EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA
COMMERCIAL DIVISION

CLAIM NO. SLUHCM2018 / 0101

BETWEEN:

J Q CHARLES LIMITED

Claimant

And

DESMOND DU BOULAY

Defendant

Before:

The Hon. Mde. Justice Cadie St Rose-Albertini **High Court Judge**

Appearances:

Mr. Mark Maragh for the Claimant /Applicant
Mr. Thomas Theobalds for the Defendant /Respondent

2019: October 17
November 7

DECISION

[1] **ST ROSE-ALBERTINI, J. [Ag]:** Before the Court is an application by the claimant, JQ Charles Ltd ("JQC") for specific disclosure of certain documents and records by the defendant Desmond Du Boulay ("Mr. Du Boulay"). JQC's claim is for specific performance

of a contract between the parties, for the purchase of immovable property belonging to Mr. Du Boulay. The application is vigorously opposed.

Background

[2] Some insight into the events which have led to this claim will place the application in context. JQC asserts that by a written contract dated 12th October 2018 Mr. Du Boulay agreed to sell his immovable property registered in the Land Registry of Saint Lucia as Block 0231C Parcel 38 ("the property") to JQC for the purchase price of $2,000,000.00. The property is encumbered by a hypothecary obligation and judicial hypothec in favour of the Bank of Saint Lucia Limited ("the bank") and the sale was conditional on Mr. Du Boulay obtaining the consent of the bank in relation to the sale price. The sale was due to close within 45 days of the date of the contract. JQC says that all the conditions for sale were achieved and Mr Du Boulay has failed or refused to complete the transaction. Consequently JQC seeks specific performance of the contract or alternatively damages for breach of contract, interest and costs.

[3] Mr. Du Boulay's response to the claim is that the parties commenced negotiations for the sale of the property in September 2018. The consideration was $2,000,000.00 or such other amount as may be accepted by the bank, in order to discharge the encumbrances over the property. He states that it was a condition precedent of the sale that he obtains the bank's consent to the terms of the sale and not merely the sale price.

[4] Mr. Du Boulay alleges however that prior to entering into the contract with JQC, the bank had agreed to the sale of the property to Eroline Foods Company Ltd ("Eroline") for the sum of $2,000,000.00 in full and final settlement of his debt to the bank. He says a valid agreement for sale exists between himself and Eroline, which is evidenced by a letter dated 23rd March 2018. That agreement had been partly performed by Eroline through payment of certain sums to various agencies, on his behalf. He further says that in or about April 2018, Eroline approached the bank and requested its consent to purchase the

property at the stipulated price. The bank subsequently agreed to a purchase price of $2,095,000.00 whereupon Eroline proceeded to obtain a loan from the bank to purchase the property. That loan agreement is dated 29th June 2018 and the attendant mortgage debenture is dated 16th October 2018. Mr. Du Boulay states that he had always informed JQC of the existence of the agreement between himself and Eroline, as well as the payments made on his behalf by Eroline, reimbursement of which would have to form part of the terms of any agreement entered into with JQC.

[5] Mr. Du Boulay alleges that subsequent to the contract, he contacted the bank and a representative of the bank communicated to him, by email dated 29th October 2018 that the bank would not consent to the sale to JQC because of the impending sale to Eroline, as the loan and mortgage were already at an advanced stage. This, he says was communicated to the attorney for JQC by his attorney in a letter dated 7th December 2018. It was further communicated that he did not have in his possession any communication from the bank indicating willingness to discharge the encumbrances on receipt of the sum of $2,000,000.00, as asserted by JQC. Mr. Du Boulay further says that subsequent to the email of 29th October 2018 there was direct communication between JQC and the bank in which JQC sought the consent of the Bank to purchase the property, but such consent was not forthcoming.

[6] Having not been obtained the bank's consent within the time stipulated for closing, Mr Du Boulay says the contract is now expired, is incapable of fulfilment, and is therefore discharged. Consequently, the deposit and additional sum paid by JQC pursuant to the contract were refunded on 19th January 2019 and no further legal obligations remain between the parties, under the contract.

