

**IN THE COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT**

Family Division

2022/FAM/div/00507

BETWEEN:

L. M. M.

Petitioner

v.

N. G. Z. G.

Respondent

Before: The Honourable Madam Justice C.V. Hope Strachan,
Justice of the Supreme Court of The Commonwealth of The Bahamas

Appearances: Robert Adams K.C. and Edward Marshall II for the Applicant
Krystal Rolle K.C. and Darron Cash for the Respondent

Hearing Dates: 7th November 2024

Divorce – Application for Discovery – Matrimonial Causes Rules – Civil Procedure Rules Part 28 - Discovery of documents – Whether the documents are in the possession, custody, or power of the Respondent - Whether the documents are relevant to the matter in question

RULING

INTRODUCTION

[1.] This application was begun by way of Summons filed on 21st October 2024 in which the Applicant pursuant to Rule 23 of the Matrimonial Causes Rules sought an Order for the discovery of the following documents namely:

- a) email message(s) or any other forms of communication between the Petitioner (and/or any person or agent acting on her behalf) and Dr. Yaisel Kerr regarding me and/ or either both minor children of the family or either of us;
- b) email message(s) or any other forms of communication between the Petitioner (and/ or any person or agent acting on her behalf) and King's College regarding me and/ or either or both minor children of the family or either of us;
- c) email message(s) or any other forms of communication between the Petitioner (and/ or any person or agent acting on her behalf) and others in the same nature as those identified in (i) and (ii) above namely wherein the Petitioner (and/ or any person or agent acting on her behalf, with or without her knowledge or consent) attempts to, or does, accuse, imply or infer, the Respondent of alleged "abuse" and seeks such party's assistance in reporting and/ or substantiating such allegations;
- d) any/ all communications between the Petitioner (and/or any person or agent acting on her behalf) to any Governmental or Quasi- Governmental authority either alleging "abuse" against me or requesting assistance regarding any alleged "abuse" by me; and
- e) email message(s) to and from the email account associated with 'lauradivocesnewton@gmail.com' regarding me, our potential divorce, or possible future contemplated divorce proceedings as between the Petitioner and me, and/ or either or both minor children of the family or either of us.

AND FOR AN ORDER that the Petitioner pay the Respondent the costs of and occasioned by this application such costs to be taxed if not agreed.

[2.] The Affidavit of the Applicant supports the Summons filed on 21st October 2024 the parts which are relevant to this application are extracted verbatim:

Email to King's College

[3.] In or about November 2023, I was informed by Mr. Matteo Rossetti, the Founding Principal of King's College ("King's"), where one of the minor children of the family, namely, G.G., attended and currently attends that correspondence had been sent to King's by the Petitioner alleging that I was abusing G.G. and demanding that King's report the matter to the Department of Child Protection Services.

[4.] Mr. Rossetti informed me that King's was unable and/ or unwilling to voluntarily provide that correspondence to me, for several reasons, which included advice it had received

from its counsel and attorneys. I was, however, informed by Mr. Rossetti and believe that King's had conducted a full internal investigation into the Petitioner's allegations against me, which I know included interviewing G.G.'s teachers, interviewing and observing G.G., and interviewing me. I of course had no objection to the investigation by King's and I encouraged it to fully investigate all of the allegations that had been made against me, particularly given my understanding of their obligations under the Child Protection Act and to protect G.G. I further encouraged King's to fulfill its duty as it saw appropriate, including making a complaint to Child Protection Services should they have concerns regarding G.G.'s well-being in any way while in my care.

[5.] Ultimately I was informed by Mr. Rossetti that King's had concluded that no action was necessary or appropriate by King's further to the allegations contained in the correspondence sent by the Petitioner as there was and is no evidence to substantiate the claims of abuse that were being made against me. I also understand from discussions with Mr. Rossetti that King's College has communicated this position to the Petitioner in writing.

[6.] Notwithstanding, the false allegations of abuse that were made against me, to King's and others, these accusations are very embarrassing and cruel to both me and G.G. They have caused me significant emotional hurt.

