THE EASTERN CARRIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT

Claim No. SKBHCV2021/0106
(formerly Claim No. SKBCV2019/0146)

BETWEEN:

DALE AMORY

1st Claimant/1st Applicant

REGINA AMORY

2nd Claimant/2nd Applicant

ASHTON AMORY

3rd Claimant/3rd Applicant

and

ERNEST AMORY

1st Defendant/1st Respondent

DENISE MALONEY

2nd Defendant/2nd Respondent

Appearances:

Ms. Joia Reece with her Ms. Joanne Flemming for the Claimants
Mr. Brian Barnes with him Mr. Nassibou Butler, Ms. Indira Butler, Ms. Lisa Hazel-Claxton and Ms. Leigh-Anne Wellington for the Defendants

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2023: May 5;

June 9.

DECISION

[1] **GILL, J.:** The matter for the court's determination is an application by the claimants for specific disclosure of classes of documents.

Background

[2] On June 24, 2019, the claimants filed a fixed date claim form and statement of claim against the defendants seeking, among other things, declaratory relief in respect of certain properties bequeathed in the last will and testament of Reginald C. Amory, and for the first defendant to be estopped from asserting his personal interest in relation to those properties and assets bequeathed and devised to the claimants.

[3] The claim survived a strikeout and/or summary judgment application by the defendants by an order of Moise J on December 29, 2021.

[4] Having gone through various stages, the matter was listed for pre-trial review on February 16, 2023. When the matter came on for hearing before this court, counsel for the parties indicated that the claimants' application for specific disclosure filed on July 8, 2022 had not yet been heard and determined. Therefore, I gave directions for submissions and set May 5, 2023 for the hearing of the application.

The application

[5] The claimants, who are the widow (1st claimant) and two children of Reginald C. Amory (hereinafter "the deceased"), seek specific disclosure of classes of documents including a list of all companies and/or businesses operated by the deceased and his brother, the 1st defendant, the corporate or registration documents of the companies or businesses, a list of names of the trading businesses from which the deceased received revenue or income, a list of financial institutions from which the deceased and the 1st defendant obtained loans between 1992 and 2017, the amounts obtained and the purposes of the loans, financial records of all the businesses operated by the deceased and the 1st defendant, names of the auditing or accounting firms engaged by the businesses, social security statements of income and contribution forms filed on behalf of the deceased by the businesses, list of all persons authorised to receive drawings or drawdowns from the businesses, list of all liabilities and outstanding balances associated with

the properties which fall under the estate of the deceased, and agreements for sale along with statements of account in respect of the sale of (i) Sands Complex Lot, (ii) R. C. Amory Building on Cayon Street and (iii) the Townsville Apartments.

[6] The claimants explain that this late-stage application was necessitated by the filing of the 1st defendant's witness statement on July 7, 2022 in which he asserted the following:

a) his deceased father founded and built a business, the engine of which was a bakery which his father left to him and it became his business;
b) the bakery called Amory Bakery was a family business;
c) the deceased and the 1st defendant worked together in the family business;
d) Amory Enterprises was an unincorporated entity over the years and only became registered as a business name in or about 2018.
e) The 1st defendant is the managing director of Amory Enterprises and the deceased was appointed as a director in name only.
f) The 1st defendant and the deceased drew from the business, and did what they wanted. They bought properties and looked after their families.
g) As Amory Enterprises was not a registered entity although operated over the years as such, with the Bank, all the applications to the Bank and transactions with the Bank had to be done personally by the deceased and the 1st defendant.

[7] The claimants contend that the information to which they say the defendants are privy, and the documents which they claim to be in the defendants' possession, are essential to the fair determination of the case, in particular, for the purposes of identifying the role the deceased played in the businesses of Amory Enterprises and the contribution and/or capital which the deceased invested in those businesses and the equity and assets derived therefrom. The claimants assert that the documents are directly relevant to the issues to be determined at trial and are necessary to dispose of the claim fairly and justly.

The opposition

[8] The defendants strenuously oppose the application, and have included in their opposition, assertions made in their application to strike and/or for summary judgment. The decision of Moise J to dismiss that application was not appealed, and still stands. I shall deal with the defendants' specific objections to the application before the court.

