

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CIVIL DIVISION
CLAIM NO. 2008 HCV 5029

IN THE MATTER OF Jamaican
Redevelopment Foundation Inc.

IN THE MATTER of section 45 and
the Fourth Schedule of the Banking
Act and section 44 and the Fourth
Schedule of the Financial Institutions
Act, and the common law and of Part
6.6 of the Civil Procedure Rules

IN CHAMBERS

Sandra Minott-Phillips and Ky-Ann Lee instructed by Myers Fletcher and
Gordon for the applicant Jamaican Redevelopment Foundation, Inc.

Michelle Shand-Forbes instructed by the Director of State Proceedings for
the Attorney General (Interested Party)

No appearance for the Director of Public Prosecutions (Interested Party)

March 26, 31 and April 8, 2009

SYKES J.

1. Before me is an application by Jamaican Redevelopment Foundation,
Inc. ("JRF") for a declaratory judgment asking that I declare that:

1. Jamaican Redevelopment Foundation Inc. is hereby allowed to
comply with the order for discovery contained in the Agreed
Confidentiality and Protective Order dated the 11th of
September 2008 and any subsequent discovery order made

("the said order") in Cause No. 380-00037-2008, in the District Court of Collin County, Texas ("those proceedings") in the United States of America on the ground that:

- a. JRF not being a bank is not subject to the provisions of the Banking Act and JRF not being a financial institution is not subject to the provisions of the Financial Institutions Act; or
 - b. JRF being a person who by reason of its capacity has access to certain records of banks and financial institutions in relation to various receivables purchased, is subject to section 45 of the Banking Act and section 44 of the Financial Institutions Act and/or the common law principles of confidentiality, but is permitted to comply with the said order because -
 - i. the disclosure by JRF ordered in those proceedings constitutes circumstances such that it is in the interest of JRF that the information be disclosed either at common law or under subsection (k) of the Fourth Schedule of the Banking Act or subsection (k) of the Fourth Schedule of the Financial Institutions Act, and
 - ii. the exceptions to section 45 of the Banking Act found in the Fourth Schedule and the exceptions to section 44 of the Financial Institutions Act found in the Fourth Schedule do not derogate from the common law exceptions to the duty of confidentiality; and
 - iii. the disclosure required by the said order amounts to such compulsion of law as permits the disclosure ordered by JRF pursuant to the common law.
2. The Applicant and its duly authorised agents are therefore entitled to disclose for the sole purpose of those

proceedings, all information and records in accordance with the said order, from January 30, 2002, being the date of JRF's acquisition of the Jamaican loans referred to in the said order.

2. I have decided to treat this application as one in which a litigant approaches the court to ask for guidance because it is uncertain of its legal obligations and does not wish to take the risk of running afoul of the law. The declaration sought was granted on March 31, 2009. These are the reasons for granting the declaration.
3. JRF is a company incorporated in the state of Texas in the United States of America with its registered office at 6000 Legacy Drive, Plano, Texas. It is registered in Jamaica as an Overseas Company (#896 overseas).
4. JRF is a debt collector. In pursuance of this business, it purchased debts owed to Jamaican financial institutions by many and varied borrowers. It will be recalled that long before the current world crisis, Jamaica experienced its own financial sector difficulty in the 1990s. Part of the strategy of the government was to take over these institutions by way of the statutory powers vested in the Minister with responsibility for finance by the Banking Act and the Financial Institutions Act. After taking over the institutions, the debt was removed from them and then sold as debt free institutions to private interests who wished to invest in them.
5. JRF took some of this debt by assignment. This was done by deed of assignment, dated January 30, 2002, between Financial Institutions Services Limited, Workers Savings and Loan Bank and Refin Trust Limited (together called "the sellers"), and JRF ("the purchaser"). In the case of Workers Savings and Loan Bank, the debt was sold directly to JRF whereas in the case of Financial Institutions Services Limited and Refin Trust Limited, they had acquired the debt and then sold it to JRF.
6. By purchasing the debt, JRF now has documents that were previously in the possession of institutions licensed under the Banking Act and

Financial Institutions Act. I shall explain more about these statutes later and why Mrs. Minott-Phillips felt that this application was necessary.