Email to Dr. Yaisel Kerr

[7.] In addition, in February 2024, I was informed by Dr. Yaisel Kerr, the MedSpa and Wellness Physician at Albany, that she had received an email message from the Petitioner on 4 October 2023, alleging that I was abusing G.G and asking her to commence an investigation into those allegations. There is now produced and shown to me and marked Exhibit "NG.1" a copy of the email message sent by the Petitioner to Dr. Kerr on 4 October 2023.

[8.] On the same date, Dr. Kerr responded to the Petitioner by informing her that she could not be involved due to her professional responsibilities and that she was not in a position to give any evidence in support of what the Petitioner had alleged in her email message against me. There is now produced and shown to me and marked Exhibit "NG.2" a copy of the email message sent by Dr. Kerr to the Petitioner on 4 October 2023.

Email account 'lauradivocesnewton@gmail.com'

[9.] Furthermore, it is now manifest from the Petitioner's evidence on page 109 of the Respondent Amended Petition filed on 30 May 2024, that prior to 11 November 2019, the Petitioner created an email account associated with the email address 'lauradivocesnewton@gmail.com'. It is clear from that evidence that the Petitioner used that email account to compile documents and possibly other materials, created in an attempt to falsely

accuse me of abuse or otherwise “set me up”, that the Petitioner would later attempt to rely upon to support knowingly false accusations in divorce proceedings which it now appears she contemplated as early, or earlier than, 2019.

[10.] In this regard, I truly believe that the email account created by the Petitioner in or possibly before 2019 and, in particular, the email messages contained in that email account regarding us and the children of the family support my claims that the Petitioner’s conduct towards me has been intentionally cruel since at least 2019 and formulated to elicit negative responses from me which the Petitioner would seek to either rely upon to support fabricated and false allegations of cruelty and/ or abuse against me; and/or attempt to use such fabricated and false allegations of cruelty and/or abuse as part of a scheme to force me to “voluntarily” provide her with, amongst other things, increased assets and resources as opposed to her contractual entitlement under the Domestic Contract.

[11.] In the premises, I respectfully urge this Honourable Court to make an Order directing the Petitioner to make the discovery of the documents and/or classes of documents referenced herein and to pay the costs of and occasioned by this application.

Background

[12.] The Applicant, (“the husband”), and the Respondent, (“the wife”) are married. The parties are currently in contested divorce proceedings in this Court. There are two children of the family namely A.D and G.G (“the children”). The wife filed a Petition (as amended) on the ground that since the celebration of the marriage the husband has treated her with cruelty. The husband filed an Answer and Cross Petition (as amended) on the ground that since the celebration of the marriage the wife has treated him with cruelty. During the course of the divorce proceedings, Counsel for the Applicant stated that while the wife was under oath during cross-examination, it was revealed that the wife had created an email account for the purpose of potential divorce proceedings against the Applicant. It was also alleged that the wife made certain allegations of abuse to third parties that the husband did towards her and the children. As a result of the allegations made, the extant application was initiated for discovery.

Applicant’s Submissions

[13.] Counsel for the Applicant submits that the pleadings reflect that the Petitioner is attempting to ruin the Applicant’s reputation. In particular, Counsel made reference to page 25, paragraph (c) and page 27 paragraphs (vi) and (viii) of the Applicant’s Amended Answer and Cross Petition filed on 19th June 2024. The relevant parts of the Amended Answer and Cross Petition are extracted below.

“(c) The Petitioner’s efforts to isolate the Respondent from his family, friends, and colleagues and to damage his reputation.

