

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO COA2019APP00191

**BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE STRAW JA**

**BETWEEN CATHERINE ALLEN APPLICANT
AND GUARDIAN LIFE LIMITED RESPONDENT**

Ms Terri-Ann Guyah instructed by Ballantyne Beswick and Co for the applicant

Michael Hylton QC, Kevin Powell and Ms Shanique Scott instructed by Hylton Powell for the respondent

27 January and 19 May 2020

BROOKS JA

[1] Guardian Life Limited (hereafter referred to as “Guardian” or “the company”) has accused Ms Catherine Allen, an actuary and a former employee of the company, of improperly sharing and transferring its confidential information. Guardian, after terminating Ms Allen’s employment by way of redundancy, had her work laptop computer assessed by computer experts. The experts, Guardian alleges, found the evidence of the confidentiality breaches, which included the transfer of confidential material to Ms Allen’s personal email account.

[2] On 12 October 2018, Edwards J, as she then was, granted Guardian's application for an order allowing for a search of Ms Allen's home. The search empowered the search team to take and secure files, documents and data concerning Guardian's business and operations. The search order also allowed for the search to be conducted on personal computers, cellular telephones, tablets and other electronic media, whether physical or internet based. Guardian's application to Edwards J was made without any notice to Ms Allen.

[3] The search was conducted between 16 and 17 October 2018. Copies were made of Ms Allen's data, including her email.

[4] Ms Allen is aggrieved by the order and the search. She denies having improperly divulged any of Guardian's confidential information. She applied to the Supreme Court to:

- a. discharge the search order;
- b. prevent any analysis or divulging of the material that had been taken by the search team; and
- c. order the return of the material that had been taken.

Simmons J (alternatively, the learned judge) heard the application, and on 20 September 2019, refused it. She also refused permission to appeal.

[5] Ms Allen has renewed her application for permission to appeal. She contends, before this court, that the search order ought not to have been granted because, among other things, Guardian omitted to disclose critical information to Edwards J. Ms

Allen also contends that the search was improperly conducted. Consequently, Ms Allen asserts that Simmons J was wrong to have refused to discharge the search order.

[6] Ms Allen filed her application to this court within the stipulated time. There is, therefore, no issue as to her compliance with the procedural requirements (see rule 1.8(1) of the Court of Appeal Rules (CAR)). The main issue to be decided is whether Ms Allen's proposed appeal has a real chance of success (see rule 1.8(9) of the CAR and paragraphs [20] and [21] of **Duke St John-Paul Foote v University of Technology Jamaica (UTECH) and Another** [2015] JMCA App 27A).

The issues before Simmons J

[7] Ms Guyah, appearing for Ms Allen, submitted that there were six main reasons for asserting that Simmons J was plainly wrong in exercising her discretion to refuse Ms Allen's application. Learned counsel said that the learned judge failed to:

- a. appreciate that notice ought to have been given to Ms Allen of the application that was made before Edwards J;
- b. enforce the principle that material non-disclosure before Edwards J required the discharge of order;
- c. recognise that Guardian had failed to meet the requirements for the granting of a search order;
- d. appreciate that there were concurrent proceedings involving the same parties, before the Supreme Court,

which could have adequately addressed the issues raised by Guardian's complaint;

- e. recognise that Guardian's counsel's failure to make an accurate note of the proceedings before Edwards J, was in breach of an established rule of practice, and merited discharge of the order; and
- f. appreciate that it was inappropriate to award costs at an interlocutory stage, when the validity of the need for a search had not been established, since the matter had not yet been tried.

The sequence of these complaints is not the same as Ms Guyah presented them. They are set out in accordance with the chronological occurrence of the issues.

[8] These issues will be considered in turn below. It must however be noted that in order to succeed in this application, Ms Allen must demonstrate that the learned judge was plainly wrong in the exercise of her discretion in the matter (see paragraph [20] of **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1).

a. The absence of notice to Ms Allen of the application

[9] Ms Guyah submitted that Guardian should have given Ms Allen notice of the application for the search order and that failure to give such notice made the order improper. Mr Hylton QC, on behalf of Guardian, indicated that applications for search orders are acceptable exceptions to the notice requirement.

