



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 2155 of 2000

TARLOCK SINGH NANDHRA

MAHENDRA PATEL

DINESH SHAH

**TAJDIN JIWA (suing on their own behalf and on behalf of the Depositors
of TRUST BANK LTD.....PLAINTIFFS**

VERSUS

ROBIN CAHILL

ANDREW GREGORY

WILFRED MURIITHI

ANIS PRINGLE

CHARLIE APPLETON

DAVID POWELL

BRIAN D'SOUZA

RICHARD NDUNGU

ZAHIR SHEIKH

JOSPHAT MWAURA

(trading as KPMG PEAT MARWICK)DEFENDANTS

RULING

By Chamber Summons dated 4th May, 2006, brought under Order VI Rule 8, Order X Rule 11 and Order XIV Rule 2 of the Civil Procedure Rules, the defendants herein seeks orders as follows:

1. The plaintiffs do within a time to be stipulated by the Court provide particulars of the Amended Plaintiff filed on 22nd January, 2001 and the Reply to Defence filed on 15th March, 2001 in response to the Requests for Particulars dated 10th April, 2006.
2. Directions be given for discovery of documents to take place within a time to be stipulated by the Court after the Particulars have been provided. Such discovery to provide for full and proper discovery of all documents which are or have been in the possession or power of:
 - a. The plaintiffs;
 - b. The person who are represented by the plaintiffs; and
 - c. The defendants

And which are relevant to the issues or matters to be determined in this case.

3. Directions as to whether the parties may disclose and use in court at the hearing of the case documents relating to the accounts of customers of Trust Bank Limited who are not parties to this case.
4. Directions as to whether the parties may disclose and use in court at the hearing of the case documents relating to inspections of Trust Bank Limited by Central Bank of Kenya.
5. Directions be given as to whether the issue raised in paragraph 1 of the Defence should be determined before any evidence is given or any question of fact is tried.
6. The costs of the application be provided for.

As per the grounds stated on the body of the application, and the affidavit sworn by Andrew Douglas Gregory on 4th May, 2006, the grounds upon which the application is premised can be paraphrased as follows:

- (i) That the particulars requested are necessary to enable the defendants understand the precise allegations made against it in order to identify the matters in issue.
- (ii) That it is necessary for directions to be given for discovery to enable the parties provide full disclosures, so as to enable them properly prepare for the hearing of the suit.
- (iii) That the requested particulars and discovery are necessary to enable the court appreciate whether the issues are common to every member of the class represented by the Plaintiff.
- (iv) That there is need for the court to give directions regarding the examination of the accounts and affairs of individual customers of Trust Bank Ltd who are not parties to this suit in view of Sections 26, 31(1), 31(2) of the Banking Act and Section 28(1)(g) of the Accountants Act.

It is contended that the Plaintiff's allegations relate to matters pertaining to audits of Trust Bank Ltd done by the defendants between 1990 and 1998 and also a scheme of arrangement relating to Trust Bank Ltd in 1998 and 1999 and this allegations will involve a detailed examination of accounts of customers of the bank covered by the duty of confidentiality owed by a bank to its customers.

Some of the allegations relate to information provided to Central Bank of Kenya and to inspections

carried out by the Central Bank of Kenya pursuant to the Banking Act. In particular, it is noted that the plaintiff intends to rely on confidential Inspection Reports prepared by Central Bank of Kenya, and management letters prepared by KPMG which contain details of the individual customers of Trust Bank Ltd, information which is protected under **sections 31 & 32** of the Banking Act & **section 28** of the Accountants Act.

Noting that the Plaintiffs cause of action as evident from paragraph 5 to 11 of the amended plaint is based on breach of statutory duty, and paragraph 12 to 18 based on negligence, while paragraph 19 to 22 is based on fraud alleged to have been committed by the defendants in the scheme of arrangement after the re-opening of Trust Bank Ltd, it was submitted that each of the persons represented in the representative suit would have to prove their case without working out injustices to the parties. The cases of ***Carnie & Ano. vs. Esanda Finance Corporation Ltd (1994/1995) 182 CLR 398*** and ***Prudential Assurance Co. Ltd vs. Newman Industries Ltd (1981) Ch 229*** were cited for the proposition that issues common to every member of the class represented will have to be decided after full discovery.

