

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MRS JUSTICE G FRASER JA (AG)**

APPLICATION NO COA2023APP00189

**BETWEEN DIANDRA BRAMWELL APPLICANT
AND ANDRENE GIBSON RESPONDENT**

Lemar Neale instructed by Nea | Lex for the applicant

Ms Georgia Hamilton and Ms Ashley Clarke instructed by Georgia Hamilton & Co for the respondent

25 September and 6 October 2023

Civil Practice and Procedure – Specific disclosure – Criteria for ordering – Whether documents requested for specific disclosure directly relevant to the issue in dispute

Civil Practice and Procedure – Costs – Whether and when costs may be awarded against a party ordered to provide specific disclosure

Civil Practice and Procedure- Application for stay of execution

BROOKS P

[1] This is an application for leave to appeal against the decision of Master Carnegie (Ag), made on 28 July 2023, which stipulated that the applicant, Ms Diandra Bramwell, should provide specific disclosure to the respondent, Ms Andrene Gibson. Ms Bramwell, also seeks leave to appeal against a costs order that the learned Master made against her, as well as a stay of execution of the decision of the learned Master.

[2] On 25 September 2023, this court made the following orders:

- “1. The application for permission to appeal filed herein on 11 August 2023 is refused.
2. The application for a stay of execution of the orders of the learned Master made on 28 July 2023 is refused.
3. Costs to the respondent to be agreed or taxed.”

[3] At that time, we promised to give our reasons in writing. We do so now.

[4] The learned Master’s orders were made on Ms Gibson’s application seeking specific disclosure of particulars of Ms Bramwell’s status as an attorney-at-law who provides a service that attracts General Consumption Tax (‘GCT’). Ms Bramwell contends that the learned Master erred in making the orders because the disclosure of her GCT registration number and certificates of registration as at specific dates was not directly relevant to the real issues in contention in the litigation.

[5] The orders arose from the case management of a claim by Ms Bramwell against Ms Gibson. Ms Bramwell averred that Ms Gibson had defamed her in her professional capacity. The impugned words were used in an email that Ms Gibson wrote to the members of a strata corporation, of which both Ms Bramwell and Ms Gibson were then members. Ms Gibson filed a defence in which she admitted using the words in question but asserted that not only were the words true but they were used on an occasion of qualified privilege. In supporting the assertions made in her defence, Ms Gibson contended that Ms Bramwell had implied that she “had jurisdiction to waive GCT charges due on legal fees payable to her”.

[6] On that issue, Ms Bramwell, in her reply to the defence, denied representing at any time to Ms Gibson “that she could waive GCT on legal fees”. Ms Bramwell further said that, in any event, she did not charge Ms Gibson any GCT when she previously acted for her in a conveyancing transaction.

[7] In her application for specific disclosure, Ms Gibson filed an affidavit sworn by Ms Shanice Baker, which exhibited three documents, two of which were said to be invoices

rendered by Ms Bramwell to Ms Gibson in that conveyancing transaction. None of the documents displayed a GCT registration number. Two of the documents, after quoting the "Attorney's fee" as being "inclusive of gct [sic] 16.5%", stated a lower figure describing it as "50% markdown less GCT 16.5%". The third document used the same figures in respect of "Attorney's fee" but described the lower figure as being the fee, with a "57% markdown".

The application for permission to appeal

[8] Mr Lemar Neale, on behalf of Ms Bramwell, submitted that Ms Gibson's application for specific disclosure of Ms Bramwell's GCT number and GCT registration certificates is misconceived. He quoted from rules 28.1, 28.6 and 28.7 of the Civil Procedure Rules ('CPR') to contend that orders for specific disclosure were only for documents that were "directly relevant" to one or more issues raised in the proceedings. Learned counsel relied on several authorities, including, **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1 ('**AG v MacKay**'), **Miguel Gonzales and Another v Leroy Edwards** [2017] JMCA Civ 5 ('**Gonzales v Edwards**') and **The Attorney General of Jamaica v BRL Limited and Another** [2021] JMCA Civ 14 ('**AG v BRL**').

