EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2018/0005
BVIHCMAP2018/0008

BETWEEN:

[1] RENAISSANCE VENTURES LTD
[2] JOSEPH KATZ

Appellants/Defendants

and

COMODO HOLDINGS LTD.

Respondent/Claimant

Before:

The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]
The Hon. Mr. Anthony Gonsalves, QC	Justice of Appeal [Ag.]
The Hon. Mr. Eamon Courtenay, SC	Justice of Appeal [Ag.]

Appearances:

Mr. Paul Chaisty, QC, with him Mr. Mark Forte for the Appellants/Defendants
Mr. Vernon Flynn, QC, for the Respondent/Claimant

2018: July 11;
July 13.

ORAL JUDGMENT

[1] WEBSTER JA [AG.]: There are two appeals before the Court: Appeal No. 5 of 2018 is an appeal by Renaissance Ventures Ltd. and Mr. Joseph Katz as executor of the estate of Mr. Eric Emanuel (together "the defendants") against the decision of the learned judge dated 22nd February 2018 by which the judge refused the appellant's specific disclosure application for the disclosure of two sets of documents, namely, the unredacted share lists prepared by the respondent, Comodo Holdings Ltd. ("Comodo" or "the company"), and Comodo's financial

information. The second appeal, No. 8 of 2018, is against the judge's order made on 9th March 2018 that the defendants pay the costs of the application to adjourn the trial of the action, and the costs thrown away as a result of the adjournment of the trial.

Background

[2] The underlying dispute between the parties concerns the defendants' claim to shares in Comodo and for rectification of the share register of Comodo to reflect the ownership of the defendants' shares.

[3] Comodo is a technology company incorporated in the BVI. In 1999 Mr. Eric Emanuel ("Mr. Emanuel") entered into a business arrangement with Mr. Melih Abdulhayoglu ("Mr. Abdulhayoglu") and Mr. Eamonn McManus ("Mr. McManus") by which they were to each be allotted one-third of the shares of Comodo. Each shareholder would own his shares in a nominee company. The 1st defendant/appellant, Renaissance Ventures Ltd ("Renaissance"), was Mr. Emanuel's company. In 2000 Comodo issued share certificate number 6 to Renaissance as Mr. Emanuel's nominee for a subscription price of $750,000. In 2003 Comodo issued additional shares to Mr. Emanuel in consideration of him forgiving the repayment of loans that Renaissance had previously made to Comodo.

[4] Mr. Emanuel died unexpectedly in a car accident in 2006. Subsequent to his death, Comodo discovered, and it is their case, that Mr. Emanuel had received various sums of money from third parties wishing to buy shares in Comodo, and that some of that money was used to pay for the Renaissance shares. Further, Renaissance had not paid for the shares with his own money and the consideration for the shares had totally failed. Renaissance was not a shareholder of the company.

[5] The case against Mr. Emanuel's estate is that neither Mr Emanuel nor Renaissance had loaned monies to Comodo and therefore had not given valuable consideration for the shares issued to Mr. Emanuel. The defendants received share certificates for their shares. However, it later transpired that Comodo had not prepared a register of members. The register was first prepared in 2012 based on information in Comodo's records, including certain lists of shareholders ("the share lists"). The defendants assert that the records used to prepare the share lists include Comodo's financial information.

[6] In April 2017, Comodo filed a claim in the Commercial Court seeking a declaration that the defendants were not members of the company. The defendants counter-claimed for an order to rectify the register of members of Comodo to reflect their respective ownership of shares in the company.

[7] On 21st March 2017, Wallbank J set a trial window for March 2018.

[8] Following standard disclosure in 2017, the defendants applied on 3rd July 2017 for specific disclosure of certain categories of Comodo's documents. Comodo made its own specific disclosure application on 7th July 2017. For varying reasons, including the passage of Hurricanes Irma and Maria in September 2017, the applications were not heard until 7th September 2017. The judge delivered an oral decision on 11th December 2017. The terms of the order were not clear and the order has not been settled.

[9] For the purposes of this appeal the relevant parts of the draft order are that Comodo was ordered to disclose of:

(i) balance sheets and profit and loss accounts for the period mid-1998 to the end of 2012; and

(ii) any and all lists of shareholders, including informal share lists created since 1998, which purport to record share ownership in the company.