It was therefore submitted that the named plaintiffs have to give proper particulars of the representation upon which they are relying, together with details of the individual deposits, the transactions in each deposits and the loss suffered by each individual. The identity and particulars of all the represented 30,780 persons and their deposits should also be revealed to enable the defendants address the case in respect of each person. These particulars were necessary to identify which depositors were paid under the scheme of arrangement before the bank went into liquidation.

It was maintained that the particulars of the amended plaint supplied by the defendant on the 6th November 2006 and particulars of reply to the defence given on 13th November, 2006, did not adequately address all the areas covered in the defendant's request for particulars.

Some of the areas not adequately covered were identified as particulars given in respect of paragraphs 1, 3, 5, 8, 9, 10, 11, 12, 18, 19 and 21 of the amended plaint.

Relying on the case of ***Humphreys & Co. vs. the Taylor Drug Co. (1988) 39 Ch D693***, where in an action for infringement of trademark, it was held that the defendant was entitled to discovery of the names and addresses of the diverse persons alleged to have been induced to purchase the goods of the defendant as and for the goods of the plaintiff, it was contended that the defendants herein were entitled to discovery of the names and addresses of the persons represented by the plaintiffs. Reliance was further placed on ***Newport (Mon) Slipway Dry Dock & Engineering Co. vs. Paynter (1887) 34 Ch D88*** wherein it was held that an entry might be wrong in different ways, therefore, the mere specification of the entries complained of did not give the defendants sufficient information of the nature of the case they had to meet, and that the plaintiffs must state shortly as to each item, the general nature of the objection made to it. It was submitted that the nature of impropriety and the fraud alleged had to be given, as the allegation of false entries alone was not sufficient.

Regarding discovery, it was submitted that the Plaintiff must make discovery of all the documents for the 4 year period in which his cause of action arose. In this regard, the case of ***Flight vs. Robinson 9ER 9*** was relied upon. It was submitted that since **section 26(1)** and **section 31(2)** of the Banking Act prohibits the defendant from relying on the information which it had given to Central Bank, there was need for the court to give directions as to what it can disclose. The court was referred to the case of ***Bank of Credit and Commerce International (overseas Ltd) (in liquidation) & Others vs. Pricewaterhouse (No.2) [1998] Ch 84*** and in ***Re-Galileo Group Ltd (1999) Ch 100***.

The Plaintiffs opposed the application through grounds of objection filed on 2nd March, 2007 wherein it is contended -

- That the application is misconceived and does not lie.
- That the honourable court does not have powers to grants prayers no.2 and 3 of the application as pleaded.

- That prayer No.1 of the application has been overtaken by events as the plaintiff has already provided the particulars as required under law.
- That prayer No.5 of the said application is premature and has no merit.

It was submitted that the procedure for summons for directions having been abolished through amendment of the rules **Order X** of the Civil Procedure Rules must be invoked for discovery of documents. It was contended that the defendants' prayers for directions does not therefore lie. It was submitted that the defendants cannot rely on **section 32** of the Banking Act because the plaintiffs were trying to enforce the provisions of the Banking Act and were therefore covered by **section 32 (c)** of that Act. Counsel for the Plaintiff relied on **Trust Bank Ltd vs. Ajay Shah & 3 Others, HCCC (Milimani) 875 of 2001**, wherein Azangalala J, overruled an objection based on **section 32(2)(c)** of the Banking Act on the grounds that the confidentiality protected by **section 32(2)(c)** does not prevent the use of such information in Judicial proceedings.