- (i) *Prior to and post the parties’ separation, the Petitioner has been spreading lies and rumors to family, friends, teachers, and community relationships to discredit the Respondent and destroy the Respondent’s support system and reputation. The Petitioner has told countless friends and acquaintances disparaging lies about the Respondent and his alleged treatment of her and the children. These lies included accusations of physical abuse. She would also often tell people that she would ‘destroy’ and ‘financially ruin’ him. The baseless allegations and behavior of the Petitioner have caused numerous people who the Petitioner has lied to, to reach out to the Respondent out of concern for the Petitioner’s wellbeing/mental health. This has caused the Respondent much angst.*

- (ii) *The Petitioner has and is attempting to destroy the Respondent’s reputation in the business community which has taken him decades to build. For example, the Petitioner’s recent participation in a failed Mareva injunction application in Canada. Her actions have been aimed at destroying the Respondent’s image and character in terms of his business and social life. Had the Mareva injunction application succeeded, the Petitioner would have made it impossible for the Respondent to take care of G.G. as he would have no funds to do so.*
- (iii) *These and other inappropriate actions by the Petitioner have caused the Respondent much unnecessary stress, concern for the children, concern for the Petitioner’s state of mind and judgment, and embarrassment.”*

[14.] Counsel further submits that the actions taken by the Respondent portray the Applicant as a child abuser which is cruel.

[15.] In relation to the email communication made from the Respondent to King’s College, Counsel submits that such communication ought to be disclosed as it relates to the allegations of abuse made against the Applicant. Counsel further submits that any response received from King’s College to the Respondent ought to be disclosed as well.

[16.] With respect to the email communication sent by the Respondent to Dr. Yaisel Kerr, Counsel submits that the court ought to make an Order for the Respondent to make disclosure of any other communication made to Dr. Kerr or any other person that accused the Applicant of

child abuse in relation to the children. Reference was made to the email to Dr. Kerr where the Respondent stated that she had attempted to obtain protection for G.G. in 2017.

[17.] Counsel submits that the Respondent gave evidence in this court that she is the owner of an email account lauradivorcesnewton@gmail.com which was created sometime in 2019. The purpose of the email account was to compile documents and information concerning possible divorce proceedings against the Applicant. There are allegations of abuse against G.G. and the Respondent that would have a damaging effect on the Applicant's reputation. Counsel submits that the information in the email is highly relevant for the purposes of considering whether the allegations the Applicant makes against the Respondent are confirmed and corroborated by the Respondent's own use of the email account. The Respondent ought to be required to disclose, verify, and confirm by Affidavit what materials are in that account, how they have been used, and what has become of them. Counsel notes that any emails made to Counsel in Canada or The Bahamas would be protected by privilege and ought to be excluded. Counsel submits that they are only requesting emails in the account in relation to any allegations of abuse to the Respondent or the children. Counsel further denies that the application is a fishing expedition.

Respondent's Submissions

[18.] Counsel for the Respondent submits that in order for Rule 23 (4) of the MCR to apply, the Applicant would have to specify that the document that is being requested exists and there must be a foundation laid that sets out the reason why such document exists. The document must be relevant to the issues to be determined that were raised in the Re-amended Petition, Amended Answer and Cross Petition, and/or Supplemental Answer and Cross Petition.

[19.] Counsel referred to page 25 paragraph (c) and page 27 paragraph (vi) of the Amended Answer and Cross Petition to address the relevant point. Counsel submits that the gravamen of the allegation is that the Respondent has made false allegations of abuse to family, friends, teachers, and community relationships. As to page 27 paragraph (vi), with regards to the Respondent communicating with Government officials, Counsel submits that there is no allegation made at all that any such correspondence was made to anyone outside of the categories of individuals addressed specifically family, friends, teachers, and community acquaintances.

[20.] Counsel further submits that on page 5 of 244 paragraphs (iv) and (v) of the Supplemental Answer and Cross Petition filed 5th June 2024, the specificity of these documents was made to demonstrate the relevance of documents to the instant matter. The paragraphs have been extracted below:

“(iv) Further, the Respondent has discovered that, by email message dated 4 October 2023 from the Petitioner to Dr. Yaisel Kerr, the Petitioner made seriously false allegations of child abuse on the part of the Respondent concerning his care of G.G. and urged Dr. Kerr to initiate an investigation into the allegations of child abuse by the Respondent so the ‘appropriate authorities’ can take steps to ‘protect’ G.G. A true copy of the said email message of 4 October 2023 is produced and marked NGZG-8.

