suspicious Activity Reports (SARs) and/or pursuant to an order of the High Court authorising the bank to divulge the information requested.
- [5] Subsequently, by letter dated 16th November 2009, the FIU wrote to the Bank requesting production of records in regard to another named account. This request however, was made in relation to a SAR filed by the Bank in June 2009. A further request for production of records in respect of a named account, in relation to a SAR, was subsequently made by the FIU. In regard to these two requests, the Bank informed FIU that in the absence of an order of the High Court, it was unable to accede to the requests.
- [6] The Bank's position is that it is under a duty of confidentiality to its customers not to disclose information to any person or authority in relation to any customer account, without the express consent of the customer, or an order of the court or in the event that the Bank has filed a SAR, in relation to a specific transaction in relation to a specific account.
- [7] With regard to the provisions of the Financial Intelligence Unit Act, the Bank submits that the framers of the legislation could not have meant that the FIU should be permitted to engage in a wholesale fishing expedition into the bank's customer's accounts on a mere request and without the presentation of a single shred of evidence or any credible evidence whatsoever. Such a situation, the Bank submits, would be ripe for abuse.
- [8] The instant action was filed in February 2010, in response thereto.

[9] The parties have submitted the matter for decision on the basis of written submissions filed.

Issues

[10]

1. Whether or not the FIU is empowered by sections 6(1) and 6(2) of the Financial Intelligence Unit Act, to request records and information from a financial institution without a court order.
2. Whether or not the FIU is required by section 37 of the Proceeds of Crime Act to make an application to the High Court for a Production Order in relation to particular material or material of a particular description.
3. Whether or not the Financial Intelligence Unit Act overrides the Bank's fiduciary duty to its customers.

The Bank's Duty of Confidentiality to its Customers

[11] A bank's duty of confidentiality to its customers at common law was addressed in the case of **Tournier v National Provincial and Union Bank of England** [1924] 1K.B. 641. Bankes L. J. noted that the duty is a legal one arising out of contract and that the duty is not absolute but qualified. In setting out what he termed the qualifications of the contractual duty of secrecy implied in the relationship of banker and customer he stated:

"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 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."

[12] In Grenada the extent of the duty is set out in section 32 of the Banking Act 2005, No 19 of 2005. It provides:

"32.- (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 auditor or receiver or official liquidator or as 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 disclosure by any court of competent jurisdiction within Grenada; or
- (d) under the provisions of any law of Grenada or agreement among the participating Governments;"

[13] So that whether under common law or statute, the duty is not absolute but qualified. Both under common law as well as by statute, disclosure of information by a financial institution pursuant to the provisions of any law of Grenada does not constitute a breach. So the pertinent question here is whether the provisions of the Financial Intelligence Unit Act require the Bank to divulge the information requested to the FIU upon a request. If so, then compliance with that law could not be considered a violation by the Bank of its duty of confidentiality.

[14] Both the FIUA and the Proceeds of Crime Act (POCA) were enacted by Parliament in January 2003. The POCA specifically states that in passing the Act the Parliament considered it expedient to extend the powers of the police and the courts in relation to the tracing and confiscation of the proceeds of drug trafficking; to make new provision in relation to money laundering; to extend the powers of seizure and forfeiture on import or export of cash suspected of being the proceeds of criminal conduct.

[15] No one today can deny the international character of money laundering.

[16] In enacting the FIUA, Parliament recognized and responded to the need for specialized skills and procedures in combating the international nature of the offence of money laundering. In fact, Grenada, like many Eastern Caribbean countries, is a member of the Egmont Group of Financial Intelligence Units headquartered in Canada. The goal of the Egmont Group is to provide a forum for FIUs around the world to improve cooperation in the fight against money laundering and financing of terrorism and to foster the implementation of domestic programs in this field. Accordingly, most members of the Egmont Group have similar provisions in their domestic FIU legislation in terms of providing simplified procedures for obtaining or receiving information and for disseminating of material to other FIUs upon request.

[17] Under section 4 of the FIUA, the FIU consists of a Director who is appointed by the Minister responsible for National Security; a number of police officers selected by the Commissioner of Police; Customs Officers appointed by the Comptroller of Customs; a number of consultants and other personnel.

