

A. NEMBHARD J

INTRODUCTION

- [1] This matter concerns an application by the Claimant, Jamaica Association of Composers Authors and Publishers Limited (“JACAP”), for an order for specific disclosure of the Audited Financial Statements of the Defendant, KLAS Sports Radio Limited (“KLAS”), for the period 2015-2020.
- [2] The gravamen of JACAP’s complaint is that KLAS has failed to comply with its request for disclosure of the latter’s Audited Financial Statements for the period 2015-2020 (“the Audited Financial Statements”). JACAP asserts that the Audited Financial Statements are crucial for the computation of the damages owed by KLAS for the period 2015-2020 and are directly relevant to the issues to be determined by the Court.

BACKGROUND

- [3] The application for specific disclosure is made against the background that JACAP is a copyright licensing body and that, pursuant to reciprocal agreements and agency agreements with local and international performance rights societies and musical publishers, it has the sole and/or exclusive rights in Jamaica to broadcast or license the broadcast of and to transmit or authorize the transmission of, the musical works within its repertoire by radio, television or otherwise.
- [4] KLAS is a company responsible for the operation of the national radio broadcast station, KLAS-ESPN Sports FM 89.
- [5] On or about 1 September 2009, KLAS broadcasted and/or transmitted and/or authorized the transmission and/or retransmission, via its radio programmes, musical works which are the property of JACAP and/ or for which JACAP is the sole and/or exclusive licensee of the public performance rights in Jamaica.
- [6] By way of its Claim Form, filed on 6 November 2014, JACAP seeks, inter alia, the following order: -

- a. An inquiry as to the damages payable (including statutory damages) for infringement of copyright by the Defendant of the musical works for the period September 1, 2009 to date.

[7] On 19 September 2018, Palmer J entered Judgment in default of Defence in favour of JACAP against KLAS, on the basis that KLAS had failed to file a Defence within the period specified by rule 10.3 (1) of the Civil Procedure Rules, 2002 (“the CPR”). On the basis of that Interlocutory Judgment in Default of Defence, the matter proceeded to a hearing of the Assessment of Damages on 14 and 15 October 2020.

[8] At the commencement of that hearing, Learned Counsel Mr Chad Lawrence, who appears on JACAP’s behalf, made an oral application for an order for specific disclosure of the Audited Financial Statements on the following bases: -

- (i) That disclosure of the Audited Financial Statements had been requested of KLAS and that, up to the time of the hearing of the Assessment of Damages, same had not been disclosed;
- (ii) That the Audited Financial Statements are or have been in the control of KLAS;
- (iii) That the Audited Financial Statements are directly relevant to the matters that are in issue in the proceedings; and
- (iv) That the Audited Financial Statements are necessary in order to dispose fairly of the Claim.

THE ISSUE

[9] The application raises the following core issue for the Court’s determination: -

- (i) Whether the Court should make an Order for specific disclosure of the Defendant’s Audited Financial Statements for the period 2015-2020, at the hearing of the Assessment of Damages.

[10] With respect to that core issue, four (4) sub-issues arise. They are identified as follows: -

- (i) Whether the Audited Financial Statements are or have been in the control of KLAS;
- (ii) Whether the Audited Financial Statements are directly relevant to one or more matters in issue in the proceedings;
- (iii) Whether an order for specific disclosure is necessary in order to dispose fairly of the Claim or to save costs; and
- (iv) Whether an order for specific disclosure should be made at this late stage.

THE LAW

Disclosure

[11] Disclosure is the procedure by which one party to an action must disclose to the other party, by means of a list, the existence of all documents which are or have been in his control and which are directly relevant to one or more of the issues that arise for the court's determination.

[12] The primary purpose of disclosure is that it will often reveal documents that are critical to a party's prospects of success in the litigation; it enables the parties to evaluate more accurately the strengths and weaknesses of their cases; and it enables the narrowing of issues, which encourages settlements, with the resultant saving of time and expense.

