THE REPUBLIC OF TRINIDAD AND TOBAGO

In the High Court of Justice

Claim No. CV2012-05191

CL FINANCIAL LIMITED

1st Claimant

COLONIAL LIFE INSURANCE COMPANY (TRINIDAD) LIMITED

2nd Claimant

AND

PROMAN HOLDING (BARBADOS) LTD

1st Defendant

PROCESS ENERGY (TRINIDAD) LIMITED

2nd Defendant

LAWRENCE DUPREY

3rd Defendant

Appearances:

1st Claimant: **Fyard Hosein SC leading Sasha Bridgemohansingh and instructed by Luana Boyack**

2nd Claimant: **Deborah Peake SC leading Kerwyn Garcia and instructed by Luana Boyack**

1st & 2nd Defendants: **Christopher Hamel-Smith SC leading Jonathan Walker and instructed by Catherine Ramnarine**

3rd Defendant: **Not present and unrepresented**

Before The Honorable Mr. Justice Devindra Rampersad

Dated the 27th day of June 2017

RULING

Introduction

1. Before the court were applications for disclosure by the claimants and the first and second defendants together with an application by the claimants for the inspection and copying of documents contained in an expert report annexed to the defence of the 1st defendant. The parties were given at opportunity to make oral submissions on 1 June 2017 at which time attorneys for the claimants provided the court with brief written submissions.

2. The court gave its oral ruling on 27 June 2017 granting the claimants' application and dismissing that of the first and second defendants. At the time of giving its ruling the court had the benefit of the transcript of the Court of Appeal's ruling[1] in relation to an appeal of the court's previous order on an application for specific disclosure - CA P 015/2017 ***Cl Financial Limited & Anor v Proman Holding (Barbados) Limited & Anor -*** in addition to the submissions of the parties.

The claimants' application

3. By application dated 21 March 2017 the claimants applied for, inter alia:

    3.1. An order pursuant to rule 28.16(1)(e) of the CPR directing that the first and second defendants allow them to (a) inspect the originals or where the originals do not exist copies of; and (b) take copies of all documents mentioned or alluded to in the expert's report dated 20 March 2012 prepared by Hill Schwartz Spilker Keller LLC (the Hill Report) annexed as exhibit 'J' to the defence of the first defendant; and

    3.2. An order pursuant to part 28.5 of the CPR directing that the first and/or second defendants carry out a search for, produce and disclose copies of 12 classes of documents most of which dated back to a 5 year period prior to 3 February 2009.

4. That application was supported by the affidavit of instructing attorney for both claimants, Ms. Luana Boyack. There was no affidavit filed in opposition of the application.

The application for inspection/copying of documents

5. Rule 28.16(1)(e) provides that a party may inspect and copy a document mentioned in an expert's report. Part 28.16 further provides that a party who

[1] Reflected in transcript dated 13 February 2017

wishes to inspect and copy such a document must give written notice to the party whose witness mentioned the document and 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.[2]

6. In addition to the Hill Report being annexed to the defence of the first defendant, an order was made on 10 November 2016 giving permission to the first and second defendants to call the author of the Hill Report, Mr. James Mike Hill, as an expert witness. According to the claimant the rule was thus clear. The documents being requested were mentioned[3] in the expert report and as such was subject to be inspected and copied provided there was compliance with the rules by giving the required notice. Attorney for the claimant admitted that it is not an unqualified right but argued that it is a right which cannot lightly be denied as the rule does not require any conditions to be met by the claimant other than the giving of notice. In this way a distinction was drawn between the wording of rule 28.16(1)(e) of the CPR and Part 31.14 of the United Kingdom which requires an application to the court for the disclosure of documents mentioned in an expert report.