[10] Mr Hylton is correct on this issue. In **National Commercial Bank Jamaica Limited v Olint Corp Limited** [2009] UKPC 16, the Privy Council reinforced the stance that short notice is better than no notice. However, the Board expressly recognised that there are instances where notice to the defendant would defeat the object of the injunction. An application for a search order, previously known as an **Anton Piller** order (derived from **Anton Piller KG v Manufacturing Processes Limited and others** [1976] 2 WLR 162), is such an instance. In **NCB v Olint**, their Lordships said, in part, at paragraph [13]:

“...Although the matter [of giving notice] is in the end one for the discretion of the judge, *audi alterem partem* [hear the other side] is a salutary and important principle. Their Lordships therefore consider that a judge should not entertain an application of which no notice has been given **unless either giving notice would enable the defendant to take steps to defeat the purpose of the injunction (as in the case of a *Mareva* or *Anton Piller* order)** or there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act.” (Emphasis supplied)

[11] The application that went before Edwards J is therefore considered an exception to the general rule about notice. There is no prospect of success on this ground.

b. The matter of material non-disclosure

[12] On the issue of non-disclosure, Ms Guyah relied on the principle that where an application is made to the court, without notice to the respondent, the applicant has a responsibility to make, to the court, full and frank disclosure of all relevant matters. Failure to do so, learned counsel submitted, required the court to apply the sanction of

discharging any order that was made during the without-notice hearing. Ms Guyah relied on **Jamculture Limited v Black River Upper Morass Development Company Limited** (1989) 26 JLR 244 as an example of that principle being applied by this court.

[13] Learned counsel submitted that, at the hearing before Edwards J, Guardian failed to disclose at least five material issues. She submitted that the breaches consisted of:

- a. contending that Ms Allen had breached her duty of confidentiality, in emailing company material to her private email address, when there was, prior to her separation from the company, no company policy preventing that action;
- b. failing to disclose to the court that Ms Allen was entitled, in the course of her duties, to disclose material to persons outside of the company;
- c. failing to disclose that several of the email messages complained about, had been disclosed in a claim that Ms Allen had previously filed against Guardian for wrongful dismissal;
- d. failing to disclose that Guardian had offered Ms Allen a redundancy payment, which she had accepted, but Guardian had not paid; and

- e failing to disclose that, after Ms Allen's separation, Guardian had hired the actuary from Sagicor, which is said to be Guardian's main competitor.

[14] In response to Ms Guyah's submissions on this issue, Mr Hylton argued that the bases for the majority of Ms Allen's complaints, in this regard, were false. The remainder, he argued, were not material. He submitted that the evidence showed that:

- a. there was no introduction of a new policy regarding email after Ms Allen's departure, and in fact she had, during her employment with Guardian, signed a copy of the document containing the policy, submitting to its contents;
- b. Guardian's complaint was not about Ms Allen sharing information in the course of her duties, but rather, sending confidential information to persons, who had no right of access to such information;
- c. the complaint of overlapping of email messages between the two parallel claims is unfounded, for of the two examples of email messages said to form part of Guardian's complaint before Edwards J, one had not been disclosed in Ms Allen's claim against Guardian, and the other, although disclosed in her

claim, did not show that she had forwarded it to an employee at Sagicor; and

- d. the offer to make a redundancy payment, which Ms Allen, did not accept, was irrelevant to the application for the search order.

In addition, learned Queen's Counsel submitted that Guardian's hiring of the competitor's actuary was not relevant to the granting of the search order. That actuary, he submitted, had nothing to do with the dispute between the parties.

