[2024] JMCA Civ 14

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE DUNBAR-GREEN JA

SUPREME COURT CIVIL APPEAL NO COA2023CV00015

BETWEEN	**OLD NATIONAL BANK T/A OLD NATIONAL WEALTH MANAGEMENT (PERSONAL REPRESENTATIVE IN THE ESTATE OF RAYMOND JOHN RYAN)**	**APPELLANT**
AND	**AL SOCRATES JOBSON**	**1ST RESPONDENT**
AND	**MICHAEL ANTHONY JOBSON**	**2ND RESPONDENT**
AND	**DEMETRI ANTHONY JOBSON**	**3RD RESPONDENT**

Written submissions filed by Myers, Fletcher and Gordon for the appellant

Written submissions filed by Lawrence Phillpotts-Brown for the 1st respondent

Written submissions filed by MayhewLaw for the 2nd respondent

Written submissions filed by Patterson, Mair Hamilton for the 3rd respondent

15 March 2024

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

Civil procedure – Specific disclosure – Application for disclosure of documents bearing specimen signatures – Refusal of the application – Whether specimen signatures required for examination by handwriting expert are directly relevant to matters in issue in the proceedings – Whether specimen signatures necessary for fair disposal of the claim or to save costs – Whether order for specific disclosure should have been granted – Rule 28.1(4), 28.6(5) and 28.7 of the Civil Procedure Rules, 2002

MCDONALD-BISHOP JA

[1] On 27 January 2023, K Anderson J ('the learned judge') refused an application brought by the appellant, Old National Bank T/A Old National Wealth Management (personal representative in the estate of Raymond John Ryan) ('Old National') for specific disclosure of several unspecified and unnamed documents bearing signatures belonging to the respondents, Al Socrates Jobson ('Al Jobson'), Michael Anthony Jobson ('Michael Jobson'), Demetri Anthony Jobson ('Demetri Jobson') and their deceased father, Gilbert Baron Jobson ('Gilbert Jobson'). The learned judge also ordered costs against Old National.

[2] Old National now appeals the learned judge's refusal of the application for specific disclosure and seeks to have the orders it sought in the court below granted on appeal.

[3] Old National's application for specific disclosure was made in the context of a claim it brought in the Supreme Court against the respondents for fraud, deceit, misrepresentation and relief under the Registration of Titles Act, on the one hand, and ancillary claims filed by the 2nd and 3rd respondents, Michael and Demetri Jobson, against Old National and other ancillary defendants, on the other hand. It is necessary to provide the factual background to those proceedings for a better appreciation of the issues arising for resolution in the appeal.

The factual background

[4] Old National is the personal representative of the estate of Raymond John Ryan ('Mr Ryan'), who died on 18 October 1977. The respondents are brothers and the sons of Gilbert Jobson, who died in 1980.

[5] In September 1957, approximately 20 years before he died, Mr Ryan became the registered proprietor of 300 acres of land known as "Half Moon Bay" in the parish of Trelawny. The certificate of title reflecting Mr Ryan's ownership of Half Moon Bay was registered at Volume 783 Folio 95 of the Register Book of Titles ('Mr Ryan's title').

[6] In April 2015, the respondents became the registered proprietors of Half Moon Bay. Their certificate of title is registered at Volume 1490 Folio 564 of the Register Book of Titles ('the respondents' title'). It is agreed, and there is no controversy between the parties, that the respondents' title was issued on the basis of a lost title application, purportedly signed by Mr Ryan on 10 December 2014, with an instrument of transfer also, purportedly, signed by Mr Ryan and the respondents on 9 December 2014 ('the 2014 transfer'), almost 37 years after Mr Ryan's death.

[7] It is an undisputed fact that the lost title application and 2014 transfer were fraudulently executed.

[8] Following several exchanges between Old National's attorneys-at-law, on the one hand, and the Tax Administration of Jamaica, the Commissioner of Lands and the Registrar of Titles, on the other hand, between August 2014 and October 2015, it was discovered that:

(i) property taxes for Half Moon Bay had been paid by Michael Jobson, on Al Jobson's behalf, for the period 2014-2015;

(ii) Mr Ryan's title was cancelled and Half Moon Bay was no longer registered in his name; and

(iii) the respondents' title had been issued naming the respondents as co-owners of Half Moon Bay.

[9] Following these revelations, in May 2016, Old National filed claim no 2016HCV02172 alleging fraud, misrepresentation, and deceit on the part of the respondents ('Old National's first claim'). Of relevance to these proceedings, is that on 10 December 2018, at the pre-trial review for the claim, Henry-McKenzie J (Ag) (as she then was) made orders appointing Mr A Frank Hicks, a handwriting expert, as an expert witness in the proceedings, and permitting his expert report to be filed on or before 4 January 2019. To date, no expert report has been prepared or filed by Mr Hicks.

[10] At the trial of Old National's first claim, the respondents raised objections concerning Old National's standing to bring the claim given that Old National had not yet received an order from the Supreme Court acknowledging it as Mr Ryan's personal representative by way of what has been referred to in the evidence in the court below as "re-sealed letters of personal representative". When the re-sealed letters of personal representative were granted, Old National filed a fresh claim against the respondents (claim no SU2019CV03953) on 4 October 2019 ('Old National's second claim'). Old National's second claim seeks similar reliefs against the respondents, as those sought in Old National's first claim. Following the filing of the second claim, Laing J declared Old National's first claim a nullity and ordered, among other things, that "[a]ll documents, save for all statements of case, filed and served to date in [Old National's first claim] shall stand as if filed and served in [Old National's second claim] …".

[11] For reasons that will soon become apparent, it is important to note that Laing J's order did not provide that all orders made in Old National's first claim be transposed to Old National's second claim and given effect as though made in that claim. Also, since the expert report of Mr Hicks was not filed as ordered by Henry-McKenzie J, it was not a document that could have stood as if filed in Old National's second claim. This observation will assume significance in treating with the application for specific disclosure below.

Old National's second claim

[12] This appeal emanates from Old National's second claim. In its statement of case in that claim, Old National alleges that Mr Ryan's estate is the rightful owner of Half Moon Bay. Old National claims that the respondents (a) paid the property taxes for Half Moon Bay over a period, having misrepresented themselves as the *bona fide* owners of Half Moon Bay, (b) submitted a fraudulent lost title application and instrument of transfer in December 2014, and thereby (c) caused themselves to be fraudulently registered as the proprietors of Half Moon Bay. Therefore, Old National claims that Mr Ryan's estate has been deprived of land as a consequence of fraud by the registration of the respondents as proprietors of Half Moon Bay.

[13] The particulars of fraud, misrepresentation and/or deceit alleged are set out in Old National's particulars of claim in these terms:

> "**PARTICULARS OF THE 1ST, 2ND AND 3RD [RESPONDENTS'] FRAUD, MISREPRESENTATION AND/OR DECEIT**
>
> a. Paying or causing the property taxes for the Property to be paid in the name of [Michael Jobson] while knowing they had no interest in the Property;
>
> b. Obtaining a receipt in the name of [Michael Jobson] for the payment of the property taxes for the Property while knowing they had no interest in the Property;
>
> c. Misrepresenting to the Tax Administration of Jamaica and the Registrar of Titles that they were the proprietors and/or *bona fide* transferees of the Property;
>
> d. Forging or causing the signature of [Mr Ryan] to be forged on the Instrument of Transfer dated December 9, 2014, more than 35 years after his death;
>
> e. Submitting the Instrument of Transfer dated December 9, 2014 to the Registrar of Titles, knowing it to be false;
>
> f. Applying to cancel the Certificate of Title registered at Volume 783 Folio 95 of the Register Book of Titles under false pretences;
>
> g. Wrongfully and fraudulently caused themselves to be registered as the proprietors of the Property now registered at Volume 1490 Folio 564 of the Register Book of Titles."

[14] Based on those averments, Old National is seeking various reliefs against the respondents including damages, declarations, orders for cancellation of the respondents' certificate of title and reinstatement of Mr Ryan's certificate of title.