7. Attorney for the first and second defendants accepted the distinction made by the attorneys for the claimants despite arguing that the material requested was not relevant to the issue at hand. In response it was asserted that relevance is not a condition to be met under rule 28.16(1)(e) as was evident by the wording of the rule. In any event, no authorities could be provided for the suggestion that the documents being requested, pursuant to rule 28.16(1)(e), had to first be relevant for the application to succeed. Instead authority was provided by attorney for the claimant which suggested that the court can refuse the application where the person refusing it could show good reason for so doing.[4]

8. The evidence before the court was that the claimants had served the requisite notice to the first and second defendants on 26 January 2017. The defendants then were obligated to comply with the notice or show good reason for refusing same. The first and second defendants refused inspection by letter dated 7 February 2017 stating that the process would be costly, arduous and likely to outweigh any potential benefits. There was however no affidavit in response to the claimants' application to put that position before the court. There was thus a lack of evidence of a good reason for refusing the application and attorney for the first and second defendants conceded that the wording of the rules would suggest that they would

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[2] See rules 28.16(2) and (3)

[3] Or makes direct allusion to the documents – see ***National Crime Agency v Abacha*** [2016] 1 WLR 4375 at paragraphs 22 and 23

[4] See ***Co-operative Group Ltd v Carillion JM Ltd.*** [2014] EWHC 2253

have no choice but to facilitate inspection given that the documents requested were mentioned in the report.

9. Taking all the preceding considerations into account the court was of the opinion that dealing justly with the matter required that the claimants be allowed the opportunity to inspect the documents mentioned in the Hill Report as the first and second defendants wish the court to rely on same.

Application for Specific Disclosure

10. The claimants also sought an order for specific disclosure of 12 identified classes of documents. This application was made pursuant to Part 28.5 which provides that an order for specific disclosure can be made but contains the proviso that such an order may only require disclosure of documents which are directly relevant to one or more matters in issue in the proceedings. Rule 28.6 goes on to stipulate that:

> *(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) It 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.*
>
> *(3) Where, having regard to paragraph (2)(c), the court would otherwise refuse to make an order for specific disclosure it may however make such an order on terms that the party seeking that order shall pay the other party's costs of such disclosure.*

11. The first question then is whether the documents are directly relevant and if they are, the court is then required to consider whether the order is necessary to dispose of the case fairly.[5] Rule 28.1(4) of the CPR provides:

> *"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 the rule of law known as "the rule in Peruvian Guano" does not apply.*

12. In relation to determining relevancy, the claimants made reference to the case of ***Harrods Ltd v Times Newspaper Ltd & Ors*** [2006] EWCA Civ 294 in which Chadwick LJ expressed at paragraph 12:

> *"In my view the judge was plainly correct to approach the application for further disclosure on*

[5] An approach with which Jamadar JA agreed in CA P 015/2017 ***CL Financial Limited & Anor v Proman Holding (Barbados) Limited & Anor*** at page 15 lines 30-33

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."

13. In light of the evidence and submissions put forward by the claimants in support of their application, the court was of the opinion that the documents requested were relevant as:

13.1. The claimants and the first and second defendants have agreed in the agreed list of issues filed 11 March 2015 that one of the issues to be determined in this case is the fair market value of the second defendant's shares as at 4 February 2009;

13.2. This issue is reflective of the pleadings in this case. At paragraph 19(iv) of the re-amended statement of case the claimants asserted that the third defendant brought about the sale of the shares of the second defendant owned by the claimants at an undervalue. By paragraph 103(iv) of its defence the first defendant contends that the claimants received a fair market value for the shares of the second defendant. That defence also went further to plead, at paragraph 107, that the preliminary valuation relied on by the claimants used methodologies that were inappropriate for valuing a company and contained a number of errors. In addition, paragraphs 23-30 of the defence of the second defendant also put its valuation into issue. More specifically, the method by which the valuation ought to be conducted was comprehensively challenged by allegations that the claimants' preliminary valuation contained a number of errors;

13.3. By order dated 10 November 2017 both parties were granted permission to call an expert witness to put forward their respective valuation reports. The claimants were further given permission to put into evidence a full expert report, as opposed to the preliminary report relied on in its pleadings, of Deloitte LLP;

13.4. In the affidavit in support of this application Ms. Boyack gave evidence that Deloitte indicated that the information contained in documents in each of the classes requested go towards determining the fair market value for the claimant's shares in the second defendant. Ms. Boyack also identified, at paragraph 22, how each class of documents requested was relevant to the case. There was however been no affidavit in opposition by the first and second defendants, from perhaps their expert, challenging the relevancy of these documents to the report that Deloitte is required to

prepare, a report which serves the purpose of assisting the court;

13.5. Deloitte, as an expert, has a duty to the court and the application appears to have been made in an attempt to ensure the fulfillment of that duty.

