

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. 2009 HCV 05137
IN CHAMBERS

BETWEEN	WILLIAM CLARKE	APPLICANT
AND	THE BANK OF NOVA SCOTIA JAMAICA LIMITED	1 ST RESPONDENT
AND	PAVEMENT AND STRUCTURES LIMITED	2 ND RESPONDENT
AND	THE CYBERCRIMES INVESTIGATIONS & RESEARCH UNIT	3 RD RESPONDENT
AND	CABLE & WIRELESS JAMAICA LIMITED	4 TH RESPONDENT
AND	ATTORNEY GENERAL OF JAMAICA	5 TH RESPONDENT

Mrs. M. Georgia Gibson-Henlin and Ms. Sherian McDonald instructed by Henlin
Gibson-Henlin for Applicant

Miss Cindy Lightbourne instructed by Dunncox for the 1st Respondent

Mr. Stephen Shelton instructed by Myers, Fletcher and Gordon for the 2nd Respondent

Mrs. Denise Kitson instructed by Grant, Stewart Phillips for the 4th Respondent

26th February 2010

BROOKS, J.

Counsel have applied for clarification and or modification of an order made in
this matter on February 23, 2010.

The points raised by the 1st and 2nd Respondents concerning the order being of
wider scope than the application sought, because of the inclusion of the aspect of a
search, are in my view, not well founded. It would make a mockery of the exercise
contemplated by the applicant and the court if what were to happen was that the
Respondents would provide to the expert and the Supervising Attorney-at-Law, what it is,

they say, is relevant to the exercise and that the expert and Supervising Attorney-at-Law would be restricted to inspection of those items. In my view the only proper method of securing proper disclosure is for a search to be ordered.

Mr. Shelton has raised the issue of the 2nd Respondent sharing its premises with other entities. In my view, there are sufficient safeguards in the order to prevent an innocent party's property being invaded; the Supervising Attorney-at-Law is given a certain degree of discretion and, in addition, the parties threatened by the search are to be allowed time for consultation if necessary.

I find that there is no need to adjust that order.

Miss Lightbourne has raised a difficult point. She says that the equipment referred to in the previous orders has been moved to another specified location; a vault at the 1st Respondent's headquarters building. To resolve this issue it would seem that, of the two alternatives that are available, that is, to return the equipment to Ellesmere Road or to have an inspection done at both locations, the latter gives more protection to the Applicant, in that there is more transparency to the exercise.

I would, therefore, add to the order, the locations identified by the 1st Respondent, at their offices at Scotiabank Centre at the Corner of Duke and Port Royal Streets in Kingston.

Miss Lightbourne also asked for a specific time to be set for the exercise. I find that the time for the exercise has been sufficiently circumscribed for there to be no undue inconvenience. A cut-off date has been supplied and times for attendance have been specified. No expert or Supervising Attorney-at-Law has yet been identified. Some flexibility is therefore needed. I will not attempt to further specify when that exercise should take place.

Mrs. Gibson-Henlin has asked for an undertaking to be given by the Supervising Attorney-at-Law. I accept the submission. In fact, it was in the text of an order which I considered when drafting the order in the present matter and I then decided at the time, against including it. However, as learned counsel has advocated the point I am now of a different view.

An undertaking should be provided.

Mrs. Kitson has raised a point of clarification of the costs awarded to the 4th Respondent.

It is unfair to the 4th Respondent, having complied with an earlier order, to continue to be part of these proceedings. The claim against it not having been discontinued, it must be struck out with the 4th Respondent's costs paid; without the need to await the outcome of any further court action.

Finally learned Counsel for the 1st and 2nd Respondents have asked for leave to appeal. This is a fairly new type of order in this jurisdiction and I am not aware of any decision by our Court of Appeal on the point. The legal profession could benefit from the guidance of that Court.

Based on the above it is ordered as follows:

1. The applications by the 1st and 2nd Respondents for reduction in the scope of the Order made herein on 23rd February, 2010 are hereby refused;
2. The Supervising Attorney-at-Law shall, upon being appointed by the parties or the Registrar, give an undertaking to the Court to:
 - a. report to the Court on all aspects of the execution of the Order of the Court;

- b. provide to the Court copies of all that the expert and the Supervising Attorney-at-Law provide to the Applicant;
 - c. return the originals of all documents and/or material obtained as a result of the Order, as soon as possible, and in any event, within two working days of their removal;
 - d. offer to explain to the person served with the Order, its meaning and effect, fairly and in everyday language and to inform that person of his or her rights to seek legal advice and apply to vary or discharge the Order;
3. In addition to premises at Ellesmere Road, the 1st Respondent must identify to the expert and the Supervising Attorney-at-Law, all the equipment and other materials which it has removed from Ellesmere Road to its building at Scotiabank Centre at the corner of Duke and Port Royal Streets in the parish of Kingston, pursuant to Orders made herein and allow access to those items in every manner prescribed by the Order made herein on the 23rd February, 2010 and every aspect of that Order shall apply to that location as if it were originally included in that Order;
4. The Application is hereby struck out as against the 4th Respondent with costs as earlier ordered;
5. Payment of the costs of the 4th Respondent in this Application is not dependent on the commencement or conclusion of any other claim the Applicant may seek to file in respect of the subject matter herein;
6. Costs to be Costs in the Application;
7. Leave to appeal granted.