The Application for Specific Disclosure

[7] The application[1] seeks an order of specific disclosure of the following classes of documents:

[1] Filed on 9th July 2019

Class 1 : Agreement for Sale between Mr. Du Boulay and Eroline.

Class 2 : Proof of payment of any deposit paid by Eroline to Mr. Du Boulay (or anyone on his behalf) in respect of the sale of the property to Eroline.

Class 3 : All records of communication including telephone records, which reference the sale of the property to Eroline and/or JQC between:

a. Mr. Du Boulay and Eroline,

b. Mr. Du Boulay and the bank, and

c. the bank and Eroline,

(or anyone acting on their behalf).

Class 4 : All documents, emails and telephone records which reference communication between Mr. Du Boulay and the bank in relation to the terms of the contract between Mr. Du Boulay and JQC prior to and after the execution of the contract.

Class 5 : All documents proving that the bank agreed to accept the sum of $2,000,000.00 from Eroline for the sale of the property prior to the contract between Mr. Du Boulay and JQC.

Class 6 : All court proceedings, documents, records and communication between the bank and Mr. Du Boulay relating to the debt due from Mr. Du Boulay to the bank.

[8] The grounds of the application are that Mr Du Boulay's List of Documents in standard disclosure[2] failed to disclose certain information or documents relevant to the matters in dispute. Mr. Gordon Charles, CEO and Director of JQC deposed the affidavit in support, stating that the request for specific disclosure was necessary to fairly dispose of the claim, save costs and judicial time and the cost of providing such disclosure was minimal.

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[2] On 25th June 2019

[9] Mr. Du Boulay, in his affidavit in answer responds to each of the classes of documents requested as follows:

Class 1 : The Agreement for Sale between himself and Eroline is disclosed at paragraph 5 of his witness statement.[3]

Class 2 : Details of payment of deposits made by Eroline to him were disclosed at paragraph 5(b) of his witness statement and reference made to Items 1, 3, 4 and 6 of his List of Documents.

Class 3 & 4 : He deals with these classes together and says that on signing of the contract with JQC, there was no further communication between himself and Eroline. Communication with the bank through the bank's representative was by way of email dated 29th October 2018 which has been disclosed at paragraph 18 of his witness statement and reference made to Item 28 of his List of Documents. He avers he has no records reflecting communication between Eroline and the bank or anyone acting on their behalf.

Class 5 & 6 : He also addressed these classes together and says the documents currently in his possession are detailed in his witness statement at paragraph 3 which relates to information contained in Item 33 of his List of Documents. Documents which relate to the legal relationship between the bank and Eroline are not in his possession.

He further says that no specific request was made by JQC to either himself or his attorney prior to filing the application. All documents in his possession have been disclosed and are available for inspection, but JQC has failed to inspect these documents.

[10] In his affidavit in reply, Mr. Charles deposed that the information was required to inform the witness statements of JQC and concern the core issue in the case, which is when and in what manner did Mr. Du Boulay seek the approval of the bank for the sale of the property to JQC. He says Mr. Du Boulay's answer fails to address the majority of the requests, and

[3] Filed on 26th July 2019

to compound the issue, the email of 29th October 2018 is in response to communication initiated by Mr. Du Boulay, which is not disclosed and is therefore incomplete.

[11] Mr. Du Boulay filed a second affidavit, in which he exhibited the documents referenced in his witness statement, List of Documents and further referenced in his affidavit in answer to the application. Additionally, he draws attention to other disclosed documents which relate to communication with the bank, such as emails between the attorney for JQC and the representative of the bank. He says the emails were referenced at paragraph 14 of his witness statement and refers to Items 19 and 21 of his List of Documents.