7. JRF is now a party to litigation in the United States of America. It brought a claim in the District Court of Collin County, in the state of Texas, against Dennis Joslin Jamaica Inc., Dennis Joslin & Company, Roellen Gin, Inc., Dennis Joslin. The defendants in the claim are alleged to be independent contractors contracted by JRF to provide services in its debt collection efforts in Jamaica.
8. The Texas action was precipitated by a claim brought against JRF in the Circuit Court of Mobile County, Alabama, in the United States of America, by a number of claimants. As I understand it, JRF retained Dennis Joslin Jamaican Inc., ("DJJ") as independent contractors, to assist in the debt collection in Jamaica. DJJ in turn contracted persons to help it fulfill its contractual obligation to JRF. These persons who were contracted by DJJ have sued JRF claiming that they were not properly remunerated. They are the claimants in the Alabama claim.
9. In the Texas action, JRF has sued DJJ under the terms of the contract, between JRF and DJJ, which requires DJJ to indemnify JRF in the event that JRF is held liable for any loss or damage arising from work done by DJJ or anyone whom DJJ contracted to do the work.
10. JRF is under a disclosure obligation according to the rules of court in Texas and so needs to disclose the records connected with the claim. I don't pretend to understand the civil procedure in Collin County Texas and what I next say should not be taken as an authoritative pronouncement on civil procedure there.
11. Among the documents placed before me is a document called "Original Petition" and it states in paragraph one that pursuant to Texas Rule of Civil Procedure 190.4, plaintiff intends to conduct discovery under a level 3 discovery control plan. Then there is another document called "Agreed Confidentiality and Protective Order." I cannot say with any

certainty whether this second document is a manifestation of the "level 3 discovery control plan" but it does appear that way.

12. This second document clearly appreciates that the parties may need to disclose confidential information and has quite an elaborate scheme to protect the confidential information so disclosed. I will not set out all the details but I shall state some of the provisions. First, it asks the disclosing party to indicate whether the information is confidential. Second, if it happens that confidential information was so disclosed but was not so designated the confidential party can still assert that the information is confidential. Third, in the event of a dispute between the parties over whether any information is confidential, there is a dispute resolution mechanism. Fourth, a restriction is placed on the persons who can receive the information and they have to be identified as persons who may receive the information before it is disclosed to them. Fifth, there is provision that the confidential information cannot be used for any other purpose but the litigation before the court. Sixth, if the information is going to be used before or at the trial, the document specifies that the presentation of the information "shall be made in the presence of only the presiding officer and other court personnel, an authorised court report, outside counsel for the parties, the jury (if any) and to such individuals duly qualified [to receive such information]" (see paragraph 11). Paragraph 11 goes on to say that "[b]efore any presentation of confidential information to this court, the presiding officer or the Clerk of this Court shall advise all court personnel and court reporters of the highly confidential nature of such information, and of the duty to maintain the confidentiality of such information."

13. I have mentioned the "Agreed Confidentiality and Protective Order" because it raises one of the important factors that would need to be considered in granting JRF's application, namely, the extent to which any confidential information sent from Jamaica would be disseminated. No system is fool proof but I am satisfied that the Order has made a serious attempt at protecting any confidential information the court in Texas may received from Jamaica.

Is JRF bound by the Banking Act and Financial Institutions Act?