[10] There was a dispute between the parties as to whether the order provided that the share lists should be redacted to remove any reference to any shareholder other than the defendants. Comodo contended that the judge ordered redaction of the lists, whilst the defendants contended that the share lists were to be produced unredacted. Comodo attempted to comply with what it considered to be the terms of the order by producing heavily redacted share lists. It did not disclose any financial information on the ground that it did not have the information requested by the defendants as such information was held by its subsidiaries.

[11] In this state of uncertainty the defendants issued a second specific disclosure application on 18th January 2018, intending that the application would be heard at the pre-trial review scheduled for 23rd January 2018. The application was not heard until 22nd February 2018. The judge granted disclosure of two categories of the documents requested but refused the following categories:

(i) Profit and loss and balance sheets, any and all information leading to the alleged conclusion that the company does not create a profit, and in particular such records as it keeps pursuant to section 98 BVI Business Companies Act.[1] The judge also refused, sub silentio, the request made in the defendants' written and oral submissions for the financial records that led to the creation of the 2012 register. The notice of application was not amended to include this request but the application was prosecuted on the expanded basis. The judge's failure to deal with records used by Comodo for creating the 2012 register is listed as one of the defendants' grounds of the appeal; and

[1] No. 16 of 2004.

(ii) Information currently redacted in the existing disclosure of share lists and registers ("the refusal order").

[12] On 26th February 2018 the defendants applied ex parte with a certificate of urgency for leave to appeal against the refusal order. The application was heard by the Full Court of Appeal on 2nd March 2018. The Court granted leave to appeal.

Submissions

[13] Learned Counsel for the defendants, Mr. Paul Chaisty, QC, submitted that Comodo had accused Renaissance and Mr. Emanuel (who is no longer around to defend himself), of serious misrepresentations and nefarious conduct, and that Comodo is in possession of the information that the defendants need to defend themselves against these accusations, and to recover their shareholdings in Comodo. He then refined his submissions by dealing with the specific requests for disclosure, namely the financial information, including financial information in the records used by Comodo to prepare the 2012 register, and the unredacted share lists.

[14] Mr. Chaisty, QC submitted further that the judge erred in making the refusal order in at least the following ways:

(i) he erred in finding that the financial information and the unredacted share lists were not relevant and necessary;

(ii) he failed to deal adequately or at all with the provisions of rule 28.16 of the Civil Procedure Rules 2000 ("CPR") that documents that are referred to in a statement of case, affidavit, witness statement or summary must be disclosed; and

(iii) he failed to deal adequately or at all with the evidence that the claimant was in control of the financial information in the sense contemplated by rule 28.2 of the CPR.

[15] As a result of these errors, the judge failed to take into consideration matters that he should have considered, or took into consideration matters that he should not have considered, and that as a result his decision to refuse disclosure of the financial information was blatantly wrong and outside the generous ambit within which reasonable disagreement is possible and should be set aside.

[16] Learned counsel for the claimant, Mr. Vernon Flynn, QC, submitted in response that (a) this is an appeal from the exercise of the trial judge's decision in managing a case for trial and the appellate court should not interfere with the exercise of discretion by the trial judge unless it is satisfied that the judge was blatantly wrong, and that his decision was outside the generous ambit within which reasonable disagreement is possible; and (b) the restriction on the Court of Appeal in reviewing the exercise of discretion is even more important in this case where the trial judge had conduct of the interlocutory and pre-trial issues in the case and is more familiar with the issues than the appellate court. The Court of Appeal should not substitute is own decision for the decision of the trial judge, even if it would not have come to the same decision as the judge. It is only if Court of Appeal is satisfied that the errors made by the trial judge are such that his decision is clearly outside the generous ambit within which disagreement is possible that it should interfere.

[17] Mr. Flynn's second major submission is that the defendants should not have applied for leave to appeal against the refusal order without giving notice to Comodo's legal advisers, and that counsel for the defendants did not make full and frank disclosure to the Court of Appeal in making the application for leave to appeal. As a result, this Court should set aside the leave that was granted on the ex parte application.

