THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CIVIL APP NO P030 OF 2020
CLAIM NO CV 2018-03315

BETWEEN

NYREE ALFONSO

(PRACTICING AS AN ATTORNEY AT LAW UNDER THE NAME AND STYLE OF N. D. ALFONSO AND CO.)

APPELLANT/FIRST DEFENDANT

AND

PORT AUTHORITY OF TRINIDAD AND TOBAGO

FIRST RESPONDENT/ FIRST CLAIMANT

ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

SECOND RESPONDENT/ SECOND CLAIMANT

AND

INTER-CONTINENTAL SHIPPING LTD

SECOND DEFENDANT

JOHN POWELL

THIRD DEFENDANT

CIVIL APP NO P028 OF 2020
CLAIM NO CV 2018-03315

BETWEEN

INTER-CONTINENTAL SHIPPING LTD

APPELLANT/SECOND DEFENDANT

JOHN POWELL

APPELLANT/THIRD DEFENDANT

AND

PORT AUTHORITY OF TRINIDAD AND TOBAGO

FIRST RESPONDENT/FIRST CLAIMANT

ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

SECOND RESPONDENT/SECOND CLAIMANT

AND

NYREE ALFONSO

(PRACTICING AS AN ATTORNEY AT LAW UNDER THE NAME AND STYLE OF N. D. ALFONSO AND CO.)

FIRST DEFENDANT

PANEL

P. Moosai JA

C. Pemberton JA

Date delivered: June 9, 2020.

Appearances:

~~For the Appellant/ First Defendant: Mr. F. Hosein S.C., leading Mr. R. Dass, instructed by Ms. T. Hadad~~

~~For the Appellant/ Second Defendant and Appellant/ Third Defendant: Mr. R. L. Maharaj S.C., leading Ms. V. Maharaj, instructed by Ms. K. Sieunath.~~

~~For the Respondents/Claimants: Dr. C. Denbow S.C., leading Mr. S. Maharaj, instructed by Ms. D. Denbow~~.

For the Appellant/First Defendant: Ms. V. Maharaj led by Mr. R. Maharaj S.C., instructed by Ms. V. Sieunath

For the Appellant/ Second Defendant and Appellant/ Third Defendant: Mr. R. Dass led by Mr F. Hosein S.C., instructed by Ms. T. Hadad

For the Respondents: Mr. C. Denbow S.C. and Mr. S. Maharaj, instructed by Mrs. D. Denbow

/s/ Moosai JA

/s/ Pemberton JA

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For the Respondents/Claimants: Dr. C. Denbow S.C., leading Mr. S. Maharaj, instructed by Ms. D. Denbow.

JUDGEMENT

NATURE OF THE APPEAL

1. This is a procedural appeal against the Order of the trial judge, dated January 16 2020. By that Order, the First Respondent, the Port Authority of Trinidad and Tobago (the "Port Authority), was granted leave to amend its '*List of Documents* ***in so far as it pertains to the Disclosure Statement*** *… filed on November 26 2019*'.

SUMMARY OF THIS JUDGEMENT

2. The issues arising on this appeal surround the nature and scope of the duty disclose as imposed by the **Civil Procedure Rules 1998** (as amended) (the **CPR**). It is noteworthy that the regime has changed from what we have become accustomed. Pursuant to the CPR, we find that the trial judge was not plainly wrong in her approach and decision to grant the Port Authority's application to amend its list of documents filed in compliance with her original disclosure Order, dated July 25 2019. Additionally, we do not find that the trial judge was plainly wrong not to include the Second Respondent, the Attorney General, in her Order granting leave to amend.

3. We do not find that the effect of the trial judge's order was to interfere in any way with any duty to disclose imposed, which may or may not have been imposed on the Attorney General by the **CPR**. In other words, the trial judge's Order in no way affected the provisions of the **CPR** with respect to the Attorney General. Further, the trial judge was correct to treat the **Port Authority's** application seeking leave to file an amended Disclosure Statement as simply that and not as an application for relief from sanctions by the Attorney General, which it was not. We find that the appeal fails both sets Appellants are ordered to pay the Respondents' costs certified fit for one

Senior and one Junior Counsel, to be assessed by the Register in default of agreement.

NATURE OF THE PROCEEDINGS

4. Before recounting the facts arising in this appeal, it is apparent that the nature of the proceedings instituted by the Port Authority and the Attorney General (collectively referred to here as the 'Respondents/Claimants') against the Appellants ought to be restated, for the sole the purpose of providing context.

