



[2020] JMCC COMM 32

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2020CD0115

BETWEEN	VINCENT CHANG	CLAIMANT/APPLICANT
AND	COLIN COOKE	1st DEFENDANT/RESPONDENT
AND	C.C.L. LIMITED	2ND DEFENDANT/RESPONDENT

IN CHAMBERS

ORAL JUDGMENT

Mr. John G. Graham Q.C. and Miss Peta-Gaye Manderson instructed by John G. Graham & Company for the Claimant/Applicant

Miss. Stephanie Ewbank instructed by Levy Cheeks Attorneys-at-Law for the Defendants/Respondents

Heard: October 1,7 & November 24, 2020

Civil practice and procedure– Application for specific disclosure–Civil Procedure Rules 2002, as amended; Rule 28.7– Whether documents requested are directly relevant to the claim or whether claimant is on a fishing expedition

PALMER HAMILTON, J

BACKGROUND

[1] The Claimant hereinafter (“the Applicant”) filed A Fixed Date Claim Form alleging oppression and/or unfair prejudice pursuant to section 213A of the Companies Act. The Applicant contends that several requests for information have been made requesting the disclosure of several documents from the Defendants (hereinafter

“the Respondents”), the nature of those documents being bank records and financial statements, including all bank loans, overdraft facilities, mortgages, and the General Ledgers. The Respondents have failed to comply with these requests resulting in the filing of the application for specific disclosure.

- [2] The Applicant further indicated that the Respondents provided a response to the application purporting to provide responses to the information requested in the application however, the response to the application is inadequate and questions 2a, b, c, d, o, p, q, r, s, t, u, v, ff, gg of the application herein remains unanswered.

SUBMISSIONS

- [3] The Applicant submitted that the information that remains outstanding is information to which the Applicant is entitled to in his capacities as shareholder and director of the 2nd Respondent. He averred that at no point has the 1st Respondent stated that *“he does not have nor never had the information requested”*.
- [4] The Applicant indicated that there are matters which speak to a pattern of behaviour where there were transactions which showed that the 1st Respondent’s self-interest and that of his wife/co-director and his son, Kynan Cooke conflicted with his duty and those conflicts were not disclosed as required by the Articles of Association.
- [5] The Respondents vigorously opposed the application on the basis that all relevant company information has already been provided and on an examination of the statements of case herein, the documents sought are not directly relevant to any matters in issue in these proceedings. It was also submitted that the categories of documents sought are unjustifiably wide in scope and therefore would impose an undue burden on the Respondents.
- [6] The Respondents further submitted that the documents requested are not necessary to dispose fairly of the claim and the likely costs of specific disclosure outweigh the likely benefits of it, as it is a fishing expedition. The cases of **Miguel Gonzales v Suzette Saunders and Leroy Edwards** [2017] JMCA Civ. 5 and

Maxwell Gayle et al v Desnoes and Geddes Limited et al (unreported), Supreme Court, Jamaica, Claim No.2 2004/HCV1339, judgment delivered on the 13th day of May 2005 in support of their submissions.

ISSUES

[7] The vexed question, which must now be determined by the Court, is whether the information requested is relevant to the issues which are to be tried.

LAW AND ANALYSIS

[8] Rule 28.6(5) of the Civil Procedure Rules, 2002, as amended stipulates: -

An order for specific disclosure may require disclosure only of documents which are directly relevant to one or more matters in issue in the proceedings.

[9] Rule 28.7 directs the matters a court should consider when deciding to make an order for specific disclosure as follows;

“1. When deciding whether to make an order for specific disclosure, the court must consider whether specific disclosure is necessary in order to dispose fairly of the claim or to save costs.

2. It must have regard to:

(a) the likely benefits of specific disclosure;

(b) the likely cost of specific disclosure; and

(c) whether it is satisfied that the financial resources of the party against whom the order would be made are likely to be sufficient to enable that party to comply with any such order.

3. Where, having regard to paragraph (2)(c), the court would otherwise refuse to make an order on terms that the party seeking that order must pay the other party’s costs of such disclosure in any event.”

[10] At paragraph 22 of **Miguel Gonzales v Suzette Saunders and Leroy Edwards** [2017] Williams JA sought to clarify the pre-requisite in rule 28.7 as follows: -

“By these provisions, a pre-requisite for disclosure is a finding that a document is, not just relevant in the usual layman’s sense, but “directly relevant” within the meaning of the rule. The rule uses the phrase “only if” in delimiting the matters to be considered in deciding whether a document satisfies the definition. This means

that a finding that a document is directly relevant can only be made in the three circumstances outlined in the rule.”

[11] At paragraph 31.12.2 of the 2010 White Book, it is said: -

“The rationale for the discretion of the court to order specific disclosure is that the overriding objective obliges the parties to give access to those documents which will assist the other’s case...The court has a discretion whether it makes this order...”

[12] I examined the all the requests for information, the responses to these requests, the affidavits and the submissions. The Applicant herein provided affidavit evidence indicating that the documents he wished to have disclosed were going to be relied on to establish his case and would adversely affect the case of the Respondents.

