



[2017] JMSC Civ.66

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2010 HCV 04315

BETWEEN	CAREIF LIMITED	1st CLAIMANT
AND	ANTHONY THARPE	2nd CLAIMANT
AND	JAMAICA OBSERVER LIMITED	DEFENDANT

Interlocutory Application – Specific disclosure – Request for Information – Unless Order – Whether there has been compliance – Whether claimants’ statement of case is struck out – Rules 28 & 34 of the Civil Procedure Rules 2002.

IN CHAMBERS

Mr. Anthony Tharpe in person for the 1st and 2nd Claimants.

Mr. Charles Piper QC and Ms Petal Brown for the Defendant.

Heard: 03rd and 9th May, 2017.

IN CHAMBERS

COR: V. HARRIS, J

[1] This is a claim for damages for defamation that was filed on September 06, 2010. However, the main issue that concerns the court is whether or not the claimants have complied with an order for discovery. The consequence of non-compliance would be that their statement of case is struck out. In light of the enquiry that is to be undertaken, I believe that a brief history of the claim might be useful.

Background

- [2] By Request for Information filed on September 06, 2011 the defendant sought further particulars from the claimant and this was purportedly answered on September 19, 2011. However, as will be seen by the orders of Anderson J below this was deemed to be invalid.
- [3] On September 14, 2011 the claimants also filed a Request for Information seeking clarification of certain matters averred by the defendant in its defence.
- [4] On the 12th day of October, 2011 the defendant filed an application seeking specific disclosure of certain documents from the claimants.
- [5] The defendant's application for specific disclosure was heard by Anderson J and on the 13th May, 2015 the learned judge made the following orders:

"1. The Claimants shall provide Specific Disclosure to the Defendant of all the documents referred to in paragraphs 1(a) to (i) of the Defendant's Notice of Application for Court Orders filed on October 12, 2011, and shall do so in a matter and form which is in full compliance with the applicable Rules of Court.

2. The Claimants shall provide full responses to each of the aspect of the Request for information filed and served by the Defendant on September 6, 2011 and further, this Court orders that the Claimants' Answers to the Defendant's Request for Information filed on September 19, 2011 is invalid in law and is ineffective for the purposes of this Order to the extent that the same only constitutes a partial response to the Defendant's said Request for Information.

3. The Claimants shall comply with the Orders number 1 and 2 above on or before September 30, 2015.

4. It is ordered that the Case Management Conference shall be before a Judge in Chambers on October 29, 2015 at 12:00 noon for one hour.

5. Unless the Claimants shall have fully complied in all respects with Orders number 1 to 3 above, then the Claimants' Statement of Case shall stand as struck out, without the need for further Court Orders.

6. The costs of the Defendant's Application for Court Orders which was filed on October 25, 2011 shall be the Defendant's costs in any event.

7. *The Defendant's Attorneys-at-Law are to prepare, file and serve this Order.*"

- [6] On the 20th day of August, 2015 the claimants filed their List of Document (the claimants' list) which, according to them, fully complied with the orders for specific disclosure and Request for Information. This has been disputed by the defendant.
- [7] At the Case Management Conference that was held on October 29, 2015 the claimant's application for Request for Information was set for hearing on June 07, 2016. This was heard by Batts J.
- [8] On June 07, 2016 Batts J ordered *inter alia* that the claimant was to file and serve an affidavit in proof of satisfaction with the order of Anderson J made on May 13, 2015 on or before June 17, 2016. This order was made on account of the issue of the claimants' non-compliance being raised by the defendant.
- [9] The defendant was permitted to file an affidavit in response on or before July 21, 2016. Batts J also ordered, for obvious reasons, that the Court was to determine whether or not the claimants had complied with the orders of Anderson J prior to considering the claimants' application for discovery.
- [10] The claimants filed their affidavit as ordered by Batts J on June 14, 2016. The defendant's affidavit in response was filed on July 21, 2016. This is the matter that is now before me for determination.

