



In the Supreme Court of Judicature of Jamaica

In Civil Division

Claim No. HCV 02033/2006

<i>Between</i>	<i>CFC Construction Engineers Limited (In Receivership)</i>	<i>1st Claimant</i>
<i>And</i>	<i>Trelawny Aggregate Limited</i>	<i>2nd Claimant</i>
<i>And</i>	<i>Glen Eyre Limited</i>	<i>3rd Claimant</i>
<i>And</i>	<i>Bacade Limited</i>	<i>4th Claimant</i>
<i>And</i>	<i>Cedar Construction Company Limited</i>	<i>5th Claimant</i>
<i>And</i>	<i>FCE Services Limited</i>	<i>6th Claimant</i>
<i>And</i>	<i>Decaba Rentals Limited</i>	<i>7th Claimant</i>
<i>And</i>	<i>Carvel Stewart</i>	<i>8th Claimant</i>
<i>And</i>	<i>Delroy Christie</i>	<i>9th Claimant</i>
<i>And</i>	<i>Calvin Bernard</i>	<i>10th Claimant</i>
<i>And</i>	<i>Barrington Richards</i>	<i>11th Claimant</i>
<i>And</i>	<i>Jamaica Redevelopment Foundation Inc.</i>	<i>1st Defendant</i>
<i>And</i>	<i>Kenneth Tomlinson</i>	<i>2nd Defendant</i>

A N D

Claim No. 2006 HCV 01959

<i>Between</i>	<i>Jamaica Redevelopment Foundation Inc.</i>	<i>Claimant</i>
<i>Between</i>	<i>CFC Construction (Engineers) Ltd.</i>	<i>Defendant</i>

Jermaine Spence and Courtney Daley instructed by DunnCox for Claimants. Claim HCV 02033 and Defendant in Claim HCV 01959 of 2006 respectively.

Sandra Minott Phillips and Ky-Ann Lee instructed by Myers, Fletcher and Gordon for 1st Defendant in Claim HCV 02033 and Claimant in HCV 01959 respectively.

Maurice Manning instructed by Nunes Scholefield, DeLeon & Co. for the 2nd Defendant.

Carvel Stewart representing the Claimants in HCV 02033 and Defendant in Claim 2006 HCV 01959 respectively.

Nordia Sinclair represents the 1st Defendant.

Heard: 11th February, 2008 & 22nd October, 2008

In Chambers

Marsh, J.

By Notice of Application for Court Orders dated 31st October, 2007, the Applicant's (Claimant in Claim No. HCV 02033 of 2006 and CFC Construction (2001) Limited, Defendant in Claim No. HCV 02033 of 2006, sought the following orders inter alia:-

1. That the claims be tried together starting with Claim No. 1959/2006.
2. That the Claimants in Claim No. HCV 02033 of 2006 be granted permission to amend the Amended Particulars of Claim and to file and serve a Further Amended Particulars of Claim by November 14, 2007.

“By inserting after paragraph 62 and before paragraph 63 of the Amended Particulars of Claim, two new paragraphs numbered 62A and 62B in the following terms:

“62A. *The Claimants state that clause 13 of the Restructuring Agreement under or pursuant to which JRF purported to act is a penalty and is accordingly void and/or unenforceable.*

62B. *The Claimants further state that JRF's notices of default dated October 20, 2005 and February 13, 2006 are ineffective, unenforceable and/or void insofar as they demand sums which are payable under an ineffective, void and/or unenforceable penalty provision in the restructuring Agreement and they are not unlawful notices capable of triggering the statutory power of sale under section 106 of the Registration of Titles Act.”*

3. The Defendants in Claim No. HCV 02033 be granted permission to file and serve an Amended Defence, if necessary, by the 14th of December, 2007.

4. That the Claimant in Claim No HCV 1959 of 2006 be granted permission to file and serve a Reply, if necessary, to the Amended Defence filed in Claim No. HCV 1959 of 2006, by the 14th of November, 2007.

5. That there be Standard Disclosure of all relevant documents on or before the 30th day of June, 2008.

6. That the Defendants in Claim No. HCV 02033 of 2006 give specific disclosure of the following on or before the 30th day of June, 2008:

- (1). The Modification of Restructured Debt Agreement entered into between the Claimants in Claim No. HCV 02033 of 2006 and Dennis Joslin Jamaica, Inc. and returned duly executed by the 1st Claimant in Claim No. HCV 02033 of 2006 to Dennis Joslin Jamaica, Inc., under cover of a letter dated March 3, 2005, and all documents in relation thereto.
- (2). All correspondence between the 1st Defendant in Claim No. HCV 02033 of 2006 and Dennis Joslin Jamaica, Inc., in relation to the aforesaid Modification of Restructured Debt Agreement.
- (3). All correspondence between the 1st and 2nd Defendants in relation to the Receivership of the 1st Claimant and the handling of all of the 1st Claimant's claims against Runaway Bay Development Limited which were assigned to the 1st Defendant.

