



[2024] JMSC Civ. 106

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016HCV04165

BETWEEN	JAMAICA ASSOCIATION OF COMPOSERS AUTHORS AND PUBLISHERS LIMITED	CLAIMANT
AND	COMBINED COMMUNICATIONS LIMITED	DEFENDANT

IN CHAMBERS

Mr. Joerio Scott instructed by Messrs. Samuda & Johnson for the Claimant

Mrs. Jacqueline Cummings instructed by Archer Cummings & Company for the Defendant

Heard: July 22nd, 2024 and September 27th, 2024

Civil Procedure and Practice — Specific Disclosure — Application for specific disclosure of audited financial statements — Whether documents requested are directly relevant to the claim — Whether an order for specific disclosure is necessary in order to dispose of the claim fairly or to save costs — Rules 28.1, 28.6, 28.7 of the Civil Procedure Rules.

T. HUTCHINSON SHELLY, J

INTRODUCTION

- [1] This is an application by the Claimant, Jamaica Association of Composers Authors and Publishers Limited (“JACAP”) for an order for specific disclosure of the audited financial statements of the Defendant, Combined Communications Limited (“CCL”) for the period 2015-2023 (to date).
- [2] The main contention for **JACAP** is that the Defendant, **CCL** has failed to comply with the request for disclosure of **CCL’s** audited financial statements for the period

2015-2023. **JACAP** asserts that disclosure of these audited financial statements is germane to the action as it would assist in the calculation of damages owed by **CCL** for the period in question. **JACAP** further asserts that the documents and information sought are indispensable to a just determination of the issue of damages. They also state that the documents are directly relevant to the issues to be determined by the Court.

- [3] The basis for the application for specific disclosure is that **JACAP** is a copyright licensing body that has reciprocal agreements with both local and international organizations and musical publishers, which gives **JACAP** the sole and exclusive rights to broadcast or licence the broadcast of and to transmit or authorize the transmission of their musical works within their repertoire by radio, television or otherwise.
- [4] **JACAP** entered into three (3) reciprocal agreements with Performing Rights Society ("**PRS**"), a company duly incorporated in the United Kingdom, American Society of Composers, Authors and Publishers ("**ASCAP**"), a company in the United States of America and Broadcast Music Incorporation ("**BMI**"), another company in the United States of America with the sole purpose of giving **JACAP** the authority to bring copyright infringement proceedings in respect of unauthorized public performance of any or all musical works which is owned or administered by these three (3) entities. Thus, pursuant to these reciprocal agreements, **JACAP** has been assigned the performing rights in the musical works of the members of the collecting societies party to a reciprocal agreement.
- [5] **CCL** is a limited liability company incorporated under the laws of Jamaica that is responsible for operating a national cable television service which commenced broadcasting on or about the 25th day of June 1996.
- [6] **JACAP** asserts that since January 2015, **CCL** has broadcasted and/or transmitted and/or authorized the transmission and/or retransmission via its cable stations or other modalities in their programming of one or more of the musical works which

form a part of **JACAP's** repertoire without seeking permission or consent of the copyright owner and/or **JACAP** and paying the requisite licence fees.

- [7] The Defendant objects to this application for specific disclosure on three bases, the first being that the Claimant had no standing to bring this action as it was instituted during a period where the Claimant was an unregistered entity and section 87A of the Copyright Act, specifically states that only registered entities can act as Collective Management Organisations.
- [8] Secondly, the Defendant merely provides cable channels to local customers and does not broadcast the information contained therein independently of what is already provided on the channels included and any royalties and/or license fees in respect of copyright works broadcasted would have already been paid to the rights holders.
- [9] Thirdly, the Defendant does not have all the audited financial statements for the period stated, neither is it under an obligation to assist the Claimant with the preparation of their witness statement. The Defendant takes issue with whether the industry standard for the calculation of fees is as asserted by the Claimants. Concerns were also raised in respect of the financial resources required to have these statements prepared within the timeline stated in the Claimant's application.

THE APPLICATION

- [10] **JACAP** filed a Notice of Application for Specific Disclosure on August 2, 2023. The orders for specific disclosure were outlined as follows:
 - a. The Defendant discloses to the Claimant and provides the Claimant with its audited financial statements for the years 2015 to and inclusive of 2022 within 14 days of the date of service of the order herein on the Defendant.
 - b. Costs of incidental and occasioned by this Application be costs to the Claimant to be taxed if not agreed and paid forthwith.
 - c. Such further and other relief as this Honourable Court deems just.