[15] In their separate defences, each of the respondents denies that Old National is entitled to the reliefs claimed. The thrust of their defences, collectively, is that:

(i) The respondents' entitlement to Half Moon Bay stems from the fact that their father, Gilbert Johnson, purchased Half Moon Bay

from Mr Ryan by an agreement for sale dated 11 September 1972 ('the 1972 Agreement') and that Michael Jobson had been in actual, open and undisturbed possession of Half Moon Bay since 1980 when their father died. Therefore, the equitable/beneficial interest in Half Moon Bay belonged to their father before he died in 1980, and to Michael Jobson thereafter.

(ii) Given that for some 41 years, neither Mr Ryan nor anyone claiming on his behalf has made any claims to ownership of Half Moon Bay, the claim by Old National is statute-barred by virtue of section 3 of the Limitation of Actions Act.

(iii) In any event, the respondents deny signing the 2014 transfer and say that the signatures purporting to be theirs are not genuine and do not belong to them.

(iv) The respondents were unaware of any lost title application being made because the title to Half Moon Bay was in Michael Jobson's possession and had been passed to Mr Drew St Clair, attorney-at-law, of Caribbean Law Group, who facilitated the respondents' registration as proprietors of Half Moon Bay.

(v) At no point in the respondents' interactions with Mr Drew St Clair did he require them to sign a lost title application or instrument of transfer concerning Half Moon Bay.

(vi) The respondents did not forge or cause Mr Ryan's signature to be forged, submit the 2014 transfer to the Registrar of Titles, apply to cancel Mr Ryan's title or cause the respondents' title to be issued.

<u>Michael and Demetri Jobson's ancillary claims</u>

[16] In addition to the defences filed by them in response to Old National's second claim, Michael and Demetri Jobson each filed an ancillary claim naming Old National, Drew St Clair and Caribbean Law Group as the ancillary defendants. In their ancillary claims, Michael and Demetri Jobson reiterate that they were not parties to the fraudulent lost title application and 2014 transfer, but that they are entitled to Half Moon Bay based on the 1972 Agreement. They go further to cast blame on Mr Drew St Clair and Caribbean Law Group whom they allege forged or caused Mr Ryan and the respondents' signatures to be forged, and fraudulently submitted the lost title application and 2014 transfer, knowing them to be false.

[17] Old National filed a defence to Michael Jobson's ancillary claim reiterating its position that Mr Ryan's estate has the sole proprietary interest in Half Moon Bay. Old National further denies that Michael Jobson was in actual, open and undisturbed possession of Half Moon Bay, or that Mr Ryan sold the property to Gilbert Jobson or anyone else, and that it formed part of Mr Ryan's estate upon his death in 1977. Further, Old National avers that the respondents acted in concert to fraudulently obtain title to Half Moon Bay.

[18] Old National's defence to Demetri Jobson's ancillary claim, if one was filed, does not form part of the record of appeal before this court, and our effort in procuring outstanding documents from the Supreme Court proved futile.

The application for specific disclosure

[19] It is against the background of the statements of case detailed above that Old National made its application for specific disclosure seeking orders that:

> "5. All [Respondents] are to carry out a reasonable search and between them and specifically disclose the following:
>
> a. Ten (10) – fifteen (15) documents genuinely signed by Gilbert Baron Jobson between March 1972 and March 1973.

> b. Ten (10) – fifteen (15) documents genuinely signed by the 1st [Respondent], Al Socrates Jobson, between June 2015 and June 2016.
>
> c. Ten (10) – fifteen (15) documents genuinely signed by the 2nd [Respondent] Michael Socrates Jobson, between June 2015 and June 2016; and
>
> d. Ten (10) – fifteen (15) documents genuinely signed by the 3rd [Respondent], Demetri Anthony Jobson, between June 2015 and June 2016."

[20] As can be seen, between 40 to 60 documents, in total, bearing the genuine signatures of the respondents and their father, are being sought by Old National. For convenience, the documents requested by Old National will together be referred to as 'the requested documents'. The main grounds of the application for specific disclosure were that:

> "11. The claim concerns allegations of fraud **and it is likely that a fair disposal of the claim will require expert evidence in relation to the handwriting of Gilbert Baron Jobson and the [respondents]**. The documents sought in paragraph 5 of the above application are necessary to provide an expert witness with sufficient material to consider in preparation of an Expert Witness' Report.
>
> 12. The documents requested are documents that would be within the knowledge of and/or under the control of the [respondents].
>
> 13. It would be fair and just to grant the orders sought herein." (Emphasis added)

[21] The application was supported by the affidavit of James-Erle Kirkland who, from the record of appeal, provided the only evidence in support of Old National's application. His evidence was that specific disclosure of the requested documents was being sought to assist the handwriting expert appointed by Henry-McKenzie J (Ag) with the completion of his report. That evidence is set out in paras. 9 – 11 of the affidavit, and reads thus:

> "9. In light of the [Old National's] allegations that [the respondents] fraudulently signed documents transferring [Old National's]

> interest in the Property to [the respondents], **on December 10, 2018 at the pre-trial review hearing of [Old National's first claim], the Hon. Mrs. Justice Henry-McKenzie (Ag.) made orders permitting Mr A. Frank Hicks as an expert witness at the trial of the claim** and requiring his expert report to be filed and served on or before January 4, 2019. Exhibited marked JEAK-9 is a copy of that Formal Order.
>
> …
>
> 11. **The documents sought at paragraph 5 of the Application are directly relevant to the issue of fraud in the proceedings as without same a handwriting expert will not be able to opine on the contested documents. They may therefore either adversely affect the [Jobsons'] case or tend to support [Old National's] case**." (Emphasis added)

[22] The record of appeal before this court does not contain any affidavit evidence filed by the respondents in the court below in opposition to the application.

Specific disclosure - the law

[23] The resolution of the appeal rests on the interpretation and application of the provisions of Part 28 of the Civil Procedure Rules, 2002 ('CPR'), which governs specific disclosure. It is, therefore, necessary to briefly discuss the relevant rules governing specific disclosure and the construction accorded to those provisions by this court in earlier decisions.

[24] Rule 28.6(1) of the CPR defines an order for specific disclosure as:

> "…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."

[25] "Document" is defined by rule 28.1(2) to mean "anything on or in which information of any description is recorded".

[26] Rule 28.6(5) provides that an order for specific disclosure may only be made in relation to "documents which are directly relevant to one or more matters in issue in the proceedings".

[27] The expression directly relevant is defined in rule 28.1(4) as follows:

> "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." (Emphasis as in original)

[28] Rule 28.7 lists the matters that must be considered when the court is asked to make an order 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." (Emphasis added)

[29] Three matters of immediate importance arise from the text of the rules. The first is that rules 28.6(5) and 28.7 disclose a two-staged process to be employed by a judge when determining whether to grant an order for specific disclosure. The first stage of the

process is whether the document is directly relevant, as that phrase is defined by rule 28.1(4), to one or more matters in issue in the proceedings; and the second is, whether specific disclosure is necessary to fairly dispose of the claim or to save costs. The court granting specific disclosure must be satisfied that both questions are answered in the affirmative (see **Miguel Gonzales v Edwards and another v Leroy Edwards** [2017] JMCA Civ 5 ('**Miguel Gonzales**'), para. [38]).

[30] Secondly, whether a document is directly relevant is to be determined by having recourse to the specific meaning attributed to that phrase by rule 28.1(4) of the CPR. The rule accords a narrow and exhaustive meaning to the phrase in the sense that a document may only be considered directly relevant for the purposes of an application for specific disclosure "only if" it falls within one or more of the circumstances prescribed in rule 28.1(4) (see **Miguel Gonzales** at para. [22], and **Attorney General v BRL Limited and another** [2021] JMCA Civ 14 ('**BRL Limited**') at para. [103].