[13] I do find that most of the documents requested have been disclosed by the Respondents, however, I find that compliance was inadequate. After examining the pleadings and the nature of the claim, I echo the findings of the Honourable Mr. Justice David Batts at paragraph 20 of the case of **Gloria Chung, Amanda Chung and Mark Chung v Michael Chung and Mikol Investments Limited** [2018] JMCC COMM 28: -

*“I find that most of the documents under the order for Specific Disclosure have been disclosed. This does not mean compliance is substantial. In fact, there has not been substantial disclosure by the Defendants nor has there been an adequate explanation given for such failure. It is the view of this Court that notwithstanding the number of documents so far disclosed, there has not been full disclosure. I find the case of **Marcan** (cited above) useful in this regard. **The documents which the Defendants failed to disclose are crucial to a determination of the claim for oppression and/or unfair prejudice pursuant to Section 213A of the Companies Act. The Bank records and statements, including all bank loans, overdraft facilities, bank statements, mortgages, and the General Ledgers, are all extremely relevant in a matter of this nature. The Claimants correctly submitted that the abovementioned documents are such that the Defendants could easily have obtained copies by requesting same from the respective financial institutions. Furthermore even the worst run companies ought to keep records of such documents.**” [my emphasis]*

[14] In my view, the bank records and financial statements, including all bank loans, overdraft facilities, mortgages, and the general ledgers, are all extremely relevant in a matter of this nature and are crucial to the determination of the Applicant’s claim

for oppression and/or unfair prejudice pursuant to section 213A of the Companies Act and the fair disposal of the proceedings on a whole.

- [15]** I respectfully disagree with the Respondents that the request for specific disclosure of these documents are a fishing exercise as, unlike in the cases cited by the Respondents, the Applicant is not seeking by disclosure to “make a case” but instead, the relevance of these documents directly impacts the question of whether the 1st Defendant exercised his power or has conducted the affairs of the 2nd Defendant in a manner that is oppressive or unfairly prejudicial to the Applicant in his capacities as a director and shareholder.
- [16]** Considering the nature of the claim of the Applicant, I find that the Respondent has not provided full or adequate responses to each aspect of the Applicant’s requests for information or provided any adequate explanation as to why no responses were provided. The empty assertion that the documents are not directly relevant to the case is not enough. Further, the response that the Applicant is a director and should request these directly from the bank is inconclusive in the light of the cause of action herein. The Respondents noted that they have authorized the bank to provide these requests to the Applicant. No evidence of this authorization was presented to the Court. In my view the documents requested do not extend beyond the scope of the issues herein. While the Respondents are of the view that the categories of documents are wide in scope, I find that they are concise and strictly confined to matters which are reasonably necessary and proportionate to enable the Applicant to prepare his case and the Respondents to understand the case that they have to meet.
- [17]** I do find however that answers to 2 (ff) and (gg) have been adequately provided in the Respondent’s Responses to Questions in the Notice of Application for Specific Disclosure.
- [18]** As it relates to the costs of this application, rule 28.7(2)(c) requires the court to give regard to the financial resources of the party against whom the order would be made

and whether or not their financial resources are likely to be sufficient to enable that party to comply with any such order. The rule further directs that: -

“...Where, having regard to paragraph (2)(c), the court would otherwise refuse to make an order for specific disclosure, it may however make such an order on terms that the party seeking that order must pay the other party's costs of such disclosure in any event.”

[19] Based on the evidence provided at this juncture, I am satisfied that the financial resources of the Respondents are sufficient to enable them to comply with the order for specific disclosure. Also, there were several requests for information made of the Respondents. Had there been full compliance with these requests, there would have been no need for the birth of application for specific disclosure.

[20] In this application the Applicant also seeks permission to add a 3rd Affidavit. Pursuant to rule 26.1(c) the court in its case management powers has the discretion to: -

“Extend or shorten the time for compliance with any ... order or direction of the Court even if an application for extension is made after the time for compliance has passed.”

[21] Rule 26.1(v) also gives the court the power to take any other order, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective. The CPR also allows a party to apply to the court for a variation of the Case Management timetable.

[22] I considered the case of **Charlesworth v Relay Roads Limited** [1999] 4 All ER 397. In this case it was highlighted that on an application to amend a statement of case or to call evidence for which permission is required, assessment of the justice of the case involved two competing factors. Firstly, that it is desirable that a party is allowed to advance every point he reasonably desires to put forward, so that he does not believe he has suffered injustice especially if the decision goes against him. If any damage suffered by the opposing party may be compensated by costs a powerful case would normally be made out for the amendment to be allowed. Secondly, the court had to consider whether the success of an application to amend or to call new

evidence would interfere with the administration of justice and the interests of other litigants who had cases waiting to be heard. Although this decision concerns factors to be taken into account when considering amendments to statements of case, I am of the view that the same factors can be used to inform the court 's decision in relation to the application for permission to file the affidavit.

[23] The proposed affidavit seeks to elaborate on evidence already dealt with in the 1st and 2nd affidavit. Though filed late, the 3rd Affidavit of the Applicant which mainly seeks to further particularise the claim, will enable the Respondents to more specifically meet the claim brought against them. It is therefore necessary that the Applicant be allowed to file this further affidavit that seeks to provide the proof for what has been pleaded. The parties also made reference in their oral submissions to an email correspondence passing between them that contemplated the filing of a comprehensive affidavit from the Applicant. The Respondents have also filed responses to this 3rd Affidavit. I see no harm or prejudice in allowing them to stand as filed. Since the trial dates were already vacated, the permission granted by the court for the Applicant to file the further affidavit will not adversely affect the trial date.

[24] At the oral delivery of this decision, it was highlighted by the tribunal that based on the nature of the issues to be determined in the substantive claim, the matter ought to have been commenced by way of Claim Form. Both parties agreed and I made Orders reflecting this agreement.

ORDERS AND DISPOSITION

1. Order in terms of paragraphs 2 a, b, c, d, o, p, q, r, s, t, u and v of the Notice of Application for Specific Disclosure dated and filed September 10, 2020.
2. 3rd Affidavit of Vincent Chang filed on October 5, 2020 to stand as filed.

3. Affidavits in Response of Deion Henry and Colin Cooke to the 3rd Affidavit of Vincent Chang both filed on October 15, 2020 to stand as filed.
4. Costs to the Applicant to be taxed if not agreed.
5. Applicant's Attorney-at-Law to prepare file and serve Orders made herein.