

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
TERRITORY OF ANGUILLA
(CIVIL)
AD 2008**

CLAIM NO. AXA HCV 2008/0045

BETWEEN:

CHARLES L. GOLDENBERG et al

Claimants/Applicants

AND

JOHN BENJAMIN & Another

Defendants/Respondents

APPEARANCES:

Mr. William Hare for the Claimants /Applicants.

Mr. D. Michael Bourne for the 1st and 2nd Defendant/Respondent

**Date: 2008: 18th 28th July
28th October**

JUDGMENT

- [1] **GEORGE-CREQUE, J.:** On 16th July, 2008, Claimants filed a claim seeking delivery up from the Defendants all legal, corporate and other files held by them on behalf of Seymour Cohn, deceased, (“the Deceased”) or his Estate. They also filed a Notice of Application of even date along with a certificate of urgency wherein the date of hearing was given as 18th July, 2008, which was the date fixed for Pre-Trial Review (“PTR”) in suit No. AXAHCV 2007/0052 being a claim brought by the same named claimants against Marc Cohn, a son and co- executor of Seymour Cohn’s US Will. They say it was urgent because of the date fixed for PTR and the October trial window given.

- [2] On 18th July, this matter came on for hearing. Initially, the Claimants indicated that they no longer wished to proceed with their Application for delivery up and inspection having learnt that Marc Cohn was willing to request the said documents and have same delivered up by the Defendants in this action. Counsel for Marc Cohn was unaware of this instant Claim and Application. However, Counsel for the Defendants wished to be heard, being of the view that costs should follow, on the basis that the making of the Application by the Claimants was wholly unnecessary and ought to be struck out as an abuse of process. Due to constraints on judicial time, counsel on both sides were ordered to file and exchange written submissions by 28th July, 2008, so that the matter could be dealt with on paper. The Defendants complied and filed written submissions on 28th July, whereas the Claimants filed theirs on 30th July without apology or explanation for not complying with the stipulated time limit.

The Background

- [3] The matter arose in this way:
- (a) The Claimants are co-executors under the Deceased's US Will. Mr. Benjamin and his company, Benjamine Company Services Ltd., it appears were the solicitor and provider of corporate services respectively acting for the Deceased prior to his death. Mr. Marc. Cohn is also one of the co- executors of the Deceased's US Will. The Deceased apparently also made a Will in Anguilla in which Marc Cohn was named sole executor. The Anguillian Will pre-dated the US Will.
 - (b) Marc Cohn obtained by his attorney Mr. John Benjamin, the First Defendant herein, Probate of the Anguillian Will. The US Will has not been admitted to probate in Anguilla. The Will and grant of the probate thereof in Anguilla is the subject of challenge in Suit No AXAHCV 2007/ 0052 in this court in which Marc Cohn is the Defendant, the challenge being made by the other co-executors of the US Will.
 - (c) Claim No. AXAHCV 2007/0052 has been progressing through the court system. Case Management had been conducted and the matter listed for PTR on 18th July, 2008.

- (d) On 25th June, the Claimants' solicitors wrote to Mr. John Benjamin requesting delivery up of all legal, corporate and other files held on behalf of the Deceased.
- (e) On 2nd July, Mr. Benjamin, who was aware of the Suit No. AXAHVC 2007/0052 in respect of the Deceased's Estate, responded by directing the solicitors to Messrs. Webster Dyrud Mitchell (WDM) solicitors for Marc Cohn, the Executor, pursuant to a grant of Probate of an Anguillian Will of the Deceased.
- (f) There followed these instant proceedings with the Application in which an abridgement of time was sought fixed for one clear day later, in breach of CPR 11.11(1)b).

Defendants' case

[4] Counsel for Mr. Benjamin and his company contends that:

- (a) there was no urgency since the proceeding in suit 52/2007 had commenced since that year and had gone through case management with no efforts being made to obtain information now said to be urgently needed at the PTR stage of those proceedings. This was merely for the convenience of the Claimants and their counsel.
- (b) The Claimants are executors under a US Will. Mr. Benjamin had been issued a grant of Probate as lawful attorney of Marc Cohn as Executor under an Anguilla Will which has not to date been revoked. Thus the Claimants, as purported in this case, are strangers to the court. Accordingly, until the grant issued to Mr. Benjamin (as lawful attorney) has been revoked by the court, the relief sought by the Claimants is misconceived, in essence, they being in no position as a matter of law to such relief.
- (c) No cause of action has been disclosed on the pleadings as against the Defendants. Further, CPR 17.1(h)(iii) is being misused.¹

¹ CPR 17.1(h)(iii) deals with the making of an interim order in respect of property which is the subject of a claim.