[15] In assessing these competing submissions, it is noted that although the principle endorsed in **Jamculture v Black River Upper Morass** predated the advent of the Civil Procedure Rules (CPR), it was followed by this court under the dispensation of the CPR. K Harrison JA, in **San Souci Limited v VRL Services Limited** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 108/2004, judgment delivered 18 November 2005, said, in part, at page 5 of the judgment:

"The authorities have made it abundantly clear that a [party seeking to set aside an order made on a without-notice application] need not go so far as to satisfy the court that the [disclosure of the undisclosed material] would necessarily have led the tribunal to reach a different conclusion. It is the evaluation of the evidence that is ultimately a matter for the tribunal alone. In **Brink's-Mat Ltd v Elcombe and Others** [1988] 3 All ER 188, Ralph Gibson LJ stated:

'The material facts are those which it is material for the judge to know in dealing with the application as made; **materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers:** see the *Kensington Income Tax*

Comrs case [1917] 1 KB 486 at 504 per Lord Cozens-Hardy MR, citing *Daglish v Jarvie* (1850) 2 Mac & G 231 at 238, 42 ER 89 at 92, and *Thermax Ltd v Schott Industrial Glass Ltd* [1981] FSR 289 at 295 per Browne-Wilkinson J'. (Emphasis supplied)

The challenge of the award would be a relevant factor for [the judge who made the order on the without-notice application (the first judge)], to consider when he comes to decide whether or not to grant permission to the [party seeking that order] to enforce the award. [The judge before whom the application to set aside the order was made (the second judge)] in my view, had erroneously concluded that even if [the first judge] knew of the non-disclosure, it would not have affected his decision." (Emphasis as in original)

Panton JA, as he then was, also disagreed with the approach of the second judge in that case. In his pithy style, he said, in part, at paragraph 6 of his judgment, "[t]o say that had [the first judge] been informed of the full facts he would have decided as he did, is to indulge in speculation of the highest order".

[16] In **Venus Investments Limited v Wayne Ann Holdings Limited** [2015]

JMCA App 24, Morrison JA, as he then was, distilled the principle that, in a without notice application, the applicant must disclose all material facts. He said at paragraph [25]:

"There is therefore an unbroken line of authority in support of the proposition that, on a without notice application, the applicant is obliged to act in good faith by disclosing all material facts to the court, including those prejudicial to its case, and that failure to do so may lead to an injunction being discharged. The duty of disclosure extends not only to material facts known to the applicant, but also to any additional facts which he would have known had he made proper enquiries. **Material facts are those which it is material for the judge hearing the without notice application to know and the issue of materiality is to**

be decided by the court, and not by the assessment of the applicant or his legal advisers. Nevertheless, there is a discretion reserved to the court to make a fresh order on terms, notwithstanding proof of material non-disclosure.” (Emphasis supplied)

[17] Material facts are all facts that would impact the mind of the judge when deciding whether or not to grant the order being sought. It is, however, accepted that, in the present case, there was no material non-disclosure by Guardian. The evidence supports Mr Hylton’s submissions, in that:

- a. Guardian showed that Ms Allen had agreed in writing, at the commencement of her employment, to comply with Guardian’s confidentiality policy;
- b. Guardian’s communication, after Ms Allen’s dismissal, to its staff, about the confidentiality policy, was by way of a reminder;
- c. email messages exhibited in Guardian’s application before Edwards J did show that Ms Allen had communicated certain information concerning Guardian’s internal operation, to senior individuals at Sagicor;
- d. there is no indication that those messages constituted part of Ms Allen’s duties;
- e. with one exception, the email messages exhibited by Guardian had not been included in the email messages, which had been disclosed in Ms Allen’s claim against

Guardian, and the one included did not show that it had been copied to an individual at Sagicor; and

- f. nothing in the antecedents of the replacement actuary had been shown to prohibit Guardian employing that person or making the employment relevant to the issues between Guardian and Ms Allen.

Simmons J, in a carefully written judgment, conducted an extensive analysis of the complaint of material non-disclosure. The learned judge found, as does this court, that there was no merit in Ms Allen's complaint about material non-disclosure.

[18] The learned judge said, at paragraph [100] of her judgment, that it might have been prudent for Guardian to have disclosed, during its application for the search order, that it had offered Ms Allen a payment by way of redundancy. She, however, accepted that it may not be relevant to the proceedings and did not warrant a discharge of the order. The fact is that Ms Allen did not accept the terms of the company's offer of payment, and Guardian, having received a report about the laptop, thereafter, withdrew its termination on the basis of redundancy, and terminated, instead, for cause. It is not clear why the learned judge thought that the offer would have been of interest to the court hearing the application for the search order.

