



[2023] JMSC Civ 68

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2019ES02162

BETWEEN

JEFFREY DALEY

CLAIMANT

AND

HAMILTON CARL DALEY

DEFENDANT

**(Also known as CARL HAMILTON DALEY
Executor in the Estate of GEORGE DALEY.
Also known as GOERGE ERNEST DALEY.
Also known as CARL GEORGE ERNEST DALEY)**

IN CHAMBERS

Mr. Garth McBean K.C., instructed by Pauline M. Brown-Rose on behalf of the Claimant.

Ariana Mills., instructed by Henlin Gibson Henlin for the Defendant/Ancillary Claimant.

Joan Thomas instructed by Joan J. Thomas & Co. For the Ancillary Defendant

Heard: January 26, 2023 and March 30, 2023

Specific Disclosure- Rules 28.1, 28.6, 28.7 considered - Striking out for non-compliance with previous ordered- Rules 26.3 (1),26.4(1) and 28.14 (2) considered- Unless Orders

O. SMITH, (AG.)

INTRODUCTION

[1] The Claimant is Jeffrey Daley, an Attorney-at Law, son of the deceased George Ernest Daley and brother of the Defendant. The Defendant is Hamilton Daley, also an Attorney-at-law and son of the late George Ernest Daley. He is the executor for his father's Estate.

BACKGROUND

[2] Mr. George Ernest Daley died testate on April 27, 2015. The Claimant is one of the named beneficiaries in the will of George Daley, dated March 2, 2004. The Defendant was named as one of the executors of his estate. He obtained a Grant of Probate on February 26, 2019.

[3] This matter came before the Court by way of Fixed Date Claim Form (FDCF) filed on November 4, 2019. The Claimant is seeking an order for the Grant of Probate to be revoked and for the defendant to be removed as an executor of the estate.

[4] On February 3, 2020, the Defendant filed an Ancillary Claim against the Ancillary Defendant, Monica Daley, seeking orders that she deliver up all monies received from the sale of property located at 3 Ascot Road, Old Harbour in the parish of St. Catherine. It is their position that the proceeds from the sale forms a part of the Estate of George Daley.

[5] Ms. Monica Daley, Ancillary Defendant filed a defence on November 22, 2021, in which she, inter alia, stated that she has no direct knowledge of when the Ascot Drive sale was completed or the amount that was received for its sale. However, thereafter on March 1, 2022, the Claimant filed an Affidavit in compliance with orders made by Icolin Reid J in which he deponed that it was Monica Daley, the Ancillary Defendant, who attended upon his office and collected the cheque which represented the net proceeds of the sale of Ascot Hall. He explained that at the time his father was unable to climb the stairs to enter his office. In support of this assertion, he exhibited a letter dated September 1, 2011, signed by Monica Daley

acknowledging receipt of the cheque in the amount of \$63,679,863.91 and other documents pertinent to the sale.

- [6] This matter has seen a number of applications and orders pertaining to disclosure. The first was a Further Amended Notice of Application for Court Orders filed by the Applicant/Claimant on February 13, 2020. In that application he sought among other things a freezing order in relation to monies held by the National Commercial Bank Limited/National Commercial Bank Insurance Company, an injunction to prevent any transaction in relation to real property in the estate of the deceased, an order for the Defendant to render an interim Statement of Account and an order for Specific Disclosure. After a hearing Wolfe-Reece J, on November 13, 2020, made a number of orders. One of the orders was for the Defendant/Ancillary Claimant to render an Interim Statement of Account in the Estate of George Daley. The statement of account was to be served on all the beneficiaries within thirty days of the order. The order specified that the statement should detail all monies received by the Defendant on behalf of the estate as well as all disbursements and payments made, and deposits held at any financial institution since the date of the death of George Daley.
- [7] The order went on to grant an order for specific disclosure in relation to the provision by the Defendant of documentary proof of the accounts and/ or investments and/or financial instruments bearing the Applicant's name, whether solely or jointly with Monica Daley in the sum of \$39.5M or any sum whatsoever...within twenty-one days of the order.
- [8] On December 10, 2020, the Defendant filed an affidavit in which he exhibited a five paged document headed "Interim Account". The document detailed several payments out for attorney costs, lease, air fare and property taxes as at November 30, 2020, but did not exhibit the documents in proof of the transactions
- [9] On March 16, 2021, the Claimant filed another Amended Notice of Application for Court Orders in response to the Interim Statement of Account filed by the