[31] Thirdly, and finally, whether a document is directly relevant under rules 28.6(5) and 28.1(4) is to be determined by having regard to the "matters in issue in the proceedings". Therefore, there must be a close examination of the issues arising in the claim, as disclosed by the pleadings and any evidence filed in support of the claim prior to the grant of specific disclosure (see **BRL Limited** at para. [32] and **Diandra Bramwell** at paras. [18] – [21]).

The appeal

(a) <u>The reasons for the learned judge's decision</u>

[32] On 27 January 2023, the learned judge dismissed the application for specific disclosure giving oral reasons for his decision. No written reasons have been provided to this court, despite requests of this court, through the Registrar of the Supreme Court, for a memorandum of the oral reasons to be provided.

[33] Notwithstanding the absence of written reasons by the judge, some indication of the judge's reasons for his decision can reasonably be gleaned from Old National's notice

of appeal. The notice of appeal lists the findings of law and fact, which are being challenged by Old National. The respondents, in their written submissions in opposition to the appeal, have taken no issue with Old National's characterisation of the judge's findings, and have resisted the appeal in a manner that assumes their accuracy. Therefore, it is open to this court to accept that Old National's characterisation of the judge's findings of fact and law, at least, is the gist of the oral reasons the judge gave for refusing the application for specific disclosure.

[34] In summary, those reasons, as gleaned from the unchallenged findings of facts and law listed in the notice of appeal, are deemed to be:

(i) The requested specimen signatures of the respondents and their father are not directly relevant to matters in issue in the proceedings.

(ii) There is no pleading impugning the 1972 Agreement that makes the signature affixed to that document a matter in issue in these proceedings.

(iii) The mere pleading that the 1972 Agreement was not genuine and was fraudulent is insufficient to make the requested specimen signatures directly relevant to matters in issue.

(iv) The grant of specific disclosure of the specimen signatures would be unfair and would give Old National the upper hand in proving its claim, going against the legal and evidential burden on Old National to prove its claim.

(v) The pleaded facts that the respondents submitted the 2014 transfer knowing it to be false and/or wrongfully and fraudulently caused themselves to be registered as the proprietors of the property were insufficient to make the requested specimen

signatures of each of the respondents directly relevant to matters in issue in the proceedings.

[35] Lastly, on this point, it is considered necessary to say that, in the absence of a formal record of the judge's reasons for his decision, this court is entitled to examine the matter afresh to determine whether, "without reasons, the approach and decision of the judge demonstrate a proper exercise of discretion" (see **Ray Dawkins v Damion Silvera** [2018] JMCA Civ 25 at para. 45). Therefore, it is still open to the court, in the absence of written reasons, to determine the appeal by way of rehearing and not simply a review, by virtue of rule 1.16(1) of the CAR. This is necessary because Old National is seeking to have this court grant the orders for specific disclosure sought in the court below. This court could only properly grant those orders upon being fully satisfied that such a course is justified in law, having regard to all the circumstances of Old National's application. It is with this in mind, that the grounds of appeal are examined.

(b) The grounds of appeal and issues arising from them

[36] Old National has advanced five somewhat overlapping grounds of appeal. Old National's contention in grounds a and b is, essentially, that the learned judge was wrong to conclude that the respondents' father's signature was not directly relevant in the sense prescribed by rule 28.1(4) of the CPR on the basis that there was no matter in issue in the proceedings concerning the fraudulent nature of the 1972 Agreement, which was purportedly signed by the respondents' father. These grounds will, therefore, be considered together as giving rise to the question of whether there is a live issue of fraud in relation to the 1972 Agreement that would render the requested documents directly relevant as required by the CPR.

[37] Grounds c and d attract similar joint treatment. Both grounds challenge the learned judge's conclusion that the respondents' specimen signatures were not directly relevant. The complaint is that the learned judge failed to appreciate that whether the respondents were complicit in the fraud that led to the 2014 transfer was a live issue to be determined in the proceedings. The issue emanating from this ground is whether Old National's

averment that the respondents are complicit in the fraud surrounding the impugned documents is effectual in rendering the requested documents directly relevant and, therefore, disclosable.

[38] Ground e stands alone but is, nonetheless, connected to the other grounds. It may be viewed as a "sweep-up" ground. It alleges that the learned judge improperly exercised his discretion by taking into account irrelevant considerations and failing to take into account relevant considerations. The issue that arises from this overarching and overlapping ground, is whether the learned judge wrongly exercised his discretion when he refused to grant the order for specific disclosure.

[39] In summary, the key issues to be determined in this appeal are:

(i) whether there is a live issue of fraud in relation to the 1972 Agreement that would render the requested documents directly relevant as required by the CPR (grounds a and b);

(ii) whether Old National's averment that the respondents are complicit in the fraud surrounding the 2014 transfer is effectual in rendering the requested documents directly relevant (grounds c and d); and

(iii) whether the learned judge wrongly exercised his discretion when he refused to grant the order for specific disclosure (ground e).

Issue (i): Whether there is a live issue of fraud in relation to the 1972 Agreement that renders the requested documents directly relevant (grounds a and b)

[40] In grounds a and b, Old National contends that whether the 1972 Agreement is fraudulent is a matter in issue in the proceedings, arising from its defence to Michael Jobson's ancillary claim. The learned judge, it says, failed to consider its position as a defendant to Michael Jobson's ancillary claim, and, therefore, erred in concluding that there was no issue of fraud in relation to the 1972 Agreement raised in the proceedings.

[41] In evaluating the merit of Old National's contention, reference is made to para. 8 of Old National's defence to Michael's ancillary claim, where Old National pleaded:

> "Paragraph 17 of the Ancillary Particulars of Claim is denied in that the purported Agreement for Sale dated January 20, 1972 [sic[22]] is not genuine, as [Mr Ryan] did not sell the property to anyone and [Old National] has no reason to believe that [Michael Jobson] had the Duplicate Certificate of Title registered at Volume 783 Folio 95 of the Register Book of Titles. [Old National] further states that the purported Agreement for Sale has several oddities which demonstrate that this purported Agreement is fraudulent."

[42] For completeness, para. 17 of Michael Jobson's ancillary claim, to which Old National was responding, states, in essence, that Michael Jobson had delivered Mr Ryan's certificate of title along with other documents to his attorneys-at-law (the 2nd and 3rd ancillary defendants) for them to take the necessary steps to ensure that the respondents could be registered as proprietors of the property as joint tenants.

[43] Old National submitted that had the learned judge properly considered its position as a defendant to Michael Jobson's ancillary claim, he would have concluded that para. 8 of its defence to that ancillary claim was, without more, sufficient to put fraud in issue in the proceedings in relation to the 1972 Agreement. Old National argues that para. 8 puts Michael Jobson on notice that Old National is asking him to meet a case that the 1972 Agreement and the signatures affixed thereon are fraudulent and do not represent evidence of Mr Ryan's sale of Half Moon Bay. As such, further particulars or details of the pleaded facts were not necessary. In support of this argument, Old National relies on the **Eastern Caribbean Flour Mills Ltd v Ormiston Ken Boyea** (unreported) Court of Appeal of the Eastern Caribbean Supreme Court, Saint Vincent and the Grenadines, Supreme Court Civil Appeal No 12 of 2006, judgment delivered 16 July 2007 ('**Eastern Caribbean Flour Mills Ltd**'). In that case, the Court of Appeal of the Eastern Caribbean Supreme Court outlined the modern approach to pleadings under the Eastern Caribbean Supreme Court Civil Procedure Rules, and stated that there is no need to particularise, in one's pleadings, all facts in support of an allegation made in civil proceedings.

[44] Having thoroughly examined the parties' statements of case in the instant case, with specific focus on Michael Jobson's ancillary claim and para. 8 of Old National's defence to that ancillary claim, I agree with the respondents that Old National's defence, as pleaded, does not raise an issue of fraud relating to the 1972 Agreement for determination in these proceedings.