5. According to the Statement of Case filed on September 17 2018, the First Appellant/Defendant, Nyree Alfonso (NA), is being sued for breach of fiduciary duty, which she owed to the Port Authority, because she used her position as Attorney at Law to exploit certain commercial opportunities arising at the Port Authority for personal financial gain (the 'arrangement'). The Statement of Case further alleges that this financial gain was diverted to the Appellant/Second Defendant, Inter-Continental Shipping Ltd (ICSL), and that ICSL acted as NA's agent in this arrangement. The Appellant/Third Defendant is the Managing Director of ICSL,[1] and is alleged to be complicit in the arrangement. The alleged financial gain was derived from monies supplied by the Government of Trinidad and Tobago who is represented by the Attorney General in these proceedings seeking recovery and/or accounts of monies spent. Dr. Denbow SC in his submissions makes the point that '*the Attorney General was neither the party to whom the fiduciary duty was owed nor played an active role in that exercise*'.[2] We see no reason to dispute this.

PROCEDURAL HISTORY

6. On July 25 2019, the trial judge made certain orders with regard to the

[1] See the joint Defence filed by ICSL and John Powell on November 28 2018
[2] Submissions filed by the Respondents in CA Civ P028/2020, [19]

disclosure and inspection of documents, evidential objections, pre-trial management, and also set the dates for trial.[3] On October 17 2019, and as a result of an application made by NA, this Order was varied mainly for the purpose of extending the deadlines given in the July 25 Order. On October 15 2019, the Port Authority filed its List of Documents.[4] NA filed her List of Documents on October 31, 2019 and a Supplemental List of Documents was filed on November 7 2019.[5] ICSL and JP filed their joint List of Documents on December 19 2019.

7. The Disclosure Statement accompanying the Port Authority's List of Documents was not signed by the Port's lay representative, but rather by their Attorney at Law, without an explanation, in breach of **Part 28 rule 9 (2) and (3) of the Civil Proceedings Rules 1998 (CPR)** (the "defect")**.** By letter dated November 20 2019, Counsel for NA, wrote to Counsel for the Port Authority, thereby drawing to Counsel's attention, the Port Authority's failure to comply with **CPR 28.7, 8 and 9.** These **rules** set out the requirements that must be met when filing a List of Documents and the Disclosure Statement made in relation thereto. Counsel for NA stated that the defect must be cured before the parties embark on collating agreed and unagreed lists and/or bundles of documents.[6]

8. As a result, on November 26 2019, Counsel for the Port Authority filed an application to amend its List of Documents in so far as it pertained to the Disclosure Statement. This application was to be considered without a hearing, pursuant to **CPR 8.8(3)** and **CPR 1.3**.[7] The proposed amendment, was attached to the application as 'Exhibit "B"'. By letter to the trial judge, dated

[3] Trial dates: March 24 to 27, 2020 and April 8 & 9 2020.
[4] CA Civ P030/2020: Record of Procedural Appeal, Vol 1, p 5
[5] ibid, Record of Procedural Appeal, Vol 1, pp 21 and 45
[6] ibid, Record of Procedural Appeal, Vol 2, p 259
[7] ibid, Record of Procedural Appeal, Vol 1, p 53

November 29 2019 Counsel for NA, objected to the application on the ground that, '*to "cure" [the Port Authority's] failure to make disclosure'*, the Port was required to apply for '*relief from sanctions*' pursuant to **CPR 26.7 and CPR 28.13**.[8] The Appellants/Defendants filed applications for variation of the timetable set out in the trial judge's July 25 Order on the ground that the Port Authority's application to amend its Disclosure Statement was inappropriate and further prevented the Appellants/Defendants from fulfilling their obligations under the July 25 Order.[9]

9. After considering the Port Authority's application and the objections raised by Counsel for NA, the trial judge determined that the matter could be dealt with in Chambers without a hearing. The **Port Authority** was granted leave to amend its Disclosure Statement **as requested** and **within the narrow confines** set out in the application. The Defendants NA, ICSL and JP filed separate appeals and their appeals were consolidated by order of the Court.

SUMMARY OF THE TRIAL JUDGE'S REASONS

10. The trial judge's reasons for granting the Port Authority leave to amend its Disclosure Statements without a hearing, are set out at page 387, Volume 3 of the Record of Appeal and are summarized below. The trial judge was of the view that:
    i. **CPR 28.9** does not impose a sanction for non-compliance with the July 25 Order, therefore the Port Authority was not required to file an application for Relief from Sanctions for the amendment sought.
    ii. Since the initial Order for disclosure did not itself specify sanctions for non-compliance, the application to amend could be determined pursuant to **CPR 26.8**.