Mr. Du Boulay's Submissions

[12] In written as well as oral submissions at the hearing, Mr. Thomas Theobalds Counsel for Mr Du Boulay submitted that the application is premature, as JQC has failed to inspect the disclosed documents or to make any written request for these documents prior to filing the application. He submits that the List of Documents contains all documents directly relevant to the case and JQC has failed to establish that the documents requested are directly relevant to one or more of the issues to be determined in the proceedings. He further submits that the some of the documents, such as communication between the bank and Eroline, have never been under the control of Mr. Du Boulay as contemplated by the rules.

[13] Additionally, Mr. Theobalds submits that, having regard to the extent of communication, documents, and information requested, it would be flawed to make an order that is disproportionate to the issues for determination. The substantive issue in the claim is whether there has been breach of the contract and the corollary to this is whether the sale was conditional on the approval of the bank. He submits that the burden rests on JQC to prove its case. JQC has been given at least two opportunities to obtain a witness summons to have a representative of the bank assist with the resolution of the matter in a fair, expeditious and cost effective manner, but has failed to comply with the orders in relation to this. Mr Theobalds submits that such non-compliance has hampered the

determination on whether specific disclosure is necessary in order to dispose of the claim fairly or to save costs[4]

JQC's Submissions

[14] Counsel for JQC, Mr. Mark Maragh, made oral submissions. He stated that the records sought are relevant to the issue to be resolved and are necessary to do justice between the parties. It would save time and cost if the documents are disclosed. He further says that there is no useful purpose in inspecting the disclosed documents as they were already in JQC's knowledge or possession and many of them are irrelevant to the dispute.

[15] Mr. Maragh argued that while the role of the bank in providing the consent required for the sale to JQC is at the heart of the dispute, nowhere in Mr. Du Boulay's witness statement and List of Documents is any information given regarding the timing and the manner of communication between himself and the bank in relation to that sale. All that is produced is an email which forms part of a thread and that email does not say that the bank is not consenting to the sale, but simply that it will not be party to the agreement and directed Mr. Du Boulay to follow up on the sale with Eroline, which the bank was funding.

[16] Counsel says that communication between the bank and Mr. Du Boulay in relation to the agreement for sale to JQC is critical to the issue whether or not he ever approached the bank to approve the sale, either prior to or within a reasonable time of the execution of the contract. More so considering that the agreed deposit was paid by JQC while he had full knowledge of his arrangement with Eroline. These matters are not only directly relevant to the key issues in dispute but are within the direct control or knowledge of Mr. Du Boulay. These are documents which he would have been entitled to possess or have the right to inspect and take copies. He would have had control over communication between himself and the bank in relation to the transaction with JQC and the transaction with Eroline. Thus, failure to disclose these communications with the bank is deliberate.

[4] CPR 28.6(1) and (2)

[17] Such disclosure is even more crucial as the bank is not a party to the proceedings and the information will assist the court in resolving the dispute, while avoiding a multiplicity of applications.

The Law

[18] Rule 28.5(5) of the of the Civil Procedure Rules 2000 ("CPR") states that "*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."*

[19] CPR 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 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.

[20] CPR 28.2 provides that the duty to disclose documents is limited to documents which are or have been in the control of that party. 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.

[21] In determining whether to make an order for specific disclosure CPR 28.6 (1) and (2) states that *"the court must consider whether specific disclosure is necessary in order to dispose fairly of the claim or to save costs. In so doing the court must also 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.

[22] CPR 28.6(3) provides that if, having regard to paragraph (2)(c), the court would otherwise refuse to make an order for specific disclosure, it may nonetheless make such an order on terms that the party seeking the order must pay the other party's costs of such disclosure in any event.