[45] Rules 8.9(1) and 10.5(1) of the CPR require claimants and defendants in civil proceedings to set out all the facts on which they rely to ground or dispute their claim. Rules 8.9A and 10.7 of the CPR further provide that a claimant or defendant may not rely on any allegation or factual argument which is not set out in its claim or defence but which could have been set out there unless the court gives permission. Those rules apply with equal force to ancillary claims and ancillary defences (see rules 18.2(1) and 18.8(3) of the CPR).

[46] The requirement for a party to set out all the facts of its case in its pleadings has been consistently applied, with stringency, where fraud is intended to be raised either as a cause of action or as a defence to a claim. Indeed, the judicial pronouncements, both before and after the coming into force of the CPR, are clear that allegations of fraud in civil proceedings cannot be made in general terms and must be "precisely alleged and strictly proved" (**Donovan Crawford and Others v Financial Institutions Services Ltd** [2005] UKPC 40 at para. 13).

[47] This age-old approach to pleadings in fraud cases was concisely expressed by Lord Selbourne in **Wallingford v The Directors of Mutual Society** [1880] 5 AC 685 at 697 in this way:

> "With regard to fraud, if there be any principle which is perfectly well-settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice. And here I find nothing but perfectly general and vague allegations of fraud. No single material fact is condescended upon, in a manner which would enable any Court to understand what it was that was

alleged to be fraudulent. These allegations, I think, must be entirely disregarded …'."

[48] The leading post-CPR authority on this point is the decision of the House of Lords in **Three Rivers District Council and others v Bank of England (No 3)** [2001] 2 All ER 513 ('**Three Rivers (No 3)**'), where Lord Millet made the following pronouncements:

> "[184] It is well established that fraud or dishonesty… must be distinctly alleged and as distinctly proved; that it must be sufficiently particularised; and that it is not sufficiently particularised if the facts pleaded are consistent with innocence... . This means that a plaintiff who alleges dishonesty must plead the facts, matters and circumstances relied on to show that the defendant was dishonest and not merely negligent, and that facts, matters and circumstances which are consistent with negligence do not do so.
>
> [185] It is important to appreciate that there are two principles in play. The first is a matter of pleading. The function of pleadings is to give the party opposite sufficient notice of the case which is being made against him. If the pleader means 'dishonestly' or 'fraudulently', it may not be enough to say 'wilfully' or 'recklessly'. Such language is equivocal. […]
>
> **[186] The second principle, which is quite distinct, is that an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud.**
>
> It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved." (Emphasis added)

[49] In similar stead, this court has recognised that "a general allegation of fraud is insufficient to establish fraud" (see **Albert Smith v Hazel Steer** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 91/2008, judgment delivered on 8 May 2009). In **Harley Corporation Guarantee Investment Co Ltd v Estate Rudolph Daley and others** [2010] JMCA Civ 46 ('**Harley Corporation**'), H Harris JA, in discussing the interplay between the specific rules applicable to fraud cases, and rule 8.9(1) of the CPR, stated at paras. [53] and [57]:

> "[53] In placing reliance on an allegation of fraud, a claimant is required to specifically state, in his particulars of claim, such allegations on which he proposes to rely and prove and must distinctly state facts which disclose a charge or charges of fraud.
>
> …
>
> [57] The Civil Procedure Rules however do not expressly provide that fraud must be expressly pleaded. However, rule 8.9(1) prescribes that the facts upon which a claimant relies must be particularized. It follows that to raise fraud, the pleading must disclose averments of fraud or the facts or conduct alleged must be consistent with fraud. Not only should the requisite allegations be made but there ought to be adequate evidentiary material to establish that the interest of a defendant which a claimant seeks to defeat was created by actual fraud."

[50] This general rule does not mean that pleadings raising fraud must contain the word "fraud" or be framed in any particular or formulaic manner (see **Armitage v Nurse** [1997] 2 All ER 705 at 715). Indeed, there is no singular civil cause of action of "fraud" in and of itself. What is required is that the pleadings must unequivocally disclose averments of fraud or the facts or conduct alleged must be consistent with one of the recognised causes of action which fall to be categorised as fraud (see **Harley Corporation** at para. [57]).

[51] The fundamental reason that the courts have imposed more onerous requirements for pleadings on the issue of fraud was summarised by Lord Hope of Craighead in **Three Rivers (No 3)**, at para. 51, in this way:

> "...as a general rule; the more serious the allegation of misconduct, the greater is the need for particulars to be given which explains the basis for the allegations. This is especially so where the allegation being made is of bad faith or dishonesty. **The point is well established by authority in the case of fraud**." (Emphasis added)

[52] Therefore, there is clear and settled jurisprudence that the court cannot take notice of an allegation of fraud that is general in nature and has not been particularised in the pleadings of the party alleging it. This general rule applies whether fraud is raised as a cause of action by a claimant or as a defence to a claim. It is not enough, therefore, for an allegation of fraud made in civil proceedings to merely place another party on notice of an intention to raise an issue of fraud, as Old National contends. Accordingly, the failure to precisely plead and particularise an alleged fraud will render the pleadings insufficient to raise fraud as a triable issue.

[53] Para. 8 of Old National's defence to Michael Jobson's ancillary claim does not provide any particulars of the fraud alleged in relation to the 1972 Agreement. It is, at most, a non-specific assertion of fraud, without particulars. As a matter of law, this assertion cannot raise or sustain a triable allegation of fraud. In the words of the House of Lords in **Three Rivers (No 3)**, there are "no primary facts" alleged in para. 8 in relation to the 1972 Agreement that could constitute fraud thereby rendering fraud a triable issue.

[54] Old National relies on **Eastern Caribbean Flour Mills Ltd** to argue that the witness statement of William Ryan Hurst, which was filed in the court below, ought to be construed together with para. 8 of its defence as sufficient to raise an issue of fraud in relation to the 1972 Agreement. However, this argument and Old National's reliance on the case of **Eastern Caribbean Flour Mills Ltd** are, with respect, misguided.

[55] In **Eastern Caribbean Flour Mills Ltd**, Barrow JA (as he then was) explored the relationship between pleadings contained in statements of case and evidence contained in witness statements under the Eastern Caribbean Supreme Court Civil Procedure Rules.

Barrow JA considered dicta by Lord Hope of Craighead in **Three Rivers (No 3)** and Lord Woolf in **McPhilemy v Times Newspapers Ltd** [1993] 3 All ER 775 ('**McPhilemy**') and concluded, in summary, that there is no longer a need for pleadings with extensive particulars because witness statements are intended to serve the requirement of providing details or particulars of the party's case. Rather, witness statements may now be used to supply details or particulars that were formerly required to be contained in pleadings. If particulars of an allegation are given in a witness statement, a judge is obliged to look at the witness statement to determine what the issues are between the parties.

[56] Barrow JA's reasoning, however, should not be understood as relieving parties of the need to sufficiently plead allegations made by a party, especially where fraud is intended to be raised as an issue for determination in the proceedings. This is made clear by the Privy Council in **Charmaine Bernard v Ramesh Seebalack** [2010] UKPC 15 ('**Charmaine Bernard**'), an appeal from the Court of Appeal of Trinidad and Tobago. In that case, the Privy Council had to determine whether an amendment to the appellant's statement of case was necessary and should have been permitted by a trial judge to include claims for lost years and funeral expenses that were not expressly pleaded. The appellant argued that the amendments were unnecessary on the basis that the details of its intended, unpleaded claims could have been included in a witness statement. Reliance was placed by the appellant on Barrow JA's pronouncements in **Eastern Caribbean Flour Mills**.

[57] In resolving this issue, the Privy Council examined rule 8.6(1) of the Trinidad and Tobago Civil Procedure Rules (which is similar in terms to rule 8.9(1) of the CPR) and stated at para. 16 that "a detailed witness statement or list of documents cannot be used as a substitute for a *short* statement of *all* the facts relied on by the claimant" (italics as in original). Their Lordships ultimately concluded that the amendments to the statement of case to include the unpleaded claims were necessary. The Privy Council went on to examine **Eastern Caribbean Flour Mills** and opined that Barrow JA's pronouncements

did not mean that a party is not required to plead their cases to a sufficient degree. Their Lordships stated that allegations made must be "sufficiently pleaded" notwithstanding that further factual details may be provided through other documents filed in the proceedings.

