

IN THE SUPREME COURT OF THE  
TURKS AND CAICOS ISLANDS

CL41/21

BETWEEN:

SUGAR RAY SMITH

1st Plaintiff

HURDIKO HARVEY

2nd Plaintiff

AND

SHANTA RIGBY

1st Defendant

DARKEYENNA SMITH

2nd Defendant

QUITA JENNINGS

3rd Defendant

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**DECISION**

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**Before:** The Hon. Registrar Narendra J. Lalbeharry

**Appearances:** Mr. Peter McKnight for the Plaintiff/Applicant  
Mr. Ashwood Forbes for the Defendants/Respondents

**Hearing Date:** 19<sup>th</sup> December 2024

**Venue:** Court 1 Supreme Court, Providenciales.

**Handed Down:** 24<sup>th</sup> January 2025

## Cases

*Dolling-Baker v Merrett and others* [1991] 2 All ER 890

*Cie Financière et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55

*Taylor v Anderton (Police Complaints Authority intervening)* [1995] 2 All ER 420

*Wallace Smith Trust Co Ltd (in liq) v Deloitte Haskins & Sells (a firm) and another* [1996] 4 All ER 403

*Ventouris v Mountain* [1991] 3 All ER 472 at 486, [1991] 1 WLR 607

*Taylor v Anderton* [1995] 2 All ER 420 at 434, [1995] 1 WLR 447

*Science Research Council v Nassé* [1979] 3 All ER 673

*Air Canada v Secretary of State for Trade (No 2)* [1983] 1 All ER 910

## BACKGROUND

1. By Writ and Statement of Claim the Plaintiffs seek an interest in property owned by their Aunt Jacqueline Smith now deceased (the Deceased). The Plaintiffs' claim is that when the deceased purchased Lot no. 60718/256 (the Property) she indicated that upon the completion of the mortgage payments to Provident Limited (the Mortgagee), the Property would be shared among both the Plaintiffs and Defendants in equal shares.
2. As evidence of the Deceased's wishes the Plaintiffs claim that the Defendants opened a bank account in the names of the 1<sup>st</sup> Plaintiff and all Defendants (the 2<sup>nd</sup> Plaintiff was not available at the time) where the rental income from the Property would be deposited. Additionally, the Plaintiffs claim that upon the death of the Deceased the Mortgagee through its Attorneys at Law Miller Simons O'Sullivan communicated through email correspondence to the Plaintiffs' Attorney-at-Law that they met with Jacqueline Smith before her death and received confirmation that the property should be transferred to the Plaintiffs and the Defendants in equal shares upon her death.
3. The Defendants have refused to acknowledge the Plaintiffs' interest in the Property and it is alleged that they opened a new bank account which is now being used to collect rental income.

4. The Defendants in their defence aver that the Deceased changed her mind before she passed away and this fact was communicated to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and her cousin Edith Skippings. They also aver that the Deceased did not make any written statement to the Mortgagee.
5. The Defendants by their Counterclaim, claim that the 1<sup>st</sup> Plaintiff and the Deceased were partners in a boating business and since the passing of the Deceased the 1<sup>st</sup> Plaintiff has never given the Defendants any proceeds from that business. They now claim half the profits from the boat business. Additionally, they claim the return of a Jeep Wrangler which they claim was owned by the Deceased but which the Plaintiff now possesses and refuses to return.
6. In their Reply and Defence to Counterclaim the Plaintiffs deny that the Deceased changed her mind and also put the Defendants to strict proof in respect of the Counterclaim.

