

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division

2014/CLE/gen/01795

BETWEEN

JURAJ VACVAL

Plaintiff

-AND-

GORDON WAYNE HERMAN

Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Ms. Glenda Roker of Davis & Co for the Plaintiff
Mr. Luther McDonald and Ms. Keri Sherman of Alexiou, Knowles & Co for the Defendant

Hearing Date: 18 September 2017

Practice and Procedure – Discovery – Specific disclosure – Order 24, Rules 7 and 8 of the Rules of the Supreme Court 1978.

The Defendant seeks specific disclosure of (i) recording of a mediation conducted by Mr. Bob Martyn; (ii) constituent documents of a Hong Kong based company and (iii) financial statements of that company for the years 2013, 2014 and 2015 and/or any other documentation evidencing the financial position of the company for the relevant years. The Defendant submitted that disclosure of these documents has become necessary since he is unable to complete and file witness statements as he is not in possession of potentially critical evidence on which it is presumed the Plaintiff intends to rely on at trial.

The Plaintiff is willing to provide the recording of the mediation but refuses to provide the other specific documents requested. The Plaintiff asserts that the production of any documentation relating to the company is of no relevance to the present action since the company is not the subject of litigation between the parties. The Plaintiff further states

that the Defendant is on a fishing expedition since the documents are not even relevant to his Counterclaim.

HELD:

1. Disclosure is not automatic and, in its case management role, the court controls its extent.
2. An order for specific disclosure should not be made in relation to unpleaded matters: *Amoco (UK) Exploration Co. v British American Offshore Ltd (2000) 23 February*, (Trans Ref 1999 Folio 1159).
3. The summons seeking specific discovery is dismissed as it is not relevant to the present action and/or to the Defendant's Counterclaim and is, more or less, a fishing expedition.

RULING

Charles J

[1] On 4 July 2017, the Defendant filed a Summons, pursuant to Order 24 Rule 7 of the Rules of the Supreme Court 1978 ("the RSC") for the Plaintiff to produce for inspection within fourteen days to the Defendant the following documents namely:

- i. Recording of the mediation conducted by Mr. Bob Martyn in its entirety;
- ii. Copies of the constituent documents of Star Trends Hong Kong Limited, a Hong Kong based watch company ("Star Trends") and;
- iii. The Financial Statements of Star Trends for the years 2013, 2014 and 2015 and/or any other documentation evidencing the financial position of Star Trends Hong Kong Limited for the relevant years.

[2] The Summons is supported by two affidavits of Wynsome D. Carey filed on 4 July 2017 and 23 August 2017 respectively.

[3] With respect to (i), the Plaintiff states that he has no objection to the production of the recording of the mediation. However, he alleges that he has experienced some difficulty in producing the recording as the original was stored in a computer which the Defendant seized and sold without his knowledge, consent and approval. That being said, the Plaintiff insists that he is taking the necessary

steps to have the recording extrapolated from a back-up drive which, according to him, is also in the Defendant's possession by virtue of his seizure of the computer.

- [4] With respect to (ii) and (iii) of the Summons for discovery, the Plaintiff asserts that the production of any documentation relating to Star Trends is of no relevance to the present action since Star Trends is not the subject of litigation between the parties. Says the Plaintiff, the Defendant is on a fishing expedition to enable him to obtain information that he was once privy to during the option period but which is no longer available to him due to his own termination of the option. Further, says the Plaintiff, the documents requested are also not relevant to the Defendant's Counterclaim.

Background facts

- [5] The Plaintiff filed an Amended Writ of Summons with a Statement of Claim on 7 April 2015. His claim against the Defendant is for (i) damages for wrongful removal and sale of personal property (ii) damages for trespass and destruction of property, trespass and illegal distress; (iii) costs and (iv) further or other relief.
- [6] Some relevant facts are that the Plaintiff and the Defendant were family friends. In or about September 2012, they entered into an agreement whereby the Defendant was to provide the Plaintiff with an interest free/penalty free mortgage for the purchase of Lot Number 6 in the subdivision known as Palatial Estates situated on Paradise Island ("the property") in exchange for the option to purchase a part of Star Trends. The completion date of the agreement was set for 26 September 2014.
- [7] On 26 September 2012, Scotiabank (Bahamas) Limited conveyed to the Plaintiff the property. On 18 December 2013, the parties executed an Indenture of Mortgage in relation to the agreement. In March 2014, the parties entered into discussions wherein they orally agreed that the completion date stated in the agreement be extended to 31 January 2015. In or about mid-June 2014, the

Defendant advised the Plaintiff that he was not interested in exercising his option and that he wished to revert to the original completion date. Thereafter, difficulties arose between them; the details of which are not material to this application.