Defendant, he sought orders for the Defendant, pursuant to Rule 41.2 (4) of the Civil Procedure Rules;

- “1. ...to provide all receipts and other documents vouching or supporting expenditure and/or disbursements made as set out in the Interim Statement of Account dated November 2020...”*

- 2. that the defendant... pursuant to Rule 28.6 of the Civil Procedure Rules make specific disclosure of all receipts and other documents supporting expenditure and/disbursements...as set out in the Interim Statement of Accounts... ;*

- 3. That the defendant produces receipts for payments and other supporting documents in relation to...*
 - a. Driveway, columns, wall design and construction,*
 - b. Property taxes paid,*
 - c. Total costs for flight transport,*
 - d. Legal costs for probate administration and litigation between 2015 to date”*

[10] This Amended Application, on my understanding, was not heard. However, it was somewhat resolved by Icolin J, who on October 7, 2021, made orders inter alia, for;

“[9] Standard disclosure by March 11, 2022.

[10] ...Specific Disclosure by the Defendant, of all receipts and other documents supporting expenditure and/or disbursements made as set out in the Interim Statement of Accounts dated November 2020 on or before March 11, 2022.

[11] Specific Disclosure by the Claimant of the final Statement of Account of the sale of the Ascot Hall property...on or before March 11, 2022.”

[11] On September 30, 2021, the Defendant filed a Notice of Application for Specific Disclosure against the Claimant. He sought specific disclosure of the Final Statement of Account of the sale of the Ascot Property. This application was also

not heard, however, Icolin Reid J, dealt with the issue in her October 7, 2021, orders.

- [12] It should be noted that on April 12, 2022, Hamilton Carl Daley filed an affidavit in which he averred that the List of Documents for Specific Disclosure filed on March 10, 2022, was filed in response to an order of Lindo J, made on March 14, 2022. However, I see this as an error as the records do not reflect that Lindo J made any order for Specific Disclosure on March 14, 2022. The signed Minute of Order dated March 14, 2022, has six orders, while the unsigned formal order, purportedly reflecting the March 14, 2022, orders, which was filed by the Claimant's Attorney on March 22, 2022, has eight. Order number 8 on the formal order reads;

"Documents listed in the defendant' List of Documents for Specific Disclosure are to be exhibited in one affidavit which is to be filed and served on or before March 17, 2022."

- [13] There is no corresponding order on the Minute of Order. In any event, it would mean that the Defendant/Ancillary claimant produced the list of documents before the order was made.

- [14] On April 27, 2022, The Honourable Mrs. Justice Lindo ordered that:

"(1) The Defendant/Ancillary Claimant produce the receipts (in respect of statement of rent, air travel, building material and payments to builders by way of specific disclosure on or before May 11, 2022."

- [15] On May 11, 2022, the Defendant filed a supplemental list of documents for Disclosure. Under schedule 2 he indicated that no receipt was received for the builder or the building supplies and referred to a memorandum from one Anthony Swaby dated September 11, 2017, as confirming this. He also referred to Bank statements for the period April 1, 2019, to December 1, 2022, which contain statements in relation to the rent but noted that he did not have them in his possession.

THE CURRENT APPLICATIONS

[16] Apparently, as a result of the disclosure made in the Claimants Affidavit filed on March 1, 2022, in response to the order of Icolin Reid J, the Defendant/Ancillary Claimant filed a Notice of Application for Court Orders for Specific Disclosure on March 30, 2022. (The Specific Disclosure Application). He seeks orders for specific disclosure of:

- “a. All Joint accounts held by Ms. Monica Daley and George Daley from August 30, 2011 to the date of his death;*
- b. Bank statements/records of all joint accounts in the name of Monica Daley and George Daley from August 30, 2011 to the date of his death; ...”*

[17] The Application was made pursuant to Rules 1.1., 28.6(1) and 28.7 of the CPR. The application goes on to state that:

- “b. In her defence filed on November 22nd 2021, the Ancillary Defendant repeatedly alleged that she does not have any direct knowledge as to when the transaction was completed or the amounts which was received from the sale of the property at Ascot Hall. Old Harbour St. Catherine (the Ascot Property).*
- c. However, the Claimant/Defendant to the Counterclaim in an affidavit filed on 1st March 2021 confirmed that the Ancillary Defendant collected the cheque in relation to the sale of the Ascot Property.*
- d. The documents for which specific disclosure is sought are directly relevant to the issues in the claim.*
- e. Additionally, the Ancillary defendant’s financial resources are sufficient to enable it to comply with an order for specific disclosure of the documents sought...”*

[18] Perhaps it will be useful to start with the affidavit of Monica Daley. As indicated earlier in this judgment she denied all knowledge of the Ascot Property sale. However, when the Claimant filed his affidavit in response to the orders of Icolin Reid, J on March 1, 2022, it clearly showed that she was well aware of the sale and had in fact collected and signed for the cheque from the offices of the Claimant.