[19] The learned judge made no error in finding that there was no material non-disclosure.

c. The satisfaction of the requirements for the granting of a search order

[20] Ms Guyah complained that Edwards J ought not to have granted a search order and that the order, once granted, ought to have been discharged. Her reasoning is that there was no evidence that Ms Allen was likely to destroy relevant material if she had been given notice of an application to disclose that material. Ms Guyah also argued that Simmons J failed to consider whether the test for the granting of the search order was met.

[21] Mr Hylton, in response, argued that there was enough evidence to support the granting of the search order.

[22] An analysis of these submissions requires an outline of the origin of the **Anton Piller** order, which is one of the most powerful orders that the Supreme Court can make in advance of a trial.

[23] The plaintiffs in that case, Anton Piller KG (Pillers), were German manufacturers who designed and copyrighted frequency converters for computers. Manufacturing Processes Limited (MPL) were Pillers' English agents. Pillers received information that MPL were in regular communication, and planned to share confidential information, with other German manufacturers, about Pillers' new converters. The information would allow the other manufacturers to develop equipment similar to Pillers'. Pillers applied, before Brightman J, for an interim injunction to refrain infringement of their copyright and also for a search order. Brightman J granted the interim injunction but refused the search order.

[24] On appeal, Brightman J's refusal was reversed. The English Court of Appeal held that although a search order should rarely be made and should only be granted where there is no other way to ensure justice is done, Pillers had satisfied the requirements. The court gave guidance that before a search order is made:

- (i) there must apparently be an extremely strong case;
- (ii) there must be serious potential, or actual damage, for the applicant;
- (iii) there must be clear evidence that the defendants have in their possession incriminating documents or things; and
- (iv) there must be a real possibility that the defendants may destroy these items before an application is heard with both parties present.

(See the judgment of Ormrod LJ at page 167 of **Anton Piller**.)

[25] Ms Allen's complaints on this issue will be assessed along the lines of that guidance, but the gravity of a search order cannot be understated. In **Lock International plc v Beswick and Others** [1989] 1 WLR 1268, Hoffmann J, as he then was, described the **Anton Piller** order, at page 1281, as:

"...The absolute extremity of the court's powers is to permit a search of a defendant's dwelling house, with the humiliation and family distress which that frequently involves."

(i) The strength of Guardian's case

[26] Ms Guyah argued that there were at least four areas in which Guardian's case against Ms Allen was proved not to be a strong one. They were:

- a. Guardian's complaint is that Ms Allen had sent confidential information to her personal email account, yet there is nothing in Guardian's policy that prevented that action and the action cannot constitute a breach of confidentiality;
- b. the absence of any evidence that Ms Allen had forwarded any relevant email from her personal email account;
- c. the lack of evidence of any mass deletions from Ms Allen's work laptop; and
- d. the evidence that a file was downloaded from Ms Allen's work laptop onto a removable device or hard drive was not, by itself, evidence of any breach of confidence.

[27] Ms Guyah's submissions do not address the gravamen of Guardian's complaint, which is that there is strong evidence that Ms Allen has been sharing Guardian's confidential information with unauthorised third parties, including persons employed to its main competitor, Sagicor. Her sending Guardian's material to her personal email account means that Guardian is at risk of her likewise improperly sharing that information to Guardian's detriment. Guardian has not stated the purpose for which Ms Allen shared the confidential information. Guardian can only speculate as to her reason for sharing the confidential information.

[28] These actions, if proved at a trial, are not only in breach of Ms Allen's contract of employment, but also very likely in breach of a fiduciary duty that Ms Allen would probably have owed to Guardian as its actuary and a senior employee. The test of whether a fiduciary duty is owed by an employee to an employer, is set out in **Helmet Integrated Systems Limited v Tunnard** [2007] IRLR 126 (at paragraph 37). In these circumstances, Guardian has satisfied the requirement that it should establish an "extremely strong *prima facie* case" against Ms Allen.