- [8] According to the Plaintiff, he and his wife left the jurisdiction on a trip and during their absence, the Defendant his servants and or agents entered the property without his permission and removed his belongings and that of his wife. Following the actions of the Defendant, the Plaintiff successfully obtained an injunction from the Supreme Court on 18 November 2014 preventing the sale of the property. The learned judge later discharged the said injunction but ordered that the Defendant deliver up to the Plaintiff all of his personal belongings left in the property. The Plaintiff alleged that he was unaware of a sale of his personal items as well as those belonging to his wife. Consequently, he brought this action seeking damages.
- [9] On 15 June 2015, the Defendant filed a Defence and Counterclaim. The Defence is not what I would classify as a normal defence. Except for an admission to paragraphs 1 and 2 of the Statement of Claim, and the relief sought whereby he puts the Plaintiff to strict proof of the alleged loss and damage, the Defence does not state (a) which of the allegations in the Statement of Claim he denies; (b) which allegations he is unable to admit or deny, but which he requires the Plaintiff to prove; and (c) which allegations he admits.
- [10] The normal rule is that where a defendant denies an allegation, he must state his reasons for doing so; and if he intends to put forward a different version of events from that given by the plaintiff, he must state his own version. A defendant who (a) fails to deal with an allegation; but (b) has set out in his defence the nature of his case to the issue to which that allegation is relevant; will be taken to require that allegation to be proved.

- [11] As I see it, the Defence is an attempt by the Defendant to articulate his account, symptomatic of what one may wish to detail in a witness statement.
- [12] A Reply and Defence to Counterclaim was filed on 16 September 2015.
- [13] The matter was referred to a Case Management Conference. On 29 August 2016, this court gave directions and fixed trial dates of 20 and 21 February 2018. The parties were also directed to file and serve an agreed as well as a non-agreed bundle of documents by 31 October 2016.
- [14] The Defendant asserted that the Plaintiff's unfiled List of Documents dated 2 March 2016 (prior to the Case Management Conference) makes reference to "Various audio recording of a mediation session between the Plaintiff and Defendant on 18 December, 2013."
- [15] The Defendant, through his attorneys requested, the production of the recording on 30 August 2016, 12 October 2016 and 17 January 2017 respectively.
- [16] By letter dated 21 February 2017, Counsel for the Plaintiff purported to comply with the request for discovery and production by forwarding eight short audio clips to the Defendant's attorneys.
- [17] By letter dated 7 June 2017, the Defendant's attorneys again requested the entire audio recording of the mediation and the constituent documents and financial statements relating to Star Trends.
- [18] To date, the Plaintiff has failed and/or refused to produce the requested documentation and the entirety of the recording.

Discovery and inspection of Documents

- [19] Order 24 Rule 7 of the RSC provides as follows:

“(1) Subject to rule 8, the Court may at any time, on the application of any party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any document specified or described in the

application or any class of document so specified or described is, or has at any time been in his possession, custody or power, and if not then in his possession, custody or power when he parted with it and what has become of it.

(2) An order may be made against a party under this rule notwithstanding that he may already have made or been required to make a list of documents or affidavit under rule 2 or rule 3.

(3) An application for an order under this rule must be supported by an affidavit stating the belief of the deponent that the party from whom discovery is sought under this rule has, or at some time had, in his possession, custody or power the document, or class of document specified or described in the application and that it relates to one or more of the matters in question in the cost or matter.

[20] Order 24 Rule 8 provides for discovery to be ordered only if necessary. It reads:

“On the hearing of an application for an order under rule 3 or 7 the Court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or, as the case may be, adjourn the application and shall in any case refuse to make such an order if and so far as it is of opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs.”

Summons for specific disclosure

[21] By Summons dated 4 July 2017, the Defendant seeks specific disclosure not only of the recording of the mediation conducted by Mr. Martyn but also copies of the constituent documents of Star Trends and its Financial Statements for the years 2013, 2014 and 2015 and/or any other documentation evidencing the financial position of the company for the relevant years.

[22] Learned Counsel Mr. McDonald submitted that the Summons for disclosure has become necessary as the Plaintiff’s failure to produce them is prejudicial and has impeded the Defendant’s ability to comply with the Order on Case Management. In particular, the Defendant is unable to complete and file witness statements as he is not in possession of potentially critical evidence on which it is presumed the Plaintiff intends to rely on at trial. He relied on a passage from Halsbury’s Laws of England: Vol. 37, 4th Ed. Reissue p. 180-181 which provides:

“552. Right of inspection of a disclosed document. Subject as follows, a party to whom a document has been disclosed has a right to inspect that document except where the document is no longer in the control of the party who disclosed it or the party disclosing the document has a right or a duty to withhold inspection of it.”

