

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT

CLAIM NO. SKBHCV2016/0283

BETWEEN:

DR. THE HONOURABLE TIMOTHY HARRIS

Respondent/Claimant

and

DR. THE RIGHT HONOURABLE DENZIL DOUGLAS

Applicant/Defendant

Appearances:

Mr. Dane Hamilton Q.C., with him, Mr. Victor Elliot Hamilton for the Claimant
Mr. Sylvester Anthony and Ms. Angelina Gracy Sookoo-Bobb for the Defendant

2019: June 27
July 22

JUDGMENT

- [1] **VENTOSE, J.:** The Respondent, Dr. the Hon. Timothy Harris, Prime Minister of Saint Christopher and Nevis, filed on 26 September 2016, a claim seeking damages for libel from the Applicant, the Right Hon. Dr. Denzil Douglas, Leader of the Opposition and former Prime Minister of Saint Christopher and Nevis, for part of a speech that Dr. Douglas made on the 22 June 2016 as follows:

"... I want to close by firstly responding to a number of the questions that were asked. And there was a caller who tried to divert the peoples' attention from the incompetence, deception and the scandalous behavior of this government by talking about some closure of some Dubai Consulate. I think this person obviously is ignorant of the facts.

When the Consulate was closed as far as I'm concerned and I'm aware of, the Counsel General then gave a comprehensive report of all of the activities of the Consulate during her tenure. Left that report in place, sent also a copy of that report to the Minister of Foreign Affairs, the Honourable Mark Brantley. So you should go and ask him what the hell he did with that report.

Second matter I wish to respond to is; Sylvine and others talking about in March of 2015 -- well I don't know what has happened to her memory, she doesn't realize that March 2015 we were not in Government. And let me say proudly, that one of the hallmarks of our own government and its policies for tourism development was medical tourism, but nothing of this crap that you are seeing here, that is happening at the Joseph N. France General Hospital. Medical tourism is what I spoke to. And today I still speak to it. That is why the owner of Marriott enjoined this government and was working towards the establishment of a proper facility at the Marriott. And when it was not possible, it would have appeared to have established a proper clinic outside of the Marriott. It was inside of the Marriott that that clinic was going to be located.

So, I want Sylvine to review her facts, jog her memory. If you need to take some medication to jog it, then do it. But you are obviously out of place to be suggesting that in March 2015 we knew something. Of course we spoke openly about medical tourism. And of course we had gone to the legal department and had begun to draft the first piece of legislation in this country, if not in the entire Caribbean to do with stem cell. That is why it never happened, because there was no legal framework. And until that was put in place, it could never take place.

So you need to get your facts right again Madame Sylvine Henry.

I also would want to make the point very, very clearly that a caller was requesting that all of the facts pertaining to this matter should be made clear and open to the public. But it will not be done because there is no Freedom of Information Act that this

government promised people when it was in a position that it would have brought into place.

I want to end by saying that there is a criminal aspect to the whole matter of the Stem Cell Scandal that took place last week Monday, because, you see, one of the patients who came in from abroad and up to now, no one even knew who he was because as two of our previous presenters today had said, that there was no medical information in any file presented to the hospital. I want to know who the heck is running the hospital up there?

How can you have patients coming up there from abroad, accepting controversial treatment in the hospital, on the ward, administered by our own trained nurses, supervised by a doctor and there is no information being brought to the relevant people who are treating and looking over this person medically?

This is scandalous. But one of the patients was eventually identified to the medical staff only after he was arrested by the police on his way out of the airport because he was found with a high powered rifle, high powered rifle. And when he was arrested and taken down to the police station he was not allowed to sleep in the police station overnight.

You know where his prison cell was? In the Marriott. That's where Harris ordered he be placed, in the Marriott. And who you think tried his case later in the week? Donna Harris, Magistrate, sister of the Prime Minister, Dr. Harris. And what do you think was the sentence or fine imposed? \$10,000.00.

You understand? Little wrap on the wrist. Whereas if it was a boy from McKnight or St. Paul's or Newton Ground, or even me. I would have been lost in prison. But \$10,000.00 is what a billionaire was made to pay after he was found at our airport travelling out with a high powered rifle, illegal firearm not even declared to the Customs. And he got a little wrap on his wrist and paid \$10,000.00. This cannot be right.

