

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2016/CLE/gen/01355

BETWEEN

BLUE PLANET GROUP LIMITED

Plaintiff

AND

WILLIAM DOWNIE

Defendant

AND BETWEEN

WILLIAM DOWNIE

Plaintiff for Counterclaim

AND

BLUE PLANET GROUP LIMITED

Defendant to Counterclaim

Before Hon. Mr. Justice Ian R. Winder

Appearances: Tara Archer-Glasgow with Audley Hanna Jr for the Plaintiff

Metta MacMillan-Hughes, Chizelle Cargill, D'Andrea Johnson and
McFalloughn Bowleg for the Defendant

29 January 2018, 7 June 2018, 19 and 20 November 2018

JUDGMENT

WINDER, J

This is the defendants' application to set aside writs of subpoena duces tecum issued on 28 March 2017 and 9 and 10 May 2017.

Background

1. On 28 March 2017 the plaintiff filed subpoenas with respect to Royal Bank of Canada (RBC) and CIBC FirstCaribbean.(CIBC) seeking banking material relative to the defendant. The Subpoenas were settled in the following terms:

TO: RBC ROYAL BANK (BAHAMAS) LIMITED

WE COMMAND THAT you within 10 days of the date hereof produce to Messrs Higgs & Johnson, East Bay Street, Nassau, Bahamas, without limitation, all account statements, advice notes, paid cheques, debit and credit vouchers, transfer applications, orders, instructions, emails, internal memoranda including fixed account statements and mortgage account statements, relating to the operation of any account in the name of WILLIAM DOWNIE, whether in his individual name or held jointly with others, as from the 1st day of November, A.D., 2010, to the date hereof.

AND that if required by the said Messrs. Higgs & Johnson, swear an Affidavit confirming that you have complied fully, completely and thoroughly with this aid Subpoena.

TO: CIBC FIRSTCARIBBEAN INTERNATIONAL BANK LIMITED

WE COMMAND THAT you within 10 days of the date hereof produce to Messrs Higgs & Johnson, East Bay Street, Nassau, Bahamas, without limitation, all account statements, advice notes, paid cheques, debit and credit vouchers, transfer applications, orders, instructions, emails, internal memoranda including fixed account statements and mortgage account statements relating to the operation of any account in the name of WILLIAM DOWNIE, whether in his individual name or held jointly with others, as from the 1st day of November, A.D., 2010 to the date hereof.

AND that if required by the said Messrs. Higgs & Johnson, swear an Affidavit confirming that you have complied fully, completely and thoroughly with this said Subpoena.

2. On 9 May 2017 a second subpoena were filed with respect to RBC. This subpoena was settled in the following terms:

TO: RBC ROYAL BANK (BAHAMAS) LIMITED

WE COMMAND YOU to attend before attend before (sic) His Lordship the Honourable Mr. Justice Ian Winder, a Justice of the Supreme Court of the Commonwealth of The Bahamas, Third Floor, Judicial Legal Complex, East Street and Bank Lane, Nassau, New Providence, Bahamas, on *Monday* the 15th day of *May* A.D., 2017 at 2:00 o'clock in the *after-noon*, and so from day to day until your evidence shall have been taken to give evidence on behalf of Blue Planet Group Limited, the Plaintiff, in the above cause.

AND WE ALSO COMMAND YOU to bring with you and produce at the time and place aforesaid all account statements, advice notes, paid cheques, debit and credit vouchers, transfer applications, orders, instructions, emails, internal memoranda including fixed account statements and mortgage account statements relating to the operation of any account in the name of WILLIAM DOWNIE, whether in his individual name or held jointly with others, as from the 1st day of November, A.D., 2010 to the date of your attendance.

3. On 10 May 2017 a second subpoena were filed with respect to CIBC. This subpoena was settled in the following terms:

TO: CIBC FIRSTCARIBBEAN INTERNATIONAL BANK LIMITED

WE COMMAND YOU to attend before attend before (sic) His Lordship the Honourable Mr. Justice Ian Winder, a Justice of the Supreme Court of the Commonwealth of The Bahamas, Third Floor, Judicial Legal Complex, East Street and Bank Lane, Nassau, New Providence, Bahamas, on *Monday* the 15th day of *May* A.D., 2017 at 2:00 o'clock in the *after-noon*, and so from day to day until your evidence shall have been taken to give evidence on behalf of Blue Planet Group Limited, the Plaintiff, in the above cause.