Discussion

[23] In the case of **QVT Fund V LP et al v China Zenix Auto International Group Ltd et al**[5], it was held that on an application for specific disclosure the applicant is required to satisfy the court of:

> *"(i) the direct relevance of the documents they seek to the issues to be determined at trial; (ii) that the Order that they seek is necessary to dispose of the claim fairly and (iii) the Order will be proportionate in all the circumstances ..."*[6]

[24] It was further emphasized that the court should strive to give effect to the overriding objective by dealing with the application in a manner that is just and proportionate in the context of the litigation between the parties and the more general requirements of the administration of justice.[7]

[25] Similarly, in the case of **Global Skynet International Limited and another v Skynet Limited et al**[8], it was stated that:

> *"The court must be concerned about questions of reasonableness and proportionality. These considerations will of course only arise where the documents themselves are relevant and under the control of the respondent. The overriding objective provides the context in which the court's discretion is to be exercised."*

[26] Applying the approach outlined in these cases, the starting point is to examine whether the documents requested are directly relevant to one or more of the triable issues in the case and should be disclosed for the fair disposal of the claim. It must be shown that the

[5] Claim No. BVIHC(COM) 0026 of 2014
[6] At paragraph 23
[7] At paragraph 12
[8] Claim No. AXAHCV 2014/0039

documents sought are in the control of Mr DuBoulay and that he intends to rely on them or they adversely affect his case or tend to support JQC's case. As well, any disclosure ordered must be proportionate to the time and cost that would be required to comply with same.

[27] The parties agree that the sale was conditional upon Mr. Du Boulay obtaining the bank's approval, although they disagree on whether approval was in relation to the sale price or the terms of the sale generally. Mr. Du Boulay alleges that he sought the bank's consent for the sale, and the bank declined. JQC alleges that the timing and manner in which he sought to do so, if he did at all, has not been disclosed. JQC further alleges that consent to the sale was in fact obtained, despite an email disclosed by Mr. Du Boulay in which he says the bank withheld consent. In my view, the interpretation and effect of that email is best left for determination at trial. These are matters to be considered against the allegation that around the same time, Mr. Du Boulay entered into an agreement for sale with Eroline for which he says approval was obtained from the bank. It clear that Mr. Du Boulay's communication with the bank in seeking consent for the sale to JQC, the timing, manner and terms of the request and the bank's response are critical to the resolution of this case. I therefore propose to address each class of documents in the context of these issues.

Class 1 : The Agreement for Sale between Mr. Du Boulay and Eroline

[28] Mr. Du Boulay disclosed in his witness statement and referenced in his List of Documents two offer letters sent by his attorney to Eroline in respect of the sale of the property. The first is dated 26th February 2018 and stipulates a purchase price of $2,700,000.00 subject to the consent of the bank. The second is dated 23rd March 2018 with a price of $2,000,000.00 plus settlement of all closing costs, again subject to the consent of the bank. Both letters state that the sale is also subject to the parties entering into a formal agreement for sale. Mr. Du Boulay now says the second letter represents the sale agreement between himself and Eroline and he has already disclosed the letter.

[29] As I see it, there is nothing to suggest that there is any other agreement, formal or otherwise, which is being withheld. A valid agreement may take a number of forms: it may be oral, or evidenced by one or several memoranda in writing, or be evidenced by part performance. It cannot be assumed that because Mr. Du Boulay cannot produce a contract, that there is no agreement or that disclosure is being withheld. That aside, I do not believe that such document is directly relevant to the central issues in the claim. Both parties are aware that there was an impending sale of the same property to Eroline and even if it is shown to be otherwise, the validity of the agreement for sale between Mr. Du Boulay and JQC and breach thereof by Mr. Du Boulay would still have to be established. I therefore conclude that there is no need for specific disclosure of this class of documents.

Class 2 : Proof of payment of any 'deposit' paid by Eroline to Mr. Du Boulay in respect of the sale of the property to Eroline

[30] It is evident that neither the letter of 23rd March 2018 or any statement made by Mr. Du Boulay in his witness statement or pleadings or any other document disclosed suggests that any 'deposit', in the true legal sense was paid by Eroline with respect to the sale. Mr. Du Boulay says that Eroline undertook to make certain payments on his behalf, pursuant to the agreement between them. He itemized them as the sums of $70,208.56 for land and house tax owed by him to the Inland Revenue Department ("IRD"); $608.75 for personal income tax owed by him to the IRD and $325.64, for NIC contributions owed by Du Boulay Building Supplies Ltd, for which he was personally liable. The total amount paid by Eroline on his behalf was $71,143.05. It is trite that parties to an agreement are free to agree to any deposit in any quantum or form they choose, regardless of the legal consequences which flow therefrom. Proof of payment of a deposit by Eroline is not directly relevant to this claim and I therefore conclude that there is no need for specific disclosure in relation to this class.