14. The court also considered that the expert of the first and second defendants would have had access to these documents being requested or at the very least would be allowed access if he determined it was required for the preparation of his report. In coming to its decision, the court was also mindful of the first and second defendant's arguments that the application (i) was not promptly made; (ii) may be disingenuous as the claimants ought to have access to some of the documents requested given that it was a shareholder prior to the sale; and (iii) overlaps with the order made for the inspection and copying of documented mentioned in the Hill Report.

15. Attorney for the claimants contended that the application was prompt bearing in mind that the order permitting the filing of a full report was only made 10 November 2016 following which a letter dated 29 December 2016 was sent requesting the disclosure. Ms. Peake SC also suggested that any perceived overlap with a previous order ought not to be the reason to refuse this application as if a document is received under one order there would be no need for it to be provided again.

16. When considered in the round, and taking in consideration that there was no affidavit in opposition to suggest that the documents were not required for a valuation report, the court was of the respectful view that the application should succeed. In light of the lack of evidence to contradict the court appointed expert, it was the respectful view of the court that it was beyond the remit of the court to second guess the expert appointed to assist the court under Part 33 of the CPR. To do so would have been to put the court in the position of Mr. Robinson which is a position the court is not qualified to adopt.

17. The court thus found the documents requested were relevant. It was also of the opinion that they were required to fairly dispose of the case as the valuation of the shares of the second defendant is directly relevant to the case and the court would be required to make findings based on both valuations (the Hill Report and the Deloitte Report). It was thus necessary that *both* valuators be provided with the resources needed to properly execute their duties.

The application of the first and second defendants

18. The application of the first and second defendants dated 22 May 2017, as admitted by their attorney, was a reformulation of a request for specific disclosure made under a former application dated 13 October 2014. By order dated 9 January 2017 the court made an order for specific disclosure in favor of the first and second defendant but that order was overturned by the Court of Appeal on 13 February 2017.

19. By order dated 9 January 2017 the court ordered the claimants to make specific disclosure of:

    19.1. Document 1(i): all documents relating to the sale of other *assets* of the claimants post 30 January 2009 including but not limited to documents relating to the authority and/or approval process followed by the claimants in respect of such transactions and all documents relating to the determination of the price for such sales.

20. Upon the order being appealed attorney for the first and second defendants conceded that the order ought to have been limited to sales of interests or shares of companies rather than to all assets sold by the company. At the hearing of the appeal however, attorney for the claimants argued that the order was plainly wrong because the documents, even as refined as suggested by Mr. Walker, were not relevant to the issues in dispute.

21. By this application dated 22 May 2017 the first and second defendants now seek an order that the claimant:

    21.1. Carry out a search for all documents that concern or otherwise relate to the sale by the claimants, or any of them, of shares in companies between 30 January 2009 to the present, and in particular documents relating to:

        21.1.1. The authorization and approvals obtained by the claimants prior to or at the time of any such sale;

        21.1.2. The price at which any such shares were sold; and

        21.1.3. Any valuation(s) obtained by the claimant in relation to the said shares prior to or at the time of any such sale.

22. Attorney for the claimants argued that the first and second defendants were in effect asking for the same order that had been successfully appealed whereas the affidavit in support of the application, sworn to by Ms. Catherine Ramnarine, deposed that the Court of Appeal indicated that a fresh application was permissible provided the application was more limited in scope.