[18] The Act provides that police officers seconded to the FIU shall retain their powers of arrest, search and seizure under the Police Act, as do customs officers under the Customs Act.

[19] The functions of the unit are set out in section 6 of the Act. It provides:

“6.- (1) In the exercise of its functions under subsection (2), the Financial Intelligence Unit shall act as the agency responsible for receiving, analysing, obtaining and disseminating information which relates to or may relate to the proceeds of the offences created by the Proceeds of Crime Act 2003 –

(2) Without limiting the foregoing and notwithstanding any other law to the contrary the Financial Intelligence Unit –

(a) shall receive all suspicious transaction reports as are required to be made pursuant to the provisions of the Proceeds of Crime Act 2003 which are relevant to its functions, including information from any Foreign Financial Intelligence Unit;

(b) may require the production of such information that the Financial Intelligence Unit considers necessary to fulfil its function;

(c)

[20] Subsection (3) of section 6 provides that any person failing or refusing to provide such information as is required by paragraph 2(b) is guilty of an offence and shall be liable on summary conviction to a fine not exceeding fifty thousand dollars or to imprisonment for a term not exceeding two years or to both.

[21] Section 8 of the Act addresses the issue of breach of confidentiality in connection with the requirements under both the FIUA and the POCA. It provides:

“8 – (1) No proceedings for breach of banking or professional confidentiality may be instituted against any person or against directors or employees of a financial institution who in good faith submit suspicious transaction or suspicious activity reports to the Financial Intelligence Unit in accordance with the Proceeds of Crime Act 2003.

(2) No civil or criminal liability action may be brought nor any professional sanction may be taken against any person or against directors or employees of a financial

institution who in good faith transmit information or submit reports to the Financial Intelligence Unit.”

[22] So the Act makes it clear that proceedings may not be brought against a financial institution for breach of confidentiality where that institution either files a SAR under POCA or provides information in good faith to FIU. Providing information in response to a request would, in the Court's view, constitute a good faith transmission of information.

[23] Despite the above provisions, the Bank submits that the provisions of section 37 of the POCA were intended for the purpose of investigations of offences created by the said Act; that since the FIU is engaged in obtaining and analysing information in relation to offences under the POCA, it is compulsory that the FIU first obtain a production order in order to legitimately access such information; that Parliament could not have intended the FIU to obtain information from a financial institution merely upon a request.

[24] Section 37 (1) provides:

“37 - (1) For the purpose of an investigation into,

- (a) Drug trafficking,
- (b) A relevant offence
- (c) Whether any person has benefitted from criminal conduct, or
- (d) The whereabouts of any proceeds of criminal conduct,

a police officer may apply to the High Court for an order under subsection (2) (a “production order”) in relation to particular material or material of a particular description.” (emphasis added)

[25] Section 37, however, does not mention the FIU. The procedure as set out in section 37 for obtaining a production order is specifically mandated to be used by police officers. While the FIU is comprised of some police officers, it includes customs officers, consultants and other experts. Both the POCA and the FIUA were enacted on the same date. They were obviously considered by Parliament together. So Parliament was aware of the provisions of both Acts. Yet the FIU is not mentioned in connection with the procedure in section 37. Furthermore, although the Proceeds of Crime Act is mentioned in other parts of the FIUA, section 37 is not mentioned in section 6 (2) (b) as the procedure to be followed in obtaining information. The Court can only conclude that Parliament did not intend to restrict the FIU to the method to be utilised by police officers in obtaining information.

