

THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

Claim No. ANUHCV2016/0532

Between:-

STAR PROPERTIES CORP

First Claimant/Respondent

AMADEO SABAT NUTO

Second Claimant/Respondent

EVALEX, S.L.

Third Claimant/Respondent

And

PIERRE VANDENBROUCKE

First Defendant/Applicant

PEGASUS INC.

Second Defendant/Applicant

Before:

Master Yvette Wallace (Ag)

Appearances:

Ms. Kathleen Bennett with Mr. Kendrickson Kentish for the Claimants/Respondents

Mr. Lenworth Johnson for the Defendants/Applicants

2017: March 24, July 10

Decision

[1] **WALLACE, M:** This is an application by the Defendants/Applicants (hereinafter "the Applicants") pursuant to Rule 34.2(1) of the Civil Procedure Rule 2000 (hereinafter "CPR") to compel the Claimants/Respondents (hereinafter "the Respondents") to provide certain information requested by the Applicants relating to certain clauses in the Statement of Claim.

Background

[2] On 28th October 2016 the Respondents brought a claim against the Applicants for,

inter alia, -

"a) An account of all sums misappropriated by the Defendants and paid away by them or at their direction from the First Claimant and or from HMC and an order for payment to the First Claimant of all sums found due on the taking of the account.

b) A declaration that the Defendants hold all monies lawfully due to the First Claimant and unlawfully received by the said Defendants as constructive or resulting trustee for the First Claimant.

c) An order that the Defendants reconstitute or repay the assets which they hold on trust for the First Claimant and deliver up those assets to the First Claimant ..."

[3] On 21st November 2016, the Applicants requested certain information from the Respondents with respect to Clauses 20, 21 and 26 of their Statement of Claim.

[4] . The Respondents replied on 1st February 2017 and provided the information requested with respect to Clause 20. They declined to provide the information for Clauses 21 and 26 on the basis that the requested information is in the nature of particulars properly supplied in witness statements.

[5] The Applicants averred that the information is required in order for them to prepare their defence and have therefore filed this Application.

The Particulars Requested

[6] The Information requested by the Applicants is as follows:

"Clause 21 (Particulars)"

An amount of USD17, 335,790.27 was paid by the Brazilian company Vansa Hoteleria Ltda during the period May 2001 to March 2012; of the above mentioned amount (USD17, 335,790.27), an amount of USDB,122,947.32 was paid to third parties during the period November 2005 to December 2013. These amounts have been unaccounted by the previous management of the Star Properties Corp;

Information Requested

i. Details by month of the sum of US\$17,335,790.27 paid by Vansa Hoteleria Ltda during the period May 2001-March 2012.

ii. Details by date of the amount of US\$8,122,947.32 paid to third parties during the period November 2005 to December 2013 and the names (and address if known of the third parties.)

Clause 26 (Particulars)

The First Defendant between 24 th July 2008 and December 2013 diverted at least US\$900,000.00 of the First Claimant's fund from its bank account at Credit Suisse, Geneva, Switzerland to the account of the Second Defendant without any legal jurisdiction for such payments".

Information Requested

Details by date of the sum of US\$900,000 of the First Claimant's funds said to be diverted

from . the bank accounts of Credit Suisse, Geneva, Switzerland, to the account of the Second Defendant."

Applicants' Submissions

[7] Counsel for the Applicants Mr. Lenworth Johnson argued that the information requested was necessary for the Applicants so that they would have sufficient records to properly prepare their

Defence. The Applicants do not have access to the records and files of the First Respondent namely bank accounts, accounting records and files. The Respondents conversely already have the documents as their claim is based on an Audit Report.

[8] Mr. Johnson submitted that the claim was one where serious allegations of misconduct - conversion, breach of trust and conspiracy - have been made. There is, he contends, greater need for the Respondents to provide information before filing of the Applicants' response. He urged the Court to follow the approach endorsed by Lord Hope in **Three Rivers District Council and Others v Bank of England (No.3)**¹ given the period of time that has elapsed is 13 years, the lack of records in the Applicants possession and the Applicants need for the information requested to properly answer the specific allegations.

[9] Counsel, Mr. Johnson further submitted that it was important for the Applicants to explain, if necessary, from the point of the Defence, the transactions. However, without the information they would be unable to do so. Moreover, given that Rule 10.7 of CPR stipulates that the Applicants may not rely on any allegations or factual argument which is not set out in the defence, unless the court gives permission, there may be explanations and defences which the Applicants may need to include from the very beginning. There could also be saving of costs as the Applicants may be forced to amend their Defence after the pleadings are closed, upon receipt of the information requested by way of witness statements.

Respondents' submissions

[10] Counsel for the Respondents Ms. Kathleen Bennett submitted that the Applicants must satisfy the conditions set out under Part 34 of the CPR. The question, she argued, was whether the information sought should be in the pleadings or whether they should be in the witness statements. One has to look at the purpose of pleadings and the purpose of witness statements.