(v) In addition to Dr. Yaisel Kerr, the Respondent has discovered that the Petitioner similarly urged other individuals, such as the administrators of G.G. school, to also initiate an investigation based on her false allegations of child abuse against the Respondent so that the authorities could take action in relation to G.G. The Petitioner’s efforts to spread lies that the Respondent is involved in child abuse is wholly consistent with similarly false allegations earlier made in the summer months of 2023 to a Canadian government child welfare agency, Simcoe and Muskoka Family Connexions (SMFC) based on an ‘anonymous complaint’. The false allegations of child abuse were investigated by SMFC, included multi-hour interviews of the Respondent, G.G., A.D., and the Petitioner. It was concluded that G.G. was not at risk of harm and SMFC’s closed its file.”

[21.] In regards to the email to Dr. Kerr, Counsel contends that the email is already in their possession. The application by paragraph a) of the Summons seems to be an application to discover documents that they already have which were attached to the Supplemental Answer and Cross Petition and the Affidavit in Support. There is no basis at all to order the Respondent to provide documents that Counsel for the Applicant already referenced or has in their possession. There’s nothing in the Affidavit of the Applicant that asserts that there are emails beyond the ones that they already obtained and exhibited and nor is there any basis for belief that such additional correspondence exists. There ought to be an allegation to suggest that there was something beyond the 4 October 2023 email and supporting evidence to demonstrate to the court why the Applicant believes that there are more emails other than this single email that is referenced.

[22.] In relation to the King’s College email, there is a reference in the Affidavit of the Applicant to communication between the Respondent and King’s College. Therefore, there is a basis to suspect that there is communication that an email exists and it is not in the Applicant’s possession. In the premises the necessary foundation has been met in the Affidavit of the Applicant as to the existence and relevance of this email to King’s College. Counsel for the Respondent has agreed to provide this email to Counsel for the Applicant.

[23.] As to paragraph (d) of the Summons, there is no application by way of interrogatory to ask the Respondent if she wrote to any government official. There is an indication of an anonymous complaint made by the Applicant in his Supplemental Answer and Cross Petition on page 5 of 244 paragraph (v). There is no reference to any particular document or communication that Counsel for the Applicant can assert that the Respondent has created and has disseminated to any government official or any other entity. Further, there is no basis at all for the court to make an order for discovery against the Respondent relative to any correspondence to any government official. There is no basis at all as to why there could be a reasonable belief that such correspondence actually existed. Counsel submits that this application is a fishing expedition. There must be an assertion that the correspondence does exist and the reason why it exists.

[24.] With respect to the email account lauradivocesnewton@gmail.com, Counsel submits that this account was created for the purpose of potential legal proceedings by the Respondent and her attorneys which is privileged and therefore cannot be disclosed.

[25.] In summary, as it relates to paragraph (a) of the Affidavit of the Applicant, Counsel submits that the email to Dr. Yaisel Kerr is already in Counsel for the Applicant's possession and therefore does not need to be provided. Further, Counsel agreed to provide the email sent by the Respondent to the King's College to Counsel for the Applicant. For paragraphs (c) and (d) of the Applicant's Affidavit, Counsel submits that there is no specificity and there is nothing to suggest that the communications exist to any government officials and ought to be dismissed. The email account lauradivocesnewton@gmail.com contains privileged information and cannot be disclosed. Therefore, the application made is a quantum leap.

ISSUE

[26.] Whether the Court should grant the Applicant's application for discovery?

THE LAW

[27.] The Applicant relies on Rule 23 of the Matrimonial Causes Rules ("the MCR"). The rule provides:

"23. (1) Any party to a matrimonial cause may with leave deliver interrogatories in writing for the examination of an opposite party.

(2) A copy of the interrogatories proposed to be delivered shall be lodged in the Registry when the summons is issued and a further copy shall be served with the summons.