[9] The defendants submit that this application is a fishing expedition, in fact, a fishing marathon, on the part of the claimants who are seeking totally irrelevant and unnecessary documents which have no part or place in this matter.

[10] The defendants posit that the application bears no resemblance to the claim filed in this matter, and offends the principle of relevance. They point out that none of the documents contained in the claimants' request was pleaded or can show how they will lead to a just disposal of this matter. However, they provide responses to the classes of documents requested in a table which I reproduce verbatim as follows:

CLASS	DOCUMENTS	RESPONSE
A	Incorporation Documents, Annual Returns, Share Registers, Share Certificates and the names of all shareholders and directors between the years 1992 to 2017 for the company named American Bakery Limited.	There is no company named American Bakery Limited for which there is any incorporation documents, share register, certificate, directors nor shareholder between 1992 to 2017 or any other period.
B	List of companies incorporated by Ernest Amory and/or Reginald Amory during the period 1992-2017.	1992 – 2016 covers a period which the Defendants had no obligations to retain any documents and is therefore not in a position to disclose any documents falling within that period. In any event any company incorporated by the Defendants are their private business. The Defendants have no knowledge of incorporating any company in 2017 or any knowledge of Reginald Amory incorporating any Companies in 2017 or at all.

C	List of trading businesses created and maintained during the period 1992-2017 by Ernest Amory and/or Reginald Amory.	The Defendants were not obligated to and are not in a position to disclose documents for 1992 – 2016 which is outside of the document retention period. The Defendants have no knowledge of any creation of any trading businesses in 2017 or have any knowledge of any such business created by Reginald Amory.
D	List of names of all the business which Reginald Amory received revenue or income between the years 1992-2017.	Reginald Amory is deceased, and his business is the business of his Estate. This case has not in any way challenged the Estate of Reginald Amory and therefore this is an improper attempt to access information about the Deceased or his estate. This is not necessary for the just disposal of this matter. In any event 1992 – 2016 is not a period for which any records may be provided. Any income received by the Deceased was his private business. The Executors are only charged with the deceased's business after his death.
E	List of Financial Institutions that Reginald Amory and Ernest entered into loan agreements with. List of all loans obtained by Reginald Amory and Ernest Amory between 1992 – 2017, the amount obtained and the purpose of obtaining the loans. Loan statements and last receipts of mortgage payments for the property situated in Canada.	The Defendants have fully disclosed the financial institutions with which the 1st Defendant and Reginald Amory have obtained loans, the loan agreements and the balances of such loans. The Defendants have also disclosed the amount spent on the house in Canada which loan remains apart of the overall loan portfolio and paid accordingly as part of a portfolio.
F	Financial statements, profit and loss accounts, annual returns, loan statements and annual audit reports for all of the business identified in class B and C above between the period 1992-2017.	No entities were identified in neither Class B nor Class C above.
G	List of names of the auditing and/or accounting Firm used by Amory Enterprises between the period 19922017.	Amory Enterprises is a name created by the 1st Defendant and the private business of the 1st Defendant. Amory Enterprise is not a company with any requirement to have auditors and in any

		event is not a party to the case before the Court nor has anything pleaded in this case which remotely involves Amory Enterprises. How this is information necessary is not clear.
H	Social Security statement of wages and contribution forms submitted on behalf of Reginald Amory during the period 1992-2017.	As far as the Defendants are aware, Reginald Amory operated as a self-employed person and paid the minimum contribution on his own account.
I	List of all persons authorized to receive drawings or draw down from the revenues of the business identified in Class B or Class C for personal use during the period 1992-2017.	No entities were identified in Class B or C. For the avoidance of doubt the business that was operated in which Reginald Amory worked as a member of the family belongs solely to the 1st Defendant. Any drawings or draw down is the business of the 1st Defendant and has no relevance to the case before the Court as the business is not on trial.
J	Communications (including emails, facsimiles, letters whatsapp for the period 1992 – 2017 to or with the third parties who issued financial assistance or loans to Amory Enterprises including the institutions identified in Classes B and C above.	The entities who issued loans issued those loans to Ernest Amory and Reginal Amory who signed those loan agreements. There were no loans to any entity called Amory Enterprises Limited or any other entities. The loans and communications were with Ernest Amory and Reginal Amory and all those transactions have been fully disclosed.
K	List all the liabilities associated with the properties in Reginald Amory's Estate and the outstanding balances during the period 1992 – 2017.	All the liabilities associated with the Estate of Reginald Amory have already been disclosed and 50% of the liabilities are due from the Estate of Reginald Amory amounting to over $7 million.
L	Sale Agreements, Certificate of Title, Statement of Account in paper or electronic form relative to the sale of the Sands Complex Lot, RC Amory Building on Cayon Street and the Townsville Apartments by the Respondents.	All the stated transactions were by the Executors of the Estate of Reginald Amory which is not the business of this claim. The Executors have a duty to account if so required and upon completion of the administration will do so. It is neither relevant nor necessary for the just disposal of this case.

