THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P-227/2020

Claim No. CV2018-04271

IN THE MATTER OF THE BREACH OF SECTION 162 OF THE MUNICIPAL CORPORATION ACT NO.21 OF 1990

BETWEEN

THE CHAIRMAN, ALDERMAN, COUNCILLORS AND ELECTORS OF THE REGION OF TUNAPUNA/PIARCO

Respondent/Claimant

AND

DARYL DANIEL

Appellant/Defendant

Panel: P. Rajkumar JA

V. Kokaram JA

Appearances:

Mr. Bryan McCutcheon instructed by Mr. Andre Rudder, Attorneys at Law for the Appellant.

Mr. Farai Hove Masaisai instructed by Ms. Antonya Pierre, Attorneys at Law for the Respondent.

Date of Delivery: Wednesday 9th December 2020

I have read the judgment of Kokaram JA and I agree.

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Peter Rajkumar
Justice of Appeal

JUDGMENT

1. Two main issues fall for determination in this procedural appeal with respect to an application for specific disclosure pursuant to Rule 28.5 of the Civil Proceeding Rules 1998 ("CPR"). The first is the effect of the failure to comply with the obligation to certify that the disclosing party understands its duty of disclosure and that its legal representative has explained this duty pursuant to Rules 28.8 and 28.9 CPR. Second, whether the documents requested by the Appellant, Mr. Darryl Daniel, from the Respondent, the Tunapuna Regional Corporation[1] ("the Corporation"), are directly relevant to one or more matters in issue in these proceedings.

2. These main issues arise from the Judge's dismissal of Mr. Daniel's application for specific disclosure[2]. It is contended by the Appellant that the Judge was plainly wrong not to have ordered specific disclosure and furthermore, not to have rectified the failure of the Corporation to properly discharge its obligations under Rules 28.8 and 28.9 CPR. In the context of this case it is submitted that both matters were inter-related and the Judge was wrong not to have addressed the failure of the Corporation to properly certify the list of documents which resulted in the necessity to make the application for specific disclosure.

3. Counsel for the Corporation eventually took the position that it would seek to rectify the omission to properly certify the list of documents. While we commend Counsel for doing so, for the sake of clarity we have set out our reasons why it is important for both parties and legal practitioners to comply

[1] The Chairman, Alderman, Councillors and Electors of The Region Of Tunapuna/Piarco

[2] Notice of Application for Specific Disclosure dated 22nd November 2019. See transcript of reasons dated 17th August 2020

with their obligation under Rules 28.8 and 28.9 CPR when making standard disclosure pursuant to Rule 28.4 CPR. In the appropriate context such omissions are not mere technicalities but are to be actively managed by the Judge in this important exercise of disclosure in civil proceedings under Part 28 CPR.

4. For the reasons set out in this judgment we consider firstly that the failure of the party, the Corporation, and its legal practitioner, to fulfil their obligations under Rules 28.8 and 28.9 CPR were material omissions of their disclosure obligations. The trial judge was plainly wrong to have ignored this deficiency and should have taken steps to correct it to give effect to the overriding objective. We do not believe that such a failure renders the list of documents disclosed as otiose but it robs the disclosure exercise of its purpose, that is, the authentication or certification by the party that those documents disclosed comport with its duty of full disclosure. In the absence of such a certificate, there is uncertainty as to whether the documents disclosed truly represent the relevant documents in the party's control or possession.

5. Second the trial judge was plainly wrong not to have ordered specific disclosure of the following requested documents which are relevant to these instant proceedings:

    i. Reports on the construction of a boundary wall at Pinto Road, Santa Rosa Heights ("the disputed wall") from site visits conducted on 18th August 2018, the 21st August 2018 and 30th August 2018 and the 18th September 2018;

    ii. Memorandums and/or correspondence between the Claimant and Town and Country Planning Division regarding the construction of the Disputed Wall;

iii. Memorandums and/or correspondence between the internal departments of the Claimant concerning the issues of the disputed wall;

iv. Minutes of the meetings of the Board of Directors from June 2018 to the present date relating to the disputed wall;

v. Minutes of the meetings of any other relevant committee of the Respondent/Claimant from June 2018 to the present date relating to the disputed wall; and

vi. Authorization and/or permissions received by the Respondent/Claimant to enter upon the Defendant's property.

6. In this judgment we first briefly examine the application for disclosure before examining the party's disclosure obligations and the relevance of the requested documents.

The Application for Specific Disclosure

7. These proceedings concern a claim by the Corporation that Mr. Daniel constructed a boundary wall on his property at Pinto Road, Santa Rosa Heights ("the subject property") in contravention of section 162 of the Municipal Corporation Act No. 21 of 1990 and the Schedule to the Town and Country Planning (General Development Order, Part I, Class II, Column 2(1). On 5th July 2018 the Corporation's Council held a Building and Market Committee meeting where a resolution was passed to serve notice to stop work on the boundary wall. It alleged that the resolution was passed due to complaints received from neighbouring residents about flooding and other nuisances caused by the wall's construction. The Corporation conducted a site visit on 6th July 2018. The report of the site visit noted that at the time of inspection

the wall was only 7 feet high but was still under construction with decorative attachments being placed at the top of the wall that would increase its height. The Corporation contended that the wall was constructed without Town and Country Planning approval. The breaches were brought to the attention of the Chairman, CEO and Corporate Secretary of the Corporation who gave directions for the issuance of a Notice dated 16th July 2018 to Mr. Daniel to cease all construction work with immediate effect.

