

Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. CL E037/1999

BETWEEN	ENVIRONMENTAL FOUNDATION OF JAMAICA	PLAINTIFF
A N D	BUCK SECURITIES MERCHANT BANKERS LIMITED (In Voluntary Liquidation)	1 ST DEFENDANT
A N D	CATHERINE PARKE-THWAITES	2 ND DEFENDANT
A N D	KARLA HENRY	3 RD DEFENDANT
A N D	CATHERINE CRAIG (Liquidator of Buck Securities Merchant Bank Limited)	4 TH DEFENDANT
A N D	MAYBERRY INVESTMENTS LIMITED	5 TH DEFENDANT

David Noël for plaintiff instructed by Myers, Fletcher & Gordon.

Alexander Williams instructed by Williams, Palomino, Gordon-Palomino
Attorneys-at-law for the fifth defendant.

Heard: 20th and 25th October, 1999

IN CHAMBERS

COOKE, J

The essence of the wrong complained of by the plaintiff against the 5th
defendant is that the latter unlawfully received into its possession an instrument

L.R.S. 2003 E No. 980067000034. The value attributed to this instrument is \$18,757.810. The plaintiff contends that the proceeds of this instrument belong to it —, as the transfer of the instrument to the 5th defendant was unlawful. It is the 5th defendant's position that the transactions were bona fide. The paragraphs in the statement claim which deals specifically with the 5th defendant are 15, 16, and 18 and are set out hereunder.

- “15.- The 5th defendant has provided no consideration for the Instrument being transferred to it.
16. - Further, at the time the Instrument was transferred to it, the 5th Defendant knew, or ought to have known, that the Instrument was being held by the 1st Defendant on trust for the plaintiff and was not beneficially owned by the 1st defendant. Despite demand, the 5th Defendant has wrongly and in breach of trust refused and/or neglected to deliver to the Plaintiff the Instrument or its proceeds.
18. - The instrument was transferred to the 5th Defendant with a view to giving the 5th Defendant a preference over others to whom the 1st Defendant owed financial obligations. The transfer of the Instrument amounted

to a fraudulent preference and is therefore invalid and void and ought to be set aside.”

These assertions contained in those paragraphs are countered in the defence of the 5th defendant in paragraphs 12, 13, and 15. These are likewise set out hereunder:-

“12. - Paragraph 15 of the Statement of Claim is denied. This defendant says, that, in or about October 1998, it received the said instrument from the 1st defendant as security for two loans granted by the 5th Defendant to the 1st Defendant, in the principal sums of \$10,000,000.00 and \$4,200,000.00.

The 1st Defendant failed to repay the said loans along with Interest accrued, and, after demands, the 5th Defendant pursuant to its right to realise the security for the said loan and relying on the executed transfer given to it by the 1st defendant transferred the said instrument to itself in partial satisfaction of all sums owing to it by the 1st Defendant.

13. - In answer to paragraph 16, this Defendant denies that it knew that the said instrument was being held by the 1st

defendant on trust for anyone and says that it is entitled to the said instrument, it being the security proffered by the 1st Defendant for the said loans.

15. - Paragraph 18 of the Statement of Claim is denied.

These then were the state of the pleadings, when the court was asked to order that the plaintiff within 7 days deliver further and better particulars pursuant to a request by the 5th defendant in a letter dated September 27th, 1999.

The details of the requests are set out below:

September 27, 1999

**Myers, Fletcher & Gordon
Attorneys-at-Law
21 East Street
Kingston.**

Attention: Mr. David Noël

Dear Sirs:

**Re: Suit No. C.L. 1999/E-037
Environmental Foundation of Jamaica v Buck
Securities Merchant Bank Limited and others.**

By now, you would have been served with our Defense.

We require the following further and better particulars of your Statement of Claim:

Under paragraph 3.

State on what basis is it alleged that the 2nd and 3rd Defendant Effectively controlled the operations of the 1st Defendant.

Under paragraph 6.

State whether the alleged trust between the Plaintiff and the 1st Defendant was oral or in writing; if oral give full particulars of the date and circumstances under which the trust arose; if in writing, give full particulars of the writing.

Under Paragraph 15.