Class 3 & 4 : All communication including telephone records, which reference the sale of the property to Eroline and/or JQC between:

a. **Mr. Du Boulay and Eroline,**

b. **Mr. Du Boulay and the bank, and**

c. **the bank and Eroline**

[31] For convenience these classes of documents are dealt with together, as they overlap. It is obvious that Mr. Du Boulay cannot be expected to have in his control or possession, or have the right to inspect and take copies of documents or records of communication between the bank and Eroline. Therefore the duty of disclosure does not extend to such documents and no order for specific disclosure ought to be made in that regard.

[32] With respect to communication between himself and Eroline, Mr. Du Boulay indicated that once he entered into the contract with JQC he had no further communication with Eroline. He cannot be expected to disclose what he does not have. There is nothing before the court which casts doubt on the veracity of this assertion. Therefore no order will be made with respect to this class of documents.

[33] In relation to communication between himself and the bank, Mr. Du Boulay disclosed a letter of 7th December 2018 to which was annexed the email of 29th October 2018 from the bank communicating its refusal to consent to the sale to JQC. The letter is from his attorney to the attorney for JQC. It conveys the bank's posture as stated in the email and denies that Mr. Du Boulay has received, but withheld the bank's consent. The letter goes on to state that he has disclosed this allegation to the bank which has still not resulted in any such consent from the bank. There is, in addition, an email of 8th November 2018 which notifies the attorney for JQC that consent to the sale was refused and in the circumstances, any further sums payable under the contract would not be accepted.

[34] While it is true that Mr. Du Boulay has disclosed some communication with the bank in relation to that sale, a glaring omission is revealed in the letter of 7th December 2018 from his counsel to counsel for JQC. In that letter it is expressed that *"consent was requested by my client [Mr. Du Boulay] in a timely fashion from the Bank of Saint Lucia which was*

regrettably not forthcoming." As JQC points out, the email of 29th October 2018 from the bank appears to be in response to an email or other form of communication initiated by Mr. Du Boulay. However, that email or communication is not disclosed. I agree that the request for consent and manner of such request is relevant to the issues to be tried and Mr DuBoulay's request to the bank in that regard ought to be disclosed.

[35] Mr. Du Boulay also disclosed direct communication between his attorney and the bank, which he says did not bring to light consent to the sale as alleged by JQC. These are emails of 12th November 2018 in which his attorney sought to confirm the bank's consent to the sale price of $2,000,000.00 and which of the bank's representative's would be signing the closing documents and radiation. The reply email of even date from the bank conveyed that communication was received from Mr. Du Boulay in relation to the sale of the property, which conflicts with the information in the email from the attorney for JQC and it was suggested that JQC's attorney address the substance of his email directly with Mr. Du Boulay. That email expressly references communication between Mr. Du Boulay and the Bank in relation to the sale to Eroline and the sale to JQC which does not appear to have been disclosed. This ought also to have been disclosed as it is relevant to the issues in the case, given that the email would shed light on any request made for the bank's consent to the sale to JQC.

[36] Mr. Du Boulay says that he has already disclosed all communication in his possession between himself and the bank, in relation to both sales. However both of these communications between himself and the bank would most likely be in his possession; or certainly he would have a right to possession, or to inspect or take copies thereof. I do not anticipate that these documents will be difficult, time consuming or expensive to disclose, consequently an order to disclose them is proportionate to the circumstances of the case and I will order that they be disclosed.