8. In addition to its declaratory relief[3] the Corporation seeks an order of the payment of $121,000.00 by way of fines pursuant to section 162 of the Act for the alleged breaches.

9. Mr. Daniel disputed that he was in breach of the Town and Country Planning Act. He alleges that the subject property has been zoned for commercial use by the Town and Country Planning Division (TCPD) on 5th February 2014. One of the primary reasons for the erection of the wall was because of a dispute between Mr. Daniel and his neighbour. On 22nd June 2018, officers from the TCPD came to the subject property, inspected the wall and the works ongoing on the subject property. They stated they had no issue with the wall or the works being undertaken. Mr. Daniel contended that the TCPD at all material times indicated that it had no objection to the wall being constructed and alleges there was no basis to issue the stop notice. He has counterclaimed damages against the Corporation for illegally entering his property to conduct site visits without authorisation and for the wrongful issue of the stop notice.

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[3] The Corporation claims against Mr. Daniel for the following declaratory relief:
"1. A declaration that the Defendant has breached section 162 of the Municipal Corporation Act No. 21 of 1990.
2. A declaration that the Defendant has breached the Schedule to the Town and Country Planning (General Development) Order, Part I, Class II, Column 2(1).

10. Both parties filed their respective lists of documents pursuant to the Judge's case management order dated 19th July 2019. Pursuant to Rules 28.8 and 28.9 CPR the list of documents must contain a certificate that the attorney has explained to the maker of the list, its disclosure obligation under Part 28 as well as a certificate from the lay party that it understands its duty of disclosure and that such duty was carried out. While Mr. Daniel's list complied with this requirement[4], the Corporation's list did not. It contained instead a certificate by the attorney at law that she had explained to the Corporation (a) the duty of standard disclosure and (b) the terms of the Court's order and its duty to disclose documents pursuant to that order. There was no certification by the Corporation pursuant to Rule 28.9 CPR. There was no identification of any person who on behalf of the Corporation had this duty explained to him/her or was responsible for carrying out the search. Further, it was the attorney who accepted responsibility for identifying individuals (unnamed) who might be aware of any document which should be disclosed. She then sets out a list of all the documents in the physical possession of the Corporation or of which it had a right to possession.[5] The list was plainly in breach of Rules 28.8 and 28.9 CPR.

11. In an exchange of correspondence between the parties, Mr. Daniel's attorneys drew to the Corporation's attention the deficiency in the said list and made a request for the following specific documents:

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[4] The Defendant's list of documents filed 16th September 2019 contained the following Certificate:

> "I, Daryl Daniel, the Defendant herein, hereby certify that my Attorneys-at-Law have explained my duty of disclosure and I understand the same and the best of my knowledge this duty has been carried out."

[5] The Certificate also provided:

> **Part 2**
> There are no documents applicable to Part 2 to the best of my knowledge, information and belief.

a) Complaints in writing received by the Corporation regarding the wall which is the subject of the dispute or a contemporaneous note of such complaints taken by the Corporation's servants and/or agents;

b) Correspondence passing between the Corporation and the TCPD regarding the wall;

c) Memorandums and/or letters and/or electronic mails between the internal departments of the Corporation concerning the issues of the case;

d) Minutes of the meetings of the Board of Directors from June 2018 to present date relating to the issues of this case;

e) Minutes of the meetings of any other relevant committee of the Corporation from June 2018 to present date relating to the issues of the case; and

f) Authorisation and/or permission received by the Corporation to enter upon Mr. Daniel's property.[6]

12. The Corporation responded to that specific request in the following manner:[7]

"1. The Complaints received were oral complaints to the Councillor for the area;

2. There is no written correspondence between the Claimant and Town and Country Planning Division;

3. **There are no internal memorandums in relation to this matter for disclosure**;

4. **There are no minutes of the Council meeting which can be disclosed**

[6] See letter dated 1st October 2019

[7] See letter dated 14th October 2019

but we have attached for your reference two resolutions passed by the Council in relation to this matter.

5. Our clients do not require authorization/permission to enter onto the subject property as they are statutorily empowered to do so as set out in the Defence to Counterclaim."

13. There was no attempt to rectify the list. There was no response to the request for the minutes in Item 11(e) above. Mr. Daniel's attorneys repeatedly sought access to the documents and rectification of the list which was strenuously objected to by the Corporation.

14. At the hearing there is very little that was said by the learned Judge in dismissing the application save that it was dismissed on the grounds of relevance and that the documents were not in the party's possession. The Appellate Court, of course, would only reverse the Judge's exercise of its discretion if it can be demonstrated that the judge was plainly wrong: See **The Attorney General of Trinidad and Tobago v Miguel Regis** Civil Appeal No.79 of 2011[8].