And that is part of the problem. Harris thinks he can take all kinds of people. Harris believes, and I am saying it very clearly and loudly for everybody to hear me. Harris believes he can take bribes and keep himself in office. That will not work in this country. Harris must go. Harris must resign. The Minister of Health, Hamilton, he must resign.

Up to this point we've heard nothing at all about the 'Kaplan Scandal', absolutely nothing. How much money did Kaplan pay the Government Ministers? How much did he pay? How come after Harris indicated that he was going to improve the checks in

the system, the Citizenship by Investment Program that we have two crooks still entering the program, signed into citizenship and given passports by Dr. Harris, himself. How come that is happening? Harris should resign. Not only over this matter, but over the 'Kaplan Scandal' matter as well.

Thank you, God bless you..."

- [2] The Applicant, on 5 December 2016, filed an amended defence to the claim alleging that the words about which the Claimant complains were: (a) fair comment and (b) based on qualified privilege.
- [3] The Applicant filed an application for specific disclosure on 6 March 2019 with supporting affidavit, seeking the following orders:
1. An order that the Claimant/Respondent shall within 14 days of this order, provide specific disclosure to the Defendant/Applicant of the following documents requested in the letter dated 24th July, 2017 from Counsel for the Defendant/Applicant, namely:
 - a. Letter Regarding Authorization of Business Activity for St. Kitts Institute for Regenerative Medicine Ltd.
 - b. A certified true copy of the Cabinet Minutes for the meeting of the 4th May, 2016 referred to in the letter dated 16th May, 2017 and captioned "Amended Letter Regarding Authorization of Business Activity for St. Kitts Institute for Regenerative Medicine Ltd";
 - c. The public relations campaign package provided to the Cabinet and or Ministry of Health and or Government "re: the launch and press conference for the "new venture as per the commitment given by Mr. Kevin Klein and or St. Kitts Institute for Regenerative Medicine Ltd";
 - d. Proof that the said public relations campaign package of St. Kitts Institute for Regenerative Medicine Ltd. was executed prior to the commencement of the regenerative programme;
 - e. A copy of the submission of the St. Kitts Institute for Regenerative Medicine Ltd.'s comprehensive business plan including its financing plan as requested by the letter of the 16th May, 2017.
 - f. A certified true copy of the extract of the Cabinet Minutes for the meeting held to confirm that the St. Kitts Institute for Regenerative Medicine Ltd complied with all of the

requirements listed in the letter of the 16th May, 2017 and thereby granting final approval of the regenerative project.

- g. The date on which the regenerative project began;
- h. A list of all medical personnel that worked on the regenerative project and certified copies of their registration with the Medical Board at the time they worked on this project;
- i. A copy of the Custom and Excise declaration forms to confirm that the material used in the regenerative project consisted of umbilical cord blood or cord blood plasma samples which were procured from reputable international cord blood banks located in countries like Brazil.
- j. The documentary proof provided by the St. Kitts Institute for Regenerative Medicine Ltd. to confirm that the raw materials to be used in the regenerative project were procured from reputable international cord blood banks.
- k. Proof that the patients used in this regenerative project were granted access to the hospital using the normal admission protocols of the hospital and that the company and its employees or patients were not entering or accessing the premises of the Hospital via private access. Given the confidentiality issue of the patients we will not object to the names of the patients being redacted from the documents provided.

2. Costs of this application shall be costs in the cause.

- [4] The three issues that arise for consideration are, first, whether any of the documents which are the subject of the application for specific disclosure "are or have been in the control" of the Respondent. Secondly, if so, are any of those documents "directly relevant" to the Applicant's case. Third, whether the Respondent can exercise a claim to a right to withhold disclosure or inspection of any of those documents.

Disclosure under the Civil Procedure Rules 2000

- [5] CPR 28.1 sets out rules about the disclosure and inspection of documents. A "copy", in relation to a document, means anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly; and "document" means anything on or in which information of any

description is recorded (CPR 28.1(2)). A party “discloses” a document by revealing that the document exists or has existed (CPR 28.1(3)). 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 (CPR 18.1(4)).

[6] CPR 28.2(1) states as follows:

Duty of disclosure limited to documents which are or have been in party’s control

28.2 (1) A party’s duty to disclose documents is limited to documents which are or have been in the control of that party.

(2) For this purpose a party has or has had control of a document if –

(a) it is or was in the physical possession of the party;

(b) the party has or has had a right to inspect or take copies of it; or

(c) the party has or has had a right to possession of it.