[19] In his affidavit filed on April 12, 2022, in support of the application and in response to Mrs. Daley's Defence, Mr. Hamilton Daley averred that it is not true that she had no knowledge of the Ascot Hall sale. He referenced alleged conversations with her in which he stated Mrs. Daley told him that she was aware that the Ascot proceeds belonged to the estate of George Daley and that she was holding the funds for the benefit of the estate but that she would not hand it over because she was taken to court. He deponed that Jeffery Daley, has confirmed that it was Monica Daley who collected the Ascot cheque on behalf of the deceased and as such her statement was not true. He expressed the opinion that she was seeking to conceal her knowledge of the Ascot money to avoid accounting to the estate. He went on in his affidavit to state that the information is needed in order for the court to ascertain whether the funds were deposited into a joint account and subsequently moved by Monica Daley. On March 25, 2021, his attorneys had requested that she disclose the information sought in this application and she refused to produce the information.

[20] In response, Mrs. Daley filed an affidavit denying the averments made by Mr. Hamilton Daley. She further stated that any joint accounts held with her husband were subject to the rule of joint survivorship.

ISSUES

Whether the joint accounts held by Monica Daley from August 30, 2011, to the date of George Daley's death are directly relevant to one or more matters in issue in the proceedings;

Whether an order for specific disclosure is necessary in order to dispose fairly of the Claim or to save costs.

THE LAW

[21] The rules relating to specific disclosure are governed by Rule 28.6 of the Civil Procedure Rules, 2002. As Amended, CPR. It reads:

- (1) *An order for specific disclosure is an order that a party must do one or more of the following things –*
 - (a) *disclose documents or classes of documents specified in the order; or*
 - b) *carry out a search for documents to the extent stated in the order and disclose any documents located as a result of that search.*
- (2) *An order for specific disclosure may be made on or without an application.*
- (3) *An application for specific disclosure may be made without notice at a case management conference.*
- (4) *An application for specific disclosure may identify documents –*
 - (a) *by describing the class to which they belong; or*
 - (b) *in any other manner.*
- (5) *An order for specific disclosure may require disclosure only of documents which are directly relevant to one or more matters in issue in the proceedings.*

[22] Rule 28.7 sets out the criteria which must be met before a court can make an order for specific disclosure;

- (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.

[23] Rule 28.1, which I will loosely refer to as the interpretation section indicates what disclosure is. It states that;

*"...a party "**discloses**" a document by revealing that the document exists or has existed."*

[24] Rule 28.1 (4) explains what is meant by directly relevant:

*"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."

Whether the joint accounts held by Monica Daley from August 30, 2011, to the date of George Daley's death are directly relevant to one or more matters in issue in the proceedings;

[25] It is important to note that the fact that certain information contained in a document may be relevant does not make it a candidate for specific disclosure. The information requested must be directly relevant to the matter before the court.

[26] In ***Miguel Gonzales and Suzette Saunders v Leroy Edwards*** [2017] JMCA Civ 5 at paragraph 22 F Williams JA examined rule 28.1(4) of the CPR and opined that:

" By these provisions, a pre-requisite for disclosure is a finding that a document is, not just relevant in the usual layman's sense, but "directly relevant" within the meaning of the rule. The rule uses the phrase "only if" in delimiting the matters to be considered in deciding whether a document

satisfies the definition. This means that a finding that a document is directly relevant can only be made in the three circumstances outlined in the rule."

[27] The Defendant/Ancillary Claimant, cited the case of ***The Attorney General of Jamaica v BRL Limited and Village Resorts Limited*** [2021] JMCA Civ 14, (**A.G v BRL Limited**) where at paragraph 103 she stated:

"The fact that the documents "may" be relevant, or merely "relate" to an issue in dispute is not sufficient to render them specifically disclosable within the ambit of the CPR; they must be 'directly relevant' as defined by the CPR."