15. In our view, the Judge failed to acknowledge that the Corporation's certification obligation under Rules 28.8 and 28.9 CPR were not fulfilled. This alone justified the application for specific disclosure. The Judge also was plainly wrong in determining that the requested documents were not directly

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[8] In **The Attorney General of Trinidad and Tobago v Miguel Regis** Civil Appeal No.79 of 2011 it was noted:

> 11. The law as to the reversal by a Court of Appeal in Trinidad and Tobago of an order made by a trial judge in the exercise of his discretion is well-established. The appellate court will generally only interfere if it can be shown that the trial judge was plainly wrong. Thus, we may say that unless it can be demonstrated, for example, that the trial judge disregarded or ignored or failed to take sufficient account of relevant considerations or regarded and took into account irrelevant considerations or that the decision is so unreasonable or against the weight of the evidence or cannot be supported having regard to the evidence or that the judge omitted to apply or misapplied some relevant legal principle or that the decision is otherwise fundamentally wrong, the Court of Appeal will not generally interfere with the exercise of a court's discretion."

relevant to one or more matters in the proceedings. They plainly were relevant to the main issues of the legal/factual basis for the Corporation to issue the stop notice and the authorisation to enter Mr. Daniel's property, matters which fairly arose on the pleadings for determination.

The Certification Obligation

16. Information exchange is critical to any dispute resolution process and it is no different for resolving claims under the CPR. Part 28 CPR now represents a simpler form of disclosure which is less burdensome and onerous compared to the process of discovery under the previous rule Order 24 RSC[9]. Pemberton JA in **Nyree Alphonso v Port Authority of Trinidad and Tobago** Civil App No. P030 of 2020 at paragraphs 17-20 recently commented on the significant reform which the disclosure process has undergone under Part 28 CPR.

17. Importantly, the pillars of the overriding objective of equality, proportionality, economy and fairness (see Part 1.1 CPR) underpin the disclosure process. It seeks to achieve a proportionate use of the party's resources both in limiting the scope of disclosure and keeping it under the court's active management. It reduces the cost of disclosure in making the process simpler such as by the filing of lists with certificates without the requirement to file an affidavit verifying the list. It maintains equality of arms and procedural justice by ensuring litigation is conducted with "all cards face up on the table", reducing surprises at trials and allowing parties to evaluate the strengths and weaknesses of their cases and encouraging settlement through advance knowledge and sharing of documentation and information in the possession of the parties. In **Davies v Eli Lilly & Co** [1987] 1 WLR 428, Lord Donaldson MR

[9] **Nyree Alphonso v Port Authority of Trinidad and Tobago** Civil App No. P030 of 2020

noted at 431:

> "In plain language, litigation in this country is conducted "cards face up on the table." Some people from other lands regard this as incomprehensible. "Why" they ask, "should I be expected to provide my opponent with the means of defeating me?" The answer, of course, is that litigation is not a war or even a game. It is designed to do real justice between opposing parties and, if the court does not have *all* the relevant information, it cannot achieve this object."

18. Although **Davies v Eli Lilly & Co** [1987] 1 WLR 428 is pre-CPR, the objective of disclosure remains the same if not more prominent under the new rules which encourages information exchange from even the earliest stages of litigation in the pre-action process.[10]

19. These principles should inform the party's approach to the procedure for discharging its obligation of standard disclosure. That process is set out in Rules 28.7, 28.8 and 28.9 CPR. Rule 28.7 provides the procedure for disclosure. Each party must make and serve on every other party a list of documents which must include the documents which are no longer in the party's control, what has happened to those documents and state where each such document then is to the best of the party's knowledge information or belief. The list must also include documents already disclosed. A standard form of the list is set out in Form 8- List of Documents. A significant consequence for failing to disclose is that the party cannot rely on any document that was not disclosed pursuant to Part 28. See Rule 28.13(1) CPR.

[10] See Practice Direction dated 1st September 2005

20. An innovation under the CPR is the certification requirement which replaced the need to verify the list of documents on affidavits. Although making the disclosure obligations simpler, the certificate is not to be understated. Rule 28.8 CPR sets out the duty of the legal practitioner in explaining to the maker of the list of documents the necessity of making full disclosure in accordance with the order and the rules and to certify on the list of documents that such explanation has been given. Rule 28.9 provides that a lay party must certify that he/she understands the duty of disclosure and to the best of their knowledge that duty has been carried out. The party's legal practitioner may sign the certificate if it is impractical for the party to sign and that certificate must specify why it is impractical for the party to give the certificate and that same was given on the party's instructions.[11] Form 8 in the Appendix to the CPR sets out the proposed list and the suggested format for certification.[12] As disclosure is a continuing process pursuant to Rule 28.12 CPR, these obligations must also be observed in filing supplemental lists of documents pursuant to Rule 28.12(3) CPR.