[58] In short, therefore, the Privy Council's approach in Charmaine Bernard is that, notwithstanding that detailed witness statements and other documents will reveal the granular details of a party's case, there is nonetheless an obligation to sufficiently delimit the factual and legal parameters of the party's case in the pleadings.

[59] The approach deployed by the Privy Council in **Charmaine Bernard** on the pleading point has been applied by this court in **Alcoa Minerals of Jamaica Incorporated v Marjorie Yvonne Patterson** [2019] JMCA Civ 49 ('**Alcoa Minerals**') and other cases. Equally, and importantly, in **Albert Smith v Hazel Steer**, a fraud case, this court rejected the view that fraud could be raised on the evidence filed in a claim in the absence of any sufficient particulars of fraud having been set out in the pleadings. At para. [20], the court, through H Harris JA stated:

> "It could well be that an allegation of fraud was contained in paragraphs 5 and 9 of Miss Jarrett's affidavit. The affidavit does not rank as a pleading; but even if the respondent had challenged the transfer by way of a pleading, the averment therein were in general terms. A general allegation of fraud is insufficient to establish fraud."

[60] The CPR and case law, when read together, clearly establish that allegations made in witness statements cannot stand as substitutes for pleaded allegations. It follows then that although Mr Hurst's witness statement seeks to explain his basis for doubting the genuineness of the 1972 Agreement, his evidential averments are incapable of raising an issue of fraud to be determined in the proceedings, in the absence of pleadings which particularise the allegation of fraud to the required degree.

[61] In these premises, I am satisfied that, as a matter of law, Mr Hurst's witness statement is unable to cure the patent deficiencies in para. 8 of Old National's ancillary

defence, in its attempt to raise an issue of fraud for determination in the proceedings in relation to the 1972 Agreement.

[62] In any event, I am also of the view that even if Mr Hurst's witness statement could, as a matter of law, be read together with para. 8 of Old National's defence as raising the issue of fraud, the evidence put forward in the witness statement in relation to the genuineness of the 1972 Agreement is far too general to amount to a particularised defence of fraud. The witness statement goes no further than reiterating the general statements made at para. 8 of Old National's defence. Thus, the averments made by Mr Hurst do not present a cogent factual basis capable of sustaining a claim for any recognised type of fraud.

[63] In light of the above, I am satisfied that when regard is had to the pleadings, no issue has been properly raised for the determination of the court as to fraud in relation to the 1972 Agreement. The learned judge was, therefore, correct to refuse specific disclosure of the signatures of the respondents' father on the basis that no issue was raised in the proceedings as to fraud in relation to the 1972 Agreement to which that signature would be relevant.

[64] Grounds a and b, therefore, fail.

Issue (ii): Whether Old National's averment that the respondents are complicit in the fraud surrounding the impugned documents is effectual in rendering the requested documents directly relevant (grounds c and d)

[65] In grounds c and d, Old National contends that the learned judge failed to consider that there is, on the pleadings in both its claim and its defence to Michael Jobson's ancillary claim, an issue as to whether the respondents were complicit in the fraud which led to the 2014 transfer. It argues that the respondents' signatures are directly relevant to the issue and the judge erred in concluding otherwise.

[66] In my view, Old National is correct in its contention that whether the respondents were complicit in the fraud that led to the 2014 transfer is a live issue, on the pleadings,

to be determined at trial. Old National's claim specifically seeks to impugn the 2014 transfer as fraudulent and casts blame for the fraud on the respondents. None of the respondents have refuted Old National's allegation that the 2014 transfer is fraudulent. Instead, they have all asserted that the signatures on the transfer documents, purporting to belong to them, are not theirs. Further, Michael and Demetri Jobson have positively asserted in their ancillary claims that the fraud perpetrated in relation to the 2014 transfer was carried out by Drew St Clair and Caribbean Law Group. There is, therefore, a live issue regarding forgery, which strongly arises from the respondents' statements of case in their averments against their attorneys-at-law.

[67] The question then becomes, whether the requested documents are directly relevant to the issue of the respondents' complicity in the forgery of Mr Ryan's signature as alleged by Old National in its claim. In answering this question, it is necessary to bear in mind, once again, that the phrase directly relevant is ascribed a forensic meaning by rule 28.1(4) of the CPR. Therefore, the fact that examination of the respondents' specimen signatures could establish that they are complicit in the fraud relative to the 2014 transfer, does not provide a sufficient basis for an order for specific disclosure under rule 28.1(4) of the CPR. Old National must satisfy the requirements for a document to be directly relevant within the meaning ascribed to that phrase by rule 28.1(4) of the CPR.

[68] Rule 28.1(4)(a) of the CPR provides that a document would be directly relevant if the party in possession of it, or who has it in its control, intends to rely on it. Old National is not seeking specific disclosure on this limb. Accordingly, rule 28.1(4)(a) of the CPR is not relevant to this appeal. What is relevant are rules 28.1(4)(b) and 28.1(4)(c) of the CPR. To be clear, Old National's position is not that the respondents' signatures fall singularly within the ambit of rule 28.1(4)(b) or 28.1(4)(c), but that there is a possibility or probability that the respondents' signatures are directly relevant under either one or the other. Therefore, whether the application for specific disclosure satisfies the requirements of rule 28.1(4)(b) or 28.1(4)(c) would not be ascertained until the requested documents are received, analysed by a handwriting expert, and a

determination made by the expert as to whether or not the signatures contained on the 2014 transfer matched the respondents' handwriting.

[69] It has not escaped attention that Old National's position regarding the requested documents being specifically disclosable is hinged exclusively on its view that the signatures are "**necessary to allow an expert to opine on the genuineness of the signatures on [the 2014 Transfer and the 1972 Agreement]**" (emphasis added). In this connection, Old National states at paras. 18 and 23 of its written submissions:

> "18. The relevant question is therefore whether the specimen signatures sought are directly relevant to the matters in issue of whether the 1972 Agreement for Sale is fraudulent. **Considering the expert in [Old National's first claim] required specimen signatures in order to opine on the impugned documents, that question can only be answered in the affirmative…**
>
> …
>
> 23. In this case, Old National obtained permission in [Old National's first claim] to call A. Frank Hicks as an expert witness at the trial. However, Mr Hick's report was not submitted because Old National was unable to provide him with the documents he requested in order to be in a position to give an opinion. Those documents he requested are the subject of Old National's application for specific disclosure." (Emphasis added)

[70] The evidential basis of these submissions is to be found in the affidavit of James-Erle Kirkland in which reference is specifically made to the order of Henry-McKenzie J (Ag) made in Old National's first claim. By that order, Henry-McKenzie J (Ag) appointed Mr Hicks as an expert in the proceedings and required his expert report to be filed and served.

[71] Of concern, is that there is no order made in the Old National's second claim (the present claim) appointing Mr Hicks as an expert in those proceedings. Neither is there any order by Laing J (or any other judge) extending Mr Hicks' appointment as an expert in Old National's first claim to its second claim, following the first claim having been declared a nullity. Therefore, strictly speaking, Mr Hicks is not an expert appointed in the

claim in respect of which specific disclosure is being sought. Accordingly, Old National cannot, in these proceedings, rely on Mr Hicks' appointment as an expert, and the need for him to fulfil his duties as an expert to the court.

[72] Without having recourse to the rules and principles governing applications for specific disclosure, it would appear that the central factual premise upon which Old National hangs its application for specific disclosure of the requested documents does not exist. Accordingly, taking the application as it is, there would have been no factual basis upon which to hold that the respondents' specimen signatures are needed to assist an expert appointed by the court to conduct his examination. It is considered necessary to highlight this observation as counsel for Old National is relying on a faulty premise to seek specific disclosure.