(ii) The risk of serious potential or actual damage to the applicant

[29] Ms Allen is alleged to have shared confidential information with Guardian's main competitor. This is sufficient evidence of potential damage to Guardian. It must be detrimental to an organisation for its major competitor to have information that is confidential to that organisation.

(iii) Proof of possession of incriminating documents or things

[30] There is no real dispute that Ms Allen was in possession of documentation as a result of her employment with Guardian. She admitted that she had emailed material from her work laptop to her personal email account. The laptop was examined by computer experts, who provided a report of their finding to Guardian (the Mintz report). The Mintz report stated that Ms Allen had sent over 1,000 emails, many with attachments, from her work laptop to her personal email account.

(iv) The risk of dissipation before a with-notice hearing

[31] Ms Guyah submitted that there was no evidence of any risk that Ms Allen would destroy the information if she had been given notice of an application for disclosure. In support of that submission, learned counsel pointed to the fact that the Mintz report indicated that there is no evidence of mass deletion of files from Ms Allen's work laptop.

[32] Mr Hylton argued to the contrary. Learned Queen's Counsel submitted that the nature of Ms Allen's breach, namely, the passing of confidential information to unauthorised persons, including Guardian's competitors, was such that she would, most likely, attempt to conceal her activities, if she were given notice of a hearing to produce the material. He submitted that Ms Allen's behaviour when she was served with the search order supported the likelihood that she would be inclined to either delete or conceal the material. Mr Hylton pointed out that Ms Allen refused the search team entry to her premises on the first day that she was served with the order to allow the search. He also submitted that she refused to allow access to documents that were the subject of the order.

[33] The learned judge considered this issue in her written judgment. At paragraph [116], Simmons J noted it was not until Ms Allen's work laptop had been examined that it was discovered that Ms Allen's conduct was questionable. At paragraph [117], Simmons J indicated that she was asked by Guardian's counsel to infer that since Ms Allen had shared the confidential information with unauthorised individuals, she would try to delete the files in her possession. Simmons J accepted that submission and

further noted that the disclosure of Guardian's confidential information was sufficient to cause concern.

[34] The learned judge's stance is supported by learning from the judgment in **Indicii Salus Ltd (in Receivership) v Chandrasekaran and others** [2007] EWHC 406 (Ch). In that case, although reminded that in the early 1980's, search orders were too readily granted, but that that situation had since changed, Warren J quoted from Oliver LJ's judgment in **Dunlop Holdings Ltd v Staravia Ltd** [1982] Com LR 3, which Warren J said is still good law. Warren J said, in part, at paragraph [15]:

"...But the decision in that case remains good law and the observations of Oliver LJ remain pertinent when he said this (see at p 3):

'It has certainly become customary to infer the probability of disappearance or destruction of evidence where it is clearly established on the evidence before the Court that the defendant is engaged in a nefarious activity which renders it likely that he is an untrustworthy person. It is seldom that one can get cogent or actual evidence of a threat to destroy material or documents, so it is necessary for it to be inferred from the evidence which is before the Court.'

This passage was approved by Hoffmann J in **Lock International plc v Beswick** at p 1280G and is as applicable today as it was then."

[35] It is true that other authorities, which Warren J cited, also spoke to the principle that the fact that a person behaves in a commercially immoral way, does not mean that they will disobey an order of the court (cited in **Lock International plc v Beswick**).

Despite these contending principles, it cannot be said that Simmons J applied any incorrect principle in assessing this aspect of the case before her.

[36] There are, however, other considerations.

Considerations where the search order has been executed

[37] Simmons J acknowledged, at paragraph [107] of her judgment, the guidelines advanced by Ormrod LJ in **Anton Piller**, as she said that she accepts that the established criteria must be met in order to grant a search order. However, she noted that the court holds a different posture once the search order has been executed. She relied on **Elvee Limited v Taylor and Others** [2001] EWCA Civ 1943, **WEA Records Ltd v Visions Channel 4 Ltd and others** [1983] 1 WLR 721 and **Lock International plc v Beswick** in support of that assertion.