4. All correspondence exchanged between the 1st and /or 2nd Defendant and/or their Attorneys-at-Law and Runaway Bay Development Limited and/or its Attorneys-at-Law, Messrs. Hart, Muirhead & Fatta, in relation to the 1st Claimant's claims against Runaway Bay Development Limited, which were assigned to the 1st Defendant."

By Written and Oral submissions, the Applicants, at Case Management Conference relied on the provisions of Parts 28.6 and 28.7 of the Civil Procedure Rules 2002. Part 28.6(1) provides a definition of an order for specific disclosure. Part 28.6 (3) provides that such an order may be made at Case Management Conference without Notice.

The order for Specific disclosure being sought falls within Part 28.6 (4) of the Civil Procedure Rules in that it identified the documents being sought by describing a class of documents Parts 28.6 (5) and 28.7 respectively of the Civil Procedure Rules provide guidance as to what a Court must consider in deciding whether it should make an order for specific disclosure.

It must have regard to

- (i) the likely benefits of specific disclosure,
- (ii) the likely benefits of specific disclosure
- (iii) whether 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.

The Applicants contend that –

1. The Modification of Restructured Debit Agreement and all documents in relation thereto which the Applicants seek to have disclosed are directly relevant in the proceedings and are necessary to fairly dispose of the claim.

The Applicants are contending that Dennis Joslin Jamaica Inc., agent of the 1st Respondent had entered into a Modification of Restructured Debit agreement with Applicants – that this was duly executed by the 1st Applicant CFC Construction (Engineers) Limited and returned to Dennis Joslin Jamaica Inc., for execution – a copy of this agreement was never returned to CFC Construction Engineers.

The provisions of the said agreement would affect the balances owed to the 1st Respondent Jamaica Redevelopment Foundation Inc.

The 1st Respondent admits that the Applicant's had executed the said agreement, Dennis Joslin Ja. Inc. acting as its agent. However, it has contended that, it was communicated to the 1st Respondent in a letter dated January 20, 2005 from Dennis Joslin to it, that for that agreement to have any effect it would first have to be approved by the Jamaica Redevelopment Foundation Inc., which approval was never given nor had it executed the agreement. The first Respondent is silent as to whether Dennis Joslin had executed the said Modification Agreement. No copy of the Modification Agreement executed by the 1st Applicant was ever provided.

The Applicant's therefore submit that the said Modification Agreement and are documents in relation thereto are directly relevant to several matters in issue (in the proceedings), whether the agreement was executed by Dennis Joslin Jamaica Inc. and the question as to the quantum of the balance of the outstanding debt. It is the contention of the 1st Respondent that it never approved or executed the Modification Agreement so is not bound by its terms and conditions. However the Applicants contend that since it was entered into by Dennis Joslin Jamaica Inc. acting as agent for the 1st Respondent all correspondence between the 1st Respondent and Dennis Joslin Jamaica Inc. in relation to

the Modification Agreement are directly relevant to the determination of the matters in issue in the proceedings and consequently should be specifically disclosed by the 1st Respondent. These and all related documents, it is submitted, as well as all correspondence earlier referred to are necessary to enable the Court to determine the questions raised on the pleadings and so specific disclosure of them is necessary to dispose of the claim fairly.

The Applicants further submitted that there should be an order for specific disclosure of all correspondence between the Respondents in relation to the receivership of the 1st Applicant and the handling of its claim against the Runaway Bay Development Limited (RBDL).

The 2nd Respondent was acting as the 1st Respondent was acting as the 1st Respondent's agent in the handling of the claim against the RBDL. The 2nd Respondent, in dealing with the claim against RBDL, was acting on behalf of the 1st Respondent and not on behalf of the 1st Applicant. All correspondence between the Respondents in relation to the aforementioned receivership and claim against RBDL, is directly relevant to issues raised on the pleadings and therefore is necessary to any disposal of the claim family.

The Applicants also seek an order for specific disclosure of all correspondence exchanged between Respondents/their attorneys and RBDL/its attorneys concerning 1st Respondent's claim against RBDL. These are relevant to issues raised in the pleadings.