State on what basis it is alleged that the 5th Defendant provided no consideration for the instrument.

Under Paragraph 16.

1. Give full particulars of specific facts, documents, overt acts or omissions on which the Plaintiff intends to rely in support of the Allegation that the 5th Defendant knew, or ought to have known, that the instrument held by the 1st Defendant on trust for the Plaintiff was not beneficially owned by the 1st Defendant.
2. Of the allegation that the 5th Defendant had actually known that the Plaintiff was not beneficially owned by the 1st Defendant, state whether it is being alleged that the 5th Defendant acted dishonestly, and if so, give full particulars of the dishonesty.
3. (a) State on what basis it is being alleged that the 5th Defendant was in breach of trust which, it is alleged, existed between the Plaintiff and the 1st Defendant.
(b) Give full particulars of the precise relation between the Plaintiff and the 5th Defendant from which any duty or trust between the Plaintiff and the 5th Defendant is alleged to have arisen.
(c) Give full particulars of the acts, omissions, facts and matters as a result of which it is alleged there is a breach of trust by the 5th Defendant.

Under Paragraph 18.

1. Give full particulars of the specific facts, documents, overt acts or omissions on which the Plaintiff intends to rely in support of the allegation that the instrument was transferred with a view to giving the 5th Defendant a preference over others.

2. **State whether or not it is being alleged that the 5th Defendant procured the transfer of the said instrument with a view of giving it a preference over others.**
3. **State the basis on which it is being alleged that the transfer of the instrument amounted to a fraudulent preference.**

Kindly let us hear from you within seven (7) days.

**Yours faithfully,
WILLIAMS, PALOMINO, GORDON –PALOMINO**

Section 168(1) of the Judicature (Civil Procedure Code) Law in so far as it is relevant states: -

“Every pleading shall contain, and contain only, a statement, in a summary form, of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved,

As Slesser LJ pointed out in *Bruce v Odhams Press Limited* [1956] 1 KB 697 at p. 712: -

“material” means necessary for the purpose of formulating a complete cause of action.”

In this case there is no complaint that there is any deficiency in the formulation of the plaintiff’s cause of action. It is the particulars requested above which is sought. The obvious question now arises – What is the use of particulars? The answer given by Slesser LJ in the *Odhams Press Case* (*supra*) at p. 712 is that:

“Their function is to fill in the picture of the plaintiff’s cause of action with information sufficiently detailed to put the defendant on his guard as

to the case he has to meet and enable him to prepare for trial.”

The defendant ought to be allowed to gird its legal loins.

However it must be recognised that:

“A party is entitled to an order for particulars only for the purpose of ascertaining the nature of his opponent’s case that he has to meet and not for the purpose of ascertaining the evidence by which his opponent proposes to prove it.”
The Aga Khan Times Publishing Company (1924)
1 KB 675 at p. 67 of per Parkes L.J.

The distinction between a “material” fact and evidence to prove can sometimes be problematic. This difficulty was adverted to by Carey J.A. in *Sandra Bass et al v. Avalon Investments Limited (SCCA No. 20/88)*. He said at p. 4:

“Although it is not always easy to distinguish facts and the evidence to prove them there are dicta which make it clear that the question is inevitably one of degree. Brett L. J. said in *Phillips v Phillips (1878) 4 QBD at p. 133* ‘The difference, although not so easy to express is perfectly easy to understand’.”

Before dealing with this specific requests of the 5th defendant I am aware that in exercising my discretion I must take into consideration fairness and convenience as between the parties. An expeditious resolution of issues is an immutable aspiration. Further costs should be minimised.

I will now deal with the requests. These requests must be viewed within the context of how the issues as between the plaintiff and the 5th defendant have been joined. These have been previously set out in respective paragraphs of the statement of claim and the defence.

(1) **Under paragraph 3**

The relevance escapes me.

(2). **Under paragraph 6**

Even if there is relevance to the 5th defendant, it is clear that trust if trust there be will be a question of law for the court to determine. The material facts as regards this issue is set out in paragraph 9 of the statement of claim which avers-

“Between November 1993 and October 1998, the 1st Defendant acted as fund manager for the Plaintiff and invested funds belonging to the Plaintiff in the various fixed income securities on behalf of the Plaintiff. These various fixed income securities were transferred or encashed the proceeds would either be returned to the plaintiff or be invested in other fixed income securities on its behalf.”

