

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division
2017/CLE/gen/00717

BETWEEN

BOLINGBROKE LIMITED

Plaintiff

AND

SUMMIT INSURANCE LIMITED

First Defendant

AND

INSURANCE MANAGEMENT (BAHAMAS) LIMITED

Second Defendant

AND

ISLAND HERITAGE INSURANCE CO. LTD.

Third Defendant

Before Hon. Ian R Winder

Appearance: Michael Scott QC for the plaintiff

Camille Cleare with Viola Major for the defendants

18 November 2020

RULING

WINDER, J

This is the first and third defendants' (collectively "the defendants") application for specific discovery and for further and better particulars of the Amended Statement of Claim.

Application for Specific Discovery:

1. By Summons dated 20 July 2020 the defendants have applied for specific discovery. The Summons is supported by the affidavit of Miko Pinder dated 20 July 2020. The plaintiff, who opposes the application, have responded to the application by an affidavit of Sharon Kelly dated 16 November 2020.

2. The defendants seek the disclosure of 13 specific categories of documents which are identified in paragraph 3 of the Affidavit of Miko Pinder. They say that these documents are relevant to certain paragraphs of the Defences and can be broadly compiled into the following four areas, namely,
 - a) Value of the Sum Insured – the Brownrigg appraisals, Kevin Sweeting architectural plans, SMG building (and insurance) contracts for renovations and additions to the property.
 - b) Condition of the Site at the time of the Event - ongoing renovations and other works go to the value of the sum insured, the condition and location of the areas alleged to be damaged by the hurricane.
 - c) Hurricane Repair Scope – these documents including the missing change orders are self-evidently relevant.
 - d) Other works - Any renovation works carried out or continued simultaneously with the hurricane repairs.

3. I accept the legal principles as set out by **Brett LJ** in the ancient but celebrated case of ***Cie Financiere et Commerciale du Pacifique v. Peruvian Guano Co (1882) 11 QBD 55, 63***, where he said:

We desire to make the rule as large as we can with due regard to propriety; and therefore I desire to give as large an interpretation as I can to the words of the rule, "a document relating to any matter in question in the action." I think it obvious from the use of these terms that the documents to be produced are not confined to those, which would be evidence either to prove or to disprove any matter in question in the action; and the practice with regard to insurance

cases shews, that the Court never thought that the person making the affidavit would satisfy the duty imposed upon him by merely setting out such documents, as would be evidence to support or defeat any issue in the cause.

The doctrine seems to me to go farther than that and to go as *63 far as the principle which I am about to lay down. It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may—not which must—either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary ... a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences: ...'

4. The defendants rely on Order 24 (Rules 3 and 7) and Order 31A of the RSC. These Orders provide as follows:

Order 24 Rules 3 and 7

O24r3.

(1) Subject to the provisions of this rule and of rules 4 and 8, the Court may order any party to a cause or matter (whether begun by writ, originating summons or otherwise) to make and serve on any other party a list of the documents which are or have been in his possession, custody or power relating to any matter in question in the cause or matter, and may at the same time or subsequently also order him to make and file an affidavit verifying such a list and to serve a copy thereof on the other party.

(2) Where a party who is required by rule 2 to make discovery of documents fails to comply with any provision of that rule, the Court, on the application of any party to whom discovery was required to be made, may make an order against the first-mentioned party under paragraph (1) of this rule or, as the case may be, may order him to make and file an affidavit verifying the list of documents he is required to make under rule 2 and to serve a copy thereof on the applicant.

(3) An order under this rule may be limited to such documents or classes of document only, or to such only of the matters in question in the cause or matter, as may be specified in the order.

O24r7.

(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.

Order 31A Rules 1(m), 15(3), 18(2)(d) state as follows:

O31Ar1(m)

The Court shall deal with cases actively by managing cases, which may include —

(m) ensuring that no party gains an unfair advantage by reason of that party's failure to give full disclosure of all relevant facts prior to the trial or the hearing of any application.

O31Ar15(3)

A party seeking to vary any other date in the timetable without the agreement of the other parties must apply to the judge before that date.

O31Ar18(2)

Except where these Rules provide otherwise, the Court may —

(d) stay the whole or part of any proceedings generally or until a specified date or event;

5. The plaintiff contends that:

- (1) The application is late, some years after the insured event;
- (2) The Court ought to, in keeping with best practice, control and limit discovery in order to reduce costs and delay;
- (3) Documents requested are not necessary to identify issues or are not relevant; and,
- (4) Certain documents have already been provided.