Specific disclosure

[13] An order for specific disclosure requires the party to whom the order is addressed to disclose only those documents or classes of documents specified in the order.¹

¹ See – Rule 28.6(1)(a) of the CPR

- [14] In deciding whether to order specific disclosure the court must consider whether such disclosure is necessary in order to dispose of the claim fairly or to save costs, having regard to the likely benefits and costs of the disclosure and whether the party against whom the order is proposed to be made has the financial resources to comply.²
- [15] Part 28 of the CPR governs the disclosure and inspection of documents and endows the court with the power to make an order for specific disclosure on or without an application.
- [16] Rule 28.2(1) of the CPR provides that a party has a duty to disclose documents which are or have been in his control. For the purposes of part 28 of the CPR, a party has or has had control of a document if it is or was in the physical possession of that party; that party has or has had a right to possession of it; or that party has or has had a right to inspect or take copies of it.³

Documents to be disclosed must be directly relevant

- [17] Rule 28.6 of the CPR grants the court the power to make an order for specific disclosure of documents that are directly relevant to one or more matters in issue in the proceedings. The rule provides as follows: -

“28.6 (1) An order for specific disclosure is an order that a party must do one or more of the following things –

- (a) disclose documents or classes of documents specified in the order; or*
- (b) carry out a search for documents to the extent stated in the order and disclose any documents located as a result of that search.*

² See – Rule 28.7 of the CPR; **Gayle v Desnoes and Geddes Limited**, unreported, 2004 HCV 01339, judgment delivered 13 May 2005, per Mangatal J

³ See – Rule 28.2(2) of the CPR

- (2) *An order for specific disclosure may be made on or without an application.*
- (3) *An application for specific disclosure may be made without notice at a case management conference.*
- (4) *An application for specific disclosure may identify documents -*
 - (a) *by describing the class to which they belong; or*
 - (b) *in any other manner.*
- (5) *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.*

[18] Rule 28.1(4) of the CPR specifically defines the term 'directly relevant'. It provides that a document is considered to be directly relevant only if the party with control of the document intends to rely on it; it tends to adversely affect that party's case; or it tends to support another party's case.

[19] In the authority of **Miguel Gonzales and Suzette Saunders v Leroy Edwards**,⁴ F. Williams JA, in seeking to expand on the term 'directly relevant', stated 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.”

[20] Further, in **The Attorney General of Jamaica v BRL Limited and Village Resorts Limited**,⁵ McDonald-Bishop JA endorsed the pronouncements of F.

⁴ [2017] JMCA Civ 5, at paragraph [22]

⁵ [2021] JMCA Civ 14, at paragraph [103]

Williams JA, in **Miguel Gonzales and Suzette Saunders v Leroy Edwards**,⁶ that a prerequisite for disclosure is that the document sought to be disclosed must be 'directly relevant' within the meaning of rule 28.1 (4) of the CPR. McDonald-Bishop JA opined as follows: -

"The fact that the documents "may" be relevant, or merely "relate" to an issue in dispute is not sufficient to render them specifically disclosable within the ambit of the CPR; they must be 'directly relevant' as defined by the CPR."

The evidence required on an application for specific disclosure

[21] It is important to note that Part 28 of the CPR does not require the filing of evidence on affidavit. There must, however, be some basis on which the court may exercise its discretion to make an order for specific disclosure.⁷ The court may examine the pleadings, the party's statement of facts and issues, the submissions as well as the documents themselves, in order to determine whether the documents sought to be disclosed are directly relevant to one or more matters in issue in the proceedings.⁸

The relevant considerations on an application for specific disclosure

[22] Rule 28.7 of the CPR outlines the considerations to which the court must have regard when deciding whether to make an order for specific disclosure. The rule reads as follows: -

"28.7 (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: -

⁶ (supra)

⁷ See – **Miguel Gonzales and Suzette Saunders v Leroy Edwards** (supra), at paragraphs [23] and [27]

⁸ See – **Branch Developments Limited T/A Iberostar Rose Hall Beach Hotel v The Bank of Nova Scotia Jamaica Limited** [2014] JMSC Civ 003 and **Maxwell Gayle and others v Desnoes and Geddes Limited and others**, Claim No 2004/HCV 01339, unreported, judgment delivered 13 May 2005

- (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.”*

The continuing duty to disclose

[23] Finally, rule 28.13(1) of the CPR stipulates that the duty imposed by an order for disclosure continues until the proceedings are concluded. Accordingly, where documents to which the duty of disclosure extends come to a party’s notice at any time during the proceedings, that party must, within fourteen (14) days, immediately notify every other party and serve a supplemental list of those documents.⁹

ANALYSIS AND FINDINGS

Whether the Court should make an order for specific disclosure of the Defendant’s Audited Financial Statements for the period 2015-2020

The pleadings

[24] The application for specific disclosure must be considered in the context of the parameters of JACAP’s case. As such, for the purpose of this analysis, it is important to begin with an examination of the pleadings filed on JACAP’s behalf.