The Respondents, the Applicants submit, possess the financial resources needed to comply with the orders sought for specific discovery, as these will not cause the Respondents to incur any significant costs.

Mrs. Minott-Phillips for the 1st Defendant made oral and written submissions.

The Applicant she contended, has not shown that the documents for which he seeks Specific Disclosure are “directly relevant to one or more matters in the proceedings. See Par 28.6(5) of the Civil Procedure Rules which reads “An order for Specific disclosure may require disclosure only if documents are directly relevant to one or more matters in issue in the proceedings.”

He has also failed to address any of the criteria set out in Part 28.7 for specific disclosure.

The Applicant’s cause of action for Conspiracy is wholly misconceived as a Receiver, once appointed under the debenture is agent of the debtor, so the Applicant would be complaining of a conspiracy between the 1st Respondent and the Applicant. Paragraph 12 of the Particulars of Claim of the Applicants refers to a “Modification of Restructured Debit Agreement.” (The Modification Agreement). A prerequisite of this “agreement” coming into being, must be the signing of it by the 1st Defendant and its return to the Claimant. There is no such allegation. Any discussion which has as its objective a negotiated settlement and which does not conclude in a settlement, is privileged and thus protected from disclosure.

The documents or class of documents which the Applicant seeks to have disclosed in the orders sought are as follows:

1. The Modification of Restructured Debit Agreement entered into between the Claimants in Claim No. HCV 02033 of 2006 and Dennis Joslin Jamaica Inc. and returned duly executed by the 1st Claimant in Claim HCV 02053 of 2006 to Dennis Joslin Jamaica Inc.
2. All correspondence between the 1st Defendant in Claim No. HCV 02033 Dennis Joslin Jamaica Inc. in relation to the Modification of Restructured Debt Agreement.

3. All correspondence exchanged between the 1st and/or 2nd Defendant in relation to the Receivership of the 1st Claimant and the handling of all of the 1st Claimant's claim against Runaway Bay Development Ltd. which were assigned to the 1st Defendant.
4. All correspondence exchanged between the 1st and/or 2nd Defendant and/or their Attorneys at Law and Runaway Bay Development Ltd. and or its Attorneys at Law Messrs. Hart, Muirhead and Fatta in relation to the 1st Claimant.

The 'without prejudice rule' is predicated, in part on public policy. This policy is that, as far as possible, parties should be encouraged where it is possible, to settle disputes without resort to litigation and not discouraged by the knowledge that anything said in the cause of such negotiations, may later be used against them in the course of proceedings. As Clarkson J. stated in *Scott Paper Co. v. Drayton Paper Works Ltd.* (1927) 44 RPC 151 -

“they should be encouraged freely and frankly to put their cards on the table.....”

The Public Policy justification, in truth essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as submissions on the question of liability.”

Were the negotiations generally aimed at settlement?

Where the parties were seeking to negotiate a compromise of the dispute, as a general rule, evidence of the contents of the negotiations are inadmissible at trial and cannot be used to establish proof of admission or partial admissions.

Where the negotiations have failed to achieve a settlement, no question of discovery arises as to the parties to the dispute are well aware of the tenure and result of the negotiations.

The Applicants are contending that they had entered into a modification of Restructured Debt Agreement where the 1st Respondent was granted additional security for the debt owed to it by way of a lien over equipment used by CFC 2001 and in exchange all interest outstanding was written off and further interest suspended until July 1, 2005 and no further monthly payments were required under the agreement until July 25, 2005 (See Paragraph 13 of the Further Amended Particulars of Claim of the Applicants/Claimant).

The First Respondent/1st Defendant maintains that the aforementioned agreement “has no binding effect or other effect upon the Defendant as the Defendant was not a signatory or party to that agreement.”

The 1st Respondent/Defendant has submitted that the agreement should be considered “without prejudice communication; is therefore privileged. It should not be the subject disclosure “as it did not result in a settlement.....”

I have taken into consideration the fact that the issue here seems to be whether or not the “negotiations resulted in a agreed settlement.”

The likely cost of specific disclosure of the agreement is apparently minimal and the financial resources of the Respondent are sufficient to enable it to comply with an order for disclosure made against it.

I take into consideration all the criteria set out in Part 28.7 of the **Civil Procedure Rules 2002**. I am further guided by Lord Griffiths statement in *Rush & Tompkins v. Greater Landon Council etal (1988) 3 All ER. 737* at page 40. Here Lord Griffith stated:-

“Thus the without prejudice material will be admissible if the issue is whether or not the negotiations resulted in an agreed settlement.....”