[11] The Application was made pursuant to the following grounds:

- a. The Court in light of public policy and the overriding objective is competent.
- b. The industry standard applied internationally to calculate the applicable licensing fee for cable providers, like the Defendant is a percentage of its gross annual revenue less General Consumption Tax.
- c. The audited financial statements are therefore necessary to calculate the licence fees owed by the Defendant.
- d. The Defendant is under a statutory duty to file audited financials of its business.
- e. The documents and information sought are indispensable to a just determination of the issue of damages.

ISSUE

[12] The issues for the Court's determination are as follows:

- i. Whether the audited financial statements are directly relevant to one or more matters in issue in the proceedings;
- ii. Whether the audited financial statements are or have been in the control of **CCL**;
- iii. Whether an order for specific disclosure is necessary in order to dispose fairly of the Claim or to save costs; and
- iv. While not strictly related to the issue of specific disclosure, the Defendant also sought to raise a sub-issue for the Court's consideration, that is, whether the disclosure should be granted in any event as the Claimant lacked locus standi.

- [13] In her Affidavit filed on August 2nd, 2023, in support of the application for specific disclosure, Ms. Lydia Rose, the General Manager of JACAP averred that the claim was brought as a result of unjust enrichment and non-payment of licence fees by the Defendant. She deponed that the Principal for the Defendant had agreed at the mediation session that was held on January 24th, 2023 that he would hand over the CCL's audited financial statements to JACAP to allow them to calculate the licence fees owed so that negotiations could be more purposeful but this documentation has not been received.
- [14] She emphasized the importance of the documents for the finalization and filing of the Claimant's Witness Statement which is required for calculating the amount of licence fees that is being claimed.
- [15] She stated further that the industry standard applied internationally is to calculate the applicable licensing fees for television and/or broadcast stations and cable providers e.g. CCL, as a percentage of the Gross Annual Revenue of the licensed entity less General Consumption Tax.
- [16] She asserted that the method of calculation and the rights of JACAP makes the disclosure of CCL's financial statements for the period of January 2015 to the date of this order directly relevant to and necessary for the resolution of the issue of quantum in the claim.
- [17] She insisted that the grant of the order being sought is unlikely to cause any significant prejudice to CCL as these are documents which are usually prepared by businesses, are essential to their business practices and is a legal requirement for satisfying its tax obligations. The Defendant would only be asked to produce records which are likely to already be in existence or that it would need to generate in any event for its own commercial purpose.
- [18] Ms Rose also informed the Court that a formal demand had been sent to **CCL** by way of a letter dated April 21, 2016, requesting, among other things, its audited

financial statements but **CCL** did not respond to the letter and has not provided their financials.

SUBMISSIONS

- [19] Mr. Joerio Scott, commenced his submissions by emphasizing the relevant factors for the Court's consideration regarding an order for Specific Disclosure as laid out in Rule 28.7 of the Civil Procedure Rules ("CPR"). Mr. Scott submitted that the audited financials of CCL are necessary for the Court to fairly dispose of the matter based on the criteria listed in Rule 28.7 (1) of the CPR as it is the only means by which the Claimant is able to calculate the license fee. He argued that the importance and necessity of this information permeates throughout the entire claim and submitted that at the very least, the Defendant has had constructive notice of the necessity of these financials.
- [20] Counsel contended that the just disposal of the claim requires the Claimant to be furnished with the Defendant's audited financials for the calculation of fees owed and for the Court to be able to determine the extent/quantum to which the CCL has been unjustly enriched. Mr. Scott submitted that the withholding of such an order would ultimately result in an unjust disposal of the matter as the Court would be unable to accurately assess damages and violence would be done to public policy as the Defendant would retain its unjust enrichment.
- [21] The cases of **Miguel Gonzales v Suzette Saunders and Leroy Edwards** [2017] JMCA Civ. 5, **Maxwell Gayle et al v Desnoes and Geddes Limited et al** (unreported), Supreme Court, Jamaica, Claim No.2 2004/HCV1339, judgment delivered on the 13th day of May 2005 and **Jamaica Association of Composers Authors and Publishers Limited v Grove Broadcasting Company Limited** [2017] JMCA Civ. 14 were relied on by Mr. Scott in support of his submissions.
- [22] Learned Counsel further submitted that the audited financials of CCL are or ought to have been in the possession of CCL as it is required for the purposes of

accounting and taxation and therefore the grant of this order would not prejudice CCL in respect of cost.

[23] Mr. Scott posited that the audited financials of CCL are directly relevant and necessary for the court's assessment of damages owed to the Claimant and without these documents, the claim cannot be justly disposed of and the overriding objectives require that the application be granted.

[24] At the hearing of the application, Mrs. Cummings made oral submissions on behalf of the Defendant. She vigorously opposed the Application on the basis that all relevant company information has already been provided. Counsel argued that on an examination of the statements of case herein, the documents sought are not directly relevant to any matters in issue in these proceedings. She also submitted that the Claimant has no standing to bring the action.