- [26] While the broad general functions are set out in section 6 (1), subsection (2) without limiting the general functions clearly enumerates specific functions in 2(a) and 2(b). Parliament saw fit, in subsection 2(b), to provide the FIU with an expedited method of obtaining information in addition to the powers exercisable by the police. The Act specifically states that the police and customs officers attached to FIU retained their powers of search and seizure. However, in addition, the Act states that FIU may request the production of such information it considers necessary to fulfil its functions.
- [27] In addition, it is clear from a reading of the Act that the request for production of information under 2(b) is not limited to information concerning a suspicious transaction report received from a financial institution. It would have been very simple for Parliament to indicate, if this was the intention by specifically providing that upon receipt of suspicious transaction report, FIU may request the production of information. Instead the two are listed and treated as two different powers under the Act.
- [28] Furthermore, the FIUA in section 6 (3) provides substantial sanctions for the failure to provide such information as requested by the FIU under section 6 (2) (b). There would be no need for this provision if Parliament intended for FIU to utilize the procedure under section 37 of the POCA since section 38 of POCA provides its own sanction for failure to comply with a production order.
- [29] The Bank further submits that it is bound by the decision of the Eastern Caribbean Supreme Court in **Hilroy Humphreys v First Caribbean International Bank (Barbados) Ltd.** Civil Suit No. ANUHCv2006/0601.
- [30] In the Humphreys' case, Mr. Humphreys brought an action against the bank claiming damages arising out of the breach of a contractual and fiduciary duty owed to him by the bank. He alleged that the bank had divulged certain personal banking information pertaining to his accounts to the office of the National Drug and Money Laundering Control Policy (ONDCP). It was not disputed that there had been no suspicious activity report in relation to Mr. Humphreys' account; that Mr. Humphreys had not consented to the disclosure; nor had a court order been obtained prior to the release of the information to ONDCP.
- [31] The Court in its decision, recognized three situations where disclosure would be legally permissible: (1) under the provisions of the Bankers Books (Evidence) Act Chapter 39 of the Laws

of Antigua & Barbuda; (2) under the Banking Act Chapter 40 of the Laws of Antigua & Barbuda and (3) under the provisions of the Money Laundering (Prevention) Act 1996. The issue for the court was whether the provisions of Antigua's Money Laundering (Prevention) Act (MLPA) authorised the bank to provide information to ONDCP without a court order. The decision is based on an interpretation of the MLPA. The Court concluded that the bank was in breach of its contractual and constitutional duty to Mr. Humphreys in that (1) it failed to obtain the required court order before releasing the said information; and (2) it had failed to follow the proper procedure set out in the Money Laundering (Prevention) Act.

[32] However, the statutory scheme setting up the ONDCP, Antigua's equivalent to the FIU, is substantially different from that enacted under Grenada's FIUA. The very composition of the ONDCP is different. Police officers and customs officers are not required to be members of ONDCP. Under that scheme the Director simply appoints to the service of the ONDCP such suitable persons as he may consider appropriate. Once appointed, these persons are given certain powers.

[33] The functions of the ONDCP are also quite different from those stated in Grenada's FIUA. Specifically there is no provision in the ONDCP Act equivalent to section 6 (2) (b) which empowers the ONDCP officers to require production of such information that they consider necessary to fulfil their function. Nor does it have an equivalent provision to section 6(3).

[34] In fact, in the ONDCP Act the authority to collect, receive, collate and analyse is specifically linked to suspicious transaction reports. That section provides:

"10. (1) The functions of the ONDCP are –

(a)

(b)

(c) to collect, receive, collate, analyse and act upon suspicious transaction reports and reports of suspicious activity;" (emphasis added)

[35] Furthermore, the relevant provision of the MLPA provides that:

"The Supervisory Authority . . . may instruct any financial institution or . . . seek the assistance of any government department, statutory body, or other public body to take such steps as may be appropriate to facilitate any investigation anticipated by the Supervisory Authority following a report or investigation made under this section." (emphasis added)