Analysis and Disposition

[28] In determining whether the information/document is directly relevant there are three things which a court is to consider, whether the party with control intends to rely on the document, whether the document tends to adversely affect that party's case or whether it tends to support another party's case. On my reading of the rules, these factors do not have to be considered cumulatively. As such a party may prove any one of them to satisfy the court that the information/document is directly relevant to the proceedings.

[29] In the Fixed Date Claim Form filed on November 2, 2019, the Claimant is seeking, among other things, that:

1. *The Grant of Probate issued by the Supreme Court of Judicature on the 26th day of February, 2019 to the Defendant to act as Executor in the Estate of the deceased in suit no. 2018 P 01708 be revoked forthwith;*
2. *The Defendant be removed as Executor in the Estate of the deceased whether acting as the Principal Executor or with power reserved to him..."*
3. ...
4. ...
5. ...

6. *The Defendant within thirty (30) days of the Order revoking the Grant of Probate made to him deliver up all documents inclusive of any Duplicate Certificates of Title held by him for the said Estate to the Executor or Administrator newly appointed by the Court herein, together with a Statement of Account of Income and Expenditure of the Estate to date from the date of death of the deceased and that a list of the documents delivered by the Defendant and a copy of the Statement of Account of Income and Expenditure be filed herein and served on the Claimant's Attorney-at-Law;*
7. *The Defendant within thirty (30) days of the Order revoking the Grant of Probate made to him, pay over all monies received and/ or being held by him for and on behalf of the said Estate to the newly appointed Executor and Administrator of the Estate;*

[30] The sale of the Ascot Property yielded \$63,679,863.91. To date those monies have not been recovered. The estate claims those monies as part of the estate of George Daley. The Last Will and Testament of George Daley states that if the Ascot Property is sold at the time of his death, then the proceeds of the sale “wherever they may have been invested...” is intended for his five named children. This should be examined in the context of what Monica Daley pleaded in her defence filed on November 22, 2021, and the revelations made by the claimant in his March 1, 2022, affidavit. For ease of reference, I will repeat the relevant portions here. She expressly stated that she “has no knowledge of whether the estate of George Daley comprises the proceeds of the sale from... 3 Ascot Drive...”. She further pleaded that although she is aware that the property was sold, she “has no direct knowledge as to when the transaction was completed or the amounts which was received for the sale...”. In spite of this she went on to say that her deceased husband at no point deposited the proceeds of the sale of the Ascot Property into any joint account held by them.

[31] I take note of the fact that it was only after the claimant filed his March 1, 2022, affidavit that Monica Daley filed an affidavit in response in which she admitted that she did in fact sign for the package from the Claimant. The basis of this statement could only be that she is asserting that she is unaware of the contents of the package. She then went on to state that she handed over the package to her husband. However, the letter that she signed for stated what it was about and

explicitly outlined what was contained in the package. On the face of the letter, it indicated the amount the property was sold for, and that the cheque was enclosed. In light of her previous assertions of no knowledge, I place reliance on the fact that the only concrete evidence before this court is that Monica Daley was the last person to hold the cheque representing the proceeds of the sale of the Ascot Property. Her husband, based on the unchallenged evidence was not independently mobile at the relevant time. He required assistance to get around. This is the very reason Monica Daley collected the cheque. A cheque is a negotiable instrument, the sums represented on the cheque can only be realised if it is deposited. It must be deposited into the account of the person in whose name it is drawn or to the person it was signed over to. The cheque must also be deposited within a particular time frame in order for the bank to accept it. It is unchallenged that the Ascot Property has been sold. There is no controversy surrounding the non-payment of the purchase price. It is therefore not farfetched to conclude that the cheque must have been deposited into an account held by George Daley or by George Daley and Monica Daley or by George Daley, Monica Daley and Hamilton Daley. What is also accepted is that the Ascot Property money or at least the cheque, representing the money, has not been seen since September 2011. I find therefore that the cheque has been in the possession or under the control of Monica Daley and that the bank accounts in question are also under her control. Although she may have no intention of relying on the content of any joint accounts held with the deceased during the period in question, I accept that their disclosure will either adversely affect her case or support the case mounted by the Defendant/Ancillary Claimant.

Whether an order for specific disclosure is necessary in order to dispose fairly of the Claim or to save costs.

[32] In considering whether the orders sought are necessary the court must consider the likely benefits of specific disclosure; the likely cost of specific disclosure and whether the party against whom the order would be made has the financial resources to comply with any such order.