[9] Mr Neale argued that the documents that Ms Gibson sought were not directly relevant to the issues in dispute between the parties. Learned counsel contended that the issue of whether Ms Bramwell was registered to charge GCT was not raised on the pleadings and was therefore not an issue in the matter. He further argued that the issue in relation to GCT between the parties was whether Ms Bramwell could waive GCT and the specific disclosure of Ms Bramwell's GCT number and GCT registration certificate does not assist in resolving that issue. In this context, learned counsel argued that the learned Master erred in granting Ms Gibson's order for specific disclosure as the disclosure of those documents is not "directly relevant".

[10] Mr Neale acknowledged that there is a requirement for an attorney-at-law to display a GCT certificate. He contended, however, that a person is only required to

register to collect GCT if he or she earns \$3,000,000.00 or more from the taxable activity.

[11] He submitted that there was no representation by Ms Bramwell to support Ms Gibson's contention of an assertion about the waiver of GCT, but that Ms Gibson had drawn an inference from the documents that Ms Baker exhibited to her affidavit. He further submitted that there was no real benefit to be derived from the disclosure that Ms Gibson sought. He contended that the fact that the disclosure may not be burdensome is not a basis for granting it. In any event, he submitted, the disclosure was not proportionate in the context of the overriding objective.

Issues

[12] The issues that arise are, therefore:

- a. Whether the learned Master erred in granting the order for specific disclosure.
- b. Whether the learned Master erred in awarding costs to Ms Gibson.
- c. Whether this court should grant Ms Bramwell's application for a stay of execution.

Discussion and analysis

The basis for disturbing the exercise of discretion of a first-instance judge

[13] Mr Neale helpfully reminded the court of the principle that this court is not allowed to disturb a decision arising from a judge at first instance exercising his or her discretion, merely because this court would have exercised its discretion differently in the circumstances (see para. [20] of **AG v MacKay**).

Whether the learned Master erred in granting the order for specific disclosure

The criteria for requesting and ordering specific disclosure

[14] F Williams JA, in **Gonzales v Edwards**, has extensively and helpfully discussed the criteria for requesting and ordering specific disclosure. McDonald-Bishop JA in **AG v BRL** has similarly done so. The essence of that learning is the stringency of the principle that an order for specific disclosure should only be made with respect to documents that are directly relevant to an issue or issues in the case. Rule 28.6(5) of the CPR makes that stipulation. Documents, for these purposes, refer to “anything on or in which information of any description is recorded” (see rule 28.1(2)).

[15] Rule 28.1(4) of the CPR defines the term “directly relevant” very strictly:

“For the purposes of this Part a document is ‘**directly relevant**’ only 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.” (Underlining supplied, bold as in original)

In para. [22] of **Gonzales v Edwards** F Williams JA interpreted rule 28.1(4) to mean that “a finding that a document is directly relevant can only be made in the three circumstances outlined in the rule”.

[16] Rule 28.7 of the CPR is also helpful in ascertaining the criteria for granting orders for specific disclosure. It sets out matters that a judge is to consider when deciding whether to grant an application for specific disclosure. It states:

- "(1) When deciding whether to make an order for specific disclosure, the court must consider whether specific disclosure is necessary in order to dispose fairly of the claim or to save costs.
- (2) It must have regard to –
 - (a) the likely benefits of specific disclosure;

- (b) the likely cost of specific disclosure; and
 - (c) whether it is satisfied that the financial resources of the party against whom the order would be made are likely to be sufficient to enable that party to comply with any such order.
- (3) Where, having regard to paragraph (2)(c), the court would otherwise refuse to make an order for specific disclosure, it may however make such an order on terms that the party seeking that order must pay the other party's costs of such disclosure in any event."

[17] Based on the guidance that those rules and cases provide, a judge, in assessing an application for specific disclosure, should:

- a. consider whether the document sought is directly relevant to any one or more of the issues in contention; then
- b. decide if it is fair and reasonable to order disclosure in the circumstances.

[18] In considering whether the document is directly relevant, the judge is entitled to examine the respective parties' statements of case. In para. [6] of **African Strategic Investment (Holdings) Limited, Randgold and Exploration Company Limited v Christopher Paul MacDonald Main** [2012] EWHC 4423 (Ch), Mr Livesy QC, sitting as a deputy judge of the Chancery Division, said:

"...Where a party makes an application for specific disclosure, the primary exercise for the court is to identify the factual issues that would arise for decision at the trial in accordance with an analysis of the pleadings. An order for disclosure should be limited to documents which are relevant to the pleaded issues."