[7] It seems to me to be clear that the duty of disclosure relates solely to documents that are or have been in a party’s control. CPR 28.2 then provides three circumstances where “a party has or has had control of a document”.

[8] The criteria for ordering specific disclosure is found in CPR 28.6(1) and (2) as follows:

Criteria for ordering specific disclosure

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; and

(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.

[9] In addition, CPR 28.16 provides that:

Documents referred to in statements of case, etc.

28.16 (1) A party may inspect and copy a document mentioned in –

- (a) an affidavit;
- (b) an expert's report;
- (c) a statement of case;
- (d) a witness statement or summary; or
- (e) the claim form.

(2) A party who wishes to inspect and copy such a document must give written notice to the party who, or whose witness, mentioned the document.

(3) The party to whom the notice is given must comply with the notice not more than 7 days after the date on which the notice is served.

[10] The Court of Appeal in **Renaissance Ventures Ltd et al v Comodo Holding Limited** (BVIHCMAP 2018/0005 and BVIHCMAP 2018/0008 dated 13 July 2018) stated that:

[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.

The Submissions of the Applicant

[11] The Applicant submits that a party is required to disclose documents on which he relies, those which adversely affect his case, and those which support or adversely affect another party's case. The relevant documents are the documents which are integral to the issues in the proceedings. The Applicant then outlines the various reasons why the documents which are the subject of the order for specific disclosure are relevant to his case. The Applicant argues that: (1) the documents or information requested are relevant to the issues concerning the stem cell

project; and (2) these documents or information directly affect, in an adverse way, the Respondent's position. The Applicant submits that the Respondent has not disclosed these documents or information in any of the three Lists of Documents filed on his behalf, and that these are documents which are within his control or which he can, in his capacity as Prime Minister, obtain.

- [12] The Applicant further submits that the documents are either in the Respondent's possession or control or in the alternative, the Respondent has the right to inspect or take copies of them. The Applicant contends that the statements made by the Respondent were critical of the government and in particular, the Respondent as Prime Minister and who is the Head of Cabinet. These statements, the Applicant further contends, were not in relation to the Respondent in his personal capacity. The Applicant submits that the issues and/or criticisms raised by the Applicant were based on the Respondent's role as Prime Minister of Saint Christopher and Nevis and the various ministerial portfolios held by the Respondent. For these reasons, the Applicant further submits, these documents are therefore relevant to the issues in this claim and are documents, which the Respondent in his capacity as Prime Minister, Head of Cabinet or line Minister can obtain, inspect, take copies of and/or were in his control and can be retrieved by him.

The Submissions of the Respondent

- [13] The Respondent submits that the documents are not his possession but in the possession of the Crown and that he has no right to disclose documents in the possession of the Crown. The Respondent further submits that he brought the claim in his private capacity, concerning statements made by the Applicant alleging that the Respondent privately enriched himself by taking bribes. The Respondent contends that he took and subscribed the oath of secrecy and cannot disclose information obtained in the course of exercising the duties of his office, without the consent of Cabinet. The Respondent further contends that no Minister of Government nor any servant of the Crown is entitled to take copies of the documents obtained in the course of their employment for the purpose of a private claim without the consent of the Crown.

[14] The Respondent submits that all of the cases cited by the Applicant in relation to documents held by the Crown, were actions involving the Crown as a party. The Respondent also submits that this is a private claim between two parties in the private capacities. Irrespective of the Applicant's pleading which directed at government policy, the Respondent complains of a private wrong suffered by allegations of personal misconduct i.e. that the Respondent accepted bribes in relation to the hospital project. The Respondent submits that the documents: (1) related to matters before the Cabinet proceedings are protected by privilege and cannot be disclosed; and (2) are not relevant to the issues to be determined justly in accordance with the overriding objective. The Respondent also specifically submits that:

20.5. The Respondent has no right to demand copies of minutes of Cabinet Proceedings which are in the custody of the Cabinet Secretary as such the Applicant is not entitled to an order for the documents noted in paragraph 1 (b) and (f) of the Draft Order.

20.6. The Respondent has no right to demand copies of the public relations package provided to Cabinet and/or the Ministry of Health which are in the possession and legal custody of the Crown. As such the Applicant is not entitled to an order for the documents noted in paragraph 1 (d) of the Draft Order.

20.7. The Respondent has no right to demand copies of the business plan or financing plan from the Ministry of Health and/or St. Kitts Institute for Regenerative Medicine Ltd without their consent. As such the Applicant is noted (sic) entitled to an order for specific disclose (sic) of the documents noted in paragraph 1 (e) of the order.