AND WE ALSO COMMAND YOU to bring with you and produce at the time and place aforesaid all account statements, advice notes, paid cheques, debit and credit vouchers, transfer applications, orders,

instructions, emails, internal memoranda including fixed account statements and mortgage account statements relating to the operation of any account in the name of WILLIAM DOWNIE, whether in his individual name or held jointly with others, as from the 1st day of November, A.D., 2010 to the date of your attendance.

4. On 29 May 2017 the defendant applied, by Summons, to set aside the writs of subpoenas filed on behalf of the plaintiff. The summons is settled in the following terms:

LET ALL PARTIES concerned attend before His Lordship the Honourable Mr. Justice Winder, one of the Justices of the Supreme Court, in Chambers, 3rd Floor, Ansbacher House, Bank Lane, Nassau, Bahamas on the day of A.D., 2017 at o'clock in the forenoon on an application on the part of William Downie, the Defendant and the Plaintiff by Counterclaim for an Order that:

1. The Writs of Subpoena duces tecum filed herein on the 9th May and 10th May, 2017 and directed to RBC Royal Bank (Bahamas) Limited ("RBC") and CIBC First Caribbean International Bank (Bahamas) Ltd ("CIBC FCIB") be set aside on any one or more of the grounds set out below namely:
 - (a) The Writs of Subpoena duces tecum were and are irregular since they were purportedly issued in relation to proceedings in chambers without an application for leave being made or granted and/or
 - (b) The Writs of Subpoena duces tecum were and are irregular since the subject banks' officers were ordered to appear to give evidence on an occasion which was not the trial of the action and/or
 - (c) The Writs of Subpoena duces tecum were and are irregular since the subject banks' officers were ordered to appear to give evidence on an occasion which was not fixed by the Court for the taking of evidence in advance of trial and/or
 - (d) The Writs of Subpoena duces tecum were and are irregular since the subject banks' officers were ordered to appear on the hearing of a Summons for Directions and/or
 - (e) The Writs of Subpoena duces tecum were and are an abuse of the process of the Court since their object was not bona fide to obtain relevant evidence and/or
 - (f) The Writs of Subpoena duces tecum were and are an abuse of the process of the Court since the evidence

sought was not relevant to the issues raised in the pleadings and/or

- (g) The Writs of Subpoena duces tecum were and are an abuse of the process of the Court since they failed to list with precision the documents required to be produced and/or
- (h) The Writs of Subpoena duces tecum were and are an abuse of the process of the Court since they were speculative and amounted to a fishing expedition and/or
- (i) The Writs of Subpoena duces tecum were and are an abuse of the process of the Court since the Banks did not have any evidence relevant to the issues raised on the pleadings and/or
- (j) The Writs of Subpoena duces tecum were and are an abuse of the process of the Court since the documents sought to be produced thereunder belonged to a party and the process of discovery had not yet commenced and/or
- (k) The Writs of Subpoena duces tecum were and are an abuse of the process of the Court since the Plaintiff made no application to the Court for inspection before trial and/or
- (l) The Writs of Subpoena duces tecum were and are an abuse of the process of the Court since the documents sought to be produced by the Bank belong to a non-party and notice was not given thereof and/or an application was not made therefor and/or
- (m) The Writs of Subpoena duces tecum were otherwise oppressive
- (n) And/or on such other grounds as may appear.

2. The Writs of Subpoena duces tecum filed herein on the 28th March, 2017 and directed to CIBC FCIB and RBC be set aside on any one or more of the grounds set out above and/or on the ground that:

- (a) They directed the Banks to produce the confidential banking information of a party to the litigation and of a non-party, direct to the opposing party in the litigation and thus constituted an abuse of the process of the Court

3. Such further or other grounds as shall appear.

And further the Defendant seeks an Order that the costs of and occasioned by this application be paid by the Plaintiff to the Defendant to be taxed if not agreed.