Issue

[11] The court must determine whether to make an order for specific disclosure in respect of any of the classes of documents requested by the claimants.

Law and analysis

[12] Part 28.5 of the Civil Procedure Rules 2000 as amended ("CPR 2000") deals with specific disclosure. It reads:

(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;
b) carry out a search for documents to the extent stated in the order;
c) disclose any document located as a result of that search.

(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.

[13] "Direct relevance" is dealt with in CPR 28.1(4) as follows:

*(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.

[14] CPR 28.6 deals with the criteria for ordering specific disclosure as follows:

28.6 (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) The court must have regard to –
(a) the likely benefits of specific disclosure;
(b) the likely cost of specific disclosure;

(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.

Direct relevance

[15] In **Dr. The Honourable Timothy Harris v Dr. The Right Honourable Denzil Douglas,**[1] Baptiste JA, in delivering the judgment of the Court of Appeal, gave guidance as the court's approach to relevance in an application for specific disclosure. At paragraphs 15 and 16 of the judgment, His Lordship stated:

> "For the purpose of disclosure, the relevance of the documents is analysed by reference to the pleadings and the factual issues that would arise for decision at the trial. Disclosure must be limited to documents directly relevant to those issues. In seeking to identify the factual issues which would arise for decision at the trial, the judge is obliged to analyse the pleadings. The critical question is whether the documents are directly relevant, and if they are, the court is enjoined to consider whether the order is necessary to dispose of the case fairly. It is necessary to pay regard to the overriding objective of the CPR which is to enable the court to deal with cases justly; this also engages the issue of proportionality.
>
> The rationale for the discretion 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 discretion as to whether to make an order for specific disclosure and will need to be satisfied that the documents are directly relevant within the parameters of the rule. However, the test for relevance is not a matter for the exercise of discretion. What documents parties are entitled to is a matter of law, not discretion."

[16] In this application, it is crucial that the claimants demonstrate to the satisfaction of the court how the disclosure requested would aid their case. [2] They must show the direct relevance of the classes of documents they want disclosed.

[17] The claimants submit that these documents are critical to establishing the contributions of the deceased during his lifetime to the businesses under the

[1] SKBHCVAP2019/0026, delivered December 9, 2021; See also *Kathryn Ma Fong v Incredible Power Limited and Others* BVIHCM 2015/0047 at paragraphs 52 and 76; *QVT Fund V LP & Others v China Zenix Auto International Group Limited & Others* [2017] ECSC J0124-1, BVI HC (COM) 0026 of 2014, delivered January 24, 2017, at paragraph 12

[2] See *Rohit Persaud v Planning Development Authority Grenada* GDAHCV2010/0564 at paragraphs 13 and 15

umbrella of Amory Enterprises and the assets or capital acquired therefrom. They contend that the documents sought are relevant to the issue of determining the equitable and beneficial interest that the deceased held in the business assets owned by the deceased and the 1st defendant.

[18] They submit that the classes of documents and information sought under the specific disclosure application will identify whether, in accordance with the deceased's wishes in his last will and testament, he validly referred to assets which he owned beneficially and could therefore be vested in the names of the claimants and secondly, whether there were any other businesses in which the deceased held an equitable and beneficial interest to be vested in the names of the claimants.

[19] The defendants counter that there is no reasonable basis on which an order for specific disclosure can be made in this case. They point out that there are only two properties in issue. Those two properties, they aver, were held as joint tenants by the 1st defendant and the deceased, and are now the property of the 1st defendant by right of survivorship.