[73] However, despite this crucial observation regarding the absence of an order appointing an expert in these proceedings, the grounds of appeal relating to the direct relevance of the documents are, nevertheless, considered to see whether there is merit in the appeal.

[74] Old National is, indeed, correct in its general assertion that the specimen signatures being requested, when analysed by a handwriting expert, may either support its case or adversely affect the respondents' case. The specimen signatures may also support the respondents' case. No one can say at this time the likely outcome of the examination. However, the mere likelihood of the signatures either supporting or undermining a party's case is not the standard required by the rules to establish direct relevance.

[75] In order to obtain the orders sought for specific disclosure on the grounds relied on, Old National is required to satisfy the court that the requested documents **tend to support its case** in accordance with rule 28.1(4)(b) or **tend to adversely affect the respondents' case** in accordance with rule 28.1(4)(c). At this stage, however, Old National has only been able to speculate that the signatures **may** fall within either rule

28.1(4)(b) or 28.1(4)(c). In **BRL Limited**, at para. [103], it was noted that rules 28.1(4)(b) and 28.1(4)(c), as framed, do not permit the grant of specific disclosure where a document 'may' be relevant, or merely 'relate' to an issue in dispute. The mere fact that a document may or could support one party or may or could adversely affect another party is not sufficient to render them specifically disclosable within the ambit of the CPR; they must be 'directly relevant' as defined by the CPR. The framers of the rules decidedly used the expression "tends to" in both sub-rules, which requires an applicant to show that the documents requested by way of specific disclosure have a positive tendency to assist the case of the party seeking disclosure or damage its opponent's case.

[76] Against this background, it is important to point out, that the direct relevance requirement under rule 28.1(4) of the CPR is far more stringent than the pre-CPR position that obtained under the rules of discovery (as it was then called) under the Judicature (Civil Procedure Code) Act ('the CPC'). Applications for discovery in civil proceedings were governed by rule 284 of the CPC. Rule 284 permitted an application for any party to a cause or matter to make discovery, on oath, of "the documents which are or have been in his possession or power **relating to any matter in question therein**" (emphasis added). The wording of rule 284 of the CPC permitted any document bearing a relation to the proceedings to be the subject of an order for discovery.

[77] A similar rule of procedure was considered in **Compagnie Financiere et Commerciale du Pacifique v The Peruvian Guano Company** (1882) 11 QBD 55 ('**Peruvian Guano**'). In that case, the court explained the relatively low threshold for an order for disclosure, under the rule, as follows:

> "It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may—not which must—either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly', because as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own

> case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences…"

[78] Therefore, under rule 284 of the CPC and under **Peruvian Guano**, a document that could merely lead to a 'train of inquiry' that either advances or damages a party's case, was susceptible to discovery.

[79] It is useful, at this juncture, to refer also to the discussion of the England and Wales Court of Appeal in **Three Rivers District Council and others v Bank of England (No 4)** [2002] All ER 881 ('**Three Rivers (No 4)**'). The case considered the threshold for the grant of pre-action discovery under rule 31.17(3)(a) of the UK CPR. Under that rule, the requirement is for the documents requested to be "likely to support… or adversely affect a party's case". The Court of Appeal considered the effect of the wording of that rule and opined:

> "…**the threshold condition in CPR 31.17(3)(a) is lowered by the qualification 'likely to'. It is not necessary that the documents of which disclosure is ordered will support the Applicant's own case or that they will adversely affect the case of another party; it is enough that they are likely to do so.** The explanation for that difference is also obvious; the rule making body appreciated that an Applicant cannot be expected to specify which documents under the control of another – which he may never have seen – will support his case or adversely affect that of another party, or to know whether he will wish to rely upon them." (Emphasis added)

[80] Rule 28.1(4) of the CPR is certainly framed in stronger terms than rule 284 of the CPC, and the rules under consideration in **Peruvian Guano** and **Three Rivers (No 4)**. The text of rule 28.1(4) makes it clear that the threshold for the grant of specific disclosure under the CPR is higher. Unlike the rule-making body of the UK CPR, the framers of our CPR have not seen it fit to lower the threshold by importing the qualification of "likely to". So, the mere likelihood of a document supporting or damaging a party's case is no longer enough to justify specific disclosure under our rules; neither is the possibility that a document may fairly lead a party to "a train of inquiry", which may

have the effect of either supporting or harming a party's case. By giving a restrictive definition to the term directly relevant, and in particular, by requiring that the documents requested by way of specific disclosure "tends to support" or "tends to adversely affect" a party's case, the framers of the CPR clearly intended that specific disclosure be granted in more stringently prescribed circumstances. The test was clearly intended to be strict.

[81] The Court of Appeal of Trinidad and Tobago in **Proman Holdings (Barbados) Ltd and another v CL Financial Ltd and others** (2017) 91 WIR 568 came to the same conclusion in relation to provisions of rule 28.1(4) of the Civil Procedure Rules of Trinidad and Tobago ('TT CPR'). Rule 26.1(4) of the TT CPR is framed in identical terms to rule 28.1(4) of the CPR, except that the former expressly states that "the rule of law known as the 'rule in *Peruvian Guano'* does not apply" (italics as in original). Interpreting its rule, the Court of Appeal explained:

> "The CPR which replaced the RSC altered the position in two fundamental ways. First, the wording of the rule was changed. **The nature of the documents that were to be disclosed under the CPR was no longer 'relating to matters in question in the action', which would include documents directly or indirectly relevant as explained in the Peruvian Guano case, but now had to be directly relevant.** Second, and perhaps only for emphasis, the CPR expressly excluded the rule in the Peruvian Guano case. **It is, therefore, patent that the intention of the CPR is to limit the scope of disclosure by adopting a narrower definition of relevance. For the purpose of specific disclosure under Pt 28 of the CPR, it is clear, therefore, that a document would not be directly relevant if it is a document that only may fairly lead to a train of inquiry which may produce any of the consequences outlined at r 28.1(4)(a), (b), or (c)**. **It must be directly relevant to any one or more matters in issue in the proceedings within the meaning of r 28.1(4)**." (Emphasis added)

[82] The Court of Appeal of Trinidad and Tobago was clearly satisfied that, even without the express wording of rule 28.1(4), which abrogated the **Peruvian Guano** rule, there was a clear intention to narrow the scope of documents susceptible to specific disclosure.

Therefore, documents that lead to a "train of inquiry", which may substantiate its direct relevance somewhere down the road, cannot be obtained by specific disclosure. This view accords with mine.

[83] As it now stands, Old National has not been able to say, in its evidence, whether the requested documents are under the control of the respondents or were under their control. It has not been able to indicate any document, which tends to assist its case or tends to damage the respondents' case. In other words, no evidentiary material is provided by Old National, which would have placed the requested documents distinctly within the ambit of either requirement being invoked. The practical effect of the definition of the phrase 'directly relevant' contained in rule 28.1(4) is that an applicant for specific disclosure is expected to specify which document under the control of his opponent, which he may never have seen, tends to support his case or tends to adversely affect his opponent's case. It is this effect of the higher threshold requirement that the framers of the UK CPR tried to circumvent by adopting a different test for disclosure.

[84] Contrary to the express requirements of rule 28.1(4), Old National's statement, at para. 11 of the affidavit in support of the application, is that "the requested documents **may** therefore **either** adversely affect the [respondents'] case or tend to support [Old National's] case". This is an unambiguous acknowledgement that it was unable to positively assert and to present material to definitively establish that the requested documents **tend to** support its case or **tend to adversely** affect the respondents' case, thereby falling within either rule 28.1(4)(b) or 28.1(4)(c). There is a possibility that the requested documents could support the respondent's case that they did not forge Mr Ryan's signature on the 2014 transfer. This outcome would negate Old National's allegation that the respondents forged Mr Ryan's signature, and there would be nothing to positively establish that they caused it to be forged. Old National has failed to surmount the higher threshold requirement imported by the words "tends to" in rules 28.1(4)(b) and 28.1(4)(c) of the CPR.