5. Notwithstanding the numerous grounds cited in the Summons the basic complaint is that the writs of subpoenas are irregular. Order 38 rule 14-18 provides:

14. (1) A writ of subpoena must be in Form No. 28, 29 or 30 in Appendix A, whichever is appropriate. (2) Issue of a writ of subpoena takes place upon its being sealed by the Registrar. (3) Before a writ of subpoena is issued a praecipe for the issue of the writ must be filed in the Registry, and the praecipe must contain the name and address of the party issuing the writ, if he is acting in person, or the name or firm and business address of that party's attorney.

15. The names of two or more persons may be included in one writ of subpoena ad testificandum.

16. Where there is a mistake in any person's name or address in a writ of subpoena, then, if the writ has not been served the party by whom the writ was issued may have the writ resealed in correct form by filing a second praecipe under rule 14(3) indorsed with the words "Amended and re-sealed". 17. A writ of subpoena must be served personally and the service shall not be valid unless effected within 12 weeks after the date of issue of the writ.

18. A writ of subpoena continues to have effect until the conclusion of the trial at which the attendance of the witness is required.

6. Forms 28 and 29 in Appendix A, referred to in Rule 14(1) provides:

No. 28

Writ of subpoena (O. 38, r. 14)

[Heading as in cause or matter]

ELIZABETH THE SECOND, by the Grace of God, of the United Kingdom of Great Britain and Northern Ireland and of Our other realms and territories Queen. Head of the Commonwealth, Defender of the Faith:

To *[names of witnesses]*

We command you to attend at the sittings of the Division of our High Court of Justice [at the Royal Courts of Justice, Strand, London] or [at *name of town and address of Court outside the Royal Courts of Justice*] on the day fixed for the trial of the above named cause, notice of which will be given to you, and from day to day thereafter until

the end of the trial, to give evidence on behalf of the [plaintiff] or [defendant]

Witness Lord High Chancellor of Great Britain
the day of 19
Issued on the day of 19 by [agent
for]

If duces tecum add: And we also command you to bring with you and produce at the place aforesaid on the day notified to you [*here describe the documents or things to be produced*].

[*Note: If the writ is to be served in Scotland or Northern Ireland in pursuance of an order of the Court insert after We command you the words wherever you shall be within the United Kingdom and add at the foot of the writ the following:-*Take notice that this writ is issued by the special order of the High Court of Justice in England dated the day of 19 , pursuant to section 49 of the Supreme Court of Judicature (Consolidation) Act 1925.]

Amended by R.S.C. (Amendment No. 5) 1971 (S.I. 1971 No. 1955...

No. 29

Writ of subpoena: proceedings in chambers (O. 38, r. 14)

[*Heading as in cause or matter*]

ELIZABETH THE SECOND [as in No. 28]

To [*names of witnesses*]

We command you to attend before [Mr. Justice] in chambers, Royal Courts of Justice, Strand, London on day the day of 19 at and so from day to day until your evidence shall have been taken, to give evidence on behalf of the [plaintiff] or [defendant] in the above-named cause [and we also command you to bring with you and produce at the time and place aforesaid *describe the documents or things to be produced*].

Witness [as in No. 28].

Issued [as in No. 28].

7. On a cursory review of the subpoenas filed in this case it becomes patently obvious that the plaintiff has not complied with the provisions of the rules and that the form drafted, and upon which the Registrar signed, deviated considerably from the forms prescribed by the rules. More extraordinarily the

plaintiff's revised form caused the personal banking material of the defendant to be released to the plaintiff through a wholly unlawful process.

8. The purpose of securing a writ of subpoena is to secure the attendance of a witness. The specific purpose may be either for:
 - a) the witness to give evidence, in the case of the subpoena ad testificandum; and
 - b) the witness to produce evidence, in the case of the subpoena duces tecum.

The fact that the witness will only be required to produce documents rather than give factual evidence does not derogate from the fact that he must attend for the proceedings. A proceedings with respect to a writ of subpoena duces tecum is not a private matter between the applicant and the witness. This fact was expressed by *North J* as far back as 1890 in the English Chancery case of *Williams v Frere 1890 1 Ch 323*, where it was stated:

An order made under rule 7 of Order XXXVII. for the attendance of a person for the purpose of producing documents is equivalent to a *subpoena duces tecum*, and has the same effect. Such an order, though unqualified in its terms, means that the person named in it must attend with the documents therein mentioned; but it is then open to him to raise any legal objection to the production of any particular document which he is asked to produce.