[38] Ms Guyah criticised the learned judge's approach on this aspect of the case. Learned counsel submitted that the learned judge had misinterpreted **Elvee Limited v Taylor** and **WEA Records**. Ms Guyah contended that since Ms Allen had challenged the propriety of the grant of the search order, particularly in respect of material non-disclosure, Simmons J ought to have considered anew the issues that are relevant to the grant of a search order, in order to determine whether to set it aside. This, learned counsel submitted, the learned judge declined to do based on her misapplication of **Elvee Limited v Taylor**.

[39] In analysing these submissions, it is to be noted that the approach taken in **Elvee Limited v Taylor** in respect of this issue is that once the search order has been executed, the sting of the order has already been felt. If, at the trial, it is found that the applicant was not entitled to it, the resultant issue will be an assessment of damages in accordance with the applicant's undertaking as to damages.

[40] The guidance provided by Chadwick LJ in **Elvee Limited v Taylor** at paragraphs 52-53, is relevant to this point. Chadwick LJ said:

"52. Once the order has been executed, however, the position changes. There is no longer a need for the court to protect the defendant from an imminent invasion of his privacy made without notice to him. The reason for that is that the invasion has taken place and the defendant is now before the court. The question, then, is whether an order which has been executed should be discharged.

53. One reason why it might be appropriate to take that course at that stage is that the court should be concerned to take the first opportunity to deny a party who has obtained a search and seizure order improperly- that is to say, without having made full disclosure- any benefits which result from that order. That is not a relevant consideration in a case where the ground advanced for the discharge of the order is not that it was obtained improperly- in the sense to which I have referred- but that, on a fuller consideration and with the benefit of the defendant's arguments and evidence, it can be seen that a search and seizure order ought not to have been made. In such a case, if the order has been made and executed, there is unlikely to be a need for an immediate discharge on an interlocutory application. **The relevant question will be whether the person against whom the order was made will have a claim in compensation under the cross-undertaking in damages given at the time it was made. That is a question that can**

usually await the decision of the trial judge; who will be in a much better position to determine whether the order, if made wrongly, has actually caused any loss..." (Emphasis supplied)

A similar position was taken by Sir John Donaldson in **WEA Records Ltd v Visions Channel 4 Ltd** and by Hoffmann J in **Lock International plc v Beswick**.

[41] Ms Guyah's complaint cannot be supported. In this case, the learned judge could no longer protect Ms Allen from the invasion of her privacy. Not only had the search been done, but a second stage, the review of the forensic images taken at Ms Allen's house, had also been completed. The relevant concern for the learned judge at the stage of the hearing of the application before her was, whether the already executed order should be discharged.

[42] In that regard the learned judge conducted an extensive analysis of the complaint about material non-disclosure, the existence of a basis for the search order and the risk of dissipation. She found in favour of Guardian on all those issues. Indeed, she stated, at paragraph [123], that she was "not satisfied that the search order was improperly made and ought to be discharged". Having so found, and the search order already having been executed, she was entitled to use the approach set out in **Elvee Limited v Taylor**.

[43] In adopting that approach, the learned judge found, at paragraph [122], that the investigation of the propriety of the application for the search order would be better suited for the conduct of the trial judge. She said:

“[Guardian] having given its undertaking to comply with any order that the court may make in respect of damages is bound to do so if the court finds that the search order ought not to have been made. Such a determination is more suited for the tribunal of fact which will have the benefit of a fulsome consideration of all the evidence both oral and documentary. There are a great number of emails in this matter which no doubt the parties will try to explain. The nature of the documents disclosed and the consequences and/or likely consequences of their disclosure will also need to be explored and a determination made.”