[8] ibid, Record of Procedural Appeal, Vol 1, p 179
[9] Joint Application by ICSL and JP dated January 2020 and NA's Application dated January 15 2020

iii. Granting the Port Authority's application without a hearing furthered the overriding objective by saving time and expense while dealing with the matter expeditiously having regard to the fact that trial dates were already set. Leave to amend ensured that the parties were placed on equal footing in that, the obligatory standard disclosure would be met by both sides timeously to allow for the proper preparation of their respective cases.

iv. The factors set out in **CPR 26.7** were helpful in determining whether the Port Authority's application should be granted.

v. The Port Authority's application to amend was made promptly relative to, the date of the Order as varied and in terms of its response to the observations made by Counsel for NA.

vi. The breach itself was not intentional.

vii. If the application for leave was not granted, both parties would be prejudiced in the conduct of their respective cases, however the greater prejudice would be against the Port Authority since they bore burden of proof. Further, the Defendants' right to seek specific disclosure or to seek any other order pertaining to disclosure was not prejudiced by the Court's Order granting leave to amend.

THE APPEAL

SUBMISSIONS

11. The Notices of Appeal contained several grounds of appeal that were addressed in Counsel's submissions, which are summarized below.

Written Submissions filed on behalf of NA

12. Counsel for NA, Mr Hosein SC, submitted that the trial judge erred by granting leave for the Port Authority to amend its Disclosure Statement without a hearing on the grounds that:

    a. NA expressly objected to such a determination, requesting to be heard for

the purpose of legal submissions;

b. the Port Authority's breach of **CPR 28.9** was substantive, **not** procedural and did in fact attract sanctions as discussed in **Arrow Trading Investment v Edwardian Group**;[10]
c. the effect of the trial judge's Order was that it '*wrongfully discharged*' the Second Respondent, the Attorney General, from disclosure obligations although the Attorney General possesses documents directly relevant to the issues in the proceedings; and
d. trial judge's Order prejudiced NA.

Written Submissions filed on behalf of ICSL and JP

13. Counsel for ICSL and JP, Mr Maharaj SC, submitted that the trial judge erred by granting the Port Authority's application to amend its disclosure statement on the grounds that:
    a. the trial judge did not have the jurisdiction to permit the Attorney General to rely on the Port Authority's disclosure statement;
    b. the effect of the Order to amend was that it relieved the Attorney General from his disclosure obligation and '*immunized*' the Attorney General from any allegation regarding the breach of that Order;
    c. the determination of the application was procedurally unfair since the Appellants/Defendants did not have the opportunity to be heard, nor did they consent to the matter being determined without a hearing;
    d. the Respondents/Claimants failed to meet the threshold since the Port Authority's failure to provide a proper certificate amounted to its failure to disclose since the requirement to provide a list of documents and the obligation to certify that list in a Disclosure Statement were not independent actions but part of a seamless whole as was stated in **Arrow Trading**; and

[10] [2005] 1 BCLC 696

e. the Attorney General's failure to disclose a list of documents or to provide a Disclosure Statement also amounted to a failure to disclose as was made clear in **Prince Abdulaziz v Apex Global Management**.[11]

Written Submissions filed on behalf of the Port Authority and the Attorney General

14. Counsel for the Respondents/Claimants, Dr Denbow SC, submitted that the trial judge was correct to grant leave for the disclosure statement to be amended without a hearing on the grounds that:
    a. this application was meant to correct an inadvertent error that could be put right by the Court pursuant to **CPR 26.8(3)**, as has been held by the Privy Council in **Webster v The Attorney General of Trinidad and Tobago**;[12]
    b. parties should not be concerned with trivia or be allowed to take advantage minor inadvertent errors as was held by the Court of Appeal in **Roland James v The Attorney General of Trinidad and Tobago**;[13] and
    c. the trial judge had a wide discretion and gave reasons for exercising it in favour of the Port Authority.

15. Counsel also submitted that with regard to the scope of the trial judge's Order for leave to amend, the Order was not about a list of documents or additional disclosure. The Order was limited to the amendment of the Port Authority's '*corporate certificate'* pursuant to **CPR 28.9(4)**. Further, the trial judge's Order made no reference to disclosure by the Attorney General. Therefore, that constitutes a new point of law, never dealt with by the trial judge and should therefore not form part of this procedural appeal. Counsel further submitted

[11] Prince Abdul Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Ltd and Another [2015] 2 All ER 206
[12] [2011] UKPC 22
[13] CA Civ 44/2014

that NA et al '*availed*' themselves of the opportunity to oppose the application for the amendment of disclosure statement without a hearing.

ISSUES

16. In light of the submissions made by Counsel, the fundamental question arising on this appeal is whether the trial judge was plainly wrong, both in her approach and in her conclusions, on the **Port Authority's** application to file an amended disclosure statement. To determine this question the following issues are discussed:
    a. What are the disclosure duties and obligations that a party is required to meet under the **CPR**;
    b. What role does the Attorney General play in **these** proceedings; and
    c. Whether the trial judge ought to have determined the application to amend without a hearing.