[11] Miss Bennett submitted that the information requested was in the nature of particulars properly supplied in witness statement and therefore the Respondents were not obligated to supply the information at that stage. Miss Bennett referred to

¹ [2001] 2 All ER 513 at para 51

Eastern Caribbean Flour Mills Ltd. v Ormiston Ken Boyea ² in which Barrow JA (as he then was) stated that "...it is settled Law that witness statements may now be used to supply details or particulars that, under the former practice, were required to be considered pleadings..."

[12] Learned Counsel Miss Bennett also submitted that the amount of details being requested by the Applicants was excessive and much more than would be necessary at this stage for the preparation of any Defence they may have.

[13] The issue is what order will best fulfill the requirements and objectives of Rule 34 and the Overriding Objective of the CPR, especially taking into consideration the weight which the Court gives to each of the factors to which it is required to consider under Rule 34.2(3).

The Law and Analysis

[14] Rule 34.1 of CPR states that Part 34 enables a party to obtain information from another party about any matter in dispute in the proceedings and that to obtain the information the first party must serve on the other party a request identifying the information sought.

[15] Under CPR 34.2:

"(1) If a party does not, within a reasonable time, give information which another party has requested under rule 34.1, the party who served the request may apply for an order compelling the other party to do so.

(2) An order may not be made under this rule unless it is necessary in order to dispose fairly of the claim or to save costs.

(3) When considering whether to make an order, the court must have regard to-

(a) the likely benefit which will result if the information is given;

2 St. Vincent and the Grenadines Civil Appeal No 12 of 2006

(b) the likely cost of giving it; and

(c) whether the financial resources of the party against whom the order is sought are likely to be sufficient to enable that party to comply with the order."

[16] Another consideration as raised by Mr. Johnson is the defendant's duty to set out the case that he intends to rely on. This is stated in CPR 10.5 (1) as follows:

"10.5 (1) The defence must set out all the facts on which the defendant relies to dispute the claim".

[17] Further, the CPR also relevantly includes the following:

1.1(1) The overriding objective of these Rules is to enable the court to deal with cases justly. And the Court has a duty to manage cases in order to further the overriding objective as stated in CPR 25, 1 including:

"25.1....

(b) considering whether the likely benefits of taking a particular step will justify the cost of taking it;

(g) encouraging the parties to co-operate with each other in the conduct of proceedings;

u) fixing timetables or otherwise controlling the progress of the case;

(I) identifying the issues at an early stage;

[18] In **Three Rivers 3**, the House of Lords considered whether a decision of the Court Appeal to strike out a claim should be upheld. Their Lordships determined that the matter should not be struck out. In the course of their reasoning they were required to consider whether the claim was sufficiently pleaded. In this regard, Lord Hope stated that as a general rule, the more serious the allegation of

3 Supra, note 1

misconduct, the greater the need there is for particulars which explain the basis for the allegation. His Lordship further stated, beginning at paragraph 49:-

'149] In my judgment a balance must be struck between the need for fair notice to be given on the one hand and excessive demands for detail on the other. In British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd (1994) 45 Con LR 1 at 4-5 Saville LJ said:

"The basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare to answer it. To my mind it seems that in recent years there has been a tendency to forget this basic purpose and to seek particularisation even when it is not really required. This is not only costly in itself, but is calculated to lead to delay and to interlocutory battles in which the parties and the court pore over endless pages of pleadings to see whether or not some particular point has or has not been raised or answered, when in truth each party knows perfectly well what case is made by the other and is able properly to prepare to deal with it. "

[50] These observations were made under the old rules. But the same general approach to pleadings under the CPR was indicated by Lord Woolf MR in McPhilemy v Times Newspapers Ltd [1999] 3 All ER 775 at 792-793:

"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. This is true both under the old rules and the new rules."

[19] This position as enunciated in **Three Rivers4** was restated and approved in **East Caribbean Flour Mills Ltd v Ormiston Ken Boyea 5**, a decision of our Court of Appeal. The Court found that a witness statement may contain particulars, which are not new allegations. It therefore does not matter that the particulars are not stated in the statement of case but are contained in the witness statements. It is however my considered view that **East Caribbean Flour Mills** is distinguishable from the case at bar. In that case, the request came at a very late stage of the

proceedings. Conversely, this application is made at an early stage of these proceedings, and moreover, the information requested is already in the possession of the Respondents

[20] In **Bertrand Burke v George Duberry**⁶ Michel J, as he then was, considered an application for certain information in respect of the Defendant's counterclaim pursuant to Part 34 of the CPR. The Court found that the general nature of the Defendant's claim was not sufficiently set out in the counterclaim. Particularly, the claim did not set out the period of the Defendant's employment with the Claimant, the precise statutory deductions which the Claimant failed to remit on the Defendant's behalf or the period during which the Claimant failed to remit deductions. The Court held that if the information was given pursuant to the request, then the likely result was that the Claimant would be better able to respond to the Defendant's claim. There was no indication that there would be any significant cost to the Defendant in supplying the information and there was no

⁴ *Supra*, note 2

⁵ Civil Appeal No.12 of 2006

⁶ ANUHCv 2008/0494

threat to the financial resources. Accordingly, the Court ordered that the Defendant should provide the information.