[25] On the face of it, there appears to be certain inconsistencies in the pleadings filed on JACAP’s behalf, in respect of the period for which it seeks an inquiry as to the damages payable for infringement of copyright. In its Claim Form, filed on 6 November 2014, at paragraph b, JACAP seeks “an inquiry as to the damages payable (including statutory damages) for infringement of copyright by the Defendant of the musical work for the period September 1, 2009 to date.” For

⁹ See – Rules 28.13(2) and 28.13(3) of the CPR

present purposes, “to date” is a reference to 6 November 2014, the date on which the Claim Form was filed.

- [26] Conversely, in its Particulars of Claim, also filed on 6 November 2014, at paragraph 13, the period referenced by JACAP is “the period of September 1, 2009 until the commencement of these proceedings and continuing”. This is the period for which JACAP asserts that it is entitled to damages for copyright infringement.
- [27] In the prayer contained in its Particulars of Claim, at paragraph 2, JACAP states that it seeks “an inquiry as to the damages payable (including statutory damages) for infringement of copyright by the Defendant of the musical work for the period March 1993 to date”. Again, “to date” is a reference to 6 November 2014, the date on which the Particulars of Claim was also filed.
- [28] The Witness Statement of Lydia Rose, filed on 6 February 2019¹⁰ and the subsequent submissions filed on behalf of JACAP, all seem to suggest that its claim for damages is confined to the periods 2010-2015 and 2015-2020.
- [29] It is the Audited Financial Statements for KLAS for the period 2015-2020 that form the subject matter of the application for specific disclosure.

The nature and import of pleadings

- [30] The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties. Pleadings serve the two-fold purpose of informing each party of the case of the opposing party and, at the same time, informing the court of the issues between the parties that will govern the interlocutory proceedings between them and which the court will have to determine at the trial.¹¹

¹⁰ See – Paragraph 25 of the Witness Statement of Lydia Rose, dated 1 February 2019 and filed on 6 February 2019

¹¹ See – **Bullen and Leake and Jacob’s Precedents of Pleadings**, 12th edition, at page 3

- [31] Pleadings are therefore required to demarcate the parameters of the case that is being advanced by each party to an action and are critical to identify not only the issues joined between the parties but the extent of the dispute between them.
- [32] Lord Woolf MR, in **McPhilemy v Times Newspapers Ltd and others**,¹² provided a comprehensive analysis of the nature and importance of pleadings. He stated as follows: -

*“The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party’s witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular, they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader.”*¹³

- [33] While the inconsistencies in the pleadings filed on JACAP’s behalf are unfortunate, as a party’s pleadings enable the opposing party to clearly discern the ambit of the claim, the Court observes that the pleadings were filed approximately six (6) years before the first day on which the matter came before the court for damages to be assessed. The witness statement of Ms Rose was filed approximately one (1) year before the first day on which the matter came before the court for damages to be assessed.
- [34] In those circumstances, it cannot be said that KLAS did not have an ample opportunity to apprehend the parameters of JACAP’s claim. Nor can it be said that KLAS did not have an ample opportunity to properly prepare itself to meet the case

¹² [1999] 3 All ER 775, at pages 792 j - 793 b

¹³ See also – **Gasoline Retailers of Jamaica Limited v Jamaica Gasoline Retailers Association** [2015] JMCA Civ 23, at paragraph [48], per Morrison JA (as he then was) and **Desmond Kinlock v Denny McFarlane & Others** [2019] JMCA Civ 20, at paragraphs [27] and [28], per Palmer J

that is being advanced by JACAP. KLAS has had an ample opportunity to cross-examine Ms Rose and to challenge the averments made by her during the hearing of the Assessment of Damages. The Court has also heard from KLAS' own witness, in the person of Mr Alston Stewart.