[19] Although F Williams JA, in **Gonzales v Edwards**, said that the equivalent rule in the English and Wales Civil Procedure Rules may be less stringent in its application than rule 28.1(4), the principle of using the parties' respective statements of case as part of

the process of determining whether a document is “directly relevant”, is eminently sensible. The primary purpose of statements of case, particularly the particulars of claim, the defence and the reply, is to identify the issues in dispute between the parties. Rule 8.9(1) of the CPR speaks to a claimant setting out its case:

“The claimant must include in the claim form or in the particulars of claim a statement of all the facts on which the claimant relies.”

While rule 10.5(1) of the CPR speaks to the contents of the defence:

“The defence must set out all the facts on which the defendant relies to dispute the claim.”

[20] Indeed, in **AG v BRL**, McDonald-Bishop JA conducted a thorough perusal of the parties’ respective statements of case as she found that “it is necessary to establish what the issues are that arise from the parties’ statements of case to be resolved by the court at trial” (see para [32] of the judgment).

[21] A judge who is considering an application for specific disclosure may, of course, in identifying the issues in dispute, rely on affidavit evidence or other material which is placed before the court. F Williams JA noted the absence of such other material on behalf of the respondent in **Gonzales v Edwards** (see para. [23] of his judgment).

Applying the principles to this case

The issues in dispute

[22] In this case, it was Ms Gibson who raised the issue of the GCT, but she did so in a particular context, namely that Ms Bramwell had “been known to [Ms Gibson] to mislead and be deceptive in...their attorney/client relationship and in [Ms Bramwell’s] role as the Secretary of the Strata Corporation” (para. 7 of the defence). She asserted that Ms Bramwell had given impressions to her, which impressions were “later discovered...to be misleading or untrue” (para. 9 of the defence). The issue of the GCT was one of the particulars of those impressions given. Para. 9 b. of the statement of defence states:

“Mis/representing [sic] as at 3 July 2019 and again on 18 September 2019 that [Ms Bramwell] had jurisdiction to waive GCT charges due on legal fees payable to her on account of representing [Ms Gibson’s] interests in the said [conveyancing] transaction.”

[23] In para. 8(b) of her reply to defence, Ms Bramwell joined issue with Ms Gibson’s assertion about the GCT. She said:

“At no time did [Ms Bramwell] represent to [Ms Gibson] that she could waive GCT on legal fees. In any event no GCT was charge [sic] to [Ms Gibson].”

[24] The other material that Ms Gibson placed before the learned Master was Ms Baker’s affidavit evidence exhibiting the invoices that were mentioned above. Ms Baker asserted that the invoices had caused Ms Gibson to “become suspicious that [Ms Bramwell] misled her into believing that [Ms Bramwell] was a GCT collecting person, and that [Ms Bramwell] had the authority to waive said GCT” (para. 5 of the affidavit).

[25] Based on that material, it may be said that among the issues in dispute raised between the parties, which are to be resolved at trial, is whether the import of the impugned documents that Ms Bramwell sent to Ms Gibson included assertions that could be interpreted as misleading or untrue.

Are the documents directly relevant?

[26] In determining whether the information is directly relevant to any of the matters in dispute, it is plain that paras. (a) and (b) of rule 28.1(4) do not apply to Ms Gibson. One or the other, or neither, may apply to Ms Bramwell, but that is not relevant to this aspect of the discussion. Those paragraphs do not apply to Ms Gibson because she does not have control of the documents containing the information and they cannot be said to “tend to adversely affect” her case. The question, therefore, is whether the documents would tend to support her case (para. (c)). That case involves, at least in part, assertions that Ms Bramwell is a person who makes untrue or misleading statements.

[27] In order to answer that question, it is necessary to examine the documents that Ms Baker exhibited. This is because the General Consumption Tax Act ('the Act') and the regulations promulgated thereunder, stipulate certain requirements of people who perform a "taxable activity". That term is defined by section 2 of the Act as meaning:

"...any activity, carried on in the form of a business, service, trade, profession, vocation, association or club, whether or not for a pecuniary profit which—

- (a) involves or is intended to involve, in whole or in part, the supply of goods and services to any other person for a consideration; and
- (b) ...
- (c) does not include—
 - (i) any activity carried on essentially as a private recreational pursuit or hobby;
 - (ii) any engagement, occupation or employment under any contract of service;
 - (iii) a directorship of a company; or
 - (iv) any activity specified in the Third Schedule (which is not applicable to this case)[.]"