## THE APPLICATION

7. On the 14<sup>th</sup> of November 2024 Mr. McKnight on behalf of the Plaintiffs filed an application for specific discovery pursuant to O.24, r.12 seeking an Order that:-
  1. *Within 7 days the defendants' attorneys serve on the plaintiffs' attorneys (i) a detailed schedule of accounting showing all rental income received in respect of property title number 60718/256 Cheshire Hall and Richmond Hill, Providenciales since and inclusive of October 2017; (ii) copies of all bank statements showing all and any rental income received in respect of the property and (iii) copies of all bank statements showing all and any expenditure on the property.*
  2. *Such further or other relief as to this Honourable Court seems fit.*
  3. *Costs*
8. The Plaintiffs' application is supported by the Second Affidavit of Sugar Ray Smith the 1<sup>st</sup> Plaintiff. Mr. Smith states that both Plaintiffs are each entitled to a 1/5 share in the Property and a 1/5 share each in the rental income generated by the Property from 2017 to present. However, they have been

refused access to the Bank account opened by the Defendants where the rental income is deposited and as a result, they do not know exactly how much their alleged total share in the rental income amounts to.

9. In response the 1<sup>st</sup> Defendant submitted an affidavit. She avers that the Plaintiffs are not entitled to the requested information for the following reasons:
  - a. *“The Defendants decided to put the 1<sup>st</sup> Plaintiff’s name on the bank account at Royal Bank Canada because he was the only male figure around at the time and in the event the Defendants were not present to sign on cheques, the 1<sup>st</sup> Plaintiff would be the second signature on the checking account”*;
  - b. The request for specific discovery is improper and premature;
  - c. The Plaintiffs can show no legal justifications why the information should be provided;
  - d. The property being claimed formed part of the estate of the deceased and the Defendants are the sole beneficiaries of the deceased estate.

## SUBMISSIONS

10. Mr. McKnight referred me to O.24, submitting as follows:-

*O.24, r.12 of The Civil Rules 2000 is identical to O.24, r.12 of The Supreme Court Practice 1999. Both provisions provide that at any stage of the proceedings in any cause or matter the Court may, subject to rule 13(1), order any party to produce to the Court any document in his possession, custody or power relating to any matter in question in the cause or matter and the Court may deal with the document when produced in such manner as it thinks fit.*

*O.24, r.13 (1) provides ‘No order for the production of any documents for inspection or to the Court, or for the supply of a copy of any document, shall be made under any of the forgoing rules unless the Court is of the opinion that the Order is necessary either of disposing fairly of the cause or matter or for saving costs’.*

*O.24, r.13 (2) provides ‘Where on an application under this Order for production of any document for inspection or to the court, or for the supply of a copy of any document, privilege from such production or supply is claimed or*

*objection is made to such production or supply on any other ground, the Court may inspect the document for the purpose of deciding whether the claim or objection is valid'*

11. Mr. McKnight submits that the test is one of relevance, and necessity for fair disposal of the matter, as well as saving costs. He submits that the Plaintiffs are entitled to rental income generated from the Property since October 2017 which to the time of the application amounts to 7 years. The amount of rent collected for this period he submits is clearly relevant as the Plaintiffs cannot assess their financial claims. It is important that all parties and the court, know the sums involved and it is relevant when it comes to the matter of costs and the issue of proportionality i.e. how much the parties have incurred in costs when contrasted with the dollar figure to which the plaintiffs are entitled to.
12. He further submits that based on the witness statements from the Mortgagee the strength of the evidence in this case is in the Plaintiffs' favor, therefore if the Plaintiffs are successful, they would be entitled to know how much they are entitled to.
13. Mr. McKnight submitted in the alternative that if the Court does not wish to order disclosure, the court can inspect the banks statements for the purpose of deciding whether the claim or objection is valid.
14. Mr. Forbes on behalf of the Defendants submitted that the application for production was premature as legal title has not yet been determined and therefore the Plaintiffs have no legal entitlement to the Bank Statements at this time. Additionally, he submits that the Plaintiffs have failed to show the relevance of requesting the Bank Statements and how it would dispose of the matter fairly and save costs.

## **LAW**

15. As a preliminary consideration, request for inspection of documents mentioned in a list of documents is allowed under Ord. 24 r. 9. Where documents are not contained in the list of documents but mentioned in pleadings, affidavits or witness statements, any party pursuant to Ord. 24 r.10 can serve a notice on the other party requiring the document to be produced for inspection. Ord. 24. r. 11 provides that if documents as requested under r.9 and r.10 are not

produced for inspection subject to r. 13(1) the court can make an order for production under r.11.