It was maintained that the request for particulars relates to information which is within the defendants' knowledge, information and possession. Relying on **Flight vs. Robinson 9 ER 9**, wherein it was stated that the general rule is that a defendant is bound to discover all the facts within his knowledge, and to produce all documents in his possession which are material to the case of the plaintiff, it was submitted that the defendants herein have already been served with a notice under **Order X Rule 15** of the Civil Procedure Rules to produce documents under their possession.

On particulars relating to negligence, it was submitted that plaintiffs have already supplied particulars showing that the defendants were negligent in preparing audit reports which did not reflect the true position of the financial affairs of the bank. Relying on **Newport (Mon) the Slipway Drydock & Engineering Co. vs. Paynter (1887) 34 Ch D 88**, it was submitted that the nature of impropriety and fraud has been disclosed and that particulars of negligence, breach of statutory duty and fraud have also been disclosed in the amended plaint. It was submitted that the court could only deal with this matter after the defendants have disclosed documents in their possession. It was contended that the defendants as auditors ought to have ensured compliance of all statutory requirements by the Trust Bank Ltd and ensured compliance with procedures such as advertisements. It was contended that information regarding the names of the plaintiffs and the quantum of loss was within the defendants' possession and knowledge as they had prepared the scheme of arrangement.

It was contended that information disclosed in the scheme of arrangement such as insider loans, ought to have been disclosed in the audited accounts for the Trust Bank and disclosure made to Central Bank. The defendants' failure to make this disclosure was negligence. It was maintained that the particulars supplied were adequate, and that the defendants were in actual fact seeking discovery under the cover of particulars. It was submitted that there was need for complete discovery to be done.

In response to these submissions, it was contended that the functions of the defendants was only to audit and not to prepare the bank's accounts. It was therefore, maintained that the defendants did not have all the accounting information hence the need for the particulars. It was maintained that **Order X Rule 11 (2)** of the Civil Procedure Rules gives the court powers to give direction.

I have considered the application, the affidavit in support, the grounds of objection, the submissions of counsels and the authorities cited. Regarding the issue raised in paragraph 1 of the defence, i.e. whether the plaint should be struck off under **Order VII Rule 1(3)** of the Civil Procedure Rules, for failing to comply with the mandatory provisions of **Order VII Rule 1(2)** of the Civil Procedure Rules, that is a matter which cannot be dealt with by way of directions. It is a matter in respect of which the defendants must bring a substantive application if they intend to seriously pursue the issue.

It is obvious from the record, that the plaintiffs have endeavoured to supply the particulars requested by the defendants through the answer to the request for particulars of the amended plaint, filed on the 6th November, 2006 and the answer to the request for particulars of the reply to defence, filed on 13th November, 2006. These particulars were supplied after the defendants' chamber summons was filed in

court. The issue now is whether the answer to the request for particulars sufficiently provides the required particulars.

Halsbury's Laws of England Vol.30 at para 37 states as follows:

“The function of particulars is to limit the generality of the allegations in the pleadings, and thus to define the issues which have to be tried and as to which discovery must be given. Each party is entitled to know the case that is intended to be made against him at the trial, and to have such particulars of his opponent's case as will prevent him from being taken by surprise; but a party is not entitled to an order for particulars for the purpose of ascertaining the evidence upon which his opponent proposes to prove his case, nor is it the function of particulars to fill gaps in a statement of claim from which a material statement has been omitted.”

The above provides an appropriate guide through which the pleadings and the particulars supplied by the plaintiff must be looked at to determine whether the defendant has been given sufficient particulars to enable him understand and appreciate the nature of the case against him. In this regard, a distinction must be drawn between particulars supplied in answer to request for further particulars of pleading and which therefore, form part of pleadings, with general discovery which is provided for under Order X of the Civil Procedure Rules, and which comes after the issues have been clearly defined from the pleadings. With this in mind, I proceed to examine the specific request for particulars and the answer thereto.