The Issues

- [11] There is now no dispute that the claimants did in fact file a List of Documents in the purported format of Form 12 and a bundle on August 20, 2015 to meet the orders for discovery that were made by Anderson J. The issue, as I understand it, is whether this has been done "in a manner and form which is in full compliance with the applicable Rules of Court." This phrase, in my view, sets the

stage so to speak, for strict adherence to Part 28 of the CPR and in particular to rules 28.6, 28.8 and 28.10.

- [12] It is also to be determined whether or not the claimants have provided “full responses to each aspect” of the defendant’s Request for Information.

The Evidence

- [13] Mr. Anthony Tharpe, who represents the 1st claimant, as well as himself, has given evidence in his affidavit that he has complied with the orders of Anderson J and that his response to the defendant’s application for discovery was served on learned counsel Mr. Charles Piper QC on August 20, 2015. He also stated that when Mr. Piper told Batts J on June 07, 2016 that there had been non-compliance on the claimants’ part this was an attempt to delay the progress of the claim.
- [14] Ms Petal K. Brown, attorney-at-law and an associate who works in the law firm of Charles E. Piper and Associates, the attorneys on record for the defendant, gave evidence that prior to June 07, 2016 a search had been conducted at the firm to ascertain whether they had been served with the claimants’ list of documents and answer to the defendant’s Request for Information. That search, she said, did not reveal that service had taken place. That was the reason, she said, the issue of non-disclosure was raised before Batts J.
- [15] Ms Brown further deponed that the court’s file was not located at the time when Batts J heard the matter and the 2nd claimant was not able to provide the court with copies of the documents he had purportedly filed. As a consequence, Ms Brown testified, there was no evidence before the learned judge that the claimants had complied with the orders made by Anderson J. She denied that by raising this issue it was an attempt to delay the claim.

Submissions

[16] Mr. Piper has submitted that the claimants' list is not in compliance with the order of Anderson J. He emphasized that the learned judge was very specific that:

*"The Claimants shall provide Specific Disclosure to the Defendant of all the documents referred to in paragraphs 1(a) to (i) of the Defendant's Notice of Application for Court Orders filed on October 12, 2011, **and shall do so in a matter and form which is in full compliance with the applicable Rules of Court.**"* (Emphasis added)

[17] He pointed the court to rules 28 and 34 of the Civil Procedure Rules (CPR) and in particular to rules 28.6, 28.7, 28.8, 28.10 and 28.14. Mr. Piper argued that a review of the claimants' list revealed that it was not compliant with Rule 28 because it was imprecise, argumentative, failed to identify the documents in a clear and cohesive manner and it has not been signed and dated.

[18] Mr. Piper said that there had been no certification of the claimants' list as required by rule 28.10. He pointed out that the 1st claimant is a company and the person who was designated to provide the information on the company's behalf had not been identified and has not certified the list on the company's behalf, as is stipulated by the CPR. The schedule containing the list of documents that were being disclosed was also absent. The list, therefore, did not meet the terms of the orders made by Anderson J.

[19] There was no answer/response to the defendant's Request for Information, Mr. Piper submitted. He said that nothing in the affidavit filed by Mr. Tharpe on June 14, 2016 neither indicated that he had filed and served any response to the defendant's Request for Information nor did it provide any explanation for its absence. (I agree that this information is not in the affidavit). In other words, there was total non-compliance with the orders of Anderson J, Mr. Piper advanced.

[20] The consequence of the non-compliance, in light of the Unless Order made by Anderson J, was that the claimants' statement of case has been struck out, Mr.

Piper contended. As a result, there is no need for the court to consider the claimants' applications for discovery.

[21] He relied on the cases of ***Marcan Shipping (London) Limited v George Kefalas and Candida Corporation*** 2007 EWCA 463; ***Philip John Eaglesham v Ministry of Defence*** 2016 EWHC 3011 (QB) and ***Evanscourt Estate Company Limited (By Original Action v National Commercial Bank Jamaica Limited (By Original Action) and National Commercial Bank Jamaica Limited v Evanscourt Estate Company Limited and Design Matrix Limited (By way of Counterclaim and Set Off)*** E-013 of 2000, a judgment of Jones J that was delivered on November 01, 2007.

