



# In The Supreme Court of Bermuda

CIVIL JURISDICTION

2011: No. 197

**BETWEEN:-**

**CAPCAR ENTERPRISES LTD**

**Plaintiff**

**-and-**

**(1) WESTPORT TRUST COMPANY LIMITED**

**(as Trustee of the Laylash Trust)**

**(2) LOIS WILSON**

**Defendants**

**-and-**

**(1) ONESIMUS NZABALINDA**

**(2) DAVID RANDOLPH WILSON**

**(in both cases as Trustees of the Laylash Trust)**

**Respondents**

## **EX TEMPORE RULING**

**(In Chambers)**

*Application for production of documents by third party pursuant to RSC Order 38, rule 13 – whether documents necessary for the purpose of the proceeding – whether third party could be compelled to produce documents at trial – alternatively, whether jurisdiction to order production of documents pursuant to overriding objective*

Date of hearing: 12<sup>th</sup> May 2016

Mr John Hindess, Marshall Diel & Myers Limited, for the Plaintiff

Ms Lauren Sadler-Best, Trott & Duncan, for the First Defendant

The Second Defendant did not appear and was not represented

The Respondents appeared in person

1. The Plaintiff claims \$45,900 in commission payments said to be due under a written contract between the Plaintiff and the Second Defendant which the Plaintiff claims the Second Defendant entered into both on her own behalf and on behalf of the First Defendant as Trustee of the Laylash Trust (“the Trust”). The First Defendant denies that the Second Defendant entered into the contract on its behalf.

2. If at trial the Plaintiff succeeds against the First Defendant, then the First Defendant, who is no longer Trustee, would look to claim an indemnity against the trust fund. The applicable principles are set out in Lewin on Trusts, Nineteenth Edition, at para 21-010:

*“A trustee’s right of indemnity affords protection to the trustee by entitling him to pay or reimburse himself out of trust property in respect of the personal liabilities which he incurs in the administration of the trust, but normally only where the liabilities are properly incurred. Thus there are two distinct relationships. The first is the relationship between the trustee and the third parties with whom he deals in the administration of the trust, or to whom he otherwise incurs liabilities. This will generate personal liabilities for the trustee, and so far as these personal liabilities are concerned, the terms of the trust will generally be of no direct importance. The second is the relationship between the trustee and the beneficiaries in connection with the liabilities incurred by virtue of the first relationship. The second relationship is concerned with the trustee’s rights of indemnity, and depends upon the terms of the trust and the manner in which the trust has been administered by the trustee. Normally, there will be no direct dealings between third parties and the beneficiaries. The third party will claim against the trustee and the trustee will claim against the trust property in which the beneficiaries are beneficially interested.”*

3. The Plaintiff does not want to risk suing a “man of straw”. Before proceeding further with its claim against the First Defendant, therefore, the

Plaintiff wishes to know if the trust fund has sufficient assets to meet the indemnity if called upon to do so. To this end the Plaintiff has issued a summons against the Respondents, who are the two current Trustees, pursuant to Order 38, rule 13 of the Rules of the Supreme Court 1985 (“RSC”):

*“(1) At any stage in a cause of matter the Court may order any person to attend any proceeding in the cause or matter and produce any document, to be specified or described in that order, the production of which appears to the Court to be necessary for the purpose of that proceeding.*

*(2) No person shall be compelled by an order under paragraph (1) to produce any document at a proceeding in a cause of matter which he could not be compelled to produce at the trial of that cause or matter.”*

4. The Respondents, who appear in person, resist the application. They object to producing information confidential to the Trust which, they maintain, they could not be compelled to produce at trial.
5. Mr Hindess, who appears for the Plaintiff, referred me to the judgment of Lord Esher MR in Staffordshire Tramways Co v Ebbsmith [1895] 2 QB 669, which was followed by the Court of Appeal of England and Wales in DB Deniz Nakliyatı TAS v Yugopetrol [1992] 1 WLR 437, and cited in the footnotes to the 1999 Edition of the White Book at 38/13/4. Although the case relates to an application under the Bankers’ Books Evidence Act, I was invited to apply it by analogy. Lord Esher stated at 674 – 675:

*“The application is for an order to inspect before the trial an account which is primâ facie not that of a party to the suit. I am disposed to think that the rule of conduct which the Court would observe in relation to such an application - though it is impossible to define it exhaustively - would be that, if the Court were satisfied that in truth the account which purported to be that of a third person was the account of the party to the action against whom the order was applied for, or that, though not his account, it was one with which he was so much concerned that items in it would be evidence against him at the trial, and there were no reason for refusing inspection, then they might order the inspection; but, unless they were so satisfied, they ought not to do so.”*

6. The trust account is not the account of the First Defendant and the items in it would not be relevant as evidence at trial as they relate neither to liability

nor quantum. Indeed the current balance of the account long postdates the First Defendant's involvement with the Trust. The Plaintiff therefore fails to satisfy either limb of Lord Esher's two-fold test, even assuming, which in the absence of argument to the contrary I shall, that the test is applicable. In short, the production of the material sought is not necessary for the purpose of this proceeding.

7. I was not referred to any other cases.
8. In the alternative, the Plaintiff invites the Court to rely on the overriding objective in RSC Order 1A to deal with cases justly. However the overriding objective is a principle governing the application of the RSC: it does not permit the Court to rewrite those rules so as to require the production of confidential material which under the RSC it could not order to be produced at trial.
9. These issues may call for more detailed consideration in some future case, with perhaps more extensive citation of authority.<sup>12</sup> However in the present case, and basing my decision four square on the material before me, the application is dismissed.
10. [Having heard the parties as to costs, the Court ordered that the Plaintiff should pay the Respondents' costs of the application, but made no order as to the costs of the First Defendant, and was not invited to do so.]

Dated this 12<sup>th</sup> day of May, 2016

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Hellman J

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<sup>1</sup> While preparing the typed version of this *ex tempore* judgment, I came across the judgment of Sir Donald Nicholls V-C (as he then was) in Khanna v Lovell White Durrant [1995] 1 WLR 121 Ch D at 127, mentioned at para 38/13/1 of the footnotes to the 1999 Edition of the White Book, which supports my conclusion. The judge stated in relation to the English version of RSC order 38, rule 13, which was identical to the Bermudian version:

*“Suffice to say, this rule empowers the court to order any person, including a non-party, to ‘attend any proceedings in the cause or matter,’ and produce documents which appear to the court to be necessary ‘for the purpose of that proceeding.’ ‘That proceeding’ harks back to ‘the proceedings’ which the person may be ordered to attend. A distinction is being drawn between a particular interlocutory or other proceeding in a cause or matter and the entire cause or matter. That this distinction is being drawn is supported by paragraph (2) which limits the*

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*documents whose production can be compelled under the order. A person is not compelled to produce at 'a proceeding in a cause or matter' a document he could not be compelled to produce 'at the trial of that cause or matter.' In my view the phrase 'necessary for the purpose of that proceeding' in paragraph (1) confines the scope of the rule to documents necessary for the purpose of the particular interlocutory or other proceeding at which the person is required to attend."*

In my judgment, the purpose of a proceeding is the relief sought. To qualify under RSC Order 38, rule 13, therefore, the proceeding must have some purpose, expressed in the form of the relief sought, other than or additional to the production of the document in question. In the present proceeding, no other relief was sought and there was therefore no other purpose.