Relevant Framework

[25] The rules relating to specific disclosure are outlined at Rule **28.6** of the CPR. The Court is empowered to make an order for specific disclosure of documents that are directly relevant to one or more matters in issue in the proceedings. The rule provides as follows:

“28.6 (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.

[26] Rule 28.7 sets out the criteria which must be met before a court can make an order for specific disclosure. The rule reads as follows:

(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.

[27] Rule 28.1(3) of the CPR gives a definition for 'disclosure'. It states that:

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

[28] 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."

[29] Rule 28.8 states the procedure for disclosure which would usually be adopted by the Parties.

DISCUSSION AND ANALYSIS

Whether the audited financial statements are directly relevant to one or more matters in issue in the proceedings

[30] Having identified the rules which relate to the Application, the Court must look at the Application in the context of the Claimant's case. This requires an examination of the pleadings of the Claimant.

[31] In the Claim Form filed on the 5th of October 2016, the Claimants seek the following orders:

- a. *An injunction to restrain the defendant from doing (whether by its directors, officers, servants, agents, licenses or any of them or otherwise howsoever) the following acts without paying the compensation to the Claimant and without the consent of the Claimant in writing, whether by contractual agreement or otherwise that is to say:*
 - i. *Transmitting;*
 - ii. *Authorising the transmission of or permitting the Defendant's studios or on any premises under the ownership, power, management or control of the Defendant to be used for its transmission of any of the musical works within the Claimant's repertoire or any other works of which the right to transmit is from time to time vested in or controlled by the Claimant;*
- b. *Restitution for Unjust Enrichment;*
- c. ***An inquiry as to the damages payable (including statutory damages) for infringement of copyright by the Defendant of the musical works for the period January 2015 to date; (emphasis added)***
- d. *In the alternative an account for profits for the aforementioned period;*
- e. *An Order for the payment of all sums found due upon taking such inquiries or account, together with interest thereon pursuant to the Law Reform (Miscellaneous provisions) Act; or at such commercial rate as this Honourable Court deems fit;*

f. Such further or other reliefs as the nature of the case may require;

g. Costs

[32] From the affidavit of Lydia Rose and the submissions filed on behalf of the Claimant, it is evident that the Claimant is seeking disclosure of these documents in order to calculate the quantum of damages which would be payable for infringement of copyright by the Defendant. It is their position that this information is directly relevant and necessary to assist the Court in determining the damages which should be paid by the Defendant if the matter is determined in the Claimant's favour at a trial. This information is not within the Claimant's possession but would be exclusively within the Defendant's possession and can only be produced by them.

[33] In the case of **Miguel Gonzales and Suzette Saunders v Leroy Edwards** *supra*, *F. Williams JA* expounded on what the term 'directly relevant' means. He stated as follows –

"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."

[34] If a document is not relevant to the proceedings, it need not be disclosed. In order to find that a document is directly relevant, it must meet one of the three criteria outlined at **Rule 28.1(4)** of the CPR. In addressing this requirement, Ms Rose averred that the documentation requested is necessary as the information contained therein would enable the Claimant to calculate and state the licensing fee owed. She asserted that the industry standard dictates that calculation of the fees payable can only be done on the Defendant's gross annual revenue less

general consumption tax (GCT). This information would be contained within the Defendant's audited financial statements.

[35] At paragraph 11 of the Claimant's submissions, Mr. Scott confirmed this position where he stated that "*the order being sought is in keeping with the Claimant's case and without which the Court's judgment entered on liability would be without teeth as the court would be unable to properly determine damages.*"

[36] In his affidavit in response, Mr. O'Sullivan did not deny that the audited financial statements would be directly relevant to the disposition of the matter. He asserted however that the Defendant company does not have all the statements for the required period. He declared his ignorance as to whether the method of calculation of licensing fees would be based on the company's gross annual revenue and acknowledged that the Defendant is required to produce these financial statements. Mr. O'Sullivan insisted however that the preparation of these audited financial statements can only be done when the company has the financial resources to pay a Chartered Accountant and the window proposed by the Claimant was not realistic in that regard.

[37] It is well established that the three (3) factors which a court must consider in making this determination are:

- a. whether the party with control intends to rely on the document;
- b. whether the document tends to adversely affect that party's case or
- c. whether it tends to support another party's case.

[38] It is my understanding that 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.