[22] Mr. Tharpe submitted that he had complied with the orders made. He stated that the court's file and bundles have been missing for years. (The file had not been located when the matter was being heard and bundles were prepared by Mr. Piper and Mr. Tharpe, for which the court is thankful.) Mr. Tharpe indicated that the bundle that I had was a supplemental bundle and that it was an oversight on his part why the claimants' list in that bundle had not been signed, dated and certified. However, he insisted that the list that was in the court's original bundle had been duly signed, dated and certified.

[23] He said that he had included the relevant sections of rule 28 and the answer to the defendant's Request for Information in the List of Documents for ease of reference to ensure that he had complied with those rules and the orders made. He maintained that he had met the orders for discovery and therefore the claimants' action remained alive and well.

The Law

[24] Rule 28.6 of the CPR makes provision for specific disclosure. Rule 28.7 sets out the criteria the court must consider when making an order for specific disclosure. Rule 28.8 states the procedure for disclosure. Rule 28.8 provides:

- (1) Paragraphs (2) to (5) set out the procedure for disclosure.
- (2) Each party **must** make and serve on every other party a list of documents in form 12;
- (3) The list **must** identify the documents or categories of document in a convenient order and manner and as concisely as possible;
- (4) The list **must** state:
 - (a) what documents are no longer in the party's control.
 - (b) what has happened to the documents; and
 - (c) where each such document then is to the best of the party's knowledge, information or belief.
- (5) It **must** include documents already disclosed;
- (6) A list of documents served by a company, firm, association or other organisation **must** –
 - (a) state the name and position of the person responsible for identifying individuals who might be aware of any document which should be disclosed; and
 - (b) identify those individuals who have been asked whether they are aware of any such documents and state the position of those individuals.(Emphasis added)

[25] Rule 28.10 sets out the duty of the maker of the list to certify that he/she understands the duty of disclosure. Rules 28.10 (1) and (2) are particularly relevant for these proceedings. They provide:

- (1) The maker of the list **must** certify in the list of documents –
 - (a) that he or she understands the duty of disclosure; and
 - (b) that to the best of the maker's knowledge the duty has been carried out.
- (2) In the case of a list served on behalf of a company, firm, association or other organisation the certificate referred to in paragraph (1) **must** be made by the person identified in rule 28.8(6)(a).

[26] I interpret the word “must” that appears in these rules as mandatory in nature.

[27] Rule 28.14 (and specific reference is made to rules 28.14 (1) and (2)) makes provision for the consequence of failing to disclose documents under order for disclosure:

(1) *A party who fails to give disclosure by the date ordered or to permit inspection may not rely on or produce any document not so disclosed or made available for inspection at the trial.*

(2) *A party seeking to enforce an order for disclosure may apply to the court for an order that the other party’s statement of case or some part of it be struck out.*

[28] Rule 28.14 (5) allows the court to make an Unless Order striking out the defaulting party’s statement of case or some part of it if that party does not comply with the order for disclosure by a specific date.

[29] Part 34 of the CPR makes provision for parties to a claim to obtain information from each other about the matters in dispute in the proceedings. This is done by the party who is seeking the information serving a request identifying the information that is being sought from the other party.

[30] Where a party has been served with request for information and fails to respond within a reasonable time, the party requesting the information may apply to the court for an order to compel the other party. (See rule 34.2 (1)) Rule 34.4 states that any information that is given under Part 34 must be verified by a certificate of truth in accordance with rule 3.12.

[31] In **Marcan Shipping** (supra) Moore-Bick LJ had this to say about the effect of non-compliance with an Unless Order:

“The scheme of the Rules relating to conditional orders is in my view both clear and salutary in its effect, namely, that such orders mean what they say, that the consequences of non-compliance take effect in accordance with the terms of the order, but the court has ample power to do justice

under rule 3.8 (equivalent to rule 26.7 of the CPR) on the application of the party in default, or, in an exceptional case, acting on its own initiative.”

- [32] Jones J in **Evanscourt Estate** (supra) applied the principles enunciated in **Marcan Shipping** and considered rule 26.7 (2) of the CPR. At paragraphs 19 and 20 of the judgment Jones J stated:

[19] “Rule 26.7 (2) provides that:

‘where a party has failed to comply with any of these Rules, a direction or any order, any sanction for non-compliance imposed by the rule, direction or the order has effect unless the party in default applies for and obtains relief from sanction...