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[11] Rules 28.8 and 28.9 CPR provides:

> "**Duty of legal practitioner**
> **28.8** The legal representative for a party must—
> (1) Explain to the maker of the list of documents:
> (i) the necessity of making full disclosure in accordance with the terms of the order for disclosure and those rules; and
> (ii) the possible consequences of failing to do so; and
> (2) **Certify on the list of documents under rule 28.7(2) or rule 28.12(3) that the explanation required by paragraph (1) has been given.**
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> **Requirement for party to certify that he understands duty of disclosure**
> **28.9** (1) The lay party must certify in the list of documents—
> *(a)* that he or she understands the duty of disclosure; and
> *(b)* that to the best of that party's knowledge the duty has been carried out.
> (2) If it is impracticable for the party to sign the certificate required by paragraph (1) it may be given by that party's legal practitioner.
> (3) A certificate given by the legal practitioner must also certify—
> *(a)* the reason why it is impractical for the party to give the certificate;
> and
> *(b)* that the certificate is given on the party's instructions.
> (4) In the case of a list served on behalf of a company, firm, association or other organisation the certificate must be made by the person identified in rule 28.7(6)(*a*)."

[12] While not contained in Form 8 it is advisable that the attorney also signs a certificate confirming its Part 28.9 duties were discharged.

21. With respect to the client it is important that the person signing the disclosure statement have an understanding of the duty to search and the nature of the relevant documents and issues in the case. The responsible persons should normally be present at case management conferences or the persons giving instructions to the attorney or have an intimate knowledge of the facts of the case. In fact, on Form 8 such a responsible person in the case of an organisation must certify that she/he accepts responsibility for identifying individuals who might be aware of any documents and which should be disclosed and identified persons in the organisations whether they were aware of such documents.

22. For the attorney, the duty to advise the client of his disclosure obligations begins at an early stage of proceedings. See **Rockwell Machine Tool Company Limited v EP Barrus (Concessionaires) Limited** [1968] 1 WLR 693. Indeed solicitors owe a duty to the court to advise their client of the duty to make full disclosure.

23. These obligations of the legal practitioner and the party in the disclosure process are therefore critical. The purpose of the rule is to bring home to each party his/her responsibility for giving disclosure. It is not a mere technicality and except to the extent permitted by the rules, it requires the party personally to make the disclosure statement. See **Arrow Trading and Investments Est 1920 and another v Edwardian Group lrd and others** [2004] EWHC 1319(Ch). In **Arrow Trading** the petitioners were minority shareholders in a private company which owned and ran a number of hotels. The petitioners filed a petition under s459 of the Companies Act 1985 seeking an order requiring the majority shareholders to buy out their shares at a fair and proper valuation and also for full disclosure by the company of all documents relating

to the company's decision to contest the petition as opposed to the customary practice of adopting a neutral position in the proceedings[13]. The petitioner challenged the disclosure statement in the list of documents served by the shareholder respondents. It was made only by one out of several Respondents. That Respondent signed the certificate stating that she "coordinated the search for documents from the second to eleventh respondents in conjunction with the second to eleventh respondent's solicitors"[14]. In the absence of a certification from the parties in the case, the certificate was plainly deficient. The Court observed:

> "[43] The two lists and disclosure statements to which I have referred fall short of what is required for each of the four reasons set out in Mr Lightman's skeleton submissions at para 30, namely, (1) none of the parties giving disclosure (other than Jasminder Singh) has deposed that he or she is aware of and understands the duty of disclosure; (2) none of them (other than Jasminder Singh) appears personally to have carried out that duty; (3) it is not clear what, if any, search any of the shareholder respondents has made to locate documents which are to be disclosed; and (4) it is not clear which documents have been (and have not been) disclosed by each of the shareholder respondents.
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> 45] I do not agree with Miss Nicholson that the non-compliance is a mere technicality in this case. Nor is it relevant that the petitioners may themselves be in breach of this agreement. The purpose of the rule is to bring home to each party his or her individual responsibility for giving standard disclosure. Except to the extent permitted by the rules, it requires the party himself to make the disclosure statement. This clearly has not happened. The petitioners are entitled to complain that it is has not. It is

[13] It was held, among other things, that the petitioners were entitled to disclosure of financial information relevant to an assessment of the reasonableness of remuneration paid to the chairman and his family directors which would enable them to consider a possible settlement of the proceedings.

[14] **Arrow Trading and Investments Est 1920 and another v Edwardian Group lrd and others** [2004] EWHC 1319(Ch), paragraph 40

not a mere technicality. It follows, therefore, that this part of the petitioners' application succeeds”

24. In **Nyree Alphonso v Port Authority of Trinidad and Tobago** Civil App No. P030 of 2020, the Court of Appeal also highlighted the importance of this certification obligation. It endorsed both **Arrow Trading Investment** and **Haley v Siddiqui** [2014] EWHC 835 as authorities underscoring the importance of fulfilling this certification duty and in certain factual contexts can be fatal to the claim:

    “30. The question whether an error during the course of disclosure is fatal, is dependent on the facts of the particular case. In the matter at bar, the trial judge outlined the factors that were considered in deciding whether to grant the Port Authority’s application. The trial judge considered inter alia, the Port’s conduct throughout the proceedings, how promptly the application to amend was made after its error came to light and the time that it would take to correct the error. The trial judge did not consider the breach to be intentional. Rather, it appeared to be ‘an oversight due to the attorneys’ failure as opposed to the [Port Authority’s]’.

    31. **Arrow Trading** provides guidance regarding the type of error that may be deemed fatal, attracting CPR 28.13 sanctions. However, in the case at bar, the nature of the amendment sought went to form and not substance”.