With respect to paragraph 1 of the amended plaintiff, the defendants sought further particulars as follows:

- a) The identity of the depositors of Trust Bank as at 18th December, 1988 by name, address, account number, account type, account balance and branch.
- b) When the plaintiffs' were elected to represent the depositors, how the election was conducted and whether the plaintiffs are still directors.

The plaintiffs' answer to that request is that the defendants have knowledge of the particulars requested and this is confirmed in the scheme of arrangement prepared by the defendants which is in the plaintiffs' bundle of documents. The plaintiffs' have also referred to the minutes of creditors' meeting held on 30th June, 1999 which is document No.14 in the plaintiffs' bundle. The plaintiffs have pleaded that they are bringing the action on their own behalf and in a representative capacity on behalf of the depositors of Trust Bank Ltd. The plaintiff has sufficiently identified the class of persons on whose behalf the suit is being brought. That would have been sufficient if the plaintiffs were only seeking declaratory orders. Nevertheless, the plaintiffs are claiming damages in the sum of Kshs.8,105,000,000 from the defendants as the value of the deposits lost when the Bank was declared insolvent and placed under statutory management. The defendants are thus entitled to know the name and address of each depositor and the value of his/her deposit which was lost. Although the scheme of arrangement may contain the names of all the depositors, some depositors may have been paid through the Deposit Protection Fund and others may have negotiated their bearer certificates and may therefore not have been subject of the loss complained of by the plaintiffs. The plaintiffs must therefore, come out clearly and identify the particular depositors whose loss is subject of the claim. In my considered view, details relating to the account number, type of account, and branch at which account held are matters of evidence which ought not to be pleaded at this stage. The plaintiffs have further given sufficient particulars relating to their authority to represent the depositors. The information provided is sufficient for purposes of pleadings.

With regard to paragraph 3 of the amended plaintiff, the defendants requested particulars of the allegation that the plaintiffs were at all times depositors in Trust Bank Ltd. However, the particulars requested such as when each plaintiff became a depositor in Trust Bank Ltd, what amount each plaintiff deposited on first becoming a depositor, what amount each plaintiff had on deposit as at 18th September, 1998 are all matters of evidence and not necessarily pleadings. Moreover, the plaintiffs have disclosed the documents upon which they rely, and these together with the particulars ordered to be supplied in respect of paragraph I should provide adequate information to the defendant. Regarding the particulars for the allegation that the plaintiffs are duly appointed representatives of the depositors of Trust Bank Ltd, the

plaintiffs have supplied sufficient particulars and in my view, the particulars supplied are adequate.

The defendants contended that particulars supplied in respect of paragraph 5 and 8 of the amended plaint regarding minimum financial disclosure prescribed from time to time by the Central Bank of Kenya, were not adequate. However, the plaintiffs have provided one of the financial provisions upon which they rely. In my considered view, it is a matter of discovery as to which documents the plaintiffs intend to rely upon and no further particulars are therefore, necessary.

Concerning paragraph No.9 of the amended plaint, the defendants required particulars of the allegation that “Trust Bank Ltd published the statutory audited reports for each year together with its financial statements every year in the national newspapers.” In their response, the plaintiffs maintain that the defendants have knowledge of the particulars requested as it was a compliance requirement which the defendants as auditors were required to and must have ascertained before issuing the audit reports. Again, publication of accounts is a matter of evidence to be disclosed during discovery.

With regard to paragraph No.10 of the amended plaint, the plaintiffs referred the defendants to the management letters for the financial year ended 31st December, 1996 and the financial year ended 31st December, 1997. The defendants have complained that no document was given in respect of the years 1995 and 1998. Obviously, disclosure of documents is a matter for interrogatories or discovery, and if by the time discovery is finalized, the plaintiffs will not have availed documents in respect of the years 1995 and 1998, the defendants will be at liberty to bring an appropriate application. For purposes of pleadings, it is enough that the plaintiffs contend that specific findings were made in the management letters.