- (d) CPR 17.1(k) does not apply unless a wholly different meaning is given to the word "goods".
- (e) This application is in reality a request for disclosure being a relief which the Claimants could not have obtained against a non party employing CPR 28.
- (f) The Claimants have failed to identify what documents they seek or the relevance of the documents (of which they have no knowledge) to the claim in Suit No. 2007/ 0052 and have merely embarked on a fishing expedition. See: **Marriott –v- Chamberlain(1886) 17QBD 154.**
- (g) Documents in the custody of Mr. Benjamin attracts legal, professional privilege having come into his possession as solicitor. No document has been identified as falling outside of this class. Moreso, in the absence of evidence showing the Claimants to be the proper party.
- (h) There is no evidence that the Claimants, for the purposes of who may be permitted inspection of corporate records, fall within the class of persons who may be permitted to inspect such records under section 157 of the Companies Act.
- (i) Compliance with the Claimants' request would run afoul of the Confidential Relationships Act, R.S.A c C085

Claimants' case

- [5] Counsel for the Claimants categorically states that this is not an application for disclosure but one for delivery up of property to which the Claimants say they are entitled as executors of Seymour Cohn's US Will. In essence they say that they stand in the shoes of the Deceased and thus the files and documents are his Estate's. As such, I propose to confine myself to the request for delivery up and inspection. It is worthwhile to note in this regard that the relief sought in this interim application will, if granted, have in reality fully satisfied the substantive relief in the claim.

The Issues

- [6] The simple issues, to my mind, then appear to be:
 - (i) Whether files and documents are property or goods for the purposes of CPR 17.1(1) (h) (iii) and 17.1 (1) (k) respectively; and

- (ii) If so, whether the Claimants may properly make such requests of the Defendants.

The Rules

- [7] CPR 17 deals with the court's power to grant interim remedies. 17.1(1)(h)(iii) says, in effect, that the court may make an interim order for the inspection of relevant (*my emphasis*) property. "**Relevant property**" means property which is the subject of a claim or in relation to which any question may arise on the claim. The Claimants have failed to show that the files and documents in the custody of the Defendants are 'relevant property' being the subject matter of any claim whatsoever. If it is said to be the subject matter of the instant claim, this begs the question as to what is the claim. In my view, there is no claim made in respect of which the files and documents can properly be said to be the subject matter within the context of CPR 17.1(1) (h) (iii).
- [8] CPR 17.1(1) (k) says, in effect, that the court may make an order for delivery up of goods. "Goods" in this context appear to warrant construction according to its natural and ordinary meaning being, articles of merchandise or some tangible item. I agree with counsel for the Defendants that use of this rule in the context of this application would be giving to the term "**goods**" a wholly different meaning in law than the context of the rule admits. There is no justification for such an extended meaning. It simply does not apply in the context in which the Claimants seek to utilize it in this application.
- [9] Having so concluded, I need not address the second issue. For completeness, however, suffice it to say that the Claimants cannot properly bring themselves at this stage in showing that they are the parties properly entitled to inspection and delivery of the files and documents, since, as the matter stands, the legal representative bearing recognition in this court is the grantee of the probate issued by the Anguillian court until set aside or revoked. Accordingly, Mr. Benjamin was quite right in referring them to the solicitors for the executor as per the probate of the Will of Seymour Cohn granted in Anguilla. The issue as to the Claimants' right has yet to be determined. Even though this Application is dressed up as an application for delivery and inspection of property, in my view, it is in reality one for disclosure. On this aspect I say no more.

Conclusion

- [10] I am satisfied that the Claimants' Application is wholly misconceived and as it turns out, on the facts, was unnecessary and certainly not urgent. Urgency is not determined by the convenience of counsel or the litigant. The Application is dismissed. The Defendants shall have their costs to be assessed unless agreed within twenty one days.

A handwritten signature in black ink, appearing to read "Janice M. George-Creque", written over a dotted line.

Janice M. George-Creque
High Court Judge