25. The disclosure statement of the Port Authority was not signed by its representative but by its legal representative without an explanation in breach of Rules 28.9 (2) and (3) CPR. The Port Authority had, however, unlike the Corporation in this case, applied to amend its list of documents to include a proper certificate. While Pemberton JA noted that such a failure to comply

with the certification duty could not be said to be a failure to disclose, it amounted to matters which ought to be put right by the Court exercising its active case management powers. See paragraph 51 of **Nyree Alphonso v Port Authority of Trinidad and Tobago** Civil App No. P030 of 2020.

26. Unlike the Port Authority's failure in **Nyree Alphoso**, in this case, the failure of the Respondent to comply with its certificate obligation was resolute in the face of the defect being drawn to its attention. It was a clear failure to comply and only until the hearing of the appeal (to the Corporation's attorney's credit) was there a willingness to comply.

27. The Judge also failed to grasp the nexus between the failure to comply with this obligation and the request for standard disclosure to enforce compliance with the obligations to properly disclose documents in the party's possession.

28. The learned authors in **Zuckerman on Civil Procedure, Principles of Practice 3rd Edition** noted:

    "15.61 Orders for specific disclosure may be used to police compliance with standard disclosure directions. An order for specific disclosure may be made, for example where the court has concluded that the party from whom disclosure is sought has failed to comply adequately with his disclosure obligations, whether by failing to make reasonable searches, or by suppressing documents, or by failing to facilitate inspection. Thus, for instance, the court may direct a party to clarify why a relevant bank statement has not been disclosed, or to disclose the whereabouts of a document that has been referred to in a disclosed letter, or to make a particular document search. Specific disclosure may be necessary in cases

where the party cannot be relied upon to carry out his disclosure duties conscientiously. However, the court has other powers too to enforce compliance with disclosure obligations, such as making a search order and striking out a statement of case."

29. In **Simbatola v Trustees of Elizabeth Fry Hostel and another** [2001] EWCA Civ 1371 the court observed "if the court concludes that the party from whom specific disclosure is sought has failed adequately to comply with the obligation imposed by an order for disclosure, whether by failing to make such a sufficient search for documents or otherwise, the court will usually make order as is necessary to ensure that those obligations are properly complied with."[15]

30. The Judge therefore failed to come to grips with the serious nature of the certification obligation, the appropriate case management response to rectify the omission and the relevance of the deficiency to the application for specific disclosure. Without such a certification, Mr. Daniel is entitled to complain that the Corporation has not made frank disclosure of the documents directly relevant to one or more issues in this matter. No one from the Corporation certified whether they understood their duty of disclosure or whether they conducted a proper search of relevant documentation.

31. The Respondent instead of curing the deficiency alleged that there was no duty on the Corporation to comply with Rule 28.9 CPR that at the time there was no Corporate Secretary of the Corporation and that the documents were not in existence. None of these are acceptable reasons for failing to comply

[15] **Simbatola v Trustees of Elizabeth Fry Hostel and another** [2001] EWCA Civ 1371, paragraph 35

with the certification requirement. First Rule 28.9 CPR requires the lay party to certify the list. In this case the Claimant/Respondent itself, the Corporation must comply with that duty. Rule 28.9(4) makes it clear that for a company, firm, association or "**other organisatio**n" the certificate must be signed by "the person responsible for identifying individuals who might be aware of the documents to be disclosed". While the Corporation is a statutory authority under the Municipal Corporations Act Chapter 24:04, it falls within the definition of "other organisation" and certainly must fulfil its duty as the lay party or lay client.[16] Additionally, such an authorised person will naturally be expected to be the person to attend CMCs pursuant to the obligation for the party to be present at those hearings. See Rule 27.5 CPR.

32. Second, the Corporate Secretary is not the only person in the organisation who can fulfil this duty and so the temporary absence of such an officer is no excuse for non-compliance with the certificate obligation. Third, the fact that the Corporation now condescends on affidavit to say there are no documents begs the question why a proper certificate was not made by the Corporation in the first instance.

33. The proper response by the Court to such a deficient certificate was to have it immediately rectified by ordering the Corporation to file an affidavit verifying the list, or amend the list to include the proper certification or to re-file the list and certificate. There are other additional case management options which are more draconian such as making an unless order to comply with the rules of disclosure. See Rule 28.13(1) CPR. The Judge's failure to address any of these options was a material error in the exercise of his discretion and in doing

[16] Rule 2.3 CPR provides that:

> "**party**" includes both the party to the claim and any attorney-at-law on record for that party unless any rule specifies or it is clear from the context that it relates to the lay client or to the attorney-at-law.."

so failed to give effect to the purpose and clear meaning of Rules 28.8 and 28.9, the disclosure obligations under Part 28 and the overriding objective. In our view, the suggested order sought by Mr. Daniel with respect to the verification of the list by affidavit adequately deals with the deficiency, is proportionate to the omission and maintains the equality of arms while ensuring the disclosure obligations are discharged economically.

34. The filing of the application for specific disclosure was therefore a natural and legitimate response to the deficient certification. We now turn to consider the question of the Judge's failure to order the specific disclosure of the listed documents on the grounds of relevance.