DISCUSSION

LAW

Rules of the Supreme Court 1975

17. Prior to the introduction of the **CPR**, discovery (now called disclosure) was governed by **Order 24 of the Rules of the Supreme Court (RSC). Order 24 rule 1(1) of the RSC**, provides that after the close of pleadings, there shall be discovery by **the parties to the action** of the documents in their possession, custody or power relative to the matters in question. **Rule 1(2)** states that **the parties** must make discovery by exchanging lists of documents**. Rule 1(5)(a)** provides that on an application by any party required by this rule to make discovery, the Court may order that the **parties to the action** or any of them make discovery.

Civil Procedure Rules 1998

18. A comparison of the language used in **RSC** and the **CPR** reveals that the duty to disclose has undergone significant reform under the **CPR** regime. This change in the *status quo* applies not only to disclosure but also to the obligations that are to be met by parties at every stage of the proceedings. Indeed, in the Foreword to the 1998 **CPR**, the then Chief Justice Satnarine Sharma observed that:

> *The CPR [introduces] a new landscape of civil litigation which, in essence, is a new civil procedural code governing the civil justice system. This new procedural code is a **radical departure** from what obtains under the 1975 Rules. It is underpinned by the Overriding Objective in Part 1 which imposes an obligation on the courts to "deal with all cases justly" and which embodies the principles of equality, economy, **proportionality**, expedition and procedural fairness, all of which are fundamental to an effective contemporary system of justice.*
>
> *…*
>
> *Case management under the CPR is predicated upon a system which gives **control and management of the pace and shape of litigation to the courts** removing it from the hands of the parties and their attorneys.*
>
> *…*
>
> *The CPR [brings] … a new litigation culture—a **paradigm shift** in the administration of civil justice. The new rules provide a comprehensive approach and authoritative*

*guidance to civil procedure in a new **court-managed** environment.*[14]

(**emphasis mine**)

19. Much has been written since 2006 about the impact of the **CPR** on litigation in Trinidad and Tobago. To illustrate the Chief Justice's words, the **CPR** provisions relevant to disclosure are reproduced. Under the **CPR**, disclosure is governed by **Part 28 of the Rules**. **CPR 28.4** provides that where **a party** is ordered to give standard disclosure, **that party** must disclose all documents which are **directly relevant** to the matters arising in the proceedings. **CPR 28.5** provides that an order for specific disclosure of documents may only require disclosure of documents, which are **directly relevant** to one or more matters arising in the proceedings. **CPR 28.9(1) and (4)** provide that a person disclosing documents on behalf of a company or some other organization must certify that they understand the duty of disclosure and that to the best of their knowledge the duty has been fulfilled. Pursuant to **CPR 28.10**, the Court has the discretion to direct that disclosure and/or inspection take place in stages. **CPR 28.1(4)** states that a document is ***directly relevant*** if:
    (a) the party with control of the document intends to rely on it;
    (b) it tends to adversely affect that party's case; or
    (c) it tends to support another party's case

20. The other important provisions relate to the Court's power to impose sanctions if the order for disclosure, whether standard or specific is not met. Pursuant to **CPR28.13(1)**, the sanction imposed when a party fails to disclose is that a document that has not been disclosed cannot be relied on or produced at trial. This is the ultimate sanction. Further, if the circumstances

[14] Foreword to the CPR 1998, The Honourable Mr Justice of Appeal Satnarine Sharma Chief Justice, Chairman of the Rules Committee, 28th April, 2006.

arise, any part of the statement of claim affected by the non-disclosure may be struck out. In **Prince Abdulaziz** the Supreme Court opined that, '*the striking out of a statement of case is one of the most powerful weapons in the court's case management armoury and should not be deployed unless its consequences can be justified*'.[15]The party who has not complied may run the risk of the entire statement of case being struck out, provided that the document not disclosed is **directly relevant** to the case to be either prosecuted or defended.

ANALYSIS

21. This review of the **CPR** provisions relevant to disclosure provides sufficient foundation for the examination of the issues arising on this appeal.

What are the disclosure duties and obligations that a party is required to meet under the CPR

22. Counsel for Appellants/Defendants submitted that the Port Authority's failure to comply with the disclosure process amounted to a substantive breach. Counsel asserted that disclosure under the **CPR** regime is not merely the exercise of filing a list of documents. Counsel contended that disclosure must take place within the mandatory requirements of **Part 28 of the CPR**, which include certification of the list of documents disclosed. Relying on **Arrow Trading**, Counsel contended that since the Port Authority failed to comply with any aspect the obligation to disclose, particularly certification of the list of documents, it was required to apply for relief from sanction.

23. Counsel for the Port Authority and the Attorney General submitted that the error contained in the Port's Disclosure Statement did not affect its List of Documents, nor did it warrant additional disclosure. Counsel asserted that

[15] [2015] 2 All ER 206, [16] per Lord Neuberger P

Roland James v The Attorney General of Trinidad and Tobago,[16] supported his contention that the Port Authority ought not to be penalized for an inadvertent error. Counsel also argued that **Arrow Trading** can be distinguished on its facts.