16. Ord.24 r.7(1) is set out as follows: -

*'(1) Subject to rule 8, the Court may at any time, on the application of any party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any document specified or described in the application or any class of document so specified or described is, or has at any time been, in his **possession, custody or power** ...*

*(2) An order may be made against a party under this rule notwithstanding that he may already have made or been required to make a list of documents or affidavits under rule 2 or rule 3.*

*(3) An application for an order under this rule must be supported by an affidavit stating the belief of the deponent that the party from whom discovery is sought under this rule has, or at some time had, in his possession, custody or power the document, or class of document, specified or described in the application and that it relates to one or more of the matters in question in the cause or matter.'*

17. The wording in r.7 (1) requires an affidavit from the respondent stating that a certain document has or has not been in their possession, custody or power while r.12 (1) provides that the court, subject to the document being necessary for the fair disposition of the matter or for saving costs, may order any document in his possession, custody or power to the court.

18. In consideration of this, I am of the view that if documents were not part of the list of documents, nor were they mentioned in pleadings, affidavits or witness statements an application must first be made under r.7 to ensure that the documents are in the possession, custody or power of the Respondent before making an application under r. 12. The simple fact is that the Applicant must know what documents are in the possession of the Respondent before making an application for production, conversely a Respondent can only produce documents in their possession, custody or power.

19. The test for deciding on an application under r. 7 is set out in r.8 which states that the court must be satisfied that discovery is not necessary. The Court of Appeal in *Dolling-Baker v Merrett and others* [1991] 2 All ER 890 stated per curium:

*“Whereas on an application under RSC Ord.24 r.8 for discovery of documents the burden is on the party objecting to the order to satisfy the court that discovery is not necessary, Ord. 13 (1) places the burden of satisfying the court that production and inspection of documents is necessary on the party applying for the order”.*

20. I am therefore of the view that in the present case the fact that no mention was made of the detailed schedule of accounting and copies of bank statements showing rental income received either in pleadings, affidavits or witness statements or the Defendants’ list of documents an application was required under Ord.24 r.7. Such an application requires an affidavit from the Defendants firstly confirming the existence of such documents. Only then can an application be made under r. 10 or.12 for production or inspection.

21. In any event I move to consider the application in its current form.

22. The general principle underlying discovery was that set out by Brett LJ in *Cie Financière et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 at 63, where he said:

*‘It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may—not which must—either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary ... a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences ...’*

23. In *Dolling-Baker (supra)* the plaintiff, a Lloyd's underwriter, brought an action against the first defendant, the reinsurer under a reinsurance policy made with the plaintiff, and in the alternative against the second defendants, the

brokers who placed the policy with the first defendant, claiming moneys due under the policy. The first defendant by his defence claimed that he was entitled to avoid the policy for non-disclosure. A similar reinsurance policy written by the first defendant and placed by the second defendants with another underwriter had been the subject of arbitration proceedings which had resulted in an award upholding the first defendant's claim that he was entitled to avoid the policy for non-disclosure. The plaintiff applied for specific discovery under RSC Ord 24, r 7a and production and inspection under Ord 24, r 11(2)b of all relevant documents in the possession of both defendants relating to the arbitration. The judge allowed discovery on the grounds that the documents were relevant and not protected from discovery but refused the application for production of the documents. The first defendant then applied for an injunction restraining the second defendant from disclosing those documents to the plaintiff. The judge refused the application. The first defendant appealed against both orders, contending that the test for discovery was not the relevance of the documents but whether discovery was necessary for disposing fairly of the proceedings.

