

THE REPUBLIC OF TRINIDAD AND TOBAGO

In the High Court of Justice

Claim No. CV2015-04245

TRI-STAR CARIBBEAN INC.

Claimant

AND

REPUBLIC BANK LIMITED

Defendant

Appearances:

Claimant: Mark Morgan instructed by Kaveeta Persad for the Claimant

Defendant: Kestor McQuilkin instructed by Marcelle Ferdinand for the Defendant

Before The Honourable Mr. Justice Devindra Rampersad

Dated the 17th day of August, 2017.

DISCLOSURE RULING

The claimant's application for disclosure and inspection

1. In its disclosed list of documents filed on 31 March 2017, the defendant indicated that it was claiming a right to withhold disclosure and inspection of the documents identified in Part 2 of Schedule 1 of that list on the ground that they were all privileged communications. The list at Part 2 identified the following:
 - 1.1. Bundle of documents including opinions, advices, statements of officials of the defendant;
 - 1.2. Internal memos between the departments of the defendant;
 - 1.3. Correspondence between the defendant and their attorneys at law and other advisors and/or agents;
 - 1.4. Miscellaneous memoranda, notes and advices to and from counsel for the defendant.
2. By its amended notice of application filed on 30 June 2017, the claimant seeks disclosure of the following classes of documents mentioned in Part 2 which it says are directly relevant to the issues in the claim:
 - 2.1. Documents including opinions, advices, statements of officials of the defendant;
 - 2.2. Internal memos between departments of the defendant;
 - 2.3. Correspondence between the defendant and other advisors and/or agents.
3. The application was originally filed on 27 April 2017. The application, as amended, is supported by the affidavits of instructing attorney, Kaveeta Persad, deposed to on 27 April 2017 and 30 June 2017. Ms. Persad also filed a further supplemental affidavit on 28 July 2017 annexing correspondence between the parties relating to the directions given by this court at the pretrial review – PTR – held on 13 June 2017. There was no affidavit in response from the defendant.

13 June 2017 – PTR

4. At the pretrial review held on 13 June 2017, counsel for the claimant indicated that the claimant was *not interested* in communications between the defendant and its attorneys. Instead, it was interested in communications by parties who were not covered by privilege along with internal communication which was not from or to

the attorneys. As a result of this hearing, the defendants attorney at law agreed to provide a *listing* of the documents in relation to the latter class of communication by 20 June 2017 following which the claimant's attorney would indicate by email to the court and to the defendants attorney whether they were satisfied with the list and whether the court would be called upon to rule on the application.

The affidavit evidence

5. Ms. Persad has indicated that a request was made by letter dated 17 February 2017 for this disclosure and was met by a response by letter dated 21 March 2017 from the defendant indicating that the same could not be disclosed because they were *"comprised of correspondence between the defendant and its attorneys and opinions from the defendant's attorneys to the defendant and they are privileged correspondence."*
6. The claimant's attorney accepts the veracity of this claim in relation to memoranda, notes and advices to and from counsel for the defendant but refutes this in relation to correspondence between the defendant and its other advisors and/or agents which cannot be privileged, according to Ms. Persad. She goes on to say that there was no sufficient or compelling response as to why the latter cannot be itemized and disclosed.
7. Ms. Persad then identified the following decisions taken and/or decision-making processes engaged during the material time which she said were relevant to the issues in this case:
 - 7.1. To not inform the claimant of the positive balance in the claimant's account numbered 0031168848 ("the Account");
 - 7.2. To not grant the claimant access to its funds when the request for access was made on 5 June 2014 and thereafter;
 - 7.3. To retain the sums amounting in aggregate to US \$146,535.13 from the Account;
 - 7.4. To withdraw the sum of US \$1,078,256.37 from the Account and remit the claimant's funds held in the Account at the defendant's Independence Square branch to an account supposedly under the control of the Banco Central de Cuba.
8. According to Ms. Persad, these decisions and/or decision-making processes must be contained in the internal documents of the defendant including the

correspondence between the defendant and its other advisors and or agents to which the claimant does not have access and such documents would be necessary in order to fairly dispose of the issues in the claim.