[21] As seen in **Bertrand Burke**, when considering whether or not to make an order under Rule 34 the Court must consider the likely benefit which will result if the information is given, the likely cost of giving the information and whether the financial resources of the party against whom the order is sought are likely to be sufficient to . enable that party to comply with the order. Further, under Rule 34.2(2) an order can only be made if it is necessary to dispose fairly of the proceedings or to save costs.

[22] The Applicants contend that the information requested is necessary in order for them to properly prepare their defence, especially given the requirements of Rule 10.5, to set out all of the facts on which the defendant relies to dispute the claim. The Applicants are acutely aware and concerned about the ramifications of Rule

10.7 in that it does not permit a party to rely on any fact which is not stated in its defence, but could have been, unless the Court gives permission or the parties agree. The Respondents contend that the case is properly made out in the pleadings, that any supplementary evidence should be properly supplied in the witness statements and that the request is one which is **excessive** in its details.

[23] Whilst the general nature of the case is discernable from the pleadings, the information requested by the Applicants is not excessive. That is, save and except for the requested information with respect to Clause 21 (i). *"details by month of the sum of US\$17,335,790.2T paid by Vansa Hotelaria Ltda during the period May 2001-March 2012."* That level of detail the Court finds in the circumstances is excessive.

Conclusion

[24] The Applicants' application is a timely application. On the facts of the case at bar, it would appear that the provision of the information will allow the Applicants to better respond to the Respondents' claim through its defence. A well pleaded case will operate to reduce the likelihood of new allegations being raised in the witness statements that follow. There may also be cost saving in the longer term if disclosure of the requested information, as modified in the order below, is made earlier. As a corollary, the Applicants will have the opportunity to prepare a comprehensive defence, in so far as is possible.

[25] There is also no cost to the Respondents in providing the information. The information was already used for and formed the basis of the Auditor's report dated 15th January 2016. Consequently, there is no substantial threat to the sufficiency of the resources of the Respondents as the information does not have to be procured - it is already within the grasp of the Respondents. Whilst it may not be in the format in which it has been requested, seemingly the information can be extracted with a minimal use of resources. Additionally, the requested information is likely to have to be provided at a later stage in the proceedings. At such later stage there is likely to be a cost consequence in that the Applicants may then have to seek to amend the pleadings. This additional burden will necessitate an application as that this can only be achieved with the Court's permission or if the Respondents indulge them.

[26] Rule 34 must however be construed in accordance with and subject to the Overriding Objective. Having regard to the overarching objective of the CPR, Rule

1.1 requires inter alia the Court to deal with cases justly. To this end the Court has powers to actively manage cases pursuant to Rules 25 and 26 of CPR, particularly, Rule 26.1(2)(w). Taking account of these, it is prudent for the requested information to be provided forthwith. In this instance, the amount in question is significant. Whilst in contrast to the case of *Bertrand Burke*, the broad period for the sums claimed is identified, a greater depth of particularisation is desirable and can be justified on the facts of this case. As articulated in *Three Rivers* the seriousness of the allegations, which in this case would include the quantum, insofar as they allow for better identification of the bases for the allegations, justifies the grant of the Order directing delivery of the requested information.

ORDER

[27] IT IS HEREBY ORDERED AND DIRECTED that:-

(1) The Claimants/Respondents or any of them shall provide the Defendants/Applicants with the information requested by the Defendants/Applicants relating to Clauses 21 and 26 of the Statement of Claim as follows within twenty-one (21) days of the date of this Order:-

(a) Clause 21

i. Details by date of the sum of US\$17,335,790.27 paid by Vansa Hotelaria Ltda during the period May 2001 - March 2012.

ii. Details by date of the amount of US\$8,122,947.32 paid to third parties during the period November 2005 to December 2013 and the names (and address if known of the third parties).

(b) Clause 26

Details by date of the sum of US\$900,000.00 of the First Claimant's funds said to be diverted from the bank accounts of Credit Suisse, Geneva, Switzerland, to the account of the Second Defendant."

(2) The Defendants/Applicants shall file and serve their Defence within twenty-eight (28) days of being provided with the information requested at paragraph 1 hereof.

(3) The costs for this Application shall be costs in the cause.

Yvette Wallace

Master(Ag)

By the Court

Registrar