23. Quite rightly, as asserted by Ms. Ramnarine, the Court of Appeal left open the possibility of the first and second defendants re-filing what was termed a 'proper application' for specific disclosure even in light of certain aspects of their former application being denied.[6] However, it should be noted that the Court of Appeal made no pronouncements on what the likely result of that application would be as it was, as it ought properly to be, considered best left to the discretion of this court.

24. That discretion, as outlined above, is to be exercised in accordance with Part 28.5 and 28.6 of the CPR in that the court is required to find the disclosure requested directly relevant and necessary to fairly dispose of the case.

25. The court's analysis of the discussion in the Court of Appeal is that, ultimately, it was felt that the appeal had to be allowed in light of the concession that the order was too broad and a finding that it did not meet the kind of reasoning it should have by failing to consider firstly whether the disclosure was relevant by looking to the pleadings. No findings were however made as to whether or not the disclosure was relevant. The court did however comment that the application/order lacked the degree of specificity which, though an unspoken criteria, underpins specific disclosure.[7] The Court of Appeal was of the opinion that the approach of the disclosure possibly leading to a relevant finding is now gone by the introduction of the new rules.[8]

26. By way of an example of the specificity that may be required Jamadar JA said in response to Mr. Walker:

> *" Take the very example you used of lack of marketability discount. If what, for example, you may have asked for a sale of company shares under the MOU in which there was a lack of marketability discount given the there is a certain focus. And if, for example, we can say, this is a matter in issue for the pleadings because paragraph one says this, and paragraph two says that, and there is a dispute of fact about that – it is demonstrably relevant. So it is demonstrably relevant, because if it can show – exactly as you are telling us here—So then, a Court may say, 'All right. We want you…. – There may be other reasons why it may fail, but they may say, we want you to specifically disclose shares in companies in which there was a lack of marketability, or whatever it was.*
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> *So what the Chief is saying is that, it is exactly that lack of specificity that is the underpinning, but unspoken criteria, in specific disclosure…."*

[6] Per Archie CJ at page 34, lines 8-18
[7] Per Jamadar JA page 27, Lines 1-19
[8] See comments of Archie CJ and Jamadar JA on page 28, lines 3-17

Discussion

27. This court looked at the pleadings before it and did not see any allegations made of any sales in shares in companies between 30 January 2009 to present. The court was thus convinced that there is any issue arising with respect to what the first and second defendants have requested at paragraph 1(a) and (b) of its application. This court stated in its previous ruling, dated 9 January 2017, that other valuations are irrelevant and that finding was not the subject of the appeal on 13 February 2017. The court is still of the view that other valuations are irrelevant. One of the major focus of this case now is to determine whether the sale was at an undervalue and that involves a comparison of the Hill report versus the one relied on by the claimants to suggest that the sale was undervalued.

28. The only reason the court may have considered shares in companies was to consider whether the first and or second defendants were relying on a pattern of behaviour with respect to the sale of companies around that time but that has not been pleaded. There was no pleading in relation to any pattern of behaviour. Had the first and second defendant identified specific companies sold under a specific pattern that may have been considered but that is not the case.

29. The court was of the respectful view that the application amounts to a train of inquiry that is not permissible under this type of application – one as per the Peruvian Guano exclusion to the rule - and is a fishing exercise. That is not allowable. The application was thus dismissed.

The Order

30. In the circumstances, with respect to the application for specific disclosure it was ordered as follows:

> "1. The 1st and 2nd Defendants provide the Claimants with complete copies of all documents mentioned or alluded to in the expert's report dated March 20, 2012 prepared by Hill Schwartz Spilker Keller LLC (the Hill Report) annexed as exhibit "J" to the 1st Named Defendant's Defence including but not limited to "the financial and other information provided to" the preparer of the Hill Report and that copies of each such document be delivered to the offices of the filing attorney on record for the Claimants - by 26 July 2017.
>
> 2. The 1st and 2nd Defendants allow the Claimants to (a) inspect the originals or where originals do not exist copies of; and (b) take copies of all documents mentioned or alluded to in the Hill Report including but not limited to "the financial and other information provided to" the preparer of the Hill Report and that each such document be made ready by the 1st and 2nd Defendants for inspection and copying at the offices of the filing attorney on record for the 1st and 2nd Defendants by 26 July 2017.