6. Having considered the submissions and respective cases for both of the parties, I order the plaintiff to make specific discovery in respect of the following:
 - (1) The Bahamas Realty Appraisal prepared by Robin Brownrigg of Bahamas Realty and any subsequent appraisals prepared for Jacaranda;
 - (2) The full set of architectural plans and drawings prepared by Kevin Sweeting in or about April 2016 and the professional building contracts related to the proposed Phase 3 Renovations;
 - (3) All job costings, plans, drawings, professional and building contracts, punch list, insurance proposals, policy schedules, addendums and endorsements for the renovation works underway as at the date of the hurricane from inception to completion;
 - (4) All documents supplied by the plaintiff to DHP for it to produce the May 2017 costs estimate;
 - (5) All DHP photographs, architectural drawings, measurements from those drawings, and quotes referenced by Mr McLeod in his witness statement; and,
 - (6) Change orders requested by the defendants together with the backup documents to support each change order.

7. I find that this information is relevant and discoverable or that the plaintiff has, by its own account, already provided same. In respect of the requests relative to Mr McLeod and DHP, I am satisfied that his site inspection notes, photographs, architectural drawings, measurements from his drawings and quotes referred to in his report are discoverable. What must be noted is that McLeod is an expert witness and proposes to give evidence at the trial. I have seen the report and he merely gives his opinion without providing the support referred to in the report. In the absence of this material Mr McLeod would undermine the weight to be given to his evidence. It is also difficult to see how he can meaningfully meet with the defendants' expert, as he has been ordered to do, if he seeks to withhold this material.

Application for Further and Better Particulars

8. The defendants wrote to the plaintiff on 20 July 2020 requesting further and better particulars of the Amended Statement of Claim filed on the 30 April 2018. The requests were immediately refused by letter dated 21 July 2020.

9. By Summons dated 24 July 2020 the defendant applied to the Court for further and better particulars of the Amended Statement of Claim as set out in the letter of 20 July 2020. The request was as follows:

Under Paragraph 3

Of: *“As a direct consequence of that hurricane, Jacaranda suffered over a million dollars’ worth of damage now calculated at \$1,610,428.00 and Bolingbroke has subsequently made a claim under the Policy”*

Request pursuant to the Schedule of Policy: -

- 1) Are the details and amounts of the claim for repairing or replacing the damaged parts of the buildings listed in the Scott Schedule made exclusively under Section 1 Buildings (Item 1) building(s): of the Home occupied as the Main House as defined in the Policy? If not,
 - 2) What are the details and amounts of the claim for repairing or replacing the damaged parts of the buildings under Section 1 Buildings (Item 2) building(s): of the Home occupied as the Guest House as defined in the Policy and/or (Item 3) building(s): of the Home occupied as the Play House?
 - 3) Are the details and amounts of the claim for repair or replacement of contents listed in the Scott Schedule made exclusively under Section 2 Contents (Item 4) Contents: of the Main House? If not,
 - 4) What is the amount of the claim for repair or replacement of contents made under Section 2 Contents (Item 5) Contents: of the Guest House?
10. The application for further and better particulars is supported by the affidavit of Miko Pinder dated 28 September 2020. The plaintiff opposes the further and better particulars on the same bases as the application for discovery.

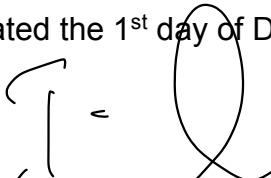
11. In *Astrovlanis Compania Naviera SA v Linard [1972] 2 QB 611*, Lord Justice Edmund-Davis had this to say:

The requirement to give particulars reflects the overriding principle that the litigation between the parties, and particularly at trial, should be conducted fairly, openly, without surprises and, as far as possible, so as to minimise costs.

12. I am satisfied that the particulars requested are not unreasonable and necessary for the proper understanding of the plaintiff’s case and will ensure that the litigation between the parties, and particularly at trial, would be conducted fairly, openly and without surprises. I therefore order that the plaintiff do provide the requested particulars by 14 December 2020.

13. I accept that these applications could have been brought at an earlier date. In the circumstances, whilst I am not persuaded not to exercise my discretion as a result of the delay I will order that the costs of these application will be the defendants' costs in the cause and therefore will not be available unless they are successful in the action.

Dated the 1st day of December 2020



Ian R. Winder

Justice