[20] In determining whether the classes of documents are directly relevant, the court must examine the pleadings. The claim is in relation to properties devised in the will of the deceased. The statement of claim reveals that the claim was brought as a result of the first defendant asserting his right to properties so devised.

[21] The properties listed in the statement of claim (hereinafter "the properties"), as bequeathed to the claimants in his will, are as follows:

> *"i. The Church Street Property to the 2nd named Claimant*
>
> *ii. The Townsville Property to the 3rd named Claimant*
>
> *iii. The Sands Property to the 3rd named Claimant*
>
> *iv. The Lozack Road Property to the 1st named Claimant."*

[22] The claimants allege that the Church Street Property, at the time of the death of the deceased, was held as joint tenants by the 1st defendant and the deceased. They

state that the 1st defendant and the deceased held the Townsville Property as tenants in common, and the Sands Property and the Lozack Road Property as joint tenants.

[23] The claim acknowledges that the 1st defendant has a legal interest in the properties, and infers that the deceased had no lawful authority to devise the entire properties as he purported to do. Paragraph 12 of the statement of claim reads:

> *"12. That based on the arrangements and course of dealings between the deceased and the 1st Defendant, the deceased operated and laboured under the belief that he had acquired interest and/or some interest in the respective properties that permitted him to dispose said interest by his Last Will and Testament."*

[24] In spite of this, the claim states that the 1st defendant and the 1st claimant, the widow of the deceased, entered into an agreement dated January 4, 2018 for him to transfer his legal interests in the properties so as to reflect the intention of the deceased, and in acknowledgment of the 1st defendant's agreement and/or arrangement under the joint venture known as Amory Enterprises.

[25] The claim then alleges that the defendants indicated that the properties are owned solely by the 1st defendant and that they would not transfer the properties to the claimants as beneficiaries of the estate of the deceased.

[26] Hence, the claimants seek declarations that the properties are held in trust for their benefit, that they be granted all the legal and equitable interest in the said properties, that the 1st defendant is estopped from asserting his strict legal rights in relation to the properties, that the 2nd defendant holds the properties in trust for the claimants as the intended (at the time of the filing of the claim) executor of the estate of the deceased. Further or in the alternative, the claimants ask for a declaration as to their beneficial interest as beneficiaries of the estate of the deceased in the properties.

[27] The defence filed on September 6, 2019, takes no issue with the Church Street Property bequeathed to the 2nd claimant. They concede a half-share in the

Townsville Property bequeathed to the 3rd claimant. They agree with the claimants that the 1st defendant and the deceased owned and held the Townsville property as tenants-in-common.

[28] The defendants' main contention is with the Sands Property and the Lozack Road Property. They state that those two properties were owned by the 1st defendant and the deceased as joint tenants. Therefore, by right of survivorship, at the time of death of the deceased, these properties were solely owned by the 1st defendant.

[29] The defendants aver that the agreement signed between the 1st defendant and the 1st claimant reflected that all the properties were his personal properties, and that nowhere in the agreement document did he state that it was to reflect and/or acknowledge any intention, agreement and/or arrangement of or with the deceased under any joint venture.

[30] The 1st defendant contends that there are no projects in any joint ventures known as Amory Enterprises, and there is no financing anywhere obtained by any joint partnership known as Amory Enterprises.

[31] On the facts pleaded in the claim, this case is about the ownership of the properties, whether they were held as joint tenants or tenants in common, and whether they were held in trust for the claimants. The claim shows that the issues arose as a result of the 1st defendant's assertion of his rights as the sole owner of the properties, subsequent to an agreement reached with the 1st claimant. Interestingly, the claimants are asking the court for a declaration that the properties are held in trust by the defendants without such a pleading in the body of the claim. Further, the defendants point out that the claimants' contention that joint tenancy has no place in business is only raised in their submissions in this application for specific disclosure, and there is no such allegation in the claim.

[32] The statement of claim clearly alleges that three of the properties were held by the deceased and the 1st defendant as joint tenants, and that "the said properties …

were used as investment properties by the deceased and the 1st Defendant herein in a joint venture known as Amory Enterprises". Therefore, issues of ownership and a joint venture operation did not arise only out of the 1st defendant's affidavit in opposition to this application. These are live issues in the statement of claim.