14. I had promised, earlier, to explain more about the concerns of Mrs. Minott-Phillips. In order to operate as a commercial bank in Jamaica, the person (which can only be an appropriately capitalised company) must receive a licence from the relevant authorities. Section 45 of the Banking Act criminalises unauthorized disclosure of confidential information and the person is only exempt from criminal prosecution if the disclosure is made pursuant to the exceptions listed in the Fourth Schedule to the Act.
15. The Financial Institutions Act established a very similar regime for the operation of merchant banks. The equivalent section is section 44. This provision criminalises unauthorized disclosure of confidential information unless the disclosure falls within the Fourth Schedule to that Act.
16. There has been an ongoing debate in Jamaica over whether the common law principles on bank secrecy in *Tournier v National Provincial and Union Bank of England* [1924] 1 K.B. 461 have been replaced completely by section 45 of the Banking Act (see Downer J.A. in *Troy Megill v The Attorney General* (1994) 31 J.L.R. 87, 95).
17. It is not hard to see why some persons think that section 45 of the Banking Act and section 44 of the Financial Institutions Act covers the entire field. If Parliament has legislated and imposed criminal sanctions for disclosure of confidential information except in accordance with the statutory regime, then it is arguable that any disclosure apart from the statutorily authorised circumstances is likely to be unlawful and possibly criminal. However, the resolution of this debate will have to wait another day.
18. It is against this background of the law, as it presently stands, that this application is made. According to Mrs. Minott-Phillips, the words of section 45 (1) of the Banking Act and the similarly worded provision in the Financial Institutions Act had the potential to impose criminal sanctions on her client. I shall set out only section 45 (1) of the Banking Act since that will suffice for present purposes. The provision reads:

Subject to subsection (2), no official of any bank and no person who, by reason of his capacity or office has by any means access to the records of the bank, or any registers, correspondence or material with regard to the account of any customer of that bank shall, while his employment in, or as the case may be, his professional relationship with the bank continues or after the termination thereof, give, divulge or reveal any information regarding the money or other relevant particulars of the account of that customer. (My emphasis)

19. Learned counsel submitted that the expression "no person who by reason of his capacity or office has by any means access to the records of the bank, or any registers ..." could cover persons such as JRF who bought the debt.
20. I am not convinced that this is likely to be correct. The provision is clearly directed at employees and officials of the bank. To my mind, the expression identified by counsel would apply to persons such as bank inspectors or persons who may be contracted by the bank to perform specific functions but are not necessarily employees of the bank. They could be independent contractors.
21. I believe that I am reinforced in my conclusion that the statutory provisions could not apply to JRF in the circumstances of how it came to acquire the debt. I go back to first principles. "A debt is a right to demand payment of money at a stipulated time" (see Smith, Marcus, *The Law of Assignment*, (2007) (OUP) para. 3.05, page 37). A debt cannot be physically possessed but can only be realised by court action. Therefore, it is a chose in action. It is well known that choses in action can be assigned. The issue is, what is assigned? It is the benefit of a contract that can be assigned and not the contract itself.
22. If the obligations and rights under the contract are to be transferred, then what occurs is a novation and not an assignment. A

novation requires that the parties to the initial contract both agree that a third party, who must himself also agree, shall perform the obligations of one or both parties under the initial contract. A novation, therefore, requires a tripartite agreement and that agreement is an entirely new contract, and becomes the source of all contractual rights and obligations of the parties. This stands in sharp contrast to an assignment which is an agreement between the assignor and the assignee. In the case of an assignment of debt, the debtor is not a party to the assignment. He derives no enforceable rights under the assignment since he is not privy to that contract.

23. All of what has been said is clear enough from the case of *Tolhurst v The Associated Portland Cement Manufacturer (1900)* [1902] 2 K.B. 660 C.A. This decision was affirmed on these points by the House of Lords at [1903] A.C. 414.

24. With this foundation, I look at the relationship between a bank and its customer. The relationship is one that arises out of a contract. The *Tournier* principles are implied terms of the contract between the parties. The secrecy obligation, where not expressed, is an implied term. The secrecy obligation is a burden placed on the bank. This burden is not transferred under an assignment. For JRF to be obliged to perform this contractual obligation in relation to the customer, there would have to be a novation. For this to happen, the customer and the bank and JRF would have to agree that JRF would perform this secrecy obligation. Of course, I assume that there is no term in the contract between the assignor and assignee requiring the assignee to keep information secret, and even if there were such a term, the customer of the bank could not enforce it because of lack of privity.

25. JRF's rights and obligations on an assignment are to be found in the contract unless statute imposes further obligations. The Banking Act and Financial Institutions Act did not purport to affect the nature of the contract between licensees under those Acts and their customers. The statute simply imposed a duty on officials of the licensed institutions and even though customers might benefit from the statutory obligation of secrecy that is not the same as saying that those obligations form part of the contract between the licensees and

their customers. A breach of those provisions is unlikely to give rise to a cause of action. The remedy is a criminal prosecution.