20.8. The Respondent has not (sic) right to demand copies of the files of medical personnel registered with the Medical Board without the consent of the Medical Board as such the Applicant is not entitled to an order for specific disclosure in relation to (sic) document listed in paragraph 1 (h) listed in (sic) the Draft Order sought by the Applicant.

20.9. The Respondent has no right to demand without the consent of the Comptroller of Customs and/or the permission of Cabinet to demand (sic) copies of (sic) document noted in paragraph 1 (i) listed in the Draft order sought by the Applicant and they are not within his possession.

20.10. The class of documents noted in paragraph 1 (j) of the Draft Order is not only wide, but possibly in the possession of multiple third parties, including the Ministry of health, the Comptroller of Customs, St.

Kitts Institute for Regenerative Medicine Ltd, all of whom the Respondent has no right to demand without their consent copies of the document.

20.11. The document noted in paragraph 1 (k) of the Draft Order is not in the possession of the Respondent but in the possession and legal custody of the Ministry of Health. The Respondent has no right to demand copies from the Ministry of Health without their consent copies of these documents.

20.12. Furthermore, the proceedings of Cabinet are confidential, the Respondent cannot be required to disclose Cabinet minutes as they are in the legal custody of the Cabinet Secretary and he his (sic) not entitled to obtain copies without the consent of Cabinet. They are subject to oath of secrecy that the Respondent took and subscribed upon entering into the duties of his office.

- [15] In addition, the Respondent submits that the disclosure of the documents, as the Applicant contends, cannot simply be based on the fact that the Respondent is a Minister of Government, i.e. a member of Cabinet – these documents would have come to his knowledge solely by reason of his office, which he has sworn not to disclose under the oath of secrecy made pursuant to section 60 of the Constitution.

The Duty of Disclosure

- [16] The CPR makes it clear that the first and foremost consideration in the duty of disclosure is limited to documents which are or have been in the control of that party. It is no surprise that it is found in CPR 18.2 after CPR 28.1 which defines the scope of the duty of disclosure and inspection of documents. Anything else is secondary to the question of whether the documents or have been in the control of that party. The question of relevance, although critically important, is secondary. Documents, however relevant, cannot be disclosed by a party if those documents are not or have not been in the control of that party. The first question that now arises is whether the Respondent has or has had control of a document because: (a) it is or was in his physical possession; (b) the Respondent has or has had a right to inspect or take copies of it; or (c) the Respondent has or has had a right to possession of it.

[17] It is accepted on the evidence that the Respondent is or was not in physical possession of any of the documents. Does the Respondent have or had the right to inspect or take copies of the documents or to take possession of the documents? The Respondent submits that the documents related to matters before the Cabinet proceedings are protected by privilege and cannot be disclosed. That is not the test at this stage to determine whether the documents fall to be disclosed in accordance with CPR 28. This issue might arise in respect of an exercise of a claim to a right pursuant to CPR 28.14 to withhold disclosure or inspection of document. However, that claim to a right only arises in respect of a document that satisfies the requirements of CPR 28.2 (documents which are or have been in a party's control), CPR 28.6 (criteria for specific disclosure) and 28.4 (standing disclosure), importing the requirement of "directly relevant", as defined in CRR 28.1(4).

[18] Having regard to all the circumstances, it is my considered opinion that the Respondent, although the action in defamation is a civil action brought in his personal capacity, I agree with the Applicant that the statements made by the Respondent were critical of the Respondent as Prime Minister and Head of Cabinet, and that they were not in relation to the Respondent in his personal capacity but were based on the Respondent's role as Prime Minister of Saint Christopher and Nevis and the various ministerial portfolios held by the Respondent. Consequently, the Respondent must disclose the documents which he has or has had a right to inspect or take copies of them; or has or has had a right to possession of them.

The Right to Inspect or Possess

[19] I will now outline my reasons in respect of the specific documents which are the subject of the application for specific disclosure as follows:

- (i) 1(a) – the Respondent disclosed the 5 March 2013 letter which makes reference to an earlier letter which that letter amended. I have no doubt that the Respondent as Prime Minister has a right to inspect a copy of that letter.