3. Each document mentioned in paragraph 1 above be disclosed by the 1st and 2nd Defendants in a list of documents which complies in all respects with Part 28.7 of the CPR and that such list be filed in these proceedings and served on the Claimants on or before 14 days from the date of this Order.

4. That the 1st and 2nd Named Defendants pay the Claimants' costs of and occasioned by that part of the Claimants said Application dated March 21, 2017 relating to the making of this Order such costs to be agreed between the Claimants and the 1st and 2nd Defendants and in default of such agreement to be quantified by the Court."

31. With respect to the Hill Report Documents:

"5. The 1st and 2nd Defendants provide the Claimants with complete copies of all documents mentioned or alluded to in the expert's report dated March 20, 2012 prepared by Hill Schwartz Spilker Keller LLC (the Hill Report) annexed as exhibit "J" to the 1st Named Defendant's Defence including but not limited to "the financial and other information provided to" the preparer of the Hill Report and that copies of each such document be delivered to the offices of the filing attorney on record for the Claimants by 26 July 2017.

6. The 1st and 2nd Defendants allow the Claimants to (a) inspect the originals or where originals do not exist copies of; and (b) take copies of all documents mentioned or alluded to in the Hill Report including but not limited to "the financial and other information provided to" the preparer of the Hill Report and that each such document be made ready by the 1st and 2nd Defendants for inspection and copying at the offices of the filing attorney on record for the 1st and 2nd Defendants by 26 July 2017.

7. Each document mentioned in paragraph 1 above be disclosed by the 1st and 2nd Defendants in a list of documents which complies in all respects with Part 28.7 of the CPR and that such list be filed in these proceedings and served on the Claimants on or before 14 days from the date of this Order."

32. With respect to the documents requested by the claimants' expert:

"8. The 1st and/or 2nd Named Defendants carry out a search for, produce and disclose copies of:

(i) All documentation relating to the financial operations and prospects of each of the 2nd Named Defendant, CE Limited (CEL), Caribbean Nitrogen Company Limited (CNC), Industrial Plant Services Limited (IPSL), Nitrogen (2000) Unlimited (N2000) and Southern Chemical Corporation (SCC) (subsidiaries and affiliated/associated companies of the 2nd Named Defendant), including any discussions and setting of budgets/forecasts, agreements to historical results and reporting of and discussion of financial results for the 5 year period prior to and ending on February 3, 2009;

(ii) All strategy and business plan papers for each of the 2nd Named Defendant, CEL, CNC, N2000, SCC and IPSL for the 5 year period prior to and ending February 3, 2009;

(iii) All industry and market research (including price forecasts for materials and products) held at the 2nd Named Defendant, CEL, CNC, N2000, SCC and IPSL for the 5 year period prior to and ending February 3, 2009;

(iv) All documentation relating to all offers for sale for all or any (including assets held by the companies) of the 2nd Named Defendant, CEL, CNC, N2000, SCC and IPSL for the 5 year period prior to February 3, 2009;

(v) All documentation relating to any share transfers between shareholders of the 2nd Named Defendant, CEL, CNC, N2000, SCC and IPSL (or assets held by them) for the 5 year period prior to February 3, 2009;

(vi) All documentation relating to any sale of shares in the 2nd Named Defendant, CEL, CNC, N2000, SCC and IPSL (or assets held by them) to third parties in the 5 year period prior to February 3, 2009;

(vii) All valuations undertaken of the 2nd Named Defendant, CEL, CNC, N2000, SCC and IPSL for the 5 year period prior to February 3, 2009;

(viii) All documentation relating to any discussions and all correspondence and/or draft terms sheets with banks or investors regarding raising of debt in the 2nd Named Defendant, CEL, CNC, N2000, SCC or IPSL for the 5 year period prior to February 3, 2009;