[33] In their submissions in support of the application, the claimants set out the facts and law on which they rely to convince the court that the properties were held as tenants in common.[3] The defendants are adamant that the 1st defendant's right of survivorship has not been defeated, and there is no pleading that a trust was created, and in any event, there was none.

[34] The court, at this stage, will not engage in a mini-trial as to how the properties were held. The issues of whether a trust was created over the properties held as joint tenants, whether the right of survivorship was defeated or severed, whether the 1st defendant ought to be estopped from asserting his sole right to the properties he disputes, are matters for full ventilation at trial.

Status of the Properties

[35] In the circumstances of this case, and in consideration of the overriding objective to deal with cases justly, the status of the properties is of importance as to the direct relevance of the disclosure sought. The defendants provide another useful table showing the status of the properties as follows:

PROPERTIES	OWNERS	HOLDING	STATUS
Church Street	Estate of Edward Ashton Amory	Proprietorship	Sold
Townsville	Ernest Amory Reginald Amory	Tenants-in-Common	Sold
Sands Complex	Ernest Amory Reginald Amory	Joint tenants	Sold
Lozack Road	Ernest Amory Reginald Amory	Joint tenants	Mortgaged

[3] Gilbert Kodilinye, Commonwealth Caribbean Property Law, 4th Edition, at page 106; *O L Panton Administrator of the Estate of Olive Hinds v Dorothy Roulstone* (1976) 24 WIR 462 at pages 465 and 466; Halsbury's Law of England Equitable Jurisdiction (Volume 47 (2021)) 4. Principles of Equitable Jurisdiction (6) Equality is Equity 110. Equity prefers a tenancy in common.

[36] The defendants submit that the status of the properties above underscores the need for the claimants to understand that this claim is an exercise in futility. They explain that the duty of the Executor is to the estate first and foremost to liquidate and pay its just debts and only thereafter, if anything remains, the beneficiaries may be considered. On a finding of Ventose J in these proceedings, the defendants proffer that executors do not need the court's permission to carry out their duties. The defendants state that irrespective of the holdings of the four properties above, three properties have been sold by the Executors and the proceeds paid to the Bank to reduce the loan indebtedness. They maintain that the fourth property, the Lozack Road Property, is personally owned by the 1st defendant and heavily mortgaged, and can neither be sold nor transferred nor otherwise dealt with without the consent of the mortgagee. This property, the defendants submit, is not susceptible to the claim by the claimants.

[37] Therefore, the defendants contend that as the case stands, all that may be awarded to the claimants is an order that at the end of the administration of the estate of the deceased, a detailed accounting is filed in accordance with the Oath of Executor to render a just accounting if called upon to do so. In the circumstances of this case, they state that there is no merit in proceeding with this case or the issue of specific disclosure.

[38] The defendants, as executors of the estate of the deceased, have disposed of three of the properties, the proceeds of which have been applied to the debts of the estate of the deceased. Any claim as to the holding of the Lozack Road Property appears to be stifled by substantial mortgage entanglements. Respectfully, therefore, I see no point in ordering the disclosure requested, whether fully or in a narrower form than sought by the claimants.[4] In my view, this will only further delay the proceedings by a time-wasting exercise. The issues of joint ownership (joint tenancy or tenants in common), holding the properties in trust, and estoppel can be properly determined

[4] See *QVT Fund V LP & Others v China Zenix Auto International Group Limited & Others* [2017] ECSC J0124-1, BVI HC (COM) 0026 of 2014, delivered January 24, 2017 at paragraph 28

without the disclosure requested, and in the circumstances of this case, I find not directly relevant to the matters in issue. In light of the status of the properties, the claimants must consider to what end this claim is being pursued.

[39] The claimants' submission that the duty to disclose is ongoing until the conclusion of the case, is limited in CPR 28.12 by the condition of the court making an order for such disclosure. The court is not inclined to make such an order.

Order

[40] Based on the foregoing, I make the following orders:

1) The claimants' application for specific disclosure is dismissed.
2) The claimants shall pay the defendants costs of the application in the sum of $2,000.00.
3) The matter shall proceed to pre-trial review.

Tamara Gill
High Court Judge

By the Court

Registrar