- [35] Consequently, notwithstanding the state of the pleadings, this Court is of the view that it cannot tenably be argued that the parameters of JACAP's claim would not have been apparent to KLAS or that KLAS has been taken by surprise by the application for specific disclosure. The Court is further strengthened in this position by JACAP's assertion that it had requested that KLAS disclose the Audited Financial Statements prior to the commencement of the hearing of the Assessment of Damages and that that request was not met. The Court also notes that JACAP's assertion in that regard has not been challenged.
- [36] The question now arising for the Court's determination is whether it should make an order for specific disclosure of the Audited Financial Statements and at this stage, during the hearing of the Assessment of Damages.
- [37] In seeking to determine this issue, the Court must consider whether the Audited Financial Statements are or have been in the control of KLAS; whether the Audited Financial Statements are directly relevant to one or more matters in issue; and whether an order for specific disclosure is necessary in order to fairly dispose of the claim or to save costs.
- (i) *Whether the Audited Financial Statements are or have been in the control of KLAS*
- [38] JACAP asserts that the Audited Financial Statements ought to be in the possession of KLAS. This assertion has not been challenged by KLAS. The Court notes that the Audited Financial Statements are documents that were either generated by KLAS or on its behalf. As such, it can be said that the Audited Financial Statements are documents that are or were at some point in time, in the physical possession or under the control of KLAS.

[39] Consequently, the Court has no difficulty finding that the Audited Financial Statements are documents which are or have been in the possession or under the control of KLAS.

(ii) Whether the Audited Financial Statements are directly relevant to one or more matters in issue in the proceedings

[40] The application for specific disclosure is one that was advanced orally and no affidavit(s) has/have been filed in support of the application. It is in those circumstances that KLAS makes the complaint that the application for specific disclosure, which is being made at the conclusion of the hearing of the Assessment of Damages and by way of closing submissions, is an abuse of the processes of the Court and deprives KLAS of “a useful defence on the Assessment of Damages to limit the quantum of damages that it may be found liable to pay”.

[41] KLAS also makes the complaint that the application for specific disclosure seeks to afford JACAP a “second bite at the cherry” in circumstances where it had indicated to the Court, at the commencement of the hearing of the Assessment of Damages, that it was in a position to prove its damages.

[42] The Court notes however, that rule 28.6(2) of the CPR expressly provides that an order for specific disclosure may be made on or without an application. The authorities are similarly clear that the filing of evidence on affidavit is not a requirement under Part 28 of the CPR. There must however be some basis on which the Court may exercise its discretion to make an order for specific disclosure.

[43] A pre-requisite for an order of specific disclosure is a finding that the document to be disclosed is directly relevant to one or more matters in issue in the proceedings. Such a finding can only be made within the ambit of the three (3) sets of circumstances outlined in rule 28.1(4) of the CPR.

[44] In seeking to determine whether the Audited Financial Statements are ‘directly relevant’ within the meaning of the rule, the Court is permitted to examine the pleadings filed on behalf of JACAP, its statement of facts and issues, the evidence

adduced on JACAP's behalf at the hearing of the Assessment of Damages, the submissions filed by the parties as well as the Audited Financial Statements themselves.¹⁴

[45] JACAP asserts, in its Submissions in Support of Assessment of Damages and List of Authorities, filed on 20 November 2020, that it requires the Audited Financial Statements in order to compute the damages owed to it by KLAS. At paragraph 41, JACAP submits as follows: -

“As the court is aware, we rely on the audited financials of the Defendant company to assess damages and despite our best efforts to request the audited financials to date, we have not been successful.

[46] The Court adopts the submissions advanced by Mr Lawrence in this regard and finds that the Audited Financial Statements are directly relevant to the issue of the quantum of damages that KLAS may be ordered to pay for its copyright infringement. The Court also finds that the Audited Financial Statements will assist in its assessment of the quantum of damages to be paid by KLAS for its copyright infringement for the period 2015-2020.

(iii) Whether an order for specific disclosure is necessary in order to dispose fairly of the Claim or to save costs

[47] 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. In doing so, the court must have regard to the following: -

- (a) the likely benefits of specific disclosure;
- (b) the likely cost of specific disclosure; and

¹⁴ See – **Branch Developments Limited T/A Iberostar Rose Hall Beach Hotel v The Bank of Nova Scotia Jamaica Limited** [2014] JMSC Civ 003 and **Maxwell Gayle and others v Desnoes and Geddes Limited and others**, Claim No 2004/HCV 01339, judgment delivered 13 May 2005

- (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.