Relating to paragraph No.11 of the amended plaint, it is not practical at this stage for the plaintiffs to give particulars of the balance sheet relied upon in respect of each individual. The defendants have been given a general picture that the claim against them arise by virtue of their having prepared the audited accounts and balance sheet for Trust Bank Ltd. The plaintiffs have further made it clear that the figure forming the subject of their claim arise from the scheme of arrangement which was prepared by the defendants. The particulars supplied are adequate and the defendants can only secure any further information by way of discovery.

As concerns paragraph No.12 of the amended plaint, the particulars supplied by the plaintiffs is clear that the plaintiffs relied on the provision of the law and policy regarding the requirement for preparation and publication of balance sheets, profits & loss accounts and relied on the same for information and guidance.

Regarding the particulars in respect of paragraph 16 of the amended plaint, the defendant has sought particulars of the balance sheet such as the specific years of the balance sheets, how defendant caused each to be published, in what way they were not correct, details of the inaccuracies, how they represented a deceptive view of the financial status of Trust Bank Ltd, and how the defendants caused or permitted such entries to be contained or published in the said balance sheets. Looking at the particulars of negligence, which were provided in paragraph 16 of the amended plaint, and the answer to the particulars which refers the defendant to specific documents I am satisfied that the particulars supplied are sufficient, to enable the defendant understand the case against it, the plaintiffs have given material facts upon which they intend to rely and the defendant can only elicit further information through discovery.

Further particulars were required with regard to paragraph 18 of the amended plaint for the amount of the deposit lost by each of the plaintiffs on 18th September, 1998. The plaintiffs have referred the defendants to the scheme of arrangement which the defendants maintain is not adequate. For reasons given in respect of particulars for paragraph 1 of the Amended plaint, it is necessary that the plaintiffs provide particulars of their specific loss and therefore, further particulars should be provided in respect of paragraph 18.

With respect to paragraph 19 of the amended plaint, the defendants sought to know first, whether the advice of the statutory manager was written or verbal, if written, documents should be identified and if verbal, made by whom to whom and when, and secondly, whether the advice of the defendants was

written or verbal, if written documents should be identified, if verbal, made by whom to whom and when. The plaintiffs have responded that in both situations, the advice was oral. It has given particulars of the persons who gave the advice and information when such advice was given. Specific dates may not have been given, but the information provided is sufficient to enable the defendants appreciate the allegations being made against them. To demand more is to ask the plaintiffs to disclose its evidence in pleadings.

Particulars which were required in respect of paragraph 21 of the amended plaint are similar to those of paragraph 19 of the amended plaint, and I would make the same conclusion as for paragraph 19. Sufficient particulars have also been supplied with regard to paragraph 21(a) and 21 (b) of the amended plaint.

With regard to particulars sought in respect of paragraph 21 (c), 21 (e), 21 (f) and 21 (g), the plaintiff has disclosed the specific documents upon which they rely. They have also given specific dates of the meetings. In my view, the information supplied is sufficient for purposes of pleadings, and any further information can only be pursued by way of discovery.

With regard to paragraph 21 (k) of the amended plaint, the defendants sought first, particulars of the circumstances relied upon by the plaintiffs in alleging that the defendants owe a duty of disclosure to which the plaintiffs referred the defendants to paragraph 21 (m) of the amended plaint wherein particulars of fraud were given. In my view, that sufficiently provides adequate particulars. Secondly, the defendants sought details of all monies alleged to have been embezzled by the directors including the date and amount of each transaction complained of, and the identity of the director or shareholder. To this the plaintiff responded that the particulars have already been supplied above. However, my examination of the answer to the particulars has not come across any such information. Embezzlement and fraud are serious allegations in respect of which clear particulars must be provided. The plaintiffs must therefore provide the required particulars of paragraph 21 (k) of the amended plaint in this regard.

With regard to paragraph 21 (n) of the amended plaint, the plaintiffs have provided sufficient particulars regarding the alleged fraud and have clearly indicated the documents relied upon. Subject to the production of particulars of the insider loans and non-performing loans [already referred to in respect of paragraph 21 (k)], the particulars provided in respect of this paragraph are adequate.