Analysis
Relevance

[18] The CPR provides that a document is disclosable only if it is "directly relevant" to the case. Rule 28.1(4) provides that a document is directly relevant if:

> "(a) the party with control of the document intends to rely on it;
> (b) it tends to affect that party's case; or
> (c) it tends to support another party's case."

[19] Mr. Chaisty, QC submitted that the excluded documents are directly relevant to the issues in the case. Further, even though this is not a claim for money, there are serious issues regarding payments of substantial amounts of money by third parties to Mr. Emanuel; payments made by Renaissance to the claimant for the shares issued to Renaissance; and loans made by Renaissance and Mr. Emanuel and/or Renaissance to Comodo that were eventually treated as the consideration for the issue of the shares to Mr. Emanuel. These are heavily contested issues in the case.

[20] In our view, it could hardly be said that the requested financial information in Comodo's balance sheet and other financial records is not directly relevant to the defendants' case. To take just one example, the financial accounts could prove, or disprove, whether the alleged loans were made to Comodo. If it is shown that the loans were made, this could assist in proving that the shares issued to Mr. Emanuel were properly issued and whether the Court should order rectification of the register of members to reflect his estate's shareholding in the company.

[21] We are satisfied that the requested financial information is directly relevant to the defendants' case.

[22] The judge disallowed the request for financial information on the grounds that Comodo had filed evidence that it had carried out a search and no documents in that category were found. Further, that the financial information was not directly relevant under CPR 28.5(5).

[23] The first part of this finding was made on a wrong factual basis. There is no evidence that Comodo had searched for and not found the financial information. What Mr. Abdulhayoglu said in his Eighth Affidavit is that Comodo is a holding company, it did not keep its own financial information, the information is kept in the subsidiaries and he can view the information to determine Comodo's financial position. In our opinion if he had access to the information in the subsidiaries that Comodo owned and controlled, it follows that he controlled the financial information for the purposes of rule 28. The learned judge erred in not taking this into consideration when he made the refusal order.

[24] The second part of the finding is also incorrect, because, as we have found, the requested financial information is directly relevant to the issues in the case and the learned judge erred in not so finding.

[25] The same can also be said of the information redacted from the informal share lists. In the first place, we find that it is remarkable that Comodo did not create a register of members until 2012 in clear violation of section 41 of the Business Companies Act 2004, and now seeks to withhold information from the defendants about the details of how it kept the information regarding its shareholders prior to 2012. It is also a part of the defendants' case that representatives of Comodo have stated in the past that the defendants are shareholders of company. Mr. Chaisty submitted that the unredacted share lists are important for the defendants to see who are the listed as shareholders and to cross-examine witnesses for Comodo at the trial.

[26] We are satisfied that the unredacted share lists are directly relevant to support the defendants' case.

CPR 28.16

[27] As stated above rule 28.16 of the CPR provides that documents that are referred to in a statement of case, affidavit, witness statement or summary must be

disclosed by the party referring to them. The logic of this rule cannot be doubted. If a party refers to a document in his pleadings or written evidence, he must be taken to be relying on that document and must produce it if requested by any other party in the case. The requesting party under this rule does not have to prove that the document is directly relevant to the case.

[28] Mr Chaisty took us to several places in the pleadings and evidence where Comodo made reference to, for example, the records that the claimant used to create the 2012 share register. Even a single reference to these records is sufficient to make them liable to be disclosed upon request. For example, in Rubin v Expandable Ltd.[2] a reference in a witness statement to "he wrote to me" was held to be a direct allusion to the letter that was written and it was liable to be disclosed.

[29] In the instant appeal the references in the pleadings and witness statements to the records used in compiling the share lists, and the share lists themselves, are sufficient to make these documents liable to disclosure under rule 28.16.

[30] The judge did not deal with rule 28.16 in any meaningful way. He made passing references to the rule when making his order but he did not deal with the application of the rule to the facts in the case in any substantive way. Had he done so he would have found that there are references to the disputed documents in Comodo's pleadings and evidence, which means these documents are liable to be disclosed.

[31] There are ways of objecting to disclosure of referenced documents, for example, the document may be privileged. Lack of control may also be raised. None of these objections were raised in this case. In any event, we have found that Comodo had control of the financial information. The evidence of Mr. Abdulhayoglu referred to above is that the information is in the subsidiaries

[2] [2008] EWCA Civ 59.

and he is able to view them to determine the financial state of Comodo. This is control for the purposes of disclosure under CPR 28.16.