The production under rule 7 is not a production for the purpose of private inspection, but must have reference to some proceeding in the litigation.

(emphasis added)

9. The plaintiff's deviation from the prescribed form also resulted in a breach of Section 19 of the Bank and Trust Companies Regulations as well as Section 177 of the Evidence Act (which incorporated the provisions of the old Bankers Book Evidence Act). Section 19 of the BTCA provides:

19. (1) No person who has acquired information in his capacity as —

- a) director, officer, employee or agent of any licensee or former licensee;

...

shall, without the express or implied consent of the customer concerned, disclose to any person any such information relating to the identity, assets, liabilities, transactions or accounts of a customer of a licensee or relating to any application by any person under the provisions of this Act, as the case may be, except —

(i) ...

(ii) ...

(iii) when a licensee 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;

(iv) ...

(v) ...

Section 177 of the EA provides that

“a banker or officer of a bank shall not, in any legal proceedings to which the bank is not a party, be compellable to produce any banker's book the contents of which can be proved under this Act, or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of a judge made for special cause.” (emphasis added)

The above legislation provides the circumstances by which a customer's banking information may be disclosed. I find that neither enactment permitted disclosure as: (1) the revision of the form, by the plaintiff, to cause disclosure by the licensees to be made directly to counsel for the plaintiff, without any supervision by the Court (notwithstanding the signature of the Registrar) was not lawfully provided for in the rules; and (2) there was no order of a judge.

10. This protection of confidentiality and privacy of banking customers has become an integral part of our banking law systems and ought to be fearlessly guarded and transgressed only as permitted by law. **Malone J**, in the case of **Lesser Antilles Trading Co. v. Bank of Nova Scotia - [1984] BHS J. No. 24** recognized this position which continues to be the state of the law notwithstanding the many adjustments in the financial services laws. **Malone J** stated at paragraph 6 of the ruling stated:

6 The Banks and Trust Companies Regulation Act, No. 64 of 1965 was much canvassed at these proceedings, but, to my mind, it has little relevance. The reason being that the provisions of that Act do not affect the principles of the common law which here, as in England, govern the duty of confidentiality that a banker owes to his customer. As Georges, C.J., said, IN THE MATTER of an application by Senator Edward Andrew Maynard, etc, Action 300 of 1984 at p 6:

"save for the penalty" (i.e. the penalty prescribed in section 10(3) of that Act for contravention of the provisions of section 10(1) "the principles governing confidentiality of banking transactions in The Bahamas are the same as those defined in English law in the case of *Tournier v National Provincial and Union Bank of England* (1924) 1 K.B. 461."

7 *Tournier's* case decided that a banker's duty of confidentiality is not a moral one but is recognised at common law to be a legal one arising out of contract. It is not an absolute duty but a qualified duty. The qualifications Bankes L.J., classified under four heads at p 473 as follows:

"(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 expressed or implied consent of the customer."

11. The plaintiff says at paragraph 1.2.1 of its submissions that:

1.2.1 It is submitted that the application by the Defendant is once again an abuse of process, an unnecessary use of Court's time and a cost building exercise. This submission is supported by the fact that: (i) the Plaintiff's subpoenas were lawfully issued; (ii) the laws of The Bahamas and the Rules of the Supreme Court, clearly permit for the subpoenas to be issued in the current form; (iii) the documents ordered to be produced were plainly necessary for the fair disposal of the *inter partes* hearing and for the current proceedings generally; and (iv) the Defendant has himself put the subpoenaed documents into evidence before the Court, and for use in the proceedings; which now makes any objection to the disclosure of the bank documents futile and frivolous.

12. The plaintiff says that it was permitted under Order 1 rule 7 of the RSC to alter the prescribed form to suit the circumstances of the case. Order 1 rule 7 of the RSC which provides:

The forms in the Appendices to the English Rules of 1976 shall be used where applicable with such variations as the circumstances of The Bahamas, the Constitution, the practice and procedure of the Supreme Court and the circumstances of the particular case require.