- [48]** Mr Lawrence has submitted, on JACAP's behalf, that the benefits of an order for specific disclosure are in keeping with the principle of *restituto integrum*, as JACAP ought to be placed in the position in which it would have been had it not been for the wrongdoing on the part of KLAS.
- [49]** Mr Lawrence also submitted that an order for specific disclosure would remove the necessity to file an additional claim thereby saving the court's time and resources. Additionally, it was asserted that, in the circumstances of this case, the costs of specific disclosure would be at a minimum.
- [50]** Again, the Court accepts JACAP's submissions in this regard. This Court is of the view that an order for specific disclosure of the Audited Financial Statements would be beneficial. It would provide JACAP with the required information to compute the amount of damages that it contends that KLAS is liable to pay. An order for specific disclosure of the Audited Financial Statements would be beneficial in that it would ensure that the Court is seized of all the relevant information that it requires, in order to fairly dispose of the Claim as well as to save costs.
- [51]** JACAP has maintained that, despite its best efforts to obtain the Audited Financial Statements from KLAS, it has been unsuccessful. Miss Lydia Rose, the General Manager employed by JACAP, averred that, while JACAP has obtained the Audited Financial Statements for the period 1 January 2010 to 31 December 2015, the Audited Financial Statements remain outstanding.¹⁵
- [52]** The Court finds that this evidence is indicative of the efforts made by JACAP, prior to the commencement of the hearing of the Assessment of Damages, to obtain the Audited Financial Statements.

¹⁵ See – Paragraph 19 of the Witness Statement of Lydia Rose dated 1 February 2019 and filed on 6 February 2019

- [53] Furthermore, it is not correct to say that JACAP's application for specific disclosure is one that is being made for the first time at the conclusion of the hearing of the Assessment of Damages and by way of closing submissions. In fact, Mr Lawrence raised the issue of the non-disclosure of the Audited Financial Statements before this Court at the commencement of the hearing of the Assessment of Damages and advanced his application at that time. The Court invited both parties to address the issue of JACAP's request for specific disclosure, by way of written submissions and authorities which were to be filed.
- [54] Regrettably, the Court is unable to accept the submission made on KLAS' behalf, that the application for specific disclosure of the Audited Financial Statements, at this stage, is improper. The Court is unable to accept KLAS' submission that the application for specific disclosure of the Audited Financial Statements is improper, on the basis that JACAP had asserted that it was able to prove its Damages, at the commencement of the hearing of the Assessment of Damages and elected to proceed on the facts known to it. The Court is also unable to accept the further submission that the application affords JACAP a 'second bite at the cherry' and that such an order for specific disclosure of the Audited Financial Statements, in the absence of a Notice of Application for Court Orders and a supporting affidavit, denies KLAS of 'the useful defence on assessment of damages to limit the quantum [of Damages] it may be liable to pay'.
- [55] In all the circumstances, this Court is of the view that an order for specific disclosure is necessary in order to dispose of the Claim fairly and in order to save costs. Consequently, the Court will make an order for specific disclosure of the Audited Financial Statements.

DISPOSITION

- [56] It is hereby ordered as follows: -

(1) The Claimant's oral application for specific disclosure of the Defendant's Audited Financial Statements for the period 2015-2020, is granted;

- (2) The Defendant is to disclose to the Claimant its Audited Financial Statements for the period 2015-2020 and which are to be disclosed on or before 24 September 2021;
- (3) The Claimant is at liberty to file and serve a Further Witness Statement of Lydia Rose in relation to the Defendant's Audited Financial Statements for the period 2015-2020, on or before 8 October 2021;
- (4) The Defendant is at liberty to file and serve Further and/or Additional Witness Statements in respect of its Audited Financial Statements for the period 2015-2020, on or before 5 November 2021;
- (5) The costs of the oral application for specific disclosure are to be costs in the Claim;
- (6) The Defendant is denied leave to appeal;
- (7) The hearing of the Assessment of Damages is adjourned part heard before A. Nembhard J, for a date to be fixed by the Registrar; and
- (8) Messrs. Samuda & Johnson are to prepare, file and serve the Orders made herein.