[44] The learned judge’s decision, not to discharge the search order, cannot be said to be plainly wrong. Although Ms Allen did not form a competing company, as in some of the other previously decided cases, where a search order was granted, there is strong evidence that she shared confidential information over a protracted period with employees at a competing company. Simmons J found that those facts justified the granting of a search order.

d. The significance, if any, of the concurrent proceedings involving the same parties

Whether a less stringent order would have been sufficient

[45] Ms Guyah contended that the information required by Guardian could have been obtained through methods other than the search order and there was no evidence justifying the use of the “absolute extremity of the court’s powers”. Learned counsel pointed out that an **Anton Piller** order ought not to be granted if another order would be more appropriate in the circumstances. She argued that the concurrent related proceedings between the parties would have allowed Guardian to have applied for a disclosure order in the context of that concurrent claim. Furthermore, learned counsel

submitted, the application for and securing of a search order, was out of proportion with the prejudice that Guardian claimed it had suffered. In particular Ms Guyah pointed to the fact that Guardian already knew which email and what material Ms Allen had sent to her personal email account. Accordingly, there was no need, she submitted, for a search order.

[46] Mr Hylton argued that the proceedings previously filed by Ms Allen dealt with issues other than those which arose in Guardian's claim. As a result, learned Queen's Counsel submitted, it would not have been appropriate to have sought an order for disclosure in those proceedings.

[47] The learned judge did not specifically consider this issue. Having accepted that there was sufficient basis to have issued the search order, she was not required to do so.

[48] Nonetheless, there is merit in Mr Hylton's submission. Ms Allen's claim dealt with wrongful dismissal and issues to do with breaches of the Insurance Act. That claim did not logically allow for an application for disclosure in respect of issues concerning breaches of confidence, breach of fiduciary duty and breach of contract that were the substance of Guardian's claim against her. These were properly the subject of either a counter-claim or a different claim. Guardian cannot be faulted for having chosen to proceed by a different claim.

e. The absence of a transcript of the proceedings before Edwards J

[49] Ms Guyah contended that there was a requirement in this jurisdiction that counsel, who appeared at a without-notice hearing, should afterwards produce to the absent party a transcript, or at least a summary, of the hearing of without-notice application. Learned counsel relied, for support of that submission, on the case of **Interoute Telecommunications (UK) Ltd v Fashion Gossip Ltd** (unreported, 23 September 1999); *The Times*, 10 November 1999.

[50] Although that case was decided in the United Kingdom, learned counsel submitted that the principle had been adopted in this jurisdiction. Learned counsel reported that Guardian's counsel did not comply with that rule. Accordingly, she submitted, the search order should be set aside as a result of that breach.

[51] Mr Hylton submitted that the principle in **Interoute Telecommunications**, as helpful as it may be, is not a requirement in this jurisdiction, and is not in general practice. This court's experience is in line with Mr Hylton's submissions. It should also be said that a failure to comply with that principle cannot invalidate the grant of the without-notice order. The judgment in **Interoute Telecommunications** did not suggest such an outcome.

[52] **Re DP Holding SA (in provisional liquidation) Hellard and another v Chen and others** [2017] All ER (D) 21 (Mar) demonstrates that, even in the United Kingdom, there is a flexibility to the application of the principle derived from **Interoute Telecommunications**. In **Re DP Holding**, a complaint, similar to Ms

Guyah's, was made to Registrar Baister. He reported the complaint, in part, at paragraph 19 of his judgment:

"19. [Counsel for the applicant seeking the discharge of the without-notice order] submits that whenever there is an *ex parte* hearing of any kind, the party in attendance must provide a full note of the hearing....In support of that he relies on *Interoute Telecommunications (UK) Ltd v Fashion Gossip Ltd* (unreported, 23 September 1999) in which Lightman J gave the following guidance:

'I should add a reminder to practitioners. It is the duty of counsel and solicitors, when they make an *ex parte* application for relief (and most particularly freezing injunctions) to make in the course of the hearing a full note of the hearing, or, if this is not possible, to prepare a full note as soon as practicable after the hearing is over, and to provide a copy of that note with all expedition to all parties affected by the grant of relief on that *ex parte* application. This is essential so that the parties affected may know exactly what occurred and the basis and the material to make an informed application for discharge. The sooner that obligation is widely understood and complied with, the sooner the risk of injustice on *ex parte* applications will be alleviated.'

[Counsel] also relies on a passage from the *White Book* (2016) which he says makes clear that the practice applies to 'any form of relief 'without notice' to the respondent' (see paragraph 25.1.25.4)."