[85] Based on the preceding discussion, I am driven to hold that the learned judge was correct to conclude that the unspecified requested documents are not demonstrated to have been directly relevant, within the meaning of rule 28.1(4). Therefore, Old National's averment that the respondents are complicit in the fraud alleged is not sufficient to establish that the requested documents are directly relevant as contemplated by the rules.

[86] Accordingly, grounds c and d must also fail.

Issue (iii): Whether the learned judge wrongly exercised his discretion when he refused to grant the order for specific disclosure (ground e)

[87] In ground e, Old National complains that the learned judge erred in the exercise of his discretion by considering irrelevant matters and failing to consider relevant matters. In summary, Old National's complaints in this regard are that the judge was in error by:

> (i) concluding that the legal and evidential burden and the need to be fair to the respondents were reasons not to grant specific disclosure;
>
> (ii) labelling the application for specific disclosure as a fishing expedition;
>
> (iii) failing to give any consideration to whether the order was necessary to dispose fairly of the claim, taking into account both sides; and
>
> (iv) failing to consider the factors considered in rule 28.7(2) of the CPR.

[88] As indicated earlier, an applicant for specific disclosure must show that the documents sought to be disclosed are both directly relevant and necessary to dispose fairly of the claim or to save costs. Therefore, both direct relevance and necessity must be established in the sense prescribed by the relevant rules. Where an applicant for

specific disclosure fails to demonstrate to the satisfaction of the court that the documents sought by way of disclosure are directly relevant, this would be dispositive of the application. In those circumstances, there would be no need to consider whether disclosure is necessary in order to dispose fairly of the claim or to save costs because the crucial precondition has not been fulfilled. However, where direct relevance is established, the court must, nevertheless, satisfy itself as to the necessity of disclosure by having regard to the matters delineated by rule 28.7 of the CPR.

[89] It is noted that Old National contends, at para. 24 of its written submissions, that "no other relevant hurdle [apart from direct relevance] that arises from CPR 26.8 was raised by the Respondents below". In the context of Old National's submissions, this contention suggests that once direct relevance was established on its application, the court would need not consider anything else. It also suggests that it was the respondents' duty to raise any relevant bars to the grant of specific disclosure or that the respondents can raise no other bar to the grant of specific disclosure in this court. However, these suggestions cannot be accepted.

[90] It was the duty of the learned judge to consider the application and to exercise his discretion within the context of the relevant law. He was not bound by what the parties agreed or did not agree to be in issue, or by the failure of the respondents to make any other objection to the grant of specific disclosure. The question of whether specific disclosure was to be granted was one for the learned judge. In any event, Old National stated in its grounds for making the application that "the claim concerns allegations of fraud **and it is likely that a fair disposal of the claim** will require expert evidence in relation to the handwriting of Gilbert Baron Jobson and the [respondents]" (emphasis added). Old National, itself, had raised the question of necessity.

[91] Accordingly, the learned judge was also required to consider whether the specific disclosure was necessary to fairly dispose of the claim or save costs, in the circumstances of the proceedings. It is, therefore, irrelevant to have regard to what "relevant hurdles" were raised or not raised by the respondents in the court below.

[92] Within this context, it is noted as an apt starting point that the requirement that specific disclosure must be necessary for a fair disposal of the claim or to save costs clearly imports the overriding objective of the CPR. The overriding objective imposes an obligation on the judge and the parties to a case to manage and conduct the case with a view to "saving expense" and "ensuring that it is dealt with expeditiously and fairly" (see rules 1.1(1), 1.1(2)(b), 1.1(2)(d) and 1.3 of the CPR).

[93] The court in **Tinkler v Stobart Group Ltd** [2021] EWHC 3035 (Ch) observed at para. 15 of its judgment that the rule under the UK CPR, that disclosure must be "necessary in order to fairly dispose of the claim or to save costs", gives the court "a wide discretion and flexibility to make an order considering all the circumstances of the case". It is apparent, therefore, that some wider enquiry into the overall value of specific disclosure and its impact on the proceedings is required even when direct relevance is satisfactorily established. The overriding objective demands no less.

[94] In the pre-CPR case of **David John Hall v Sevalco Limited; William James Crompton v Sevalco Limited** (1996) the Times, 27 March 1996, Bingham MR (as he then was), spoke to the requirement under rule 1(1) of the UK RSC Order 26 that, for interrogatories to be permitted, they must be "necessary either for disposing fairly of the cause or matter or for saving costs". The learned Master of the Rolls remarked, in that context, that "[n]ecessity is a stringent test". The same would hold true in the context of applications for specific disclosure under rule 28.7(1) of the CPR. Necessity is a stringent test. Therefore, if specific disclosure will not advance the fair disposal of the case or there is no benefit to be derived from it, then it should be refused as it would not be required to dispose fairly of the claim or save costs (see **Jamaican Legend Limited and another v Percival Hussey** [2020] JMCA Civ 49 at para. [99]).

[95] In this regard, the matters raised by Old National in its final ground of appeal have served to demonstrate that in considering whether the order should be granted, the learned judge went beyond the question of whether the requested documents were directly relevant. The learned judge had clearly gone on to consider whether the

requested documents were necessary to fairly dispose of Old National's claim. Having done so, he concluded that it would not have been fair to the respondents to order disclosure of the requested documents given the incidence of the burden of proof.

[96] Regarding the learned judge's consideration of the evidential and legal burden and his conclusion on the need to be fair to the respondents, one must have regard to Old National's pleadings. Old National alleged that the respondents forged or caused Mr Ryan's signatures to be forged on the impugned documents. Old National must prove those averments by putting forward material to establish it on a balance of probabilities. Old National did not plead forgery of the signatures of the respondents (or their father, for that matter). The alleged complicity of the respondents seemingly arises from the fact of Mr Ryan's signature being on the lost title application and 2014 transfer after he had died. The allegation is strengthened by the presence of signatures purporting to be those of the respondents on the impugned documents.

[97] It was the respondents who raised the issue that their signatures were forged as a positive defence, and two of them did so in their ancillary claims. As it stands, the respondents' collective defence is not a bare denial. Having put forward positive defences and ancillary claims alleging forgery of their signatures (in the case of two respondents), the respondents would bear the legal and evidential burden to prove the positive assertions in their defence and ancillary claim. In keeping with the law governing the burden of proof in civil cases, the parties would have both the legal and evidential burden to prove their positive cases.

[98] Old National can rely on an inference to be drawn from the presence of the signatures to assist them in proof of their case. It is an established principle of law that a person who purportedly signs a document is bound by his signature appearing on that document unless he proves otherwise. Old National has recognised this principle in its defence filed in response to Michael Jobson's ancillary claim, which it states in para. 12:

> "In response to paragraph 23 of the Ancillary Particulars of Claim, [Old National] states that the signatures of [the respondents]

> appear on the lost title application and the [2014 transfer], which, unless strong evidence to the contrary can be shown, proves that they fraudulently obtained title for the property."

[99] Therefore, the learned judge would have failed to properly or adequately take account of the parties' statements of case in his reported reasoning regarding the incidence of the burden of proof. Like Old National, the respondents will also have something to prove if they are to succeed on the fraud issue; that is, that their signatures were forged in the circumstances they have alleged.

[100] However, this is not the end of the matter. The crucial question arising in the appeal is whether the court had the power to use the specific disclosure machinery to compel the respondents to provide specimen signatures to Old National for Old National to prove their complicity in the fraud, which is Old National's claim. In my view, the court does not have such a power. Rule 28.1(2) of the CPR makes it plain that specific disclosure may only be granted for "documents" as that term is defined by the rule. The signatures are not documents within the meaning or contemplation of the rule. Furthermore, even if it could be argued that what is required are documents, the fact that there is no specificity or precision in the identification of the documents would be fatal to the application. In Blackstone's Civil Practice, 2004, it is noted at para. 48.11, that "[a]n application for disclosure of 'all documents relating to [the other side's financial and tax affairs which are necessary to prove the quantum of his counterclaim" was held to be too imprecise in *Morgans v Needham (1999) The Times, 5 November 1999"*.