The Relevance of the Documents

35. Mr. Daniel would have been entitled to seek specific disclosure in the face of a deficient certification. Indeed the application was made pursuant to Rule 28.5(1) (b) and (c) and not Rule 28.5 (1) (a) CPR. In other words it was not an application to disclose documents specified in the order but, in the face of the deficient certification, to carry out a search for the documents stated in the order and to disclose those documents located as a result of the search.

36. The party's obligation to give standard disclosure is to disclose those documents directly relevant to the matters in question in the proceedings. While no doubt the deficient certification certainly colours the background to the application, the Court must be focussed on the relevance of documents requested to the issues for determination.

37. With respect to specific disclosure the obligations are straightforward and were comprehensively reviewed in **Proman Holdings (Barbados) Ltd and Process Energy (Trinidad) Limited v CL Financial Limited and others** Civil Appeal No. CA P198/2017 and **Nyree Alphonso**. Both parties are on common ground with the legal requirements of standard disclosure but differ on the relevance of these documents to the matters in question in the proceedings.

38. In **Nyree Alphonso** it was noted:

> "25. When one examines the CPR, one sees that its thrust is significantly different. The Court mandates who is to give standard disclosure of material that is directly relevant to the proceedings. Disclosure is now court driven. Disclosure is not to be used as a fishing expedition. If a party wishes the other party to disclose a specific document that is relevant to the issues arising in the proceedings, then that party must make an application for specific disclosure.
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> 26. Another key aspect of the obligation to disclose is that the relevance of the material to be disclosed is determined by the court, using the guidelines provided in the CPR. The material must be "directly relevant" to the case to be tried. What is directly relevant is a matter to be assessed on the pleaded case. In this way, time and expense, and moreover, the inclusion of irrelevant material is kept in check."

39. Mendonça JA in **Proman Holdings** also explained the "two boxes" to be checked in making an order for specific disclosure:

"6….First, it must be satisfied that the documents of which specific disclosure is sought are directly relevant within the meaning of that term as defined at rule 28.1(4). Second, the Court must be satisfied that specific disclosure is

necessary in order to dispose fairly of the claim or to save costs. In so deciding, the Court must have regard to the matters set out at 28.6(2) and where relevant 28.6(3) and to the overriding objective."

40. Mendonca JA explained that the nature of the documents that were to be disclosed under the CPR was that they had to be directly relevant, as opposed to "relating to matters in question in the action", (which would include documents directly or indirectly relevant as explained in the **Peruvian Guano**[17] case). Indeed the CPR expressly excluded the rule in the **Peruvian Guano** case:

    "13….It is, therefore, patent that the intention of the CPR is to limit the scope of disclosure by adopting a narrower definition of relevance. For the purpose of specific disclosure under part 28 of the CPR, it is clear, therefore, that a document would not be directly relevant if it is a document that only may fairly lead to a train of inquiry which may produce any of the consequences outlined at 28.1(4) (a), (b), or (c). It must be directly relevant to any one or more matters in issue in the proceedings within the meaning of 28.1(4)."

41. In this case attorney for Mr. Daniel has argued that the documents are directly relevant for the purpose of Rule 28.1 (4) (b) and (c) CPR in the main part that it tends to adversely affect the Corporation's case or support Mr. Daniel's case. To determine the question of relevance it is important to pay close attention to the pleadings and other relevant documents. In **Proman Holdings** Mendonça JA went on to explain:

    "15….As was noted in **Harrods Ltd v Times Newspaper Ltd and Others** [2006] EWCA Civ 294 (where the English rule is similar to the rules under

[17] **The Compagnie Financière et Commerciale du Pacifique v The Peruvian Guano Co** (1882) 11QBD 55

consideration here, in that it requires disclosure of documents on which a party relies or documents that may adversely affect his own or support another party's case), (at para 12, per Chadwick LJ):

> "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 issue 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."

42. In **Disclosure 5th Ed [2016]**[18] the learned authors observed:

> "6.56 The application may be based merely on probability arising from the surrounding circumstances or in part on specific facts deposed to. Once this test has been satisfied, the court has a discretion whether or not to order disclosure. In deciding whether or not to make an order for this specific disclosure, the court will take into account all the circumstances of the case and in particular, the overriding objective. Thus the court will take into account the importance of the documents sought, the nature and complexity of the issues, the amount at stake in the litigation, the cost and burden to the disclosing party of complying with the order, the financial position of the parties, and the importance of the case and general consideration of proportionality."

[18] P. Matthews & H.M Malek QC

43. It is clear that one would glean the relevance of documents from the issues to be determined from the pleadings. Mendonca JA in **Proman Holdings** opined that reference can be made not only to the pleadings but Part 35 information as well as witness statements to glean the issues in dispute.[19]

44. The Court must however be wary of too wide an obligation to disclose documents having regard to the irrelevance of the **Peruvian Guano**[20] rule. In other words the documents must be directly relevant and not simply ones that put one on a train of inquiry of discovery which may unearth something relevant. The purpose is obvious. It makes disclosure more economical, direct and proportionate. There will be no ploughing through masses of documents to unearth something relevant. The document requested must be pinned and hinged on an issue to be determined.