(3) Interrogatories shall, unless otherwise ordered, be answered by affidavit to be filed within ten days.

(4) Any party to a matrimonial cause may apply for an order for discovery of documents by an opposite party, who may be ordered to make such general or limited discovery on oath as the Registrar may think fit.”

[28.] Additionally, Part 28.1 of the Civil Procedure Rules, Ch. 2022 (“the CPR”) (as amended) sets out rules about the disclosure and inspection of documents. It provides:

(1) ...

(2) In this Part —

...

“document” means anything on or in which information of any description is recorded whether in writing, electronically, or howsoever.

(3) A party “discloses” a document by revealing that the document exists or has existed.

(4) For the purposes of this part a document is “directly relevant” if —

- (a) the party with control of the document intends to rely on it;
- (b) it tends to adversely affect that party’s case; or
- (c) it tends to support another party’s case,

but the rule of law known as “the rule in Peruvian Guano” does not apply to make a document “directly relevant”.

“anything on or in which information of any description is recorded whether in writing, electronically or howsoever.”

[29.] Part 28.4 of the CPR indicates the documents that are to be disclosed as it relates to Standard disclosure. This section provides:

“If a party is required by any direction of the Court to give standard disclosure that party must disclose all documents which are directly relevant to the matters in question in the proceedings.”

Analysis and Discussion

[30.] An application for discovery is permitted in divorce proceedings and can be made either by discovery of documents or interrogatories. In Elliott v Albert [1934] 1 K.B. 650 at p. [661], *Scrutton L.J.* made reference to Redfern v Redfern [1891] P. [139] where both *Lindley L.J.* and *Bowen L.J.* opined that:

“discovery in divorce cases was permissible both by discovery of documents and by discovery by interrogatories... discovery as to cruelty or desertion in a divorce case is permissible.”

[31.] Halsbury Laws of England, Volume 84A of 2024 provides a definition for discovery of documents.

“Any party to a cause or matter may apply to the judge for an order directing any party, other than the proper officer of the Crown, to make discovery on oath of any documents which are or have been in their possession or power relating to any matter in question in the cause or matter. Thereupon the judge may make such order as they think fit, but discovery may not be ordered unless they are of the opinion that it is necessary either for disposing fairly of the cause or for saving costs.

On the hearing of any application for discovery, the judge in lieu of ordering the filing of an affidavit of documents may order the party from whom discovery is sought to deliver to the other parties a list of the documents which are or have been in their possession, custody or power relating to the matters in question, although the ordering of such a list does not preclude the judge from afterward ordering the party to make and file an affidavit of documents.”

[32.] While Rule 23 (4) of the MCR does provide for discovery, Counsel for the Respondent rightly pointed out that the appropriate application to be made in this instance is for interrogatories to ask questions in relation to the allegations made before discovery can be granted. As it stands, there is no specificity in any of the documents being requested by the Applicant save, and except for the email to King’s College and the email to Dr. Yaisel Kerr.

[33.] In the authority of The Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Company [1882] 11 QBD 55 *Brett LJ* enunciated the test to determine the relevance of a document to a matter in question at page 63 of the judgment:

“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 ... to advance his own case or to damage the case of his adversary. I have put in the words “either directly or indirectly,” because, as it seems to me, a document can properly be said to contain information which may enable the party ... 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...”

[34.] The Court can make an order for standard disclosure or specific disclosure of documents. Before an application for discovery can be made there are certain requirements that must be satisfied. In **B v B (matrimonial proceedings: discovery)**[1979] 1 All ER 801, *Dunn J* opined that:

“The court may make an order either for general discovery or discovery of specific documents or classes of documents. The court may also make an order for the production of documents for inspection by the other party or by the court...”

[35.] *Dunn J* further stated at p. 805 of the judgment that:

“...the court has no jurisdiction to make an order for discovery or production unless, firstly, the person against whom discovery is sought is a party to the suit, secondly, the documents are in his possession, custody, or power, and, thirdly, the documents relate to matters in question in the proceedings. These requirements must be satisfied before discovery is ordered even if hardship is thereby caused to one party to the suit.”