[33] In **A.G v BRL Limited** McDonald-Bishop JA, sought to expound on what she called, “the test of necessity”, (28.7(1), in this way:

*“[87] In **David John Hall v Sevalco Limited; William James Crompton v Sevalco Limited** (1996) the Times, 27 March 1996, Sir Thomas Bingham MR, in speaking of the same test of necessity that was required with respect to interrogatories under the United Kingdom's Order 26, rule 1(1), the former equivalent rule, usefully opined:*

*“The guiding principle in this field must be that laid down in RSC Order 26 r 1(1), **that interrogatories must be necessary either for disposing fairly of the cause or matter or for saving costs. Necessity is a stringent test.** It cannot be necessary to interrogate to obtain information or admissions which are or are likely to be contained in pleadings, medical reports, **discoverable documents or witness statements unless, exceptionally, a clear litigious purpose will be served by obtaining such information** or admissions on affidavit. As a general statement we would agree with the statement in the Guide to Commercial Court Practice, ... that:*

***‘Suitable times to interrogate (if at all) will probably be after discovery and after exchange of witness statements.’** (Emphasis supplied)*

[34] Counsel for Monica Daley has argued that the content of the joint accounts held between her client and the deceased are not relevant. She relied on the law of survivorship to argue that anything held jointly between husband and wife will belong to the surviving partner. Counsel submitted that her client's position has remained constant in relation to the Ascot Property, that she does not know of its whereabouts. The issue of the Ascot Property money has been a live issue among the parties from at least 2015. The exhibits on file, i.e., emails, demonstrate that this money is one of the vexing issues surrounding the estate.

[35] The counterclaim which was filed by Hamilton Daley is directly related to the Ascot Property money. I cannot agree with counsel that her client's position has remained constant. She did not reveal that it was she who collected the cheque. She did not reveal that it was she who signed the letter acknowledging receipt of the cheque. The letter disclosed that Monica Daley, among other things, ought to have known the exact amount that was received for the Ascot Property. How would the disclosure of the joint accounts benefit this matter? In light of the

discussion above it would serve two purposes. First, it could settle the mystery of where the money is. Secondly, the parties would be better able to streamline their case and the court would have the information needed to fairly consider some of the issues before it and dispose of the matter.

[36] There is no cost associated with disclosing the accounts. Further, the cost of obtaining bank statements or records is not prohibitive for Monica Daley. I have been given no reason to believe that she is impecunious.

THE APPLICATION FOR AN UNLESS ORDER

[37] The second application was filed on behalf of the Claimant, on June 22, 2022. This was yet another Notice of Application for Court Orders by the Claimant. (The Unless Application) It seeks the following orders:

1. *That the defendant having failed, neglected or refused to comply with the orders for specific disclosure made by the Honourable Mrs. Justice I. Reid on the 7th day of October, 2021, the Honourable Mrs. a Lindo on the 14th day of March 2022 and again on the 27th day of April 2022 be ordered to produce the relevant receipts and other supporting documents for four flights/transportation, property rental income and driveway construction costs within twenty-one (21) days from the date so ordered.*
2. *That unless the defendant produces all receipts and other documents supporting expenditure and/or disbursements made as set out in the Interim Statement of Account dated November 2020 for:-*
 - i. Flights/transportation;*
 - ii. Property rental income; and*
 - iii. Driveway construction**on or before a date so specified by the Court, his Defence and Ancillary Claim be struck out.”*
3. *That within twenty-one (21) days from the date so ordered, the defendant so produces: -*
 - i. A copy of the Payment Advice;*
 - ii. A certified copy of the Form 8 issued by the Commissioner of Stamp Duty and Transfer Tax in the Estate of George Ernest Daley; and*
 - iii. A copy of the Revenue Affidavit submitted by the Defendant to the Commissioner of Stamp Duty and Transfer Tax.” ...*