26. In the case of Workers Savings and Loans Bank, JRF bought the debt directly from it. Unless there is an express term to that effect, that the secrecy obligation, implied or expressed, in the initial contract between that bank and its customers would not affect JRF. In the case of Financial Institutions Services Limited and Refin Trust, any secrecy obligation on JRF is even more remote.

27. The other point which is vital is that the provisions of Banking Act and the Financial Institutions Act apply only to their licensees operating under those statutes. JRF is not operating by virtue of any licence granted by the relevant authorities. JRF is not purporting to stand in the place of the licensed institutions in relations to those institutions' debtors. It has not taken over any of these institutions. JRF is not an independent contractor retained any of the financial institutions or banks and by virtue of that capacity has access to bank records. JRF holds no office in relation to banks. It is not an official of the banks. It is extremely doubtful whether section 45 of the Banking Act and section 44 of the Financial Institutions Act contemplated assignees of debt, especially assignees who are taking from a person who itself took the debt from the institutions.

28. In this particular case, the deed of assignment states that the seller "as beneficial owner HEREBY ASSIGNS to the purchaser all of the seller's rights, title and interest in and to all the assets described EXHIBITED A attached hereto and all interests and other monies (if any) now due and subsequently to become due in respect of such Assets TO HOLD same unto the Purchaser absolutely" (see para. 2 of deed of assignment). I have not seen the agreement for sale and purchase of assets, but what is clear from the deed is that it only the rights, title and interest of the sellers that is transferred. There is nothing there about secrecy obligations under any of the relevant institutions. All this is consistent with view I have expressed about assignments and novations.

29. Thus my view, subject to full argument on the point, is that section 45 (1) of the Banking Act and the equivalent provision in the Financial Institutions Act do not apply to JRF. To extend the reach of the criminal law under a statute that governs only licensees under that statute to JRF in these circumstances would, in my view, require compelling justification. It seems clear to me, on reading both statutes, that the secrecy provisions did not contemplate assignees. More direct language is required before the statutory secrecy provisions can be extended to persons such as JRF who are outside the statutes.
30. As far as the common law is concerned, there are two sources of obligations: contract and tort. No contractual provision has been identified which imposes a secrecy obligation on JRF. No submission has been made raising the possibility of a secrecy obligation founded in tort.
31. On a closing note, it is regrettable that the Attorney General's representative did not assist in this matter. Her instructions were, neither to support nor oppose the application. It appears that her instructions did not extend to assisting the court to arrive at a proper interpretation of the provisions. The Director of Public Prosecutions, although served, did not attend this application.
32. In view of the position that I have taken, I see no compelling reasons for future applications of this nature. I have been told that similar applications have been made to this court and granted. I have noted that in previous applications the declarations say that the statutes do not exclude the common law contractual obligations of secrecy. As noted above, a reasonable counter argument can be made. I can understand the caution of counsel but, until I am persuaded otherwise, I do not see how section 45 of the Banking Act and section 44 Financial Institutions Act can apply to JRF in circumstances as outlined. Thus, until it is established either that the statutes apply to assignees or there is a contractual obligation on assignees of debt for institutions licensed under the Banking Act and Financial Institutions Act, I do not see why applications of this nature are necessary.

Resolution

33. In resolving this application, I will assume that there is a secrecy obligation imposed on JRF. The question then is, assuming such a duty exists, are there any circumstances in which the information can be disclosed? I would say that there is. One obvious one would be where JRF has to take enforcement action against the debtor. Another would be where the debtor takes legal action against JRF. A third can be found in the papers before me. Part of the allegations made by JRF is that in the Alabama claim, the claimants there are saying, among other things, that they were not paid the commission due to them for work done in relation to certain debtors. In order, to refute this, it may be necessary for JRF to disclose some information about the debt. It may be necessary to disclose the size of the debt and the nature of the work done in order to determine the size of the commission.
34. The declaration is granted in terms of paragraphs one and two of the application.