[39] On a careful review of this request for specific disclosure and the relevant factors, the Court accepts that the resolution of the quantum of damages (if any) would

likely turn on what fees the Claimant would have been deprived of over the period 2015 to present day. It is not disputed by the Defendant that these records would contain the information in respect of their revenue and/or profits. In the absence of any challenge to the Claimant's assertion as to the manner in which the fees would be calculated, the Court is satisfied that this information is of direct relevance to a Tribunal tasked with determining what fees, if any, would have been due and payable by the Defendant and what damages would then be justified if the matter were to conclude in the Claimant's favour. It goes without saying, that not only would this information assist the Claimant's case but it would possibly undermine that of the Defendant.

[40] In light of this conclusion, the Court agrees with the submissions advanced on behalf of the Claimant and finds that the audited financial statements are directly relevant to the issue of the quantum of damages that **CCL** may be ordered to pay for its copyright infringement. The Court is also of the view that the audited financial statements will assist in its assessment of the quantum of damages to be paid by **CCL** for its copyright infringement for the period 2015-2023.

Whether the audited financial statements are or have been in the control of CCL.

[41] It is the averment of **JACAP** that the audited financial statements for the period requested ought to be in the possession of **CCL**. This averment has been challenged in part by **CCL** who contend that they do not have all the documents requested. The Court notes that the Defendants accepted that audited financial statements would be generated by **CCL** or on its behalf in keeping with normal business practices. They have not denied the Claimant's assertion that the information which would be contained in these documents would be within their possession. Neither have they sought to suggest that the statements which they acknowledge do exist are not in their possession. The sole issue which has been raised by them is the financial costs associated with having this done.

- [42] On a review of the history of this matter, it is clear that the Claimant's application for specific disclosure would not have been the first time that this documentation had been requested, as it had been the subject of previous correspondence sent in 2016. For the Defendant to raise the financial expense as a factor which militates against compliance, almost eight (8) years later, in spite of the ample opportunity to remedy this situation, not only lies ill in one's mouth but is roundly rejected by the Court as a good/compelling reason for refusing this application.
- [43] In the circumstances, the Court is satisfied that the audited financial statements are documents that are or were in the physical possession or under the control of **CCL** and should be disclosed by them.

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

- [44] 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.
- [45] Mr. Scott submitted that an order for specific disclosure would be in keeping with the overriding objectives in that it would save the Court's time and resources as well as the principles of *restituto integrum* as it would place **JACAP** in the position that it would have been had it not been for the injustice and wrongdoing of **CCL**.
- [46] The Court accepts that given the clear recalcitrance of the Defendant in disclosing these documents and their direct relevance to one of the central issues between the Parties, an order for specific disclosure of the audited financial statements would be useful for the adjudication of the matter. These documents would undoubtedly provide **JACAP** and ultimately the Court, with the required information to calculate the fees that **JACAP** contends **CCL** is liable to pay. An order for specific disclosure of the audited financial statements would also assist the Court in determining the quantum of damages by which the Claimant assert the

Defendant has been unjustly enriched. The order would also be beneficial in that it would ensure that the Court is in possession of all the relevant information, in order to fairly dispose of the Claim as well as to save costs.

Whether the Claimant had locus standi to commence the claim

- [47] In submissions made by Mrs. Cummings as well as in the affidavit of Mr. O'Sullivan, the question was raised whether the order sought could properly be granted by the Court. This argument was founded on the fact that the Claimant would not have been regarded as an entity qualified to bring an action against the Defendant as it had not been registered as required at Section 87A of the Copyright Act. In reviewing this submission, the Court is mindful that there was no application filed by the Defendant seeking an order for this action to be struck out on this basis.
- [48] The Court observes that the relevant Act was amended in December 2023 with the provision at section 154 specifically addressing the gap in the law since 2015 and making retroactive the registration of the Claimant and like bodies, from 2015 to the passage of the amendment in 2023, thereby legitimizing any actions taken or claims filed in the intervening years.
- [49] In any event, this issue not having been raised by the Defendant as one for a Court order and being a matter which is clearly triable, the Court is not persuaded that it would be appropriate at this stage to make such an order.

ORDERS/DISPOSITION

- [50] For the foregoing reasons, the Court makes the following orders:

1. The Claimant's Application for specific disclosure of the Defendant's audited financial statements for the period 2015-2023 is granted.
2. The Defendant is to disclose to the Claimant its audited financial statements for the period 2015-2023 on or before 28 October 2024.

3. The Claimant is permitted to file and serve the Witness Statement of Lydia Rose in relation to the Defendant's audited financial statements for the period 2015-2020, on or before 29th November 2024.
4. The Defendant is permitted to file and serve any relevant Witness Statements in respect of its audited financial statements for the period 2015-2022, on or before 20th December 2024.
5. The costs of the application for specific disclosure is awarded to the Applicant to be taxed if not agreed.
6. Applicant's Attorney-at-Law to prepare file and serve Orders made herein.