- (ii) 1(b) – the Respondent has the right to inspect and take copies of any Cabinet minute, because as Prime Minister, he chairs Cabinet;
- (iii) 1(c) – The document is mentioned in the 16 May 2016 letter as one of the conditions for the approval by Cabinet. The Respondent has a right to inspect this document.
- (iv) 1(d) – The respondent has the right to inspect and take copies of any document evidencing the execution of the public relations campaign.
- (v) 1(e) – The document is mentioned in the 16 May 2016 letter as one of the conditions for the approval by Cabinet. The Respondent had a right to inspect this document.
- (vi) 1(f) – As mentioned earlier, the Respondent has the right to inspect Cabinet minutes.
- (vii) 1(g) – no longer relevant
- (viii) 1(h) – The Respondent, as the Prime Minister, has the right through the Minister responsible for Health to inspect or possess the information stated therein.
- (ix) 1(i) – The Respondent, as the Prime Minister, has the right, as the Minister responsible for Customs and Excise, to inspect or possess the information stated therein.
- (x) 1(j) – The Respondent, as the Prime Minister, has the right, as the Head of Cabinet which granted the approval, to inspect or possess the information stated therein.
- (xi) 1(k) - The Respondent, as the Prime Minister, has the right, through the Minister responsible for Health, to inspect or possess the information stated therein.

[20] It seems unrealistic to suggest that that the Claimant, as Prime Minister, is not entitled to the documents which are the subject of the application for specific disclosure. The Prime Minister is the head of Cabinet and the ministers report to him for any matters which falls under their ministerial portfolio. It would be a strange thing indeed if the Prime Minister does not have a right to inspect a document that falls within the line ministry of a Minister who is ultimately answerable to the Prime Minister in his capacity as Minister. It is this thinking that has underpinned the decisions made above that the Respondent, as the currently sitting Prime Minister of Saint Christopher and Nevis, must disclose the documents which he has or has had a right to inspect or take copies of them; or has or has had a right to possession of them.

Are the Documents "Directly Relevant"?

[21] As mentioned earlier CPR 28.1(4) states that 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. The essence of the Applicant's defence is that of (a) fair comment and (b) qualified privilege. The Applicant submits that it is pellucid that the Applicant referred to the Respondent and raises criticisms of and concerning him in his capacity as Prime Minister and/or the responsible Minister. The Applicant submits further that the Respondent has conveniently selected certain lines from the Applicant's speech to complain about or allege libel. The Applicant's defence is that by letter dated 5 March 2013, Royal St. Kitts Medical Centre was granted a business authorization to conduct stem cell research and regenerative medicine. This medical center was intended as part of the Government's policy to conduct medical tourism and not for the use of one individual, and this was also expressly stated in the speech about which the Respondent complains. The Applicant also pleaded that he was at all times fully aware of the grant of the business authorization as he was engaged in a number of meetings and communications, as the then Prime Minister, in relation to the project.

- [22] The Applicant alleged in his defence that: (1) the facility was set up without the knowledge of the Chief Medical Officer and was a radical departure from the policy and grant of the previous Government and that the facility was done without proper notification; and (2) the doctors who conducted or were engaged in the project were not registered with the Medical Board. The Applicant submits that the essence of the statements made by him was that the Respondent and his Administration did not follow proper procedure, including to consult with or inform the public, before the stem cell facility was set up to carry out research for one patient, namely, Mr. Peter Nygard. The Applicant further contends that this was also the position of the Chief Medical Officer, Dr. Patrick Martin in June 2015 which resulted in him shutting down the operation of the facility as he was not aware of its operation and the medical doctor was not registered with the Medical Board, which as Chief Medical Officer he chaired.
- [23] The Respondent submits that the Applicant has pleaded fair comment. The Respondent further submits that: (1) it is not sufficient for a defendant to specify merely the matter of public interest; (2) the defendant must go further to give particulars of the facts upon which the comments are based; (3) those facts must go to the pith and substance of the matter; and (4) the defendant must know what they are because he intends to prove them at trial and it is no hardship on him to give particulars of them. The Respondent submits that a comment in order to be justifiable as fair comment must appear as comment and must not be so mixed up with the facts that the reader cannot distinguish between what is report and what is comment. The Respondent further submits that fair comment must not convey imputations of an evil sort except so far as the facts truly stated warrant the imputation. In addition, the Respondent contends that to allege a criminal intention or disreputable motive as actuating an individual is to make an allegation of fact which must be supported by adequate evidence.
- [24] The decision of the Supreme Court of the United Kingdom in **Joseph v Spiller** [2011] 1 AC 852 contains a recent restatement of the defence of fair comment in the law of defamation. The Supreme Court reiterated that the defence requires:

83 The issue that has arisen in this case results from a change of emphasis in relation to the elements of the defence of fair comment. Those elements were, and still are: the statement in issue is comment and not fact; the matter in respect of which the comment is made is a matter of public interest; where that matter consists of facts alleged to have occurred, the facts are true; the comment is "fair"; the statement is not made maliciously.