[53] Registrar Baister dealt with the complaint at paragraph 48 of his judgment. He said:

"48. I do not think that in reality much hangs on the failure to provide a note or adequate note either. It is plain that none was made (in the sense of being typed) before [it was requested by opposing counsel] and that the failure to provide it promptly on request was a breach of the respondents' reasonable expectation in the light of accepted

practice. What was provided was not very good either. However, it is important to bear in mind that the [ex parte hearing] was brief, so it cannot be said that the respondents suffered any real prejudice as a result of the applicants' solicitors' failure to provide a note on time or in an acceptable form. I should also say that there is a flavour of opportunism about the force with which the point has been pursued. An apology has been offered. It should be accepted. The matter should be left at that – which is where I propose to leave it.”

[54] Ms Allen’s complaint with regard to this issue cannot be said to have a real prospect of success.

f. The issue of costs of the application before Simmons J

[55] Ms Guyah submitted that the learned judge erred in granting costs to Guardian in respect of the application before her. Learned counsel argued that the application ought to have been treated as a stay of discharge of the search order until the trial of the claim. The appropriate order, on her submissions would be one of “costs to be costs in the claim”.

[56] Mr Hylton argued that Ms Allen’s application to discharge the search order was unsuccessful and the general rule concerning unsuccessful parties should apply. He submitted that there was nothing that prevented the application of the general rule. He contended that the application had been completely dealt with and that there was no aspect of it that was reserved for the trial judge. Learned Queen’s Counsel relied on the decision in **Elvee Limited v Taylor** as guidance for this issue.

[57] It is to be noted that the award of costs is in the discretion of the tribunal hearing the application (see section 47 of the Judicature (Supreme Court) Act). It is also to be noted that the usual order is that the unsuccessful party must pay the costs of the successful party (see rule 64.6(1) of the CPR). The application before Simmons J clearly had a successful and an unsuccessful party. Guardian succeeded in resisting Ms Allen's application to set aside the search order. There is nothing which would have caused the learned judge to have departed from the application of the general rule.

[58] Additionally, the present issue was considered in **Elvee Limited v Taylor**. In that case, the judge at first instance, who refused an application to discharge a search order, ordered that the costs of the application be reserved to the trial judge. This is an order similar to that for which Ms Guyah advocates.

[59] The Court of Appeal of England and Wales considered that order to be wrong. Chadwick LJ, who gave the leading judgment for the court, explained the error in the judge's approach. He said, in part, at paragraphs 78 and 79:

"78. ...paragraph (14) of the judge's order reserved all costs to the trial judge. It is said that he was wrong to make that order because there was nothing which would happen at a trial which could affect the proper decision as to where the costs of an application to discharge a search and seizure order on the grounds of non-disclosure should fall.

79. It seems to me that there is force in that criticism. **The judge ought to have appreciated that there was a distinction to be drawn between the costs incurred in obtaining the Anton Piller order in July 2000 - which was a matter which could properly be reserved to the trial judge - and the costs of the application to set aside on the grounds of non-disclosure.** Because I

am satisfied that the judge's approach was wrong, this is a case in which I regard it as open to this Court to interfere with the costs order which he had made.” (Emphasis supplied)

[60] The reasoning of Chadwick LJ, is consistent with the provisions of the CPR in this regard. The challenge to the search order did allow the learned judge in the instant case to award costs to Guardian. This issue has no real prospect of success.

Conclusion

[61] There is no merit in the issues advanced on behalf of Ms Allen. Acting on the principles set out in **The Attorney General of Jamaica v John Mackay**, it cannot be said that Simmons J was in error in any aspect of her reasoning in arriving at her decision. Accordingly, this appeal has no prospect of success and the application for permission to appeal should be refused.

P WILLIAMS JA

[62] I have read, in draft, the judgment of Brooks JA. I agree with his reasoning and conclusion and have nothing further to add.

STRAW JA

[63] I too have read the draft judgment of Brooks JA and agree with his reasoning and conclusion.

BROOKS JA

ORDER

1. Application for permission to appeal is refused.
2. Costs to the respondent to be agreed or taxed.