24. To our mind, the arguments raised by the Appellants/Defendants were birthed in the old approach to litigation under the **RSC**. We can say with some conviction that this process of discovery, now disclosure, was one of the key aspects of litigation of that era which not only lengthened the litigation time but also increased the financial burden placed on litigants. It affected access to justice, which in this modern era was not to be countenanced.[17]

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.

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

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[16] [2011] UKPC 22

[17] See **BLACKSTONE'S CIVIL PRACTICE 2001** Para. 1.2 p. 2 where the authors state, *"There is a system of judicial case management for all cases, which effectively removes control of the timescale and cost of litigation from the parties, identifying the relevant issues at an early stage and controlling the extent to which a party can inflate the costs of litigation, including* ***curtailment on the rights of parties to require others to disclose documents****."* This power is now solely in the clutches of the court. This is where the regime of specific disclosure comes alive. **The onus shifts now to the party requesting the disclosure to prove that it is directly relevant in accordance with the CPR**. In addition, the authors opine that, ***"There is an overall emphasis on reducing the role of taking technical points and obstructive tactics and encouraging the identification and speedy trial of relevant issues only****."*. Further I include, *"…no radical reform of Cicil procedure could attract uniform approval and the time for debate is past. It is clear that many long-standing and well-founded criticisms of the previous procedure have been addressed and the courts have been swift to ensure that the new rules and procedures have been applied form the onset.".*

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.

27. In **Arrow Trading** the petitioners were minority shareholders in a lucrative hotel company. The petitioners sought an order requiring the company to buy out their shares for fair value on the ground that the company's actions were prejudicial to their interests. Two independent company directors opposed the petition contrary to the customary practice of maintaining a neutral position. The petitioners applied for full disclosure regarding the company's decision to oppose the petition including financial documents and legal advice. During the disclosure exercise, issues arose regarding the **adequacy** of the disclosure statements provided by the petitioners as well as the respondents. The Court observed that **none of the parties** giving disclosure (except one) **deposed that they were aware or understood the duty to disclose**; **none of them** appeared to have **personally carried out that duty**; **it was not clear whether efforts were made to locate documents**; and **it was not clear which documents were disclosed and by whom**. The Court therefore ruled that it could not in those circumstances agree that the non-compliance was a mere technicality.

28. Counsel for the Appellants/Defendants also relied on **Prince Abdulaziz**. In **Prince Abdulaziz**, at a case management conference, the Court ordered each party to '*file and serve a statement, certified by a certificate of truth signed by them personally in the case of individuals*'. The prince did not sign on the ground that Saudi Arabian protocol dictated that as a member of the royal family he should not get personally involved in litigation. He requested that his attorney sign the statement on his behalf certifying that there had been full disclosure. The Court refused and issued an unless order that unless the prince complied

his defence would be struck out. The prince applied for a variation of the Court's order and for relief from sanctions. The Court refused to grant his application on the ground that there had been no change in circumstances. The prince appealed. The Supreme Court dismissed his appeal on the grounds that the prince did not object to the order when it was first given, nor did the content of his statement listing the disclosable items comply with the Court's order in that it failed to disclose the location of certain items described in the Court's order. Therefore a variation of the Court's order would be prejudicial to the other parties.

29. The **Prince Abdulaziz** case can be distinguished on the facts. In the case at bar, the claim was instituted by the Port Authority. The Attorney General was named as a party so as to comply with the requirement that litigation instituted by any State entity must be done through the Attorney General as the State's representative (discussed below). The Port Authority listed in full those documents in its possession or control which were directly relevant to the issues arising in the proceedings. Further the Port Authority did not seek a variation of the Court's Order. However, as was pointed out by Counsel for the Appellants/Claimants, the statement of truth attached to the disclosure document was flawed. The Port Authority applied to the Court to amend that document so that it would stand in full compliance with the procedural matters relating to disclosure under the **CPR**.

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 made 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 types 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. In **Roland James**, Mendonça JA spoke strongly against parties and attorneys-at-law who opposed applications to correct '*trivial or insignificant things*'. In His Lordship's view, this amounted to unreasonable conduct that obstructed the furtherance of the *overriding objective*. He opined that '*the law is not concerned with trivial or insignificant things*'.[18] Further, '*it is unacceptable for a party to try to take advantage of a minor inadvertent error as it is for rules, orders and practice directions to be breached in the first place*'.[19] We associate ourselves with these remarks. When one looks at the List of Documents disclosed here, the error contained in the Disclosure Statement did not amount to the 'failure to disclose'. Therefore, as was held by the trial judge, an application for relief from sanction was not necessary. The trial judge, therefore, was not plainly wrong.