- [25] The Respondent attempts, in submissions filed, to raise issues that properly belong to a judge or jury at trial. The question of whether a statement is comment or fact is one for a judge or jury at trial. It is not a matter that can properly be disposed of in an interlocutory application. It was, therefore, no surprise that Lannan J (Ag.) rejected the Respondent's application to strike out the Applicant's amended defence (**Harris v Douglas** Claim No. SKBHCV 2016/0283 dated 31 August 2018). The Supreme Court in **Spiller** stated (at [104]) that:

... The comment must, however, identify at least in general terms what it is that has led the commentator to make the comment, so that the reader can understand what the comment is about and the commentator can, if challenged, explain by giving particulars of the subject matter of his comment why he expressed the views that he did. A fair balance must be struck between allowing a critic the freedom to express himself as he will and requiring him to identify to his readers why it is that he is making the criticism.

- [26] In addition, the Supreme Court also stated that:

102 It is a requirement of the defence that it should be based on facts that are true. This requirement is better enforced if the comment has to identify, at least in general terms, the matters on which it is based. The same is true of the requirement that the defendant's comment should be honestly founded on facts that are true.

- [27] The Applicant submits that through his witness statements and witness summary he intends to prove these pleadings by way of evidence lead at trial. The Applicant further submits that the issue of whether or not the proper procedure was set up, followed or carried out by the Administration led by the Respondent in relation to the stem cell research is central to the determination of this claim. It is not necessary for me to make a determination on whether it is "central" but rather whether the documents which are the subject of the application for specific disclosure is directly relevant to the Applicant's defences. The Applicant contends

that the specific documents requested concern the two grants of authorization to St. Kitts Institute for Regenerative Medicine Ltd. (by letter dated 5 March 2013 and by letter dated 16 May 2016) and speak to whether or not the proper procedures were in fact followed before the stem cell research facility, which is the subject of the Respondent's claim, was established.

[28] The Respondents submit that: (1) none of the documents requested go to the pith and substance of the libel; (2) the statements complained of, made by the Respondent disclose discreditable and criminal conduct; and (3) is for the Applicant to prove his case that his "comments" as alleged, were supported by facts within his knowledge and referred to in his statements. The Respondent further submit that: (1) the Applicant has chosen to plead and rely upon matters solely in relation to his criticism of a government policy; (2) these are irrelevant to the consideration as to whether the Respondent had set out facts from which the inference could be drawn that the Applicant was in the receipt of bribes; and (3) the court should not order disclosure on the basis of these irrelevant matters, as they do not affect the just disposal of the claim. The Respondent contends that the Applicant has set out his position of relevance in relation to each document. The Respondent concludes that, firstly the documents are irrelevant to the determination as to the issue of fair comment, as they fail to be likely to show that the Respondent accepted bribes in relation to the project or would support any fact from which such an inference can be drawn. Secondly, that the application for specific disclosure only be described as amounting to a fishing for some ancillary purpose, namely, determining the details of Government policy and how it was carried out for political purposes.

[29] Having regard to the learning in **Spiller** and the contents of the paragraphs quoted above, it is my view that the documents requested are "directly relevant" to the defence of fair comment. The Respondent specifically pleads in the claim form that in their natural and ordinary meaning the words in the Applicant's statement were understood to mean, among others, that "[t]he Claimant in his capacity as Prime Minister allowed the Stem Cell Research Centre to operate without safeguards

and safety protocols **in exchange for personal monetary gain**" (emphasis added). The Respondent focusses on the bold part of the quote to emphasise that this the sting of the defamatory statement. That may be so, and it is not necessary for me to decide this point. However, the defamatory statement has two aspects, the first focusses on the operation of the "Stem Cell Research Centre" or the St. Kitts Institute for Regenerative Medicine Ltd. and the second relates to the alleged motive for so doing. There is nothing wrong with the Claimant seeking documents that are "directly relevant" to the former and not the latter. An application for specific disclosure need not be necessary in relation to all of the defamatory meanings of the words about which the Respondent complains. It is sufficient if they are "directly relevant" to the Applicant's case, since they are documents that relate to the operation of the "Stem Cell Research Centre" or St. Kitts Institute for Regenerative Medicine Ltd. It is not necessary for these documents to also relate to the second part of the ordinary meaning of the words. The Applicant must at trial adduce evidence that support such a meaning, and this is a matter for determination at trial. My approach to this issue finds support in the decision of the Court of Appeal of England and Wales in **Harrods Ltd v Times Newspaper Ltd** [2006] EWCA Civ 294 cited by the Respondent. The trial judge, on an application for disclosure of documents, must first examine the pleadings. The Court of Appeal had the following to say about this approach:

12. In my view the judge was plainly correct to approach the application for further disclosure on the basis that it was essential, first, to identify the factual issues that would arise for decision at the trial. Disclosure must be limited to documents relevant to those issues. And, in seeking to identify the factual issues which would arise for decision at the trial, the judge was plainly correct to analyse the pleadings. The purpose of the pleadings is to identify those factual issues which are in dispute and in relation to which evidence can properly be adduced. It is necessary, therefore, to have in mind the issues as they emerge from the pleadings and are relevant in the present context.

[30] The Applicant has, therefore, satisfied me that the documents which are the subject of the application for specific disclosure are directly relevant to the Respondent's case. I have carefully considered the requirements set out in CPR 28.6. I am of the view that the order for specific disclosure is necessary in order to

dispose fairly of the claim in this matter. The order for specific disclosure will reveal documents that are necessary in respect of the Applicant's defences. There is little or no costs in respect of the production of the documents. I am also satisfied that the financial resources of the Respondent are likely to be sufficient to enable that him to comply with any such order. The Applicant has therefore satisfied me that the documents which are the subject of the application for specific disclosure are directly relevant to the Respondent's defences.

Does the Respondent have a right to withhold disclosure or inspection of any document?

[31] CPR 28.14 governs the right of a party to withhold disclosure or inspection of a document. It provides as follows:

Claim of right to withhold disclosure or inspection of document

28.14 (1) A person who claims a right to withhold disclosure or inspection of a document or part of a document must –

(a) make such claim for the document; and

(b) state the grounds on which such a right is claimed;

in the list or otherwise in writing to the person wishing to inspect the document.

(2) A person may however apply to the court, without notice, for an order permitting that person not to disclose the existence of a document on the ground that disclosure of the existence of the document would damage the public interest.

(3) A person who applies under paragraph (2) must –

(a) identify the document, documents or parts thereof for which a right to withhold disclosure is claimed; and

(b) give evidence on affidavit showing –

(i) that the applicant has a right or duty to withhold disclosure; and

(ii) the grounds on which the right on duty is claimed.

(4) Unless the court orders otherwise, an order of the court under paragraph (2) is not to be –

- (a) open for inspection by; nor
 - (b) served on;
- any person.

(5) person who does not agree with a claim of right to withhold inspection or disclosure of a document may apply to the court for an order that the document be disclosed or made available for inspection.

(6) On hearing such an application the court must make an order that the document be disclosed unless it is satisfied that there is a right to withhold disclosure.

(7) If a person –

- (a) applies for an order permitting that person not to disclose the existence of a document or part of a document; or
- (b) claims a right to withhold inspection;

the court may require the person to produce that document to the court to enable it to decide whether the claim is justified.

(8) On considering any application under this rule, the court may invite any person to make representations on the question of whether the document ought to be withheld.

[32] The Respondent submits that the documents relate to matters before the Cabinet proceedings are protected by privilege and cannot be disclosed. The Respondent cites in support section 60 of the Constitution of Saint Christopher and Nevis which provides that:

A Minister or a Parliamentary Secretary shall not enter upon the duties of his or her office unless he or she has taken and subscribed the oath of allegiance, the oath of office and the oath of secrecy.

[33] Section 119 of the Constitution defines “oath of secrecy” as oath of secrecy set out in Schedule 4 to the Constitution, which is as follows:

I do swear (or solemnly affirm) that I will not on any account, at any time whatsoever, disclose any counsel, advice, opinion or vote given by any Minister as a member of Cabinet and that I will not, except with the authority of Cabinet and to such extent as may be required for the proper conduct of the government of Saint Christopher and Nevis, directly or indirectly reveal the business or proceedings of the Cabinet or

any matter coming to my knowledge as a member of (or Secretary to) the Cabinet. So help me God.