9. In her last affidavit, filed on 28 July 2017, Ms. Persad indicated that the defendant's attorney responded to the court's direction on 13 June to provide a list by letter dated 21st of June 2017. The list comprised of 67 items of correspondence all involving the defendant's attorneys at law. By letter dated 23 June 2017, the claimant's attorney at law quite rightly pointed out that the defendant's said letter and listing did not address the court's direction. She reiterated in her letter that the claimant was not interested in matters between the defendant and its attorneys but, instead, of the other matters referred to before.
10. In response, by letter dated 30th of June 2017, the defendant's attorney at law identified six items of correspondence and indicated that they were covered by legal advice and litigation privilege:
 - 10.1. Memorandum from Roopnarine Oumade Singh to David Dulal-Whiteway dated 10 June 2014;
 - 10.2. Email from Beatriz Lopez to Roopnarine Oumade Singh, Susan Monsegue and Joel Chadha dated 29 December 2015;
 - 10.3. Email from Roopnarine Oumade Singh to Beatriz Lopez and Susan Monsegue dated 29 December 2015;
 - 10.4. Email from Beatriz Lopez to Roopnarine Oumade Singh dated 29 December 2015;
 - 10.5. Email from Roopnarine Oumade Singh to Beatriz Lopez dated 29 December 2015;
 - 10.6. Email from Beatriz Lopez to Roopnarine Oumade Singh dated 30 December 2015.
11. In her affidavit, Ms. Persad said¹ that she and counsel verily believe that these documents were not so covered by legal advice or litigation privilege and did not believe that all of the documents contained in the defendant's papers and records have been itemized. For example, there must be internal documents relating to the administration of the claimant's Account, the internal decisions taken by the

¹ Affidavit of 20 July 2017 at paragraph 9

defendant's officers, servants and/or agents to transfer the claimant's funds to Cuba and to return the sum of US \$33,727.32 to the claimant.

The Law

12. There are two main issues arising in this case.
13. The first is the procedure for disclosure – is the disclosing party obligated in law to list the documents which they seek to exclude as being privileged? That is the contention for the claimant in this matter and the claimant goes on to imply that by failing to do so, the defendant has not complied with the order for disclosure hence the application for the defendant to itemize and disclose the classes of documents sought.
14. The other is whether the categories of documents which the claimant seeks disclosure of are in fact privileged.

Part 28 of the CPR – the process of disclosure

15. The process of disclosure of a document is the revelation by the disclosing party that the document exists or has existed², whether or not it is in the physical possession of the disclosing party. The proviso to the latter is that the duty to disclose is limited to documents which are or have been in the control of that party³. Therefore, it stands to reason to conclude, on a plain reading of the rules, that no duty arises if the disclosing party *never* had control of the document.
16. The procedure for disclosure is set out at Part 28.7:

“Procedure for disclosure

28.7 (1) Paragraphs (2) to (5) set out the procedure for disclosure.

(2) Each party must make, and serve on every other party, a list of documents in Form 8.

*(3) The list must identify the documents or **categories of documents** in a convenient order and manner and as concisely as possible.*

(4) The list must indicate—

(a) those documents which are no longer in the party's control;

(b) what has happened to those documents; and

² Pt. 28.1 (3) of the CPR

³ Pt. 28.2 (1)

(c) state where each such document then is to the best of the party's knowledge, information or belief.

(5) It must include documents already disclosed.

(6) A list of documents served by a company, firm, association or other organisation must—

(a) state the name and position of the person responsible for identifying individuals who might be aware of any document which should be disclosed; and

(b) identify those individuals who have been asked whether they are aware of any such documents and state the position of those individuals.”

[Emphasis added]

17. The rule provides differently from the UK position⁴ and allows for the listing of “categories of documents”. Therefore, the defendant’s disclosure by way of categories i.e. documents including opinions, advices, statements of officials of the defendant, internal memos between the departments of the defendant and correspondence between the defendant and other advisors and/or agents seem at first blush to accord with the rule.

Part 28.14 – Order for disclosure sought

18. In response, the claimant has brought this application under Part 28.14 of the CPR. That rule provides:

“Claim of right to withhold disclosure or inspection of a 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) Unless the court orders otherwise, an order of the court under paragraph (2) is not to be served on any other person nor be open for inspection by any person.

(4) A 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 such document be disclosed or made available for inspection.

(5) 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.

⁴ Pt. 31.10 (3) of the UK CPR provides: “The list must identify the documents in a convenient order and manner and as concisely as possible” without provision for “categories of documents”

(6) If a person—

(a) claims a right to withhold inspection; or

(b) applies for an order permitting that person not to disclose the existence of a document or part of a document, the court may require the person to produce that document to the court to enable it to decide whether the claim is justified.

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

(8) This rule does not affect any rule of law which permits or requires a document to be withheld on the ground that its disclosure or inspection would damage the public interest.”