I am satisfied that this submission untenable. Any deviation permitted to the prescribed form cannot extend to changing the entire nature and colour of the application and or permitting it to bypass statutory enactments established for the provision of such material. The difference in the forms of 28 March 2017 and the subsequent forms procured in 9 and 10 May 2017 is surely a recognition by that the plaintiff that it erred in the presentation of the 28 March subpoenas for signature.

13. Additionally, the plaintiff's attempt to pray in aid Order 2 rule 2 cannot be supported. In this regard, the plaintiff says, at paragraphs 8.1 - 8.5 of its submissions, that:

8.1 It is respectfully submitted, as set out above, that the form and substance of the First RBC Subpoena and the First CIBC Subpoena are entirely proper having regard to the RSC and the practice of this jurisdiction. Further, there is a presumption of regularity both in the issuance of the First RBC Subpoena and the First RBC Subpoena and the process involved in their issuance by the Registrar.

8.2 In any event, it is submitted that, at worst (which is not admitted) if this Honourable Court was somehow convinced that the First RBC Subpoena and the First CIBC are subject to irregularities, this Honourable Court has the power to rectify this under express provisions of the RSC.

8.3 The relevant provisions of Order 2 of the RSC provide:

"1. (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirement of these Rules, whether in respect of time, place or manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step in the proceedings or any document judgment or order therein. (2) ...

2. (1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity".

8.4 The Defendant in his submissions has sought to argue that Order 2 of the RSC is cannot be applicable and that any issues with the relevant Subpoenas cannot be treated as an irregularity. However, when one considers the issue in the context of the actual authorities, the Defendant's position is unsustainable. It is now well settled law that Order 2 of the RSC effectively eliminates the concept of a nullity and any defect in proceedings is an irregularity which is capable of being rectified by the Court.

8.5 As a starting point note must be taken of the dicta of Lord Denning in *Harkness v Bell's Asbestos and Engineering Ltd* (1967) 2 QBD 729 (see at tab 11) wherein he discussed the effect of Order 2 rule 1 thusly:

"This new rule does away with the old distinction between nullities and irregularities. Every omission or mistake in practice or procedure is henceforward to be regarded as an irregularity which the court can and should rectify so long as it can do so without injustice. It can at last be asserted that "it is not possible for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistake step in his litigation." That could not be said in 1963: see In re Pritchard, decd.3 But it can be in 1966. (sic) The new rule does it."

The above dictum in *Harkness* was entirely adopted within this jurisdiction by Gonsalves-Sabola J (as he then was) in *Para Investments Ltd. v. Chestnut* [1985] BHS J. No. 69.

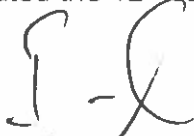
14. The result of the irregularity here, contravening the confidentiality rights of the defendant both at common law and by legislation, is so egregious that it would not be a proper exercise of the court's discretion to permit it to remain. In my view, such an irregularity cannot remain having regard to the obvious injustice to the defendant caused by its issuance. It must be set aside. The fact that the defendant, in defending the application sought to lay before the court the material improperly disclosed ought not to change the circumstances. The defendant, whether rightly or wrongly, sought to demonstrate the egregious nature of the breach of his rights by lodging (under seal) an affidavit of what was disclosed. I am not satisfied that it is proper for the plaintiff to use his actions to say that no injustice has been caused to the defendant in these circumstances.

15. In the circumstances therefore, I order that the subpoenas duces tecum filed on 28 March 2017 be set aside and all materials provided in respect thereof be returned to the respective banking institutions. As the subpoenas of 9 and 10 May 2017 were not proceeded upon, I make no order in respect thereto.

16. I see no basis why costs ought not follow the event. I accept that the defendant threw the "kitchen sink" at the plaintiff in what really was a simple application. The plaintiff nonetheless responded in kind with affidavits and authorities when it was far more appropriate to have conceded what was, in my view, a clearly unsustainable defence of the subpoenas. This could have been and ought to

have been done at a very early stage. In the circumstances therefore, I order that the plaintiff shall pay the defendant's costs. I propose to fix these costs.

Dated the 12th day of February 2019

A handwritten signature in black ink, appearing to be 'I-W', written over a horizontal line.

Ian Winder
Justice