- [34] The rationale for ensuring that every Minister as a member of Cabinet takes the prescribed oath is to ensure the confidentiality of the proceedings of Cabinet. This is why the oath speaks to the obligation not to “disclose any counsel, advice, opinion or vote **given by any Minister as a member of Cabinet**” (bold added). This suggests to me that it seeks to protect the deliberations of the members of Cabinet to ensure full and frank discussions on the matters arising during meetings of the Cabinet. I agree with Counsel for the Respondent that the proceedings of Cabinet are confidential. No authority is needed for this statement. However, Lloyd Barnett, *The Constitutional Law of Jamaica*, Oxford University Press (1977) states (at pp. 77-78) that:

The rule of Cabinet secrecy is a corollary to the principle of collective Cabinet responsibility and serves to prevent decisions of the Cabinet being attributed to single ministers. The oath for the due execution of office, which section 74 requires all Ministers to take, binds them to preserve the principle of Cabinet secrecy and to refrain from disclosing individual Ministerial opinion and votes. Accordingly, Cabinet Decisions do not usually mention the names of the Ministers apart from the name of the Minister who made the related Submission. Where arguments are recorded in the minutes the impersonal form is normally employed. This rule is desirable in the interest of ensuring that Ministers feel perfectly free in the course of Cabinet discussions to express their views. It is undesirable that they should deliberate under the inhibition which would be produced by the apprehension that they may be quoted in some future political controversy.

- [35] To the extent to which the Applicant seeks disclosure of the minutes of meetings of Cabinet, this will not be allowed except that the decisions of Cabinet made in relation to the “Stem Cell Research Centre” or the St. Kitts Institute for Regenerative Medicine Ltd. on the respective dates and the associated documents so tabled will be ordered to be disclosed.

Disposition

- [36] For the reasons explained above, I hereby grant the application for specific disclosure of the following documents:

- (1) The letter regarding the authorization of business activity for the St. Kitts Institute for Regenerative Medicine Ltd issued prior to 16 May 2016 and to which reference is made in the letter to the Director of the St. Kitts Institute for Regenerative Medicine Ltd dated 16 May 2016;
- (2) A certified true copy of any decisions taken by Cabinet at its meeting dated 4 May 2016 in relation to the St. Kitts Institute for Regenerative Medicine Ltd;
- (3) The public relations campaign package provided to the Cabinet and or Ministry of Health and or Government "re: the launch and press conference for the "new venture as per the commitment given by Mr. Kevin Klein and or St. Kitts Institute for Regenerative Medicine Ltd";
- (4) Proof that the said public relations campaign package of St. Kitts Institute for Regenerative Medicine Ltd. was executed prior to the commencement of the regenerative project;
- (5) A copy of the submission of the St. Kitts Institute for Regenerative Medicine Ltd.'s comprehensive business plan including its financing plan as requested by the letter of the 16 May 2017;
- (6) A certified true copy of any decisions taken by Cabinet at any meeting held in respect of the confirmation that the St. Kitts Institute for Regenerative Medicine Ltd complied with all of the requirements listed in the letter of the 16 May 2017;
- (7) A list of all medical personnel that worked on the regenerative project and certified copies of their registration with the Medical Board at the time they worked on the regenerative project;
- (8) A copy of the Custom and Excise declaration forms to confirm that the material used in the regenerative project consisted of umbilical cord blood or cord blood plasma samples which were procured from reputable international cord blood banks located in countries like Brazil;
- (9) The documentary proof provided by the St. Kitts Institute for Regenerative Medicine Ltd. to confirm that the raw materials to be used in the regenerative project were procured from reputable international cord blood banks; and
- (10) Proof that the patients used in this regenerative project were granted access

to the hospital using the normal admission protocols of the hospital and that the company and its employees or patients were not entering or accessing the premises of the Hospital via private access. The names of the patients shall be redacted from the documents provided.

- [37] The documents referred to in paragraph 36 shall be disclosed to the Applicant by the Respondent by close of business on 2 August 2019.
- [38] An injunction is also granted restraining or prohibiting the Applicant, whether by himself, his servants, agents, subordinate or otherwise however from using any of the documents disclosed in paragraph 36 otherwise than in the course of these proceedings except to the extent to which any of those documents have become part of the public domain.
- [39] Costs in the sum of \$1500.00 to be paid by the Respondent by close of business on 2 August 2019.

Eddy D. Ventose
High Court Judge

By the Court

Registrar