[101] Old National has no interest in any of the requested documents for the use of their contents to support its claim or defence to the ancillary claim. The documents, which remain unnamed and unspecified, are only needed for the signatures they bear. Having regard to rule 28.1(2) and the excerpt from the learned authors of Blackstone's Civil Practice, 2004, it is apparent that the specific disclosure regime under the CPR is not suited to facilitate Old National's request.

[102] In that context, it is reasonable to conclude that Old National only requires the specimen signatures to investigate the respondents' complicity in the fraud and to refute the respondents' case of adverse possession being advanced. As Old National itself has expressly recognised, it does not have to establish that the signatures of the respondents were forged because the signatures are on the documents purporting to be the respondents, until the contrary is proved. So why then seek disclosure of the specimen signatures in such circumstances? It could only be to obtain evidence from the respondents to assist Old National in proving the respondents' alleged complicity in the fraud that is not disputed in relation to the lost title application and the 2014 transfer.

[103] In my view, the court cannot properly compel the respondents to provide their signatures to Old National for it to conduct its investigation towards proof of their complicity in the fraud, which, fundamentally, is what the application is all about. This is where the question of fairness would arise. The respondents have relied on the pronouncements of Denning LJ in **Air Canada et al v Secretary for Trade** [1983] 2 AC 394 ('**Air Canada**') at page 441. I find the following portions of those pronouncements particularly instructive for present purposes.

> "The due administration of justice does not always depend on eliciting the truth. It often depends on the burden of proof. Many times it requires the complainant to prove his case without any discovery from the other side.
>
> …
>
> If the plaintiff fails to prove his case - for want of any admission by the defendant - no injustice is done to him. Even though the truth may not have been ascertained, no injustice is done. In these cases all that justice requires is that there should be a fair determination of the case whatever the real truth may be. Likewise, when a plaintiff alleges that the defendant has done him some wrong, but has no evidence whatever to support it. He seeks to obtain it by making a 'fishing expedition'. He asks to see all the documents of the other side so as to see if he can get some evidence out of them. The court invariably refuses. It refuses because 'justice' requires that he should have some material to go upon before he goes 'fishing'.

> I hold that when we speak of the administration of justice this does not always mean ascertaining the truth of what happened. It often means that, as a matter of justice, a party must prove his case without any help from the other side. He must do it without discovery and without putting the other side into the witness box to answer questions."

[104] I share the learned judge's view that it would be unfair and, therefore, impermissible for the court to compel the respondents to assist Old National in proving its case in these circumstances by providing their specimen signatures for the purpose of an investigation to see whether they were complicit in the fraud. The unfairness and resultant impermissibility arise from the fact, as already established, that the unidentified requested documents would serve no other purpose than to open a "train of enquiry" for Old National to secure the signatures for testing to see whether there is support for their case regarding the respondents' alleged complicity in the undisputed fraud. Part 28 of the CPR excludes specific disclosure of such documents, given the definition of documents that are directly relevant. As the learned authors of Blackstone's Civil Practice 2004 noted, "the scope of disclosure is therefore very wide, but it does not include what are traditionally called 'train of enquiry' documents".

[105] In this case, it is indisputable that Old National is seeking "train of enquiry" documents, having failed to establish on acceptable evidentiary material, that what it is seeking tends to support its case or tends to damage the respondents' case. Therefore, its case for specific disclosure is nothing short of speculative, and the learned judge would have been right to refuse the application on the basis that it was a "fishing expedition".

[106] I am fortified by this conclusion on the strength of the learning derived from the highly persuasive dicta of their Lordships in the Court of Appeal and House of Lords in **Air Canada**. This case demonstrates the interplay between the direct relevance and necessity tests. The case has established that for the requested documents to be disclosable based on necessity, it cannot be based solely on the belief that they will assist the court in determining the facts upon which the decision of the case will depend, even

though those facts could operate one way or the other, that is, in favour of the party seeking disclosure or against it.

[107] In **Air Canada**, the judge at first instance was faced with an application for the production of documents to assist the plaintiffs in investigating the Secretary of State's dominant purpose for permitting the British Airport's Authority ('the BAA') to finance improvements to the Heathrow Airport from internal revenues. The BAA imposed a 35% increase in the charge for the airlines' use of the airports. The plaintiffs did not allege that the Secretary of State's true motives were other than in accordance with government policy as expressed in a White Paper and a statement by the Secretary of State. The production of the documents was opposed on public interest immunity grounds and certificates to that effect were submitted to the court. The judge was provisionally inclined to order the production of one set of the documents and so decided to inspect them. He made the order for inspection but stayed the order pending appeal.

[108] The judge's decision to order inspection was that the documents would be necessary for fairly disposing of the case or for the due administration of justice (said to be the same) if they give substantial assistance to the court in determining the facts upon which the decision in the case would depend. He concluded that the documents were very likely to affect the outcome "one way or the other".

[109] The Court of Appeal and the House of Lords disagreed with the judge's conclusion and reversed the order for inspection. The Court of Appeal held that for disclosure to be ordered, there must be a likelihood that the documents would support the plaintiffs' case-the parties seeking discovery. The House of Lords agreed with the Court of Appeal.

[110] The important thing to note for present purposes is that even though the threshold test was lower in the applicable UK rule, the courts held that the judge was wrong to have ordered the production of the documents for his inspection in a case where it was not **shown definitively on any material placed before the court that the documents were likely to help the case of the plaintiffs**. The proclamations of their

Lordships in both courts have established unequivocally that once the document for which disclosure is sought could likely assist the other party from whom disclosure is desired, the necessity test is not satisfied.

[111] The dicta of all the judges of the Court of Appeal and the House of Lords are equally instructive. However, for the sake of brevity, I will adopt, for illustration of the point, the persuasive pronouncements of Fox LJ in the Court of Appeal and Lord Edmund-Davies in the House of Lords. I will begin with Fox LJ, who, having agreed with Lord Denning in the lead judgment of the Court of Appeal, opined at page 419:

> "The judge's conclusion was, of course, based upon the approach which I have already mentioned and with which I do not agree. The judge stated that, if it were necessary for the airlines to show a likelihood that the documents, if produced, would help them, he could not, on the material available, conclude that they had done so. I agree with that, both in relation to the category A and the category B documents. **The documents might help the airlines or they might not. It is guesswork. What, then, is the court to do? Here are documents which are admittedly relevant and which might possibly contain material of consequence to the resolution of the airlines' constitutional claim. Should the court look at them to see if they are of assistance? In my view, the court should not. I think that the party seeking disclosure should normally have to show that there is a reasonable likelihood that the documents will assist his case. That is necessary to prevent 'fishing'**. The mere fact that the documents are relevant cannot be sufficient." (Emphasis added)

[112] Lord Edmund-Davies, for his part, opined at page 441:

> "…at every stage of interlocutory proceedings for discovery, the test to be applied is: will the material sought be such as is likely to advance the seeker's case, either affirmatively or indirectly by weakening the case of his opponent? To take but one more example out of many, such was again the test applied by the Court of Appeal in *Woodworth v. Conroy [1976] Q.B. 884*.
>
> It is accordingly insufficient for a litigant to urge that the documents he seeks to inspect are *relevant* to the proceedings. For

> although relevant, they may be of merely vestigial importance, or they may be of importance (great or small) only to his opponent's case. And to urge that, on principle, justice is most likely to be done if free access is had to all relevant documents is pointless, for it carries no weight in our adversarial system of law." (Italics as in original and underlining supplied)

[113] All the judges in **Air Canada** concluded, in essence, that the mere possibility or likelihood that documents might assist the court in determining the outcome of the case cannot be the proper