Discussion

19. It is therefore obvious that the court is being asked under Part 28.14 (4) for an order that the categories of documents be disclosed. The very fact that these categories of documents were included in the defendant’s list surmounts the hurdle of relevancy since by listing these categories of documents, the defendant accepts their relevance to the case⁵. In those circumstances, it is for the defendant to establish that there is a right to withhold disclosure⁶. To my mind, establishing that right means exactly that and goes beyond a mere statement by counsel that privilege attaches. That is not a conclusion which binds the court. It is for the court to make that determination based on settled legal principles and authorities.⁷ In this case, the only evidence from the defendant is by way of the letters dated 21 March 2017 and 30 June 2017 forwarded to the claimant’s attorney at law from the defendant’s attorney at law. Both speak to the documents being privileged with the latter going on to identify the six items which are mentioned above. The explanation about the contents of those items is set out in the second paragraph of the 30 June letter which states as follows:

*“The only other documents our client has been able to locate are set out hereunder and we maintain that **they are covered by legal advice and litigation privilege.**”*

[Emphasis added]

20. Regrettably, the defendant has not set out in an affidavit any facts towards establishing any foundation for the conclusion that the six items carry either of

⁵ Pt. 28.4 provides: “Where a party is required by any direction of the court to give standard disclosure that party must disclose all documents **which are directly relevant to the matters in question** in the proceedings.”

⁶ Pt. 28.14 (5)

⁷ See **Waugh v British Railways Board** [1980] AC 521, [1979] 2 All ER 1169, HL; and **Three Rivers District Council v Bank of England** [2004] UKHL 48; **Winterthur Swiss Insurance Company v AG (Manchester) Ltd** [2006] EWHC 839 (Comm) at [71]

those two privileges i.e. legal advice⁸ and/or litigation privilege⁹. Therefore, the court has no factual material to work with regarding the nature of the documents. Counsel for the defendant suggests that it is open to the court to review the documents, being one of the options provided in the UK first instance decision of *Atos Consulting Ltd v Avis Europe plc* [2007] EWHC 323. However, to get to that stage, there must be some prima facie evidence to establish the assertion of the right to privilege. There is none, other than counsel's statement that it is privileged which, as mentioned above, the court is not willing to accept on its face without anything more. Therefore, the court is of the respectful view that it is not necessary to inspect the documents since, borrowing the language from *Atos*, the asserted right has not been established on the evidence so that it need not consider whether to consider any challenge to that asserted right.

21. Consequently, Part 28.14 (5) applies and, since the court is not satisfied that there is a right to withhold disclosure, an order will be made for the disclosure of these six items.
22. With respect to the other concerns raised by the claimant's attorney at law in relation to the bald statement made by the defendant's attorney at law that these six items were the only items/documents that the defendant could find, the court agrees with the claimant's attorney at law's submission in this regard. It seems rather inconceivable that the history of the defendant's documents including opinions, advices, statements of officials of the defendant, internal memos between the departments of the defendant and correspondence between the defendant and other advisors and/or agents is limited to these six items.
23. What were the statements of officials of the defendant? Whose opinions and advices were mentioned or contemplated in the categories of documents? How many internal memos were there between the defendant's departments? Only one memo was referred to out of the six items mentioned by the defendant's attorneys. Why, then, was it necessary to categorize internal memos in the disclosure list rather than just identify this one memo?
24. The court agrees with the attorney's, for the claimant, suggestions at paragraph 18 of his submissions and is not inclined to accept without more that the defendant has done everything that it could to properly comply with the order for disclosure made to date. The court has considered the agreed list of issues filed on 3 May 2017

⁸ See *Caribbean Civil Court Practice* 2011 – Note 24.27; and *R (Prudential plc) v Special Commissioners of Income Tax* (2013) UKSC 1

⁹ See *Caribbean Civil Court Practice* 2011 – Note 24.25; and *Waugh v British Railways* (1980) AC 521

and is of the respectful view that the defendant ought to make diligent searches for documents which are directly relevant¹⁰ to the case at hand. The defendant has not suggested that any such urgent search would cause financial difficulty or would be disproportionate in the circumstances.

25. Therefore, the court is minded to, and will, make the order requested by the claimant on its amended notice of application.

The Order:

26. There will therefore be an order in terms of the draft order dated 17 August 2017 as amended and initialed by the court i.e. as follows:
- 26.1. The defendant is to itemize and disclose by 25 August 2017, the relevant internal documents relating and pertaining to the claimant's account contained in the following categories of documents:
- 26.1.1. Documents including opinions, advices, statements of officials of the defendant;
- 26.1.2. Internal memos between departments of the defendant; and
- 26.1.3. Correspondence between the defendant and its other advisors and/or agents.
- 26.2. The defendant is to provide copies of all documents disclosed under this order by 1 September 2017.
- 26.3. The defendant is to pay the claimant's costs of this application to be quantified by the court at the next hearing in default of agreement.

/s/ Devindra Rampersad J

.....
Devindra Rampersad J

¹⁰ Pt. 28.1 (4) – i.e. documents which the defendant intends to rely on, documents which tend to adversely affect the defendant's case or documents which tend to support the claimant's case.