24. Parker LJ provided an exposition of Order 24 giving a thorough explanation of various rules within the Order which I now set out below:
- a. Rule 1 provides the general obligation to give mutual discovery of documents
  - b. Rule 2 provides for automatic discovery in certain cases
  - c. Rule 3 provides:
 

*'(1) Subject to the provisions of this rule and of rules 4 and 8, the Court may order any party to a cause or matter (whether begun by writ, originating summons or otherwise) to make and serve on any other party a list of the documents which are or have been in his possession, custody or power relating to any matter in question in the cause or matter, and may at the same time or subsequently also order him to make and file an affidavit verifying such a list and to serve a copy thereof on the other party ... '*
  - d. Rule 7 (set out above)
  - e. Rule 8, to which both rr 3 and 7 are subject, provides:
 

*'On the hearing of an application for an order under rule 3, 7 or 7A [which is not immediately relevant] the Court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or, as the case may be, adjourn the application and shall in any case refuse to make such an order if and so far, as it is of opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs.'*



- f. It is to be noted that r 8 imposes a bar only if the court is of the opinion that the discovery is not necessary either for disposing fairly of the cause or matter or for saving of costs.
- g. So far, the rules are dealing with discovery in the sense of listing by affidavit, or by lists unverified or verified by affidavit. They are not dealing with production or inspection. The rules which deal with production and inspection begin at r 9.
- h. Rule 11 provides:
  - (2) Without prejudice to paragraph (1) but subject to rule 13(1) the Court may, on the application of any party to a cause or matter, order any other party to permit the party applying to inspect any documents in the possession, custody or power of that other party relating to any matter in question in the cause or matter.*
  
  - (3) An application for an order under paragraph (2) must be supported by an affidavit specifying or describing the documents of which inspection is sought and stating the belief of the deponent that they are in the possession, custody or power of the other party and that they relate to a matter in question in the cause or matter.'*
- i. Rule 12 and 13 (are set out above)
- j. It is to be noted that in contrast with r 8, which provides that the order is not to be made if and so far as the court is of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs, under r 13(1) the provision is that no order is to be made unless the court is of the opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.

25. Parker LJ continued:

*It is submitted on behalf of the first defendant that the effect of r 13(1) is that the burden of satisfying the court that production and inspection is necessary is squarely upon the party applying; whereas under r 8 it is for the party who is objecting to any such order to satisfy the court that discovery by list or affidavit is not necessary. It appears to me that that approach and submission are correct, and there is a perfectly sensible reason for it. If one is merely at the stage of discovery, it does no harm in most cases for the party against whom discovery is sought merely to list his documents. That discloses that he has them, or has power over them. But he can object to produce them on the grounds of privilege or, indeed, on any other ground. At that stage not very much has occurred except that the applying party will be enabled*

*to know what documents the objecting party has, and it is right that the burden should be upon the objector in such a case. When, however, one gets to the stage of production and the document is to be produced to the court or the other side, the position is different, and it should be (and the rules appear to me to state with complete clarity) that it is for the party seeking production to satisfy the court that such production is necessary for the purposes specified in r 13(1), namely for disposing fairly of the cause or matter or for saving costs.*

26. The meaning of ‘*disposing fairly*’ was considered by Bingham MR in *Taylor v Anderton (Police Complaints Authority intervening)* [1995] 2 All ER 420 at 434, [1995] 1 WLR 447 at 462, where he said:

*‘The crucial consideration is, in my judgment, the meaning of the expression “disposing fairly of the cause or matter”. Those words direct attention to the question whether inspection is necessary for the fair determination of the matter, whether by trial or otherwise. The purpose of the rule is to ensure that one party does not enjoy an unfair advantage or suffer an unfair disadvantage in the litigation as the result of a document not being produced for inspection. It is, I think, of no importance that a party is curious about the contents of a document or would like to know the contents of it if he suffers no litigious disadvantage by not seeing it and would gain no litigious advantage by seeing it. That, in my judgment, is the test.’*

27. In *Wallace Smith Trust Co Ltd (in liq) v Deloitte Haskins & Sells (a firm) and another* [1996] 4 All ER 403 in an application for production under Ord 24 r. 13 Neill LJ sets out what he considers as the correct approach under r.13. I now express this below:
- a. The general principles underlying discovery remain those contained in the judgment of the Court of Appeal in the Peruvian Guano case *supra*
  - b. Where the Court is asked to make an order for the production of documents for inspection it is clear that an order is not to be made unless the court ‘*is of the opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs*’
  - c. It is for the party making the application for production to satisfy the court that the test of necessity is satisfied (*see Ventouris v Mountain* [1991] 3 All ER 472 at 486, [1991] 1 WLR 607 at 622 per Parker LJ).
  - d. In considering the application the court should bear in mind the words of Bingham MR in *Taylor v Anderton* [1995] 2 All ER 420 at 434, [1995] 1