- [36] The Court had no hesitation in holding that before this section even comes into play a report must first be made by the Financial Institution to the ONDCP.
- [37] I therefore do not find this decision binding on this court in deciding the scope of the functions and powers of FIU especially section 6(2) (b) of the FIUA. The Antiguan Legislation is simply different in regard to the powers, function and procedure.
- [38] The second decision referred to by the Bank is **Antigua Commercial Bank Limited v Hilroy Humphreys** Claim No. HCVAP 2007/021. This case also concerned a claim for damages for breach of contractual and/or fiduciary duty against a bank. The same provisions of the Money Laundering (Prevention) Act 1996, the Banker's Book (Evidence) Act and the Banking Act of Antigua were under consideration by the Court of Appeal. Rawlins, C.J. held that the bank was not lawfully entitled to disclose any information relating to Mr. Humphreys' accounts to a third party without his consent or an order of the court. The above comments are equally applicable to this decision.
- [39] The respondent, in support of its submission that the FIU need not follow the provisions of section 37 in order to lawfully request information pursuant to section 6 (2) (b), refers the court to the case of **The Attorney General v Financial Clearing Corporation**, Court of Appeal, Commonwealth of the Bahamas Civil Appeal No. 70 of 2001. The controversial legislation concerned in this appeal was section 4 of the Bahamas Financial Intelligence Unit Act. That section is quite similar to section 6 of the Grenada FIUA and provides:
- "4. (1) In the exercise of its functions under subsection (2), the Financial Intelligence Unit shall act as the agency responsible for receiving, analysing, obtaining and disseminating information which relates to or may relate to the proceeds of the offences specified in the Second Schedule.
- (2) Without limiting the foregoing and notwithstanding any other law to the contrary the Financial Intelligence Unit -
- (a) shall receive all disclosures of information such as are required to be made pursuant to the Proceeds of Crime Act, 2000 which are relevant to its functions, including information from any Foreign Financial Intelligence Unit;
 - (b) . . .
 - (c) . . .
 - (d) May require the production of such information excluding information subject to legal professional privilege that the Financial Intelligence Unit considers relevant to fulfil its functions"

[40] In regard to the provisions of section 4 (2) (d), the trial judge had previously held that the FIU could not require the production of information relevant to the proper discharge of its functions having regard to the provisions of section 15 of the Banks and Trust Companies Regulation Act 2000. That section prohibits the giving of information by any officer of the bank to any person except when the bank is lawfully required to make disclosure by any court of competent jurisdiction within the Bahamas or under the provisions of any law of The Bahamas. The trial judge held that section 4 (2) (d) did not specifically require the bank to produce banking information to the FIU. Further, that in light of section 14 (1) of the Financial Transactions Reporting Act 2000 which required a bank to disclose information if the bank reasonably suspected a transaction involved the proceeds of criminal conduct, the FIU could not require a Bank to disclose information under the Act.

[41] The Court of Appeal examined the provisions of the three pieces of legislation.

[42] With regard to the powers set out in section 4 (2) of the Act Churaman, J. A. had this to say:

“So when section 4(2) of the Act say, as it does, “. . . and notwithstanding any other law to the contrary, the FIU . . . may require the production of such information . . .” it is in fact a free standing power conferred by the Parliament, and it is a power that is unconditional in the sense that it requires no pre-authorisation by any court of law; and when combined with the provisions of section 15 of the Banks and Trust Companies Regulation Act 2000 to the effect that the Bank “shall disclose . . . when it is required so to do under the provisions of any law of the Bahamas . . .” then any vestigial doubt as to the legality of the power of the FIU to require information dissipates.”

[43] The appeal was therefore allowed and the trial judge’s order set aside.

[44] Although this decision is not binding on this court, I find it highly persuasive. The provisions of section 4 (1) and 4(2) are almost identical to section 6 (1) and 6(2) of the Grenada FIUA. In addition, the relevant provisions under the Banks and Trust Companies Regulation Act are similar to the provisions in Grenada’s Banking Act in terms of the prohibition on a bank not to disclose information concerning its customers’ accounts and the exceptions to that duty.

[45] In the Court’s view section 6 (2) (a) and (b) confer specific powers on the FIU and accordingly the FIU need not obtain prior court approval in order to request the production of information under section 2 (b). Furthermore, the requested information need not relate to a suspicious activity report previously filed by the bank.

[46] Accordingly, the Court holds:

- (1) that the FIU is empowered by section 6 (1) and 6 2(b) of the Financial Intelligence Unit Act to request information from a financial institution that it considers necessary to fulfil its function without resort to a court order.
- (2) that the FIU need not follow the procedures contained in section 37 of the Proceeds of Crime Act in order to access information; and
- (3) that the requested information need not relate to a suspicious activity report previously filed by the bank.

[47] Furthermore, the Court is of the view that disclosure to the FIU in response to a request made under section 6 (2) (b) is covered by section 32 (1) (d) of the Banking Act and therefore cannot be taken to be a breach of the Bank's duty of confidentiality.

[48] Accordingly, the application for the declarations set out in the fixed date claim form is denied with cost of \$1,000.00.


Clare Henry
HIGH COURT JUDGE