- [23] Learned Counsel Ms. Roker who appeared for the Plaintiff submitted that the Plaintiff has no difficulty in producing the recording of the mediation but he had encountered some difficulties. According to learned Counsel, the Plaintiff is making a concerted effort to do so. In the circumstances, I will order that the Plaintiff produce the recording of the mediation conducted by Mr. Bob Martyn by 13 October 2017.
- [24] With respect to (ii) copies of the constituent documents of Star Trends and (iii) the Financial Statements of Star Trends for the years 2013, 2014 and 2015 and/or any other documentation evidencing the financial position of the company for the relevant years, the Plaintiff opposes the application and relies on the affidavit of Darron Ellis filed on 21 August 2017. The gist of Mr. Ellis’ affidavit is that the documents sought have no relevance to the present action.
- [25] Ms. Roker correctly submitted that Star Trends is not the subject of litigation between the parties and the production of any documentation relating to Star Trends is of no relevance to the claim between the Plaintiff and the Defendant.
- [26] The Plaintiff next submitted that the action before the court relates to damages for unlawful entry and unlawful repossession of the property together with damages for the alleged subsequent illegal distress and sale of personal items which were contained in the property. The Defendant’s counterclaim is for loss and damage being payment of the sum of \$240,000 representing loss of rental value of the property, outstanding real property taxes, outstanding maintenance fees, storage and moving costs and outstanding amount for a vehicle.
- [27] Ms. Roker also correctly submitted that there is no claim outlined in the Counterclaim for damages or loss as it relates to Star Trends specifically. Further, says the Plaintiff, on numerous occasions prior to the end of the option

period, the Defendant made it clear that he would not exercise his option to purchase shares in the company. The affidavit of Mr. Ellis discloses that on at least four occasions it was stated and documented by the Defendant that he would not exercise his option to purchase shares in the company.

[28] Learned Counsel Ms. Roker insisted that the Defendant is using these proceedings as a fishing expedition to enable him to obtain information that he was once privy to during the option period but which is no longer available to him due to his own termination of the option.

Analysis and findings

[29] In **Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co.** (1882) 11 QBD 55, Brett LJ said that there has been a long tradition of an extensive obligation to disclose relevant documents in the course of proceedings. This includes disclosing documents which would not only be evidence of an issue in the action, but also those ‘which, it is reasonable to suppose, contain information which *may*, either directly or indirectly, lead the party seeking disclosure to a train of enquiry which enables him to advance his own case or to damage that of his adversary.’

[30] The RSC on disclosure attempts to limit the extent of the process. O. 24 r. 7 of the RSC provides for discovery of particular documents and O. 24 r. 8 provides for discovery to be ordered if necessary. Thus, disclosure is not automatic and, in its case management role, the court controls its extent.

[31] An application for specific disclosure will involve questions as to its reasonableness. The application should contain the reason why the applicant is not satisfied with the disclosure afforded so far by the respondent and why the applicant anticipates that specific disclosure ought to be worthwhile. Where specific disclosure is ordered it should be precise as to the description of documents to be disclosed; it should not, for example, order the disclosure of all documents relating to the party’s financial and tax affairs which are necessary to

prove the quantum of the counterclaim: **Morgans (a firm) v Needham** [1999] 44 L.S. Gaz. R 41, CA.

[32] An order for specific disclosure should not be made in relation to unpleaded matters: **Amoco (UK) Exploration Co. v British American Offshore Ltd** (2000) February, (Trans Ref 1999 Folio 1159), Longmore J, as in the present case. When asked to make an order for specific disclosure the court should be particularly conscious of the requirement of proportionality as well as the overriding objective of Order 31A of the RSC.

[33] In this action, the Defendant submitted that he is unable to complete and file witness statements since he is not in possession of potentially critical evidence on which it is presumed the Plaintiff intends to rely on at trial. As the Plaintiff correctly submitted, the action before the court relates to damages for unlawful entry and unlawful repossession of a residential home together with damages for the alleged subsequent illegal distress and sale of personal items which were contained in that property.

[34] The Defendant's Counterclaim is for loss and damage being payment of the sum of \$240,000 representing loss of rental value of the property, outstanding real property taxes, outstanding maintenance fees, storage and moving costs and outstanding amount for a vehicle.

[35] As I see it, there is no need to bring copies of the constituent documents and the financial statements of Star Trends into litigation when the Plaintiff's claim is simply one for damages.

Conclusion

[36] In my opinion, the Defendant's Summons seeking specific discovery of the constituent documents and the financial statements of Star Trends for the years 2013, 2014 and 2015 is not necessary as Star Trends has no relevance to the present action and/or to the Defendant's Counterclaim. Accordingly, I will dismiss

the Summons as it relates to those documents. The Plaintiff will produce the recording of the mediation to the Defendant by 13 October 2017.

[37] As the trial date is fast approaching, both Counsel are urged to file and serve witness statements by 31 October 2017 and comply with all other directions as detailed in the Order dated 29 August 2016.

[38] Even there is an appeal, unless the Appeal Court stays this ruling, this trial will commence on the dates indicated.

[39] The Plaintiff is the successful party in this application. Consequently, the Defendant will pay to the Plaintiff costs to be taxed if not agreed.

Dated this 5th day of October, A.D., 2017.

**Indra H. Charles
Justice**