*WLR 447* at 462 that the 'purpose of the rule is to ensure that one party does not enjoy an unfair advantage or suffer an unfair disadvantage in the litigation as the result of a document not being produced for inspection'

- e. In addition, the court is entitled to take into account whether the documents are confidential and, if so, whether the necessary information could be obtained by some other means. In *Science Research Council v Nassé* [1979] 3 All ER 673 discovery was sought, in the context of a complaint of discrimination, of the records of other persons interviewed for the post for which the complainant had applied. In giving guidance on the matter, Lord Wilberforce said

*'There is no principle in English law by which documents are protected from discovery by reason of confidentiality alone. But there is no reason why, in the exercise of its discretion to order discovery, the tribunal should not have regard to the fact that documents are confidential, and that to order disclosure would involve a breach of confidence ... The ultimate test in discrimination (as in other) proceedings is whether discovery is necessary for disposing fairly of the proceedings. If it is, then discovery must be ordered notwithstanding confidentiality. But where the court is impressed with the need to preserve confidentiality in a particular case, it will consider carefully whether the necessary information has been or can be obtained by other means, not involving a breach of confidence ... In order to reach a conclusion whether discovery is necessary notwithstanding confidentiality the tribunal should inspect the documents. It will naturally consider whether justice can be done by special measures such as "covering up", substituting anonymous references for specific names, or, in rare cases, hearing in camera.'*

- f. The court should examine the facts of the individual case and in particular should consider: (a) the central issues in the action; (b) the nature of the documents; and (c) the information which the documents are likely to contain.
- g. The judge has a discretion whether or not to inspect the documents. But if the party seeking discovery shows that the production of the documents may be necessary for the fair disposal of the action an order should normally only be refused after the court has examined the documents and considered them in the light of the material already in the applicant's possession. Indeed, as is apparent from the speech of Lord Wilberforce in *Science Research Council supra* the court will need to inspect the documents where relevance is admitted but it is asserted that the documents are confidential.

28. In addition to the guidance provided by Neill LJ, Simon Brown LJ also provided guidance on the application of r.11 and r.13 which I express as follows:-

- a. The burden lies upon the party holding the documents to show that they are not discoverable, i.e. not relevant (r.7)
- b. The burden lies on the party seeking inspection to show that that is necessary for the fair disposal of the action. (the question of 'saving costs', the other limb of r 13(1), was not considered as it was not relevant.)
- c. If no element of confidentiality (or, of course, public interest immunity—but that only becomes relevant on the cross-appeal) is asserted in the documents, routinely they will be produced for inspection without the need for a r 13 hearing on the issue of necessity. As Lord Scarman said in *Air Canada v Secretary of State for Trade (No 2)* [1983] 1 All ER 910 at 924, [1983] 2 AC 394 at 444:

*It may well be that, where there is no claim of confidentiality or public interest immunity or any objection on the ground of privilege, the courts follow a relaxed practice, allowing production on the basis of relevance. This is sensible, bearing in mind the extended meaning given to relevance in Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co (1882) 11 QBD 55.'*

- d. If confidentiality is asserted or any other ground of objection arises, r 13 assumes relevance and it becomes necessary to decide whether inspection is necessary for the fair disposal of the action. As Lord Scarman had earlier said in *Science Research Council v Nassé, BL Cars Ltd (formerly Leyland Cars) v Vyas* [1979] 3 All ER 673 at 699, [1980] AC 1028 at 1089:

*'The only complicating factor is the confidential nature of relevant documents in the possession of the party from whom redress is sought. The production of some of these may be necessary for doing justice to the applicant's case. If production is necessary, they must be produced. The factor of confidence however militates against general orders for discovery and does impose upon the tribunal the duty of satisfying itself, by inspection if need be, that justice requires disclosure.'*