[20] As it is, the Claimant’s Statement of Case stands struck out until such time as it has been relieved on his application...”

- [33] In **Eaglesham v Ministry of Defence** (supra), the defendant’s applications for extension of time to comply with an Unless Order and relief from sanctions were refused. In that case, the defendant had previously been granted an extension of time to comply with an order for specific disclosure and the learned judge made a conditional order in the traditional “unless” form that if the defendant failed to comply by a certain time, their statement of case would stand as struck out.

- [34] Andrews J at paragraphs 39 and 46 of the judgment had this to say:

“[39]...The Court must endeavour to ensure that cases are dealt with expeditiously and fairly; it must allot to a case an appropriate share of the court’s resources, whilst taking into account the need to allot resources to other cases; and it must seek to enforce the compliance with rules, practice directions and orders. An “Unless Order” is an order of last resort...

[46]...At the end of the day, Unless Orders should mean what they say. The Defendant knew the risk...”

Analysis

- [35] Before going on, I wish to thank both Mr. Piper and Mr. Tharpe for their submissions and the assistance that they gave to the court.
- [36] The effect of the order made by Anderson J on May 13, 2015 is simply that if there was a default in compliance by the claimants their claim would be struck out without further orders of the court.
- [37] In this matter Anderson J imposed an “Unless Order” which was tailored to meet the particular conditions of the case. He, no doubt, considered that the justice of the case required that the order be made and complied with on its terms.
- [38] I am of the belief that his decision was made against the background of the approach that was taken by the claimants (both content and form) in their responses to the defendant’s request for discovery. (See Claimants Answers to Defendant’s Request for Information filed on September 19, 2011 and Claimants Supplemental Response to Defendant’s Request for Production filed on June 18, 2014. The latter was in response to an order made by Simmons J on June 11, 2014 that the claimants were to respond in writing to the [defendant’s] Request for Information dated September 15, 2011 on or before June 24, 2014).
- [39] The only comment I will make on the claimants’ response that was filed on June 18, 2014 is that it was neither in a clear and precise form, as is customary and expected, nor did it adequately address all the information that was being sought by the defendant.
- [40] However, looking at this issue as a whole, I have arrived at a position that the claimants have responded (albeit the former was declared invalid by Anderson J and the latter inadequate by me) to the defendant’s request for information on two occasions. They filed a List of Documents on August 20, 2015. I wish to add that the claimants completed those three tasks, in my own view, in a timely manner.

[41] The vexed question, which must now be answered by the Court, is whether the claimants have actually conformed to the specific directions of Anderson J. That is, the specific disclosure must be done “in a manner and form that complies with the applicable Rules of Court” and “full responses to each of the aspect” of the defendant’s Request for Information must also be provided.

[42] I am constrained to agree with learned counsel Mr. Piper that the claimants’ list is not consistent with the “applicable rules of court” and that it is “imprecise, argumentative, fails to identify the documents in a clear and cohesive manner” and has not been signed, dated and certified.

[43] Regrettably, I have arrived at this conclusion for the following reasons:

(1) In Form 12 although it was stated by Mr. Tharpe as a director of the 1st claimant that, “I have asked any individuals identified, if identified and where identified, whether they are aware of any documents which should be disclosed.” (See page 2 of the List of Documents). Whether or not this was done remains unclear because the names and positions of the persons identified have not been stated. What has been written is “No individuals have been named.” So, were individuals identified and have not been named? Who provided the documents on behalf of the 1st claimant that were disclosed? I found this response not only confusing but also not compliant with rules 28.8 (6) and 28.10 (2). It is mandatory that the person(s) be identified and that person(s) is required to certify the list of documents disclosed on behalf of the 1st claimant.

(2) The List of Documents contained copious quotations from sections of Rule 28. This has helped to create much of the confusion and uncertainty because it was difficult to grasp the reason certain documents were not being disclosed. The inclusion of the rule in the list is certainly not a requirement. It is my view that the need to guard against a lack of clarity and prevent confusion is fundamental to the principles of disclosure. I am

fortified in my conclusion by rule 28.8 (3) which provides that the list must identify documents or categories of documents in a convenient order and manner and as concisely as possible.

