

EASTERN CARIBBEAN SUPREME COURT  
FEDERATION OF SAINT CHRISTOPHER AND NEVIS

IN THE HIGH COURT OF JUSTICE  
(CIVIL)

CLAIM NO. SKBHCV2015/0205  
BETWEEN:

[1] IDELANO F. BART

Claimant

and

[1] CONSTRUCTIONS TECHNOLOGIES LTD  
[2] LINCOLN PEMBERTON

Defendants

Before:

Ms. Agnes Actie

Master

Appearances:

Ms. Midge Morton of counsel for the claimant

Ms Deidre Williams of ccounsel for the Defendants

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2016: October 20;  
November 11

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JUDGMENT

1. ACTIE, M.: The claimant by notice of application seeks an order of the court for specific disclosure. On 29<sup>th</sup> September 2015, the claimant, an Attorney- at- Law and Senior Counsel, filed a statement of claim with claim form against the defendants for breach or repudiation of a retainer for legal services. The claimant avers that the defendants engaged his services to act as their Attorney- at-Law in relation to several contracts to have been entered into by the defendants with other parties but more specifically a building contract for the Beacon Heights Project entered into on January 18, 2010 by the first defendant with the Social Security Board.
2. The claimant seeks the disclosure of a Bill of Quantities for the building phase contract and or the value of the contract sum for the Beacon Heights project. The

claimant avers that the document is required for a fair disposal of the claim. The claimant further avers that the value of his claim is dependent upon the information contained in the Bill of Quantities as his fees are determined in accordance with the Bar Association's scale of fees as provided in the retainer agreement between the parties. The claimant states that the document is in the possession or control of the defendants or they can get access to it.

3. The respondents in response deny that the Bill of Quantities is in the possession of the first defendant. The first defendant states that the requested document is no longer in his possession and is unable to locate a copy. The respondents state that a request was made to the Director of the Social Security Board for a copy of the Bill of Quantities. The Social Security Board by letter dated 24<sup>th</sup> May 2016, responded informing that it does not have a copy of the said document. The respondents further aver that the value of the claim is not dependent on the Bill of Quantities and is not directly relevant to determine the value of the claim.

#### Law and Analysis

4. CPR 2000 Part 28.1 (1) sets out rules about the disclosure and inspection of documents.
  - (2) In this Part –
    - “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.
  - (3) A party “discloses” a document by revealing that the document exists or has existed.
  - (4) For the purposes of this Part a document is “directly relevant” if –
    - (a) the party with control of the document intends to rely on it;
    - (b) it tends to adversely affect that party's case; or
    - (c) it tends to support another party's case; but
    - (d) the rule of law known as “the rule in Peruvian Guano” does not apply.

5. 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. CPR 28.2 (1) provides that the duty of disclosure is limited to documents which are or have been in **party's control**. 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.
  
6. It is the **respondents'** averment that the Bill of Quantities is no longer in their possession. It is the evidence that the respondents in an attempt to source a copy made a request by letter to the Social Security Board for the Bill of Quantities. The Social Security Board in response stated that the document could not be found.
  
7. The court in the absence of evidence to the contrary is to take at face value of the fact that the respondents state that the Bill of Quantities requested by the claimant is no longer in their possession. The court takes notice of the further effort made by the respondents in sourcing a copy of the document from the Social Security Board. The Social Security Board responded informing that it did not have a copy of the said document requested. I find no reason in the absence of evidence to take a contrary view.
  
8. Counsel for the claimant in her oral submissions was of the view the Bill of Quantities was at some point transmitted via email and a copy should be on the respondents' computer hard drive and/or server and a proper search may reveal a copy of the said document.
  
9. CPR 28.5 (1) provides that an order for specific disclosure is an order that a party

must do one or more of the following things:- (a) disclose documents or classes of documents specified in the order;(b) carry out a search for documents to the extent stated in the order;(c) disclose any document located as a result of that search.

10. Rule 28.6 (1) provides the criteria for ordering specific disclosure. The court when deciding whether to make an order for specific disclosure must consider whether specific disclosure is necessary in order to dispose fairly of the claim or to save costs. 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.

11. The averment made by counsel for the claimant for a search of computer hard drives and/or servers in an attempt to retrieve a copy of the Bill of Quantities is merely speculative. Counsel did not present any convincing argument that the document was transmitted by email. It would be disproportionate of the court to make an order to go on a fishing expedition to check computer hard drives and/ or servers on the basis that something may turn up. To make such an order will result in additional costs and further delays.

12. The court notes that the claimant in his statement of claim seeks to recover legal fees in an amount to be decided by the court under the retainer agreement executed by the parties. The claimant in the alternative seeks a declaration that the contract sum of the building contracts as it relates to the Beacon Heights Development project, dated January 18, 2010 to be in the sum of XCD \$10,000,000.00 and the legal fees due and owing to the claimant as a consequence thereof is 1% of the said sum.

13. It appears from the evidence that the Bill of Quantities goes to the accuracy of the quantum in relation to the claim. I am of the view that the Bill of Quantities is part **of the background of the claimant's case**. The Bill of Quantities although relevant, if it was available, is not in my view necessary for the just and fair disposal of the claim. The claimant has pleaded for reliefs in the alternative as he seeks a declaration from the court to ascribe a stated value to the claim in an effort to determine his fees.
14. The court also notes that the claimant by his own admission states the disclosure of the Bills of Quantities may or may not adversely affect the his case or the **defendant's case and /or tend to support either party's case**.
15. The court will not act in futility and make an order for standard disclosure for a document which clearly on the evidence is not available. The court accepts the respondents evidence that the Bill of Quantities in not in their possession or control. The court further takes notice of the fact that the respondents did not merely deny the existence of the document but went further to source a copy from the Social Security Board. The claimant claims for a value to be ascribed to the contract in order to determine the fees. I am of the view that the claimant will not be prejudiced by the unavailability of the Bill of Quantities as the court if persuaded and satisfied with the evidence will provide for a value of the claim in an effort to determine the fees. .
16. Applying the facts and principles outlined above I would accordingly refuse the **claimant's application for the standard** disclosure with costs to the respondents in the sum of \$500.00.
17. The matter shall be listed for further case management directions, if necessary.

Agnes Actie  
Master