- [38]** The grounds on which this application is made are that on October 7, 2021, I. Reid J made orders for the Defendant to provide supporting receipts and other documents to the Interim Statement of Accounts for the Estate and he has not complied with the order. The Statement of Account had no supporting documents to vouch for the expenditure and/or disbursement made by the Estate of George Daley. In addition, two further orders for specific disclosure had been made on March 14 and April 27, 2022, by Lindo J, which to date the Defendant has also failed to comply with. The last ground concerned the legal fees charged by the Defendant. In that the Charged Defendant has legal fees charged based on a value of the Estate not reflected in the Oath of Executors.
- [39]** In spite of the grounds delineated in the Application, at the time of the submissions counsel for the Claimant/Applicant indicated that the focus of the submissions, were the orders of Lindo J made on March 14, 2022 and April 27, 2022 which are set out in paragraphs 12 and 14 above requiring the Defendant/Ancillary Claimant to produce by way of specific disclosure certain documents.
- [40]** By way of observation, as far as this court can tell, it does not appear that the Defendant/Ancillary Claimant has complied with the order for specific disclosure that he should provide documentary proof of the investments and/or financial instruments bearing the name, whether solely or jointly with Monica Daley in the sum of \$39.5M or any sum whatsoever.
- [41]** In his submissions, counsel for the Claimant also argued that the order made by Wolfe-Reece J on November 13, 2020, was one made pursuant to Rule 41.2(4). He went on to say that what was provided was a bare Interim Statement of Accounts for which the Defendant had not vouched. Counsel also submitted that the documents listed in the Bundle of Hamilton Daley filed on April 11, 2022, were sporadic and were also not vouched for. Counsel looked at the affidavit of Hamilton Daley filed on January 24, 2023, and lodged a similar complaint.

[42] Finally, counsel argued that there was a vast variance between the value of the estate at the death of George Daley and the value of the estate on which payment for legal work was estimated. Counsel contended that the invoice dated November 15, 2019, submitted by the Defendant/Ancillary Claimant was in the sum of \$4,537,500.00. However, the invoice submitted for legal work done in his capacity as attorney-at-law for the estate was calculated on an estate valued at \$82,500,000.00.

Submissions on behalf of the Defendant/Ancillary Claimant

[43] Counsel began her submissions by stating that no orders were made pursuant to Rule 41 of the CPR. She relied on the judgment of Wolfe-Reece J **Jeffrey Daley v Hamilton Carl Daley** [2020] JMSC Civ 228. She argued that there was nothing in the judge's orders for the court to conduct an account.

[44] She pointed out that the Notice of Application before the court on that day was an application for a freezing order and for specific disclosure. The application also sought an order that the Defendant produce an interim account. As such there was no application for the taking of an account and no such order was made. I will say from the outset that I am in agreement with counsel's position on this matter.

[45] In relation to the orders of I. Reid J, counsel submitted that a List of Documents was filed, however, the Claimant never requested an inspection. Nevertheless, counsel argued that all the receipts in the possession of her client that relate to the Interim Statement of Account were filed.

[46] In relation to air travel counsel contended that the Claimant is preoccupied with receipts. However, the order stated, "receipts or other supporting documentation". This was provided as such it is not enough to argue compliance because the documents have not been seen.

[47] In relation to the issue of the bank statements it was submitted that a further search was done which uncovered seven bank statements for June 2016 to 2019 which

led to another List of Documents being filed on November 18, 2022. In any event she concluded that the documents are no longer in the possession of her client.

[48] In relation to the value of the estate and the percentage charged it was submitted that at the time of filing the Oath of Executor in 2018, the Defendant/Ancillary Claimant was of the view that the estate was valued at \$20,000,000.00. Subsequently, more properties were revealed with the combined value of \$90,000,000.00. In addition to the life insurance of \$13,500,000.00, the estate was therefore valued at \$103,500,000.00. As far as counsel was concerned, the valuation report which was submitted is enough to determine whether the amount charged based on the value is accurate. (See affidavit of Hamilton Carl Daley filed on January 23, 2023, exhibits HD-6 and HD-7.

THE LAW

[49] Whether the Defendant has failed to comply with the various orders for Specific Disclosure.

Whether the noncompliance, if any, is such an extent that an Unless Order should be made

[50] Rule 28.14 (2) of the **Civil Procedure Rules, 2002, as Amended, CPR** speaks to the consequence of failure to disclose documents under order for disclosure. It reads:

(1)

(2) *A party seeking to enforce an order for disclosure may apply to the court for an order that the other party's statement of case or some part of it be struck out.*

[51] Rule 26.3 (1) provides the court with the power to impose sanctions in certain circumstances. One such sanction is to strike out a statement of case. It states:

In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court

—

(a) *that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceeding*

[52] Rule 26.4(1) speaks to the general power of the Court to strike out a statement of case:

“Where a party has failed to comply with any of these Rules or any court order in respect of which no sanction for non-compliance has been imposed, any other party may apply to the court for an “unless order”.