The leave to appeal

[32] Mr. Flynn invited us to set aside the ex parte order granting the defendants leave to appeal against the refusal order on the grounds that Comodo was not notified of the application, there was material non-disclosure, and the Court of Appeal was not presented with what would have been Comodo's position on the application, especially with regard to the impending trial.

[33] We decline the invitation. The established practice in this Court is that a respondent who is dissatisfied with the grant of leave to appeal has the opportunity to ventilate his objection as a part of his arguments at the hearing of the appeal - see paragraph 7 of the judgment of Mitchell JA in the case of Cage St. Lucia Limited v Treasure Bay (Saint Lucia) Limited).[3] We have also noted that counsel for the defendants at the hearing of the ex parte application explained to the court in her written and oral submissions that the grant of leave would in all likelihood result in an adjournment of the trial scheduled for 13th March 2018. The Court would not have been in any doubt as to the possibility of an adjournment of the trial.

[34] It is correct that on the leave application the Court was not informed by counsel of the freezing order but we do not consider that this is a basis to set aside to the order granting leave to appeal. The issue of the freezing order was not a material consideration in dealing with the application. It was a matter for the trial court and, as has happened, Comodo applied to the Commercial Court to discharge the freezing order after the trial was adjourned. A decision is pending on that application.

[3] SLUHCVAP2011/045 (delivered 23rd January 2012, unreported).

[35] We have already dealt with Mr. Flynn's other main objection that this is an appeal against a case management decision of the trial judge and this Court should not lightly interfere with the exercise of the judge's discretion.[4]

[36] Having reviewed the evidence and the full and able submissions of counsel, we are satisfied that the learned judge took matters into consideration that he should not have, and did not consider matters that he should have, and that as a result committed errors of principle and his decision was outside the generous ambit within which reasonable disagreement is possible. In the circumstances, we will set aside the refusal order, substitute our own discretion, and order the disclosure of the financial information and the unredacted share lists.

Order

(1) The appeal is allowed.

(2) The claimant/respondent, Comodo Holdings Limited, is ordered to make specific disclosure within 14 days of the date of this order of the documents listed in sub-paragraphs (ii) and (iii) of paragraph 1 of the defendants' application for specific discovery dated 18th January 2018.

(3) The claimant/respondent is ordered to make specific discovery within 14 days of the date of this order of the records used to create the 2012 register.

(4) Costs of the appeal to the defendants/appellants, to be assessed, if not agreed within 21 days of the date of this order.

The costs appeal

[37] The context of the costs appeal is that following the grant of leave to appeal on 2nd March 2018, the defendants applied to the trial judge on 6th March 2018 for an adjournment of the trial on the basis that they had been granted leave to appeal

[4] See paragraphs 15-17 above.

and intended to pursue the appeal. The contested application was heard on 9th March 2018. The trial judge granted the application, adjourned the trial, and ordered the defendants to pay the costs thrown away by the trial adjournment, and the costs of the adjournment application, within 14 days, to be assessed, if not agreed ("the costs order"). On 24th April 2018 a single judge of this Court granted leave to the defendants to appeal against the costs order. The judge did not give reasons for his decision and the reasons are not otherwise apparent from the transcript.

[38] Having heard counsel and read their submissions, we are satisfied that this is a case where the defendants acted at all stages with due expedition from the filing of the first specific disclosure application in July 2017, to the filing and prosecution of the leave to appeal application, and, as we found in the disclosure appeal, the disputed documents are directly relevant and necessary for the defendants to prosecute their case in the court below. In the circumstances, we will set aside the costs order and order that the costs thrown away by the adjournment of the trial and the adjournment application be reserved to the trial.

Order

[39] The Court hereby orders as follows:

(1) The appeal is allowed and paragraphs 6 and 7 of the order of the trial judge dated 9th March 2018 are set aside.

(2) The costs thrown away by the adjournment of the trial and the costs of the adjournment application be reserved to the trial.

(3) Each party will bear their own costs of this appeal.

I concur.
Anthony Gonsalves
Justice of Appeal [Ag.]

I concur.
Eamon Courtenay
Justice of Appeal [Ag.]

By the Court

Chief Registrar