What role does the Attorney General play in these proceedings

32. Counsel for the Appellants/Defendants submitted that the effect of the trial judge's Order was that it 'wrongfully discharged' the Attorney General, from disclosure obligations although the Attorney General possesses documents directly relevant to the issues arising in the proceedings. Counsel also argued that while the Attorney General may be the person empowered to institute proceedings on behalf of the State, there is nothing in the **State Liability and**

[18] CA Civ 44/2014, [27]

[19] Mendonça JA quoting Denton v T.H. White Ltd and Anor; Decadent Vapours Ltd. v Bevan and others; Utilise T.D.S. Ltd. v Davies and Ors [2014] EWCA Civ 906, [43]

Proceedings Act[20] that discharges the Attorney General from the duty of standard disclosure**.** Counsel argued that **Section 30 (1) of the Act** imposes a *'positive duty'* on the State to produce documents for inspection. Counsel relied on **Al Rawi v Security Services**,[21] and **Alfred Crompton v Commissioners of Customs and Excise**[22] for the proposition that the Attorney General is not exempt from disclosure obligations in civil proceedings.

33. Counsel for the Respondents/Claimants submitted that the Attorney General is a nominal claimant because this claim involves breach of duty involving an agent of the State and the recovery of State funds paid by an arm of the State. Counsel asserted that the Attorney General is not involved in the core issues of arising in these proceedings, that is, the circumstances under which, NA is alleged to have procured and arranged a contract for the charter hire of the MVSG. Counsel also asserted that when the disclosure Order, as varied, was made the Appellants/Defendants did not raise any questions regarding a duty to disclose on the part of the Attorney General. Therefore, disclosure by the Attorney General ought not to have formed part of Appellants/Defendants' submissions on appeal. Counsel argued that in any event, the Attorney General has no documents, which are directly relevant to the issues arising in the proceedings. Therefore, **Part 28 of the CPR** was not triggered in relation to him.

34. **Section 30(1)(a)** of the **State Liability and Proceedings Act** provides that:

> *30. (1) Subject to and in accordance with Rules of Court—*
>
> *(a) in any civil proceedings in the High Court to which the State is a party or third party the State*

[20] Chapter 8:02
[21] [2012] 1 AC 531
[22] [1972] 2 All ER 353

may be required by the Court to make discovery of documents and produce documents for inspection;

We see that the clear words of the **section** do not impose a 'positive duty' on the State to make discovery and produce documents for inspection. The **section** is clearly permissive and empowers the Court to make such order as is necessary in the circumstances. The **section** provides for the power of the Court rather than a duty on the State. We therefore disagree with the interpretation placed on the section by Counsel. The Attorney General is not obligated to disclose any document which the State is of the opinion will not be relevant to the exercise of standard disclosure.

35. Further, if the Appellants/Defendants are convinced that there is/ are a documents, which are in the possession and control of the Attorney General, and that these documents are directly relevant to the matters to be decided in the case, then they must come to court armed with sufficient reasons to apply for specific disclosure of those documents. This is in keeping with the new approach of saving time and expense and dealing with issues that are directly relevant to the case to be tried. Further, as has been noted by Counsel for the Respondents/Defendants, the Appellants/Defendants did in fact make applications for specific disclosure subsequent to filing this appeal. Those applications may yet bear fruit.

36. Counsel for the Appellants/Defendants also pursued with some vigour, the argument that the trial judge impliedly released the Attorney General from his duty to disclose. Counsel contended that because Attorney General did not make standard disclosure, a higher threshold was placed on the Appellants/Defendants in their application for specific disclosure.

37. Counsel for the Respondents/Claimants countered that with the argument that the duty to disclose only applies to a party in possession of documents relevant to the issues arising in the proceedings. Counsel also argued that there was nothing, which precluded the Appellants/Defendants from making an application for specific disclosure by the Attorney General.

38. The cases upon which the Appellants/Defendants relied could not assist this Court in determining the role that the Attorney General is required to play in these proceedings. **Al Rawi v Security Service**, involved an application by the State for leave to file '*closed disclosure'* and a '*closed defence*' [23] that would be filed parallel to an open defence, which did not disclose the evidence relied on. The Supreme Court held that a court did not have the jurisdiction to grant such an application without intervention by Parliament, although the application was made on the ground of public interest immunity. On the facts, **Al Rawi v Security Service** is irrelevant to the issues arising in the matter at bar and does not assist the Appellants/Defendants. **Alfred Crompton** is also irrelevant to the issues arising since the extant case involved arbitration proceedings in which the Court relieved the Commissioners of the duty to disclose on the ground of legal professional privilege.

39. The **CPR** does not impose an automatic or general duty to disclose on any party. The Court mandates who is to make disclosure and as **CPR 28.10** provides, the Court has the discretion to order that disclosure and inspection take place in stages. In this case, the Order dated July 25 2019 read *inter alia*:

> …
> 1. *Standard Disclosure to take place on or before 15th, October 2019.*

[23] Closed disclosure and defence – documents and defence to be seen by the trial judge only.