[53] There are specific rules in the CPR for standard disclosure to be made by parties to a claim whether it is for trial or for Assessment of Damages. This is in an effort to ensure that the court has before it all the information needed in order to make an informed decision. In fact, Part 28 is dedicated solely to disclosure and imposes a duty on parties in a case to disclose material relevant to the matter. The rules do not stop there but go on to allow for sanctions to be imposed where the parties fail to comply with the case management orders. (See paragraph 52 above.)

[54] In ***Davies v Eli Lilly and Co*** [1987] 1 All ER 801, Lord Donaldson MR opined on the purpose of disclosure. At page 804 he stated that disclosure “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”.

“discovery of documents involves a serious invasion of privacy which can be justified only in so far as it is absolutely necessary for the achievement of justice between the parties. Para 12”

[55] Although the CPR provides for the striking out of a party’s statement of case as a sanction for noncompliance with its rules or the orders of a judge, case law has made it clear that the power is to be used sparingly and only as a last resort.

[56] I will start with the well-known case of ***Biguzzi v Rank Leisure plc*** [1999] 4 All ER 934. In that case Lord Woolf MR that opined that:

“Under Part 3.4(2)(c) a judge has an unqualified discretion to strike out a case such as this where there has been a failure to comply with a rule. The fact that a judge has that power does not mean that in applying the overriding objectives the initial approach will be to strike out the statement of case. The advantage of the CPR over the previous rules is that the court’s powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out.”

Biguzzi is directly applicable as Rule 3.4 (2)(C) of the English CPR is similar to Rule 26.3 (1) (a) of our CPR, with the exception that our rule adds “...or direction given by the court in the proceedings.”

[57] This sentiment was underscored in **Blackstone’s Civil Practice 2002**. At paragraph 33.5 the learned authors wrote, that:

“Under the old rules it was well settled that the jurisdiction to strike out was to be used sparingly. The reason was, and this has not changed, that the exercise of the jurisdiction deprives a party of its right to a trial, and of its ability to strengthen its case through the process of disclosure and other court procedures such as requests for further information. Further, it has always been true that the examination and cross-examination of witnesses often changes the complexion of a case. It was accordingly the accepted rule that striking out was limited to plain and obvious cases where there was no point in having a trial.”

Analysis and Disposition

[58] Based on the guidance provided by the authorities, the sanction of striking out should be reserved for the more egregious breaches, for example, repeated non-compliance with the rules and procedures of the court or just blatant disregard. The basis of this application by the Claimant is that the Defendant/Ancillary Claimant has failed to comply with several orders. The first order was that of Icolin Reid J for standard and for specific disclosure. The focus of the applicant’s grouse is with the order for specific disclosure. See paragraph 10 infra. It seems to me that because the learned judge specified all receipts and other documentation the Claimant may have lost sight of the rules pertaining to specific disclosure. Although Rule 28.6 states that an order for specific disclosure requires a party to disclose particular documents or carry out a search for certain documents, a full

reading of Part 28 demonstrates that the expectation on an order for specific disclosure is not that dissimilar from an order for standard disclosure. Rule 28.8 stipulates that on an order for specific disclosure, a party is to serve on the other side a list of documents or categories of documents. The Defendant in part complied with this on March 10, 2022.

[59] Counsel for the Applicant at the beginning of his submissions advised the court that it is the March 14, 2022, order that is in question. However, as I indicated earlier, there is no perfected order on the file and the specific order that is contained in the unsigned formal order is not supported by the signed Minute of Order. In the circumstances I will decline to deal with that aspect of the application. In any event a number of documents in the List of Documents were served as Exhibit HD 1 in the affidavit of Hamilton Daley filed on April 12, 2022. Said affidavit was allowed to stand as filed by Lindo J on April 27, 2022, the very judge who it is said made the order.

[60] I will not seek to once again discuss the law/rules in relation to specific disclosure. At least two judges of concurrent jurisdiction have made orders in relation to specific disclosure concerning almost entirely, the same subject matter. They have already made a determination that the documents are directly relevant to the proceedings.

[61] The parties agree that an interim statement of account was filed in compliance with the orders of Wolf-Reece J. There is also no dispute that the Defendant/Ancillary Claimant has filed at the very least three lists of documents in compliance with the orders of I. Reid J and Lindo J. The issue, as I see it, is whether the lists of documents are a true reflection of the Interim Statement of Accounts and vice versa.