- (3) It was stated that audited financial statements for the companies that the claimants were requested to produce do not exist or have never existed without providing an explanation as to why this is so. (Most of these entities are limited liability companies. One would expect that audited financial statements would be presented by the directors to their shareholders to determine their performance and viability).
- (4) The claimants have stated that a number of documents are no longer in their control but have not stated what has happened to them or where each document could be (or is) to the best of their knowledge, information or belief which is required by rule 28.8 (4).
- (5) Mr. Tharpe has indicated that the following requests made by the defendant are irrelevant:
 - (a) audited financial statements of the companies (pages 2 -15 of the List of Documents);
 - (b) documents relating to the planning and implementation of each of the several mega real estate developments (page 16 of the List of Documents);
 - (c) prospectus outlining all of the claimants' real estate development and investment projects lodged with the Financial Services Commission (FSC) for approved listing on the Jamaica Stock Exchange (JSE) (page 17 of the List of Documents);
- (6) In their answer to the defendant's Request for information, the claimants have stated that the details of each development and investment project in which the claimants and their associated companies were involved at

the date of publication and the relevant date(s) of their commencement are irrelevant. (See paragraph A a) of the defendants Request for Information filed on September 06, 2011 and the response at paragraph a). under the heading "Specific Request for Disclosure filed Sept 6th 2011 at page 20 of the List of Documents).

Those responses (that the documents are irrelevant) are argumentative and do not conform to the applicable rules of court, as well as, the orders of Anderson J.

- (7) The claimants indicated that they had previously made standard disclosure of certain documents to the defendants. However, those documents were not included in the List of Documents for specific disclosure as required by rule 28.8 (5).
- (8) The claimants have failed to address the order for specific disclosure of documents evidencing the legal relations into which the 1st claimant allegedly entered to acquire the properties referred to at paragraphs 13 (iv) and 21.8 of the particulars of claim. (See item 1c. of the defendant's Notice of Application for Court Orders (the application for specific disclosure) filed on October 12, 2011).
- (9) The List of Documents was not signed and dated. Mr. Tharpe insisted that the one contained in the court's original bundle was. However, I also observed that the list that was served on learned counsel Mr. Piper was also not signed and dated). It was also not certified as required by rules 28.10 (1) and (2). Certification is a mandatory requirement.
- (10) The claimants did not provide a schedule containing the details of the documents or class of documents being disclosed, the reasons for claiming a right not to disclose any of them or what had happened to the documents that were no longer in their possession or under their control

and where they could be located (for the purpose of inspection, if necessary) to the best of their knowledge, information and belief.

(10) The claimants have included the response to the defendant's Request for Information in the List of Documents. This procedure is irregular as Form 12 is to be completed in accordance with an order for standard and/or specific disclosure only.

(11) The information given by the claimants in answer to the defendant's Request for Information has not been verified by a certificate of truth as required by rule 34.4. This requirement is mandatory.

[44] The upshot of my analysis is that the claimants' list is materially defective and fails to comply with the order of Anderson J that:

*"The Claimants shall provide Specific Disclosure to the Defendant of all the documents referred to in paragraphs 1(a) to (i) of the Defendant's Notice of Application for Court Orders filed on October 12, 2011, **and shall do so in a matter and form which is in full compliance with the applicable Rules of Court.**"* (Emphasis added)

[45] While the court acknowledges that Mr. Tharpe is a self represented litigant, I found his submissions and knowledge of the CPR quite impressive. He would therefore, in my opinion, have appreciated the risk of not meeting the Unless Order made by Anderson J and ought to have acted accordingly.

[46] Additionally, for the reasons stated above, I have also concluded that the claimants have not provided "full responses to each aspect" of the defendant's Request for Information.

Disposal

- [47] Therefore, applying the principles distilled from the authorities above the claimants' statement of case stands struck out until such time as it has been relieved from sanctions on their application.
- [48] Therefore, there is no need, at this time, for the Court to consider the claimants' applications for discovery.
- [49] Trial dates of the 22nd, 24th and 26th May, 2017 are vacated.
- [50] Leave to appeal is granted.