[28] Section 26 of the Act requires every person who carries on a taxable activity to apply to be registered under the Act. The result of that framework is, therefore, that every person who carries out a form of business, service, trade, profession, vocation, association or club for profit that supplies goods and services to someone else for consideration and registers in obedience to section 26 is considered a registered taxpayer. Regulation 3 of General Consumption Tax Regulations ('the Regulations') requires the Commissioner of Tax Administration Services to issue a certificate to the registered taxpayer.

[29] The Act and the Regulations also require a registered taxpayer to take other steps. Section 32A of the Act requires every registered taxpayer to display his certificate of registration in a conspicuous place in the premises where he carries on his taxable

activity. Regulation 8 requires the registered taxpayer to place the words "Tax Invoice" at the top of each tax invoice issued in respect of a taxable activity.

[30] Based on the framework, if Ms Bramwell was a registered taxpayer she should have had a certificate when she issued the invoice to Ms Gibson. Additionally, a tax invoice issued by her should bear the words required by regulation 8 of the Regulations. It is unclear from the evidence, however, whether she earned the relevant amount to be obliged to register as a taxpayer, to display a certificate or to otherwise comply with the requirements of the Act.

[31] A close examination of the documents that Ms Baker exhibited shows that two of them are not invoices but rather estimates of costs in the conveyancing transaction. The third is an invoice. All three documents that Ms Bramwell issued, however, do suggest that she was entitled to collect GCT for any taxable activity that she undertook. The reference to GCT at a particular rate suggests that contention. To the contrary, however, the absence of the words "Tax Invoice" from the invoice that she supplied to Ms Gibson is a basis for a contention that the Act is not being followed.

[32] That scenario falls within the issue of whether Ms Bramwell makes untrue or misleading statements. It also satisfies rule 28.1(4)(c) of the CPR that the documents requested for specific disclosure, namely the certificate of registration and that showing the tax registration number, at the relevant time, would tend to support Ms Gibson's case. They would, therefore, be directly relevant to an issue in the proceedings.

[33] The learned Master, therefore, did not err in ordering specific disclosure, as she did. Ms Bramwell has no real prospect of succeeding on this complaint.

Whether the learned Master erred in awarding costs to Ms Gibson

[34] Mr Neale argued that the learned Master erred in awarding costs to Ms Gibson. He submitted that Ms Gibson's application arose during the case management conference stage and so the appropriate costs order in those circumstances should be costs in the claim.

[35] The award of costs is also another matter which is specifically within the discretion of the court considering the particular case. Rule 64.6(3) of the CPR requires a court, which is considering an order for costs, to “have regard to all the circumstances”.

[36] The circumstances in this case support the learned Master’s order for Ms Bramwell to pay Ms Gibson’s costs in respect of the application for specific disclosure. Prior to filing the application, Ms Gibson’s attorneys-at-law wrote to Ms Bramwell’s attorneys-at-law requesting specific disclosure. The request was denied. Ms Gibson was, therefore, obliged to make the application to the court. Ms Bramwell opposed her application. Ms Gibson was the successful party. Rule 64.6(1) of the CPR stipulates that the general rule is that costs should be awarded to the successful party.

[37] The fact that the application was made prior to a case management conference is not a basis for setting aside the learned Master’s order.

[38] Ms Bramwell has no real prospect of succeeding on appeal on this issue either.

Whether the court should grant Ms Bramwell’s application for stay of execution

[39] Having determined that Ms Bramwell’s case has no prospect of success in her appeal, her application for a stay of execution is otiose and therefore should be refused.

Conclusion

[40] Based on the above analysis, the learned Master would not have erred in principle in granting Ms Gibson’s application for specific disclosure. Accordingly, Ms Bramwell should not be granted leave to appeal on this issue as she would not have satisfied the requirement of rule 1.8 of the CAR that she has a real chance of success on appeal. She also does not have a real chance of success on the issue of costs. Accordingly, she cannot be granted stay of execution of the learned Master’s orders.

SINCLAIR-HAYNES JA

[41] I have read the draft judgment of my learned brother Brooks P. I agree and have nothing to add.

G FRASER JA (AG)

[42] I too have read the draft reasons for judgment of my learned brother Brooks P. I agree with his reasoning and conclusion and I have nothing useful to add.