[62] An examination of the Interim Statement of Accounts and the list of Documents is therefore necessary. By way of letter to Monica Daley dated June 24, 2015, the Defendant/Ancillary Claimant revealed that he has had sole power of attorney over

the affairs of George Daley from December 6, 2010, until his death. He explicitly stated that he has had extensive authority over the business affairs, assets, bank accounts and properties of George Daley. In those circumstances, I believe that he would or ought to have control over the receipts or other documentation related to the investments, expenditures, income, bank accounts and properties held by the estate. The beneficiaries are at his mercy. An examination of the Interim Accounts reveals several expenditures for which no corresponding receipt or documentation has been provided. For example: The Interim Account refers to Flight /transport on 17/7/2017 in the amount of \$382,805.82. However, from the List of Documents filed in support of the interim account, the closest document is an email from Rental Cars dated July 17, 2017.

- [63]** In relation to the item noted on the Interim Account as flight/transport on May 4, 2018, in the sum of \$345,085.15, the closest document is an itinerary of Hamilton Daley dated May 4, 2018. An itinerary is not a receipt. It does not disclose the amount spent on travel. It is therefore, as a stand-alone document, in my view not an adequate document for these purposes.
- [64]** In relation to the item noted as flight/transport on October 20, 2019, in the sum of \$373,182.78, the closest document is a statement of Hamilton Daley from Barclays Bank dated October 1, 2019.
- [65]** In relation to the item noted as flight/transport on October 2020 in the sum of \$333,298.00 no corresponding documents could be identified.
- [66]** A receipt from Newmont Travel dated July 12, 2019, was disclosed in the List of Documents, however it does not correspond with anything on the Interim Account. Similarly, an email from Rental Cars dated August 20, 2019, and an email from British Airways dated July 2020 were not disclosed in the Interim Account. It is my view that the state of disclosure to date is not adequate to assist the court to fairly dispose of the claim and save costs. It is also my view that in light of the number of years that the Defendant/Ancillary Claimant has had sole authority over the

business/ interests and now the estate of George Daley, he should be in a better position to furnish the other parties and the court with the details of his expenditure, details of any income and on a whole the state of the Estate of George Daley. This matter has been before the court since 2019. George Daley died in April 2015 leaving a will and still his Estate remains unsettled. There have been several applications filed and heard for disclosure and other interlocutory orders. As a result of these applications the trial of the matter has been derailed on more than one occasion. The cost to the estate and the prejudicial impact on the beneficiaries cannot be overstated.

[67] In the premises, in relation to the Notice of Application for Court Orders for Specific Disclosure filed on March 30, 2022:

- a. the Ancillary Defendant, Monica Daley is to provide specific disclosure of the following:
 - i. all Joint accounts held by her and George Daley from August 30, 2011, to the date of his death;
 - ii. Bank statements/records of all joint accounts in the name of Monica Daley and George Daley from August 30, 2011, to the date of his death;
- b. The documents are to be disclosed to all parties within 14 days of the date of this order.
- c. The parties are to meet for inspection of the documents at (i) and (ii) above within 16 days of the date of specific disclosure.
- d. Unless Monica Daley complies with the orders at (i) and (ii) within 14 days her statement of case shall stand as struck out.
- e. Costs of the application to be costs in the Counterclaim

[68] In relation to the Notice of Application for Court Orders filed on June 22, 2022;

- a. The defendant/ancillary defendant is to file a table specifically indicating the correlation between the interim statement of accounts and the documents itemized in his list of documents filed on March 10, 2022, May 11, 2022, and his amended List of Documents for Specific Disclosure filed on January 25, 2023, on or before April 18, 2023.
- b. Where it is found that the Interim Statement of Account does not itemize an expenditure reflected in the Lists of Documents a supplemental statement of Account is to be filed and served on or before April 18, 2023.
- c. Where the Interim Statement of Account refers to an expenditure for which there is no correlating adequate document and or receipt in the Lists of Documents, the defendant is to provide a Further Supplemental List of Documents on or before April 18, 2023
- d. Where the defendant/Ancillary claimant is unable to produce any adequate document and or receipt, he must provide a detailed reason by way of Affidavit evidence for his inability to produce same on or before April 18, 2023.
- e. The parties are to meet for inspection of the documents at (a), (b), (c) and (d) above within 16 days of the date of specific disclosure.
- f. Unless the defendant/ancillary complies with the orders herein on or before April 18, 2023, his statement of case shall stand as struck out
- g. Costs of the application to be costs in the Claim.