(ix) All documentation relating to any internal discussions regarding the capital structure (that is the appropriate and supportable level of debt) in the 2nd Named Defendant, CEL, CNC, N2000, SCC and IPSL during the 5 year period prior to February 3, 2009;

(x) Detailed audited (signed off by the auditors) financial statements for each of the 2nd Named Defendant, CEL, CNC, N2000, SCC and IPSL for the period 2004 through 2009; including supporting analysis and valuations provided to the auditors in respect of values and/or carrying values of the investments made by the 2nd Named Defendant in CEL,CNC, N2000, SCC and IPSL;

(xi) All documentation relating to CEL's investment in, and partial divestment from, Eurotechnica Melamine S.A. Luxembourg, which is described in the 13 November 2008 summary of the 2nd Named Defendant's consolidated accounts as: "CE Limited acquired 66% of Eurotechnica Melamine S.A. Luxenbourg in November 2007 and this investment has been recorded at cost. CE Ltd. Sold 6% of ETM in April 08'";

(xii) Documentation relating to arrangements which affected or potentially affected the commercial risk/return position of the 2nd Named Defendant, CEL, CNC, N2000, SCC and IPSL during the 5 year period prior to February 4, 2009 including but not limited to (i) for CNC and N2000, any, and all contracts between those plants and gas suppliers / other suppliers including (but not limited to) any transfer pricing arrangements and minimum volume agreements; (ii) any and all contracts between the plants, i.e CNC and N2000, and major end customers; (iii) any contracts between the respective shareholders in the businesses (including the 2nd Named Defendant, CEL, CNC, N2000, SCC and IPSL) regarding profit sharing and/or transfer pricing arrangements, or similar; and (iv) all relevant documents/agreements/contracts relating to revenue and profit sharing, transfer pricing, strategy and value at the level of the 2nd Named Defendant and (v) all shareholder agreements and articles of association and articles of continuance, incorporation and amendment for the 2nd Named Defendant, CEL, CNC, N2000, SCC and IPSL to the extent not already disclosed.

9. Each document disclosed in each of the classes mentioned in paragraph 4 above be disclosed by the 1st and 2nd Defendants in a list of documents which complies in all respects with Part 28.7 of the CPR and that such list be filed in these proceedings and served on the Claimants on or before September 1, 2017.

10. The Claimants be allowed, by 9 am on September 6, 2017 to inspect and take copies of each document disclosed in the list of documents to be filed by the 1st and 2nd Defendants pursuant to paragraph 3 above.

11. The time for the Claimants to put into evidence a full expert report of Deloitte LLP be extended from March 31, 2017 to December 1 2017

12. That the 1st and 2nd Named Defendants pay the Claimants' costs of and occasioned by that part of the Claimants said Application dated March 21, 2017 relating to the making of this Order such costs to be agreed between the Claimants and the 1st and 2nd Defendants and in default of such agreement to be quantified by the Court."

33. It was also ordered that:

"1. The First and Second Named Defendants application filed 22 May, 2017 is dismissed.

2. The First and Second Named Defendants shall pay the costs of the application to be quantified by the court in default of agreement, these costs are not certified fit for senior counsel.

3. The time for the filing and exchange of witness statements is extended to 28 February, 2018.

4. The time for the filing of any Pre Trial applications is extended to 6 April, 2018.

5. Trial fixed for 22 January to 2 February, 2018 is brought forward and vacated.

6. Trial window is fixed for 9 to 12 October and 16 to 19 October, 2018 at 10:00am in POS09.

7. The Case Management Conference is fixed for 23 January, 2018 at 11:00am in Courtroom POS20, Hall of Justice, Knox Street, Port-of-Spain.

8. The Pre Trial Review is fixed for 17 April, 2018 at 11:00am in Courtroom POS20, Hall of Justice, Knox Street, Port-of-Spain."

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Devindra Rampersad J

Assisted by Charlene Williams
Judicial Research Counsel
Attorney at Law