45. In this case we have examined the pleadings and the witness statements filed in the proceedings. We have noted the Corporation's submission that there are agreed and un-agreed issues for determination. While that may be so the Court is also entitled to examine the issues that fairly arise from the relevant documents for determination and no doubt the trial judge after hearing the evidence is entitled to recast the issues if it is just and fair to do so in giving effect to the overriding objective and will not take a party by surprise. We also note the Corporation's submission that no further search will unearth some of the documents requested, but in light of our opinion on the defective certificate above, this simply is an insufficient response to the request for

[19] **Proman Holdings (Barbados) Ltd and Process Energy (Trinidad) Limited v CL Financial Limited and others** Civil Appeal No. CA P198/2017, paragraph 16.
[20] **The Compagnie Financière et Commerciale du Pacifique v The Peruvian Guano Co** (1882) 11QBD 55

disclosure. We now deal with the specific request for a search of the specific documents below.

Reports on the Construction of a Boundary Wall

46. These are clearly directly relevant to two issues raised on the pleadings. First that site visits were conducted where findings of alleged breaches of the legislation were made against Mr. Daniel by the Corporation which are in dispute in this claim and second with respect to the counterclaim of an unauthorised entry unto Mr. Daniel's property.

47. At paragraphs 5-8 of the Statement of Case it was pleaded that there were site visits and reports generated by the Corporation. One report on 6th July 2018 was disclosed. However, there were other site visits referred to in the Defence at paragraph 7, 9 and 10 on other days for which no reports were disclosed. Those site visits are relevant to the legitimacy of the Corporation's action by issuing the stop notices as well as demonstrating their authorisation to enter unto the land on these occasions. It is important to note that Mr. Daniel has put the Corporation to strict proof of their justification for the issue of the notice.[21]

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[21] See paragraphs 5-8 of the Statement of Case:

> 5. On the 6th day of July 2018, the Claimant caused a site visit to be conducted at the subject property by Mr. Randy Parey, Engineering and Survey Officer and Mr. Kemuel Dennis, Engineering and Survey Officer Assistant of the Claimant Corporation. A true copy of a report on this site visit dated 6th July 2018 is hereto attached and marked "A".
> 6. In the said report it is noted that at that point the wall was only seven (7) feet high but still under construction as shown in the attachments to the said report with decorative attachments being placed at the top of the wall that would increase its height.
> 7. The wall therefore required overall approval from Town and Country Planning Division of the Ministry of Planning and Development but was constructed without this or any other suitable clearance from the Engineering Department of the Claimant.
> 8. These breaches of the Defendant were brought to the attention of the Chairman, CEO and Corporate Secretary of the Claimant who gave directives for the issuance of a Notice dated the 16th day of July 2018 to the Defendant to cease all construction work with immediate effect by a Council Resolution on the 12th July 2018. This notice was issued under the Municipal Corporations Act No. 21 of 1990 Chap 25:04, Section 162 and served on the said 16th day of July 2018 and served directly on the Defendant on 16th July 2018 by Mr. Parey…"

Memorandum or Correspondence Between the Corporation and The Town and Country Planning Division Regarding the Construction of the Disputed Wall

48. This is directly relevant to two matters: first that Mr. Daniel had TCPD's approval or authorization to build the wall or at minimum that TCPD was aware of its construction. Second, that the Corporation had knowledge that there was no objection from TCPD for the construction of the wall. If that is so, it brings into question the reason why the stop notice was first issued. This is directly relevant to paragraphs 4(d) and (h) of the Defence.[22]

> "4(d) On or around 22nd June 2018, officers from the Town and Country Planning Division ("TCPD") came to the subject property and inspected the wall and works ongoing on the subject property. The officers stated they had no issue with the wall or the works being undertaken…………h. in any event, the TCPD has at all material times including but not limited to 6th August 2018 and 1st October 2018 indicated to the Claimant and the Defendant that it has no objection to the Wall as constructed by the Defendant. Copies of an email from Fayola Merrique, Town Planner from the TCPD dated 6th August 2018 to the Defendant and a letter from the Acting Director of the TCPD dated 1st October 2018 to the Defendant are attached as a bundle and marked "B"."

Memorandum and/or Correspondences between Internal Departments of the Departments and other Relevant Committees of the Corporation Relating to the Issue of the Disputed Wall

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[22] Paragraphs 4(d) and (h) of the Defence states:

> ""4(d) On or around 22nd June 2018, officers from the Town and Country Planning Division ("TCPD") came to the subject property and inspected the wall and works ongoing on the subject property. The officers stated they had no issue with the wall or the works being undertaken…………h. in any event, the TCPD has at all material times including but not limited to 6th August 2018 and 1st October 2018 indicated to the Claimant and the Defendant that it has no objection to the Wall as constructed by the Defendant. Copies of an email from Fayola Merrique, Town Planner from the TCPD dated 6th August 2018 to the Defendant and a letter from the Acting Director of the TCPD dated 1st October 2018 to the Defendant are attached as a bundle and marked "B"."