I therefore come to the conclusion that except for particulars in respect of paragraph 1, paragraph 18, and paragraph 21 (k) of the amended plaint, the answer to particulars provided by the plaintiffs is sufficient.

With regard to directions for discovery of documents, I note that the plaintiffs have already filed a bundle of documents. There has been no averment that the plaintiffs have failed or refused to make discovery. There is still a wide scope for the application of **Order X** of the Civil Procedure Rules. It would therefore, be premature at this stage to give any directions with regard to discovery without parties exhausting the provisions of **Order X** of the Civil Procedure Rules.

Regarding the disclosure of documents relating to accounts of individual customers of Trust Bank Ltd, who are not parties to this case and disclosure of documents relating to inspection of Trust Bank Ltd by Central Bank of Kenya, it is apparent that there is banker/customer confidentiality relationship which restricts the disclosure of such documents by Trust Bank Ltd. As accountants who carried out audit of the Trust Bank Ltd, the defendants are under section 28(g) of the Accountants Act, Cap.531, restricted from “disclosing information acquired in the cause of professional engagement, to any person other than a client, without the consent of the client, or otherwise than as required by law” **otherwise** they will be guilty of professional misconduct. This imposes a general duty of confidentiality to protect the interest of the client whose affairs may otherwise be disclosed in a manner that may be prejudicial to its business. (e.g. unfair advantage to client’s competitors through disclosure of vital information, or loss of business from the client’s customers who do not wish their affairs to be made public). In this case, the client, Trust Bank Ltd is no longer in business and such considerations would not be compelling. Moreover, the plaintiffs belong to that category of protected customers of the Bank.

Further, although under **section 31(2)** of the Banking Act, an auditor is prohibited from disclosing or publishing any information which comes into his information as a result of the performance of his duties or responsibilities under the Act, **section 26** of the Banking Act provides an exception with regard to communication made in good faith to Central Bank on matters relevant to supervision and surveillance of the affairs of institutions. Moreover, the Act has provided under **section 32 (2)** for production of books of accounts for purposes of inspection. Information acquired during the course of such inspection is to be treated as confidential. Notwithstanding these provisions in a situation such as this one, where it is alleged that the inspection was vitiated by fraud and misrepresentation, defendants be allowed to hide under the cloak of confidentiality, as the court is trying to ascertain as to whether there was compliance with **section 32(2)** of the Banking Act. It may well be that the documents required to be disclosed may relate to affairs of third parties who are not party to this suit. These are, however, judicial proceedings and the need for justice and truth transcends any protection of confidentiality.

For these reasons, I do give directions that documents relating to accounts of customers of Trust Bank Ltd who are not parties to this case may be disclosed and further, that documents relating to inspection of Trust Bank Ltd by Central Bank of Kenya may also be disclosed.

The upshot of the above is that I make the following orders:

1. **That** the plaintiffs shall within 21 days from the date hereof, provide particulars relating to paragraph 1 of the amended plaint with regard to the names, addresses and account balances of the Depositors of Trust Bank Ltd on whose behalf the plaintiffs bring the representative suit, particulars of paragraph 18 with regard to the amount of deposit lost by each plaintiff as at 18th September, 1998, and particulars relating to paragraph 21(k) of the amended plaint, with regard to details of all monies alleged to have been embezzled by the Directors including the identity of the Director/Shareholder, date and amount of each transaction complained of.
2. **That** the parties shall proceed with discovery as provided under **Order X** of the Civil Procedure Rules.
3. **That** the parties shall be at liberty to disclose documents relating to the accounts of customers of Trust Bank Ltd who are not parties to this case and documents relating to inspection of Trust Bank Ltd by Central Bank of Kenya provided they are pertinent to the matters in issue.
4. **That** the cost of this application shall be in the cause.

Orders accordingly.

Dated signed and delivered this 3rd day of April, 2008.

H. M. OKWENGU

JUDGE