- e. Disclosure will be necessary if: (a) it will give 'litigious advantage' to the party seeking inspection (see *Taylor v Anderton (Police Complaints Authority intervening)* [1995] 2 All ER 420 at 434, [1995] 1 WLR 447 at 462 per Bingham MR); (b) the information sought is not otherwise available to that party by, for example, admissions, or some other form of proceeding (eg interrogatories) or from some other source (see eg *Dolling-Baker v*

- Merrett [1991] 2 All ER 890 at 899, [1990] 1 WLR 1205 at 1214*); and (c) such order for disclosure would not be oppressive, perhaps because of the sheer volume of the documents (see eg *Nassé [1979] 3 All ER 673 at 688, [1980] AC 1028 at 1076* per Lord Edmund-Davies).
- f. If a prima facie case is made out for disclosure, then as several of the speeches in *Nassé* make plain, the court will first inspect the documents: (a) to ensure that inspection is indeed necessary (that very safeguard of itself making the court generally readier to accept that the threshold test for disclosure is satisfied) and (b) assuming it is, to see if the loss of confidentiality involved can be mitigated by: (i) blanking out parts of the documents, and/or (ii) limiting disclosure to legal advisers only.

## DISCUSSION

29. Mr. McKnight's summons for specific discovery pursuant to Ord.24 r.12 seems to be flawed as he requested the documents to be produced to the Plaintiffs' Attorney. As indicated above, r.12 requires the documents to be produced to the Court pursuant to the test laid out in r. 13 (1) on the basis that it is necessary either for disposing fairly of the cause or matter or for saving costs.
30. As indicated in *Dolling- Baker and Wallace Smith (supra)* the burden to prove the test in r.13(1) is placed on the applicant. Mr. McKnight submitted that the test is one of *relevance, necessity, and for fair disposal of the matter as well as saving costs*, this is partly incorrect as relevance is not a factor to be considered.
31. Mr. McKnight requests a detailed schedule of rental income and bank statements, I take judicial notice that these are confidential documents. In order to have these documents produced to the Plaintiffs he must prove :-
- a. That inspection or production is necessary for the fair determination of the matter and by not having disclosure of the documents it amounts to an unfair disadvantage to his clients. (see *Taylor v Anderton* per Bingham MR supra)
  - b. Where the documents are confidential in nature as in this case the Court must have regard to breach of confidentiality (see *Science Research Council v Nasse* per Lord Wilberforce supra)
  - c. The Judge has a discretion whether to inspect the documents. However, it must first be proven that the documents are necessary for the fair disposal of the action or for saving costs. In such a case if the court is minded to

refuse production it can only do so after inspection. (see Science Research Council v Nasse per Lord Wilberforce supra)

32. Mr. McKnight's submission is that the documents are necessary because the Plaintiffs must have an idea of how much rent they are claiming, no other evidence or support was provided to prove how these documents are necessary or would save costs. Mr. Forbes submits that the application is premature. I am minded to agree with him. A detailed schedule of accounting in respect of rental income for the Property and Bank Statements are confidential documents that should only be released to persons entitled to such. The Plaintiffs currently seeks an Order from the court that they are entitled to an interest in the Property, on a review of the pleadings the extent of the claim in respect of rent from the Property is unclear and will be a matter for the trial Judge. I am of the view that until such a decision is issued by the Court granting the Plaintiffs each a 1/5 share in the Property, there is no entitlement to accounting information relating to the Property and by extension rent.

33. In the circumstances I find that Mr. McKnight has failed to prove that the requested documents is necessary for fairly disposing of the matter or for saving costs. I also find that his summons under Ord.24 r.12 is defective.

## DISPOSITION

34. The Plaintiffs application is dismissed. The costs of and occasioned by the application, to be taxed on the standard basis if not agreed.

Narendra J. Lalbeharry  
Registrar Supreme Court  
Turks and Caicos Islands