2. *The inspection of documents to be completed on or before the 22nd October, 2019.*

…

40. It cannot be disputed that, as a party to proceedings, the Attorney General has a duty to disclose any material that may assist the Court in determining the issues in dispute, and that is the remit of the duty. As stated above, **section 30(1) of the State Liability and Proceedings Act** simply gives the Court the discretion to order disclosure by the State in accordance with the CPR. Disclosure is a Court directed exercise and the Court may exercise its discretion to order disclosure by the Attorney General if it is satisfied that the Attorney General controls documents that are directly relevant to the issues arising in these proceedings.

41. Whilst the order may have been expressed in clearer terms, the Attorney General was not to be fixed with responsibility for this step if any of the documents, which he had in his possession, were not directly relevant to the case at hand. If there were such documents then the Attorney General will be faced with the ultimate sanction at trial: he could not rely on them to prosecute his case. If the Attorney General chose that route then so be it. Even if the Order made by the trial judge is construed as inclusive of the Attorney General and there was non-compliance, the Attorney General will not be able to lead or rely on any documents at the trial to prove its case.

42. In addition to asserting that the Attorney General does not have or control documents directly relevant to these proceedings, Counsel for the Respondents/Claimants also argued that the Attorney General is firstly, a nominal claimant. Counsel argued that the Attorney General was named as a

claimant in order to comply with **section 19 of the State Liability Act**[24] which provides that the Attorney General may be named in proceedings instituted by the State. Being named in this capacity, the Attorney General plays no active role in these proceedings since the fiduciary duty was not owed to him but to the Port Authority.

43. Secondly, the Attorney General is a principal whose agent- the Port Authority- is fixed with disclosing all directly relevant documents on his behalf. Counsel asserted that according to **section 61(1)** of the **Port Authority Act**, the Port Authority is an agent of the State whose function is to, *inter alia,* operate the Inter Island Shipping Service between Trinidad and Tobago. Therefore, as was held in **Port Authority of Trinidad and Tobago v Pierre**,[25] the Port Authority is the State's '*statutory agent*'. As agent of the State, the Port Authority is responsible for ensuring that the disclosure obligations of the State were met. Once the Port fulfills this obligation, the Attorney General is not required to do so. *Matthews and Malek* posit that:[26]

> *Documents belonging to the agent, which are not in the control of the principal, are not disclosable by the principal…*
>
> *… [W]here an agent had a real and substantial interest in the action, and was not merely a nominal plaintiff, the Court would not order discovery of the documents in the possession of custody or power of the principal.*

44. When the original order to disclose was made by the trial judge, the Appellants/Defendants did not raise the matter of any duty by the Attorney

[24] Chapter 8:02
[25] (2017) 19 WIR127, p 131
[26] Disclosure, Matthews, P. and Malek, H. (Sweet & Maxwell 2nd Edn), [3.20] and [3.21]

General to disclose. Neither was this issue raised by the Appellants/Respondents in their Notices of Application for a new pre-trial timetable in which they objected the Port Authority's application to amend being determined without a hearing. If this issue was brought to the attention of the trial judge, she would have then had the opportunity, to consider the apparent interplay between the role of principal and agent in these proceedings, and the precise repose of the disclosure obligation. It was not and so trial judge was not directed to consider the applicability of this interplay to the facts of this case.

45. In any event, on the authority quoted above, the Attorney General, as principal of the Port Authority, had no duty to disclose. Further, Counsel for the Appellants/Defendants did not provide grounds nor have they adduced evidence demonstrating why the disclosure already made by the Port Authority is unsatisfactory. Counsel for the Respondents/Claimants pointed out that two days before Witness Statements were due, NA filed an application for specific disclosure in respect of 51 items. Counsel asserted that these are items that have either already been disclosed, are wholly irrelevant, or do not come within the realm of proper specific disclosure requests. This application for specific disclosure has been dealt with by the trial judge, and so we say nothing further on this issue.

Whether the trial judge ought to have determined the application to amend without a hearing

46. Counsel for the Appellants/Defendants submitted that the trial judge ought not to have granted to the Port Authority leave to amend without a hearing. Counsel asserts that the Appellants/Respondents expressly objected to such a determination and asked to be heard for the purpose of legal submissions.