[36.] Possession, Custody, or Power was explained by *Dunn J* as follows:

“For this purpose ‘possession’ means, the right to the possession of the document. ‘Custody’ means the actual, physical, or corporeal holding of a document regardless of the right to its possession, for example, a holding of a document by a party as servant or agent of the true owner. ‘Power’ means, an enforceable right to inspect the document or to obtain possession or control of the document from the person who ordinarily has it in fact.”

[37.] In considering each of the requirements in **B v B**, supra in turn, the Court accepts that the Respondent is a party to the action. Secondly, as it relates to possession, custody, or power, there are a number of documents that are being requested by the Applicant. As to the email to Dr. Yaisel Kerr from the Respondent, it is not in dispute that the Respondent sent the email. The Court acknowledges that Counsel for the Applicant has this email in their possession which was attached to the Supplemental Answer and Cross Petition and to the Affidavit of the Applicant filed 21st October 2024 in support of his application as an exhibit.

[38.] As to there being any further emails or documents between Dr. Kerr from the Respondent, the Court notes that there is no specific email or document that Counsel for the Applicant can rely on to satisfy the court that any such communication exists. In fact, the email between Dr. Kerr and the Respondent was obtained by the Applicant directly from Dr. Kerr. If there were any further emails, it seems to me that those emails would have been provided to the applicant in like fashion. Thirdly, any such communications between Dr. Kerr and the Respondent would have to be relevant to the matter in question. Therefore the application for discovery of any documents in relation to paragraph a) of the Summons is dismissed.

[39.] With regards to paragraph (b) of the Summons, it was agreed by Counsel for the Respondent that the email to King's College would be submitted to Counsel for the Applicant. Any communications sent from King's College to the Respondent which Counsel for the Applicant is also seeking should also be provided by the Respondent.

[40.] Paragraphs (c) and (d) of the Summons are too broad as there is no specific document that Counsel for the Applicant is requesting in relation to those paragraphs in his affidavit. Additionally, there is no indication that any such documents exist. I agree with Counsel for the Respondent that there is no evidence that the Respondent had any communications with any government or quasi-government officials or any other persons other than Dr. Yaisel Kerr and King's College. In these circumstances, I am not in a position to order such documents to be disclosed when it is not clear what documents are being requested if they exist, and how it is relevant to the matter in question.

[41.] Paragraph (e), the email account lauradivocesnewton@gmail.com. While the emails in relation to that account are in the possession, custody, and power of the Respondent it is still to be determined what documents specifically are required by Counsel for the Applicant. Counsel indicated that the emails are in relation to the allegations of abuse against the Applicant, however, I am of the view that the request is too broad and is what counsel for the Respondent describes as a fishing expedition.

[42.] In the case of Whittingham and another v. Alexiou and others [2011] 1 BHS J. No. 7, *Isaacs, J* stated in paragraph 15 of the judgment that:

"... where a party is not certain as to what he is seeking, or for that matter, what he may find as a result of discovery, he should not be allowed to go on a fishing expedition."

[43.] The Respondent gave evidence under oath that the account was created for potential divorce proceedings. In this instance, most if not all emails in relation to this account would have been between her and her attorney and would be protected by privilege. Therefore the emails in relation to this account cannot be disclosed.

Conclusion

[44.] In all of these circumstances, having considered the verbal submissions of both Counsel, the legislation, and the authorities, I am unable to grant this application for discovery save and except for the King's College emails between the Respondent and King's College. The documents requested in the application were not specified in sufficient detail to allow the Court to consider the application. Additionally, there is no indication that the documents requested exist, were in her possession, custody, power, or any relevance of the documents to the matter in question.

[45.] Costs for this application is to be determined.

[46.] The Parties have leave to make submissions in that regard within Seven (7) days.

Dated the 22nd day of January, A.D., 2025



The Honourable Madam Justice C.V. Hope Strachan