49. This is directly relevant to the Corporation's reason for the issuing of the stop notice and whether it was hinged upon any breach of TCPD approval as set out in the Statement of Case. Mr. Daniel had denied the Corporation's assertion that it had lawfully issued the notice. The Corporation is put to proof that this notice was validly issued. See paragraph 5 of the Defence:

> "5… As to paragraph 8 of the Statement of Case the Defendant can neither admit nor deny what purported breaches the Claimant is referring to as it has failed to particularise the same. The Defendant avers that he notes that a resolution was purportedly passed by the Claimant on 12th July 2018 to issue a Notice to the Defendant. The said Notice was served on the Defendant on 16th July 2018. The Defendant will contend that the Notice was issued without basis and wrongfully."[23]

50. Further the Corporation's previous Corporate Secretary Mr Bill Best requested from Mr Daniel his plans of the car park for the purpose of submitting it to a meeting of the Corporation.

51. Despite the Corporation's submission to the contrary, the legitimacy or legality of the notice is directly in dispute and in issue in this case. This is seen in the pleadings, the witness statement of Mr. Daniel and the unagreed issues filed by Mr. Daniel's attorneys.

Authorisations and/or permissions received by the Respondent to enter upon the Appellant's property

[23] Mr. Daniel is no longer seeking disclosure of the complaints in writing received by the Corporation.

52. Despite the Corporation's insistence that it does not require any authorisation to enter upon the Appellant's property, whether the Corporation was authorised to enter and the nature of that authorisation is directly relevant to the Defendant's counterclaim for damages for trespass. We also note that section 163(1) (a) of the Public Health Ordinance provides that where the Corporation has the power to enter premises the person so claiming the right to enter "shall if required produce some written document properly authenticated on the part of the Board or local authority showing the right of the person producing same to enter."

The Sanction

53. While the Court can impose a sanction pursuant to Rule 28.13 CPR to enforce compliance with the disclosure obligation, we are of the view that in the following circumstance of this case the imposition of the draconian sanction of striking out the claim would be disproportionate: First, the parties are at an advanced stage of preparation for the trial. Second witness statements have been exchanged. Third, the parties but for this aspect of disclosure are ready for trial. Finally, the issues are well defined and both parties are entitled to have the matter resolved substantially on the merits. Eventually, any breach of the order can be dealt with by the trial judge in his deliberation on costs at the end of the trial by taking into account the conduct of the parties as a relevant circumstance.

Conclusion

54. The Judge was plainly wrong in failing to take steps to rectify the defective certification on the Corporation's list and failing to order specific disclosure to conduct a search of the requested documents. The appeal is therefore allowed and the Judge's decision is set aside. As we are in as good a position of the

Judge to exercise our discretion on the application for specific disclosure bearing in mind that the trial is imminent, for the reasons set out in this judgment we will make the orders for specific disclosure set out below.

55. The Court hereby orders that the appeal is allowed and further orders that:

1. On or before 17th December 2020 the Respondent

    (a) shall carry out a reasonable search to locate all the documents listed herein below and

    (b) file and serve on the Appellant a list of documents and disclosure statement stating

        (i) all the documents that are now in its control, custody and possession and

        (ii)to the extent that such documents were once, but are no longer in its control, custody or possession, what has happened to them, or

        (iii) stating those in respect of which it claims a right or duty to withhold inspection:

    I Reports on the construction of a boundary wall at Pinto Road, Santa Rosa Heights ("the disputed wall") from site visits conducted on the 18th day of August 2018, the 21st day of August 2018 and 30th day of August 2018 and the 18th day of September 2018;

    II Memorandums and/or correspondence between the Claimant and Town and Country Planning Division regarding the construction of the Disputed Wall;

III Memorandums and/or correspondence between the internal departments of the Claimant concerning the issues of the disputed wall;

IV Minutes of the meetings of the Board of Directors from June 2018 to the present date relating to the disputed wall;

V Minutes of the meetings of any other relevant committee of the Respondent/Claimant from June 2018 to the present date relating to the disputed wall; and

VI Authorization and/or permissions received by the Respondent/Claimant to enter upon the Defendant's property.

2. To the extent that there are no further documents, the Respondent or a suitable representative of the Respondent shall on or before 30th December 2020 verify by affidavit that there are no further documents to disclose in relation to this case.
3. Upon being given 14 days' notice, the Respondent shall provide the Appellant's legal representatives copies of the documents disclosed.

The Respondent shall pay the Appellant's costs of this application before this Court and the Court below to be assessed by this Court in default of agreement. The Appellant is at liberty to file and serve its statement of costs within 21 days of the date of this order, not exceeding two pages specifying the time reasonably spent on the matter and the appropriate fee earners and their bands. The Respondent shall file and serve its response within 14 days of receipt of the statement of costs. Reply if any to be filed and served by the Appellant within 7 days of receipt of the Respondent's response, such reply not exceeding one page. The decision on costs shall be delivered in chambers on a date to be fixed.

56. By way of postscript as indicated in our exchanges with counsel at the hearing of the appeal, it appears to us that the issues raised in this matter are better dealt with in negotiation, mediation or a suitable form of ADR. Even though the parties are well advanced in their trial preparation we strongly encourage both parties to try an ADR approach before engaging the trial court's resources.

Vasheist Kokaram
Justice of Appeal