Relying on **Haley v Siddiqui,**[27] Counsel submitted that when a party applies for an application to be determined without a hearing, the Court is required to give full consideration to the application, testing the arguments of both sides to determine whether the relief sought should be granted. Counsel for NA asserted that the trial judge's determination of the Port's application without a hearing is,

> *Even more egregious when one considers that by the same Order granting the [Port Authority's] application … [the trial judge] considered that NA's application for an extension of time to file witness statements required an oral hearing.*[28]

47. However, Counsel for the Respondents/Claimants submitted that defects in the Port Authority's Disclosure Statement amounted to an inadvertent error that could be put right by the Court pursuant to **CPR 26.8(3)**, as has been held by the Privy Council in **Webster v The Attorney General of Trinidad and Tobago**. Counsel also contended that the Appellants/Defendants did not avail themselves of the opportunity to request of the trial judge, a review of the decision made. Counsel further argued that that **Haley v Siddiqui** does not support an attack of the trial judge's discretion by way of appeal.

48. In **Webster**, the appellant used the wrong form to commence his action for wrongful arrest and detention, and failed to apply to the Court for directions regarding documents to be filed or disclosed. The Privy Council assessed the effect of these errors. The Board held that the appellant's error was likely to be of no consequence since the trial judge was empowered by **CPR 26.8(3)** to

[27] [2014] EWHC 835
[28] NA's submissions, [14]

put to right any error of procedure or failure to comply with a rule, court order or direction.

49. In **Haley v Siddiqui,**[29] the trial judge stayed the proceedings pending settlement by mediation or negotiation. In the court order, the trial judge required the parties notify the court in writing of the outcome of the negotiations, and what if any, directions were required. The order also expressly stated that failure to comply may result in the application of sanctions but did not disclose what those sanctions would be. The parties failed to comply with the terms of the order. The mediation was in fact settled and the matter at an end. However, because the parties failed to notify the trial judge of this fact, the terms of the mediation agreement could not be put into effect. By his own initiative, the trial judge ordered that the claim be struck out in the absence of the parties and informed them of their right to have the order set aside, varied or stayed. The claimant applied to have the order set aside and sought relief from sanction. The trial judge refused and the claimant appealed.

50. The facts in **Haley** are unique and distinguishable from the facts of this Appeal. In **Haley**, the trial judge's order imposed the **possibility of sanction** for failure to comply and a sanction was imposed without a hearing. On the facts of the present Appeal, this was not an application to set aside an order nor was it an application to vary an order. The Port Authority's application was limited in scope and although leave to amend was granted without a hearing, in making that determination, the trial judge had before her, and considered, the objections raised by Counsel for the Appellants/Defendants. The Appellants/Defendants did not apply to the trial judge to set aside in the form mandated by **CPR 11.15** but instead chose to appeal the trial judge's decision.

[29] [2014] EWHC 835

51. In these proceedings, the trial judge's initial disclosure Order did not impose sanctions for failure to comply. Counsel for NA contended that the Order is still subject to the sanctions set out in **CPR 28.13(1)**. However, the Port Authority's failure to provide a disclosure statement, which met the requirements of **CPR 28.9** cannot be said to amount to a failure to disclose, subject to sanction. Further, the Port took immediate steps to have the error corrected. Therefore, the need for an application for relief from sanction does not arise and so **CPR 26.7** is applicable only in so far as it may provide guidance on the principles to be considered when deciding whether to grant leave in the circumstances of this case.

52. In the round, Counsel for the Appellants/Respondents failed to take advantage of the procedural remedies available to them. In **Haley**, the Court of Appeal referred to the equivalent of our **CPR 11.15** and opined that, *'where an order has been made by the court … without a hearing* ***the parties are entitled to apply to the court to have that order set aside and varied****'*.[30] (**emphasis mine**) We associate ourselves with these remarks.

ROLE OF THE APPELLATE COURT

53. The Court of Appeal is always loathe to interfere with the trial judge's discretion in case management. The Court of Appeal will only intervene if it is satisfied that the trial judge's use of that discretion was so outlandish that no reasonable judge would have exercised the discretion in that way. That requirement is not evident in this case. In **Prince Abdulaziz**, the Supreme Court opined that,

> *It would be inappropriate for an appellate court to reverse or otherwise interfere with a case management decision*

[30] ibid, [14]

> *unless it was plainly wrong in the sense of being outside the generous ambit where reasonable decision-makers might disagree.*[31]

54. The Court of Appeal cannot be seen to be undermining the fundamental premise upon which the **CPR** is predicated which is certainty of trial date. Whilst a party's right of appeal cannot be circumscribed, it is not a right, which is to be exercised lightly. We associate ourselves with Mendonça JA in **Roland James** and exhort the parties to defend and prosecute this matter in keeping with their duties under the overriding objective.

ORDER

It is hereby ordered that:

1. This appeal is dismissed.
2. Appellants are ordered to pay the Respondents' costs certified fit for one Senior and one Junior Counsel to be assessed by the Registrar in default of agreement.

/s/P. Moosai JA

/s/C. Pemberton JA

[31] [2015] 2 All ER 206, [13] (see also [43]) per Lord Neuberger