(3) **Under Paragraph 15**

What is sought here is evidence.

(4) **Under paragraph 16**

1. The plaintiff concedes that the 5th defendant should have these particulars “but not at this time.” It is the plaintiffs stance that discovery should precede any request for particulars. As to this I will deal subsequently. Suffice it to say that I make no comment on this concession.

2. Here the 5th defendant wishes the plaintiff to plead its cause in a particular way. Then if so pleaded request particulars thereto. To say this is novel would be unduly euphemistic.

3. (a) and (b) Here again these are questions of law. At this juncture I repeat that there is no challenge to the validity of the cause of action. The plaintiff has set out a sufficiency of material facts to fairly raise the issue of whether a trust existed. What the 5th Defendant is here asking for is "Show me how you are going to prove it?" What is sought is evidence. As regards 3(c) the plaintiff has conceded but "not at this time.

Under paragraph 18

1. This is request for evidence.
2. The meaning of a "preference over others" is self evident
3. This is a request for evidence.

Accordingly, by concession there would be an order only as regards under paragraphs 16(1) and 16 (3) c. In these, perhaps, it is not easy to distinguish between "facts and the evidence to prove it." But as stated earlier the plaintiff says that the provision of particulars should abide discovery and to this I now turn.

"There is no hard and fast rule as to the class of cases in which particulars should precede discovery, or discovery be ordered before particulars, but the judge must exercise a reasonable discretion in every case after carefully looking at all the facts, and taking into account any special circumstances.

Ex. 8 Waynes Merthyr Company VD Bradford & Co. [1896] 1 CH. 29 at p. 35 per Chitty J.

I will be guided by this passage.

Firstly, I will look at the state of the proceedings as appears from the record.

- a. The statement of claim was filed on the 14th September 1999.
- b. Appearance on behalf of the 5th defendant was filed on the 16th September.
- c. Appearance entered on behalf of 4th defendant filed on 23rd September 1999.
- d. Defence of 5th defendant filed on 27th September 1999.
- e. Summons for further and better particulars on behalf of 5th defendant filed on 7th October 1999.
- f. Summons in (e) supra heard on 20th October 1999.
- g. On the 20th October 1999 the defence of the 2nd Defendant was filed.
- h. On the 21st October 1999 a summons to strike out the action on behalf of the 2nd defendant was filed. This is to be heard on the 23rd November 1999.

It will be observed that both in terms of time and the state of the proceedings the action is still in its infancy. I am aware that particulars may be ordered even before a defence is filed if a judge came to the "opinion that they are necessary or desirable to enable to plead or ought for any other special reason to be so delivered"- section 171 of the Judicature (Civil Procedure Code) Law. This is not so on this case. The issues have been joined on a forthright manner. I allude

to this to indicate that at this stage and at this point in time it cannot be said that there would be any immediate embarrassment to the 5th defendant if the order was now not granted. Counsel for the plaintiff informs the court that the process for discovery in respect of all the parties will be pursued with dispatch. He further submits that the result of such discovery will produce a whole picture thus enabling a total response to the requests of the 5th defendant. The plaintiff apprehends that to grant any order at this time could lead to succeeding multiple answers to the requests. In all the circumstances there is merit in this view. While the promptitude of the 5th defendant is not to be deprecated there are times when haste has to be made slowly. This is such a time. The orders sought and conceded to by counsel for the plaintiff must await discovery. I cannot perceive how an order at this time will in anyway facilitate the resolution of the issues. Perhaps after discovery, the overall circumstances may be so revealed that the 5th defendant could conceivably reassess its positions. It cannot be ruled out that at such a time a request for particulars may be legitimate.

In conclusion it is ordered.

1. That the plaintiff do supply the further and better particulars under paragraphs 16 (1) and 16 (3) (c) within 30 days after compliance with orders for discovery.
2. Liberty to apply.

3. **Costs in cause.**
4. **Leave to appeal granted.**