[37] It must be said that the requests in class 3 & 4, as framed, are very broad and seek all communication in whatever form in relation to either sale. I consider this broad net to be imprecise and tantamount to a fishing expedition. It is accepted that a court ought not to

facilitate an order of specific disclosure where the class of documents sought are vague[9] but may consider granting the order in a more restricted form.[10]

[38] As counsel for Mr. Du Boulay points out, it is JQC's case that the bank gave consent to the sale and it is correct to say that JQC must prove its case. It would be disproportionate to make an order for Mr. Du Boulay to source all such communication in the varying forms requested to see what can be derived from these communications. In my view, this would incur unnecessary financial expense and would be time consuming, with the possibility that nothing useful to JQC may be found. In this regard, I also consider that JQC has been afforded the opportunity to obtain a witness summons to call a representative of the bank to give evidence and be cross examined. In my view this exercise could produce the same information as that being requested. Therefore, an order for specific disclosure ought to be limited only to the documents which I have identified above.

Class 5 & 6 : All documents proving that the bank agreed to accept the sum of $2,000,000.00 from Eroline for the sale of the property prior to the contract between Mr. Du Boulay and JQC, and all court proceedings, documents, records and communication between the bank and Mr. Du Boulay relating to the debt due from Mr. Du Boulay to the bank.

[39] Mr. Du Boulay has said the information requested was dealt with in detail at paragraphs 3 and 4 of his witness statement which referenced documents at Item 33 of his List of Documents. There, he sets out the break-down of the debt he owes to the bank comprising the principal balance, accrued interest as at 19th April 2019, and thereafter the daily rate for interest accrual. However, there is no independent document which verifies same. In relation to the bank's agreement to accept the sum of $2,000,000.00 for the sale of the property to Eroline prior to the contract, the document disclosed as Item 33 is a letter from his attorney to the attorney for JQC dated 24th April 2019 to which is annexed a letter from the bank's attorney to Mr. Du Boulay.

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[9] Delano F Bart v Constructions Technologies Limited and another Claim No. SKBHCV2015/0205, at paragraph 11; Global Skynet International Limited and another v Skynet Limited et al Claim No. AXAHCV 2014/0039, at paragraph 21.

[10] QTV Fund V LP et al at paragraphs 27 & 28

[40] The content of the annexed letter indicates the bank understanding that Mr. Du Boulay had made an offer to pay the sum of $2,000,000.00 in full and final settlement of the debt owed, pursuant to an agreement to sell the property to Eroline for that sum, consequent upon which the bank granted a loan to Eroline to purchase the property. To that extent the information sought is already disclosed. There is nothing to suggest that there is any other independent and direct document expressing these matters and that Mr. Du Boulay is withholding same.

[41] In any event, I do not consider any of these documents to be directly relevant to the case. It is not disputed that Mr. Du Boulay owes a sum in excess of $2,000,000.00 to the Bank or that the Bank did not agree to accept that sum in settlement of the claim from the proceeds of sale of the property to Eroline. These documents would not affect the validity of the agreement for sale between Mr. Du Boulay and JQC. They do not affect the issue of whether consent was sought from or given by the bank, and is information which can be obtained from a representative of the bank as a witness. It would seem that JQC has now understood the utility of this option and has since filed the application for the witness summons pursuant to Part 33 of the CPR.

Conclusion

[42] In light of the foregoing I make the following orders:-

1. Mr Du Boulay shall disclose and make available for inspection the following documents within 7 days of the date of this order:-
   (ii) The totality of the email thread of which the email from the bank to Mr. Du Boulay of 29th October 2018 forms part and is said to contain his request for approval for the sale to JQC.
   (iii) Mr. Du Boulay's request for the bank's consent to the sale to JQC referred to in the letter of 7th December 2018 from counsel for Mr. Du Boulay to counsel for JQC.

2. Costs will be in the cause.

Cadie St Rose-Albertini
High Court Judge

By the Court

[SEAL]

Registrar