In the light of my conclusion above regarding the issue being whether or not the agreement did or did not result in an agreed settlement, all correspondence between the 1st Respondent/1st Defendant in Claim No. HCV 02033 of 2006 and Dennis Joslin Jamaica Inc. in relation to the aforesaid Modification of Restructured Debt Agreement are subject to an order for specific discovery.

The 1st Applicant/1st Claimant sought an order for specific disclosure of all correspondence between the 1st and 2nd Defendants (Respondents) in relation to the Receivership of the 1st Claimant and the handling of the Applicant/1st Claimant’s claims against Runaway Bay Development Limited which were assigned to the 1st Respondent/1st Defendant.

I am not convinced by anything appearing on the Further Amended Particulars of Claim of the Applicant that “all correspondence” as mentioned at paragraph 6 (3) of the Notice of Court orders, are directly relevant to one or more matters in issue in the proceedings. (See Part 28.6 (5) of the Civil Procedure Rules 2002 Paragraphs 51 – 54, refer to a single letter dated 28th February, 2006.

This letter may be relevant to the alleged negligence and or fraud claimed against the Respondents/Defendants. I will therefore make specific disclosure of the letter dated 28th February, 2006, only. The relevance of any other item of correspondence between the 1st and 2nd Respondent (1st and 2nd Defendants) has not been shown to me by the Applicant. However, the 1st Respondents Attorney, in her written submissions submitted quite interestingly, that “the disclosure of any documents in this category, must be limited

to those documents which deal with the proceeds of the 1st Claimants' claim against RBDL as it was only the proceeds which were assigned to JRF, and not the handling, continuation or discontinuation of the claim."

I am therefore prepared to make an order for specific discovery of those items of correspondence which include the letter dated the 28th February, 2006 and any other correspondence which deal with the 1st Applicant's/1st Claimant's claim against RBDL.

The Applicants/Claimants sought an order for specific discovery of all correspondence exchanged between the Respondents/their Attorneys at Law and RBDL/its Attorneys in relation to CFC's claim against RBDL.

I hold that the correspondence between the Respondents and their Attorneys in relation to CFC's claim against RBDL may be relevant to the proceedings. However, any documents written by an attorney-at-law and addressed to his client and vice versa is privileged, provided that it is intended to be confidential and is written with the object of obtaining or giving legal advice or assistance.

There is nothing before me to suggest that the correspondence to and from the attorneys falls outside the category of such documents.

Since however, the Respondent's attorney has submitted that

"..... as regards paragraph to (4) of the Claimant's application, any disclosure on the part of the 1st Defendant should only relate to correspondence dealing with the proceeds obtained from this claim;"

and taking into consideration the criteria indicated in Part 28.7 of the Civil Procedure Rules 2002, all correspondence exchanged between the 1st and 2nd Respondents and between the Respondents and their Attorney at law, may be disclosed to the Applicants.

In the light of paragraph 23 of the Applicants' written submission, the Applicants' request is that "..... this application be granted in terms of paragraph 6 of the Notice of Application for Court Orders filed on 31st October, 2007."

It is therefore ordered as follows:-

1. There must be Specific Disclosure to the Applicants herein by the 1st Respondent, on or before the 19th day of December, 2008, of the following documents, if not already disclosed on the list of documents filed and served on June 30, 2008:-
 - (a). The Modification of Restructured Debt Agreement entered into between the Claimants in Claim No. HCV 02033 of 2006 to Dennis Joslin Jamaica Inc. and returned by the 1st Claimant in Claim No. 02033 of 2006 to Dennis Joslin Jamaica Inc. under cover of a letter dated March 3, 2005 and all documents in relation thereto.
 - (b). All correspondence between the 1st Defendant in claim No. HCV 02033 of 2006 and Dennis Joslin Jamaica Inc. in relation to the aforesaid modification of Restructured Debt Agreement.
 - (c). Those items of correspondence which include letter dated 28th February, 2006 and mentioned in paragraphs 51 - 54 of the Further and Better Particulars of Claim and which deal with the 1st Applicant's/1st Claimant's Claim against Runaway Bay Development Ltd.
 - (d). All correspondence exchanged between the 1st and 2nd Respondents and between Respondents and RBDL in relation to CFC's case against RBDL.
2. Orders at Case Management Conference to be made on a date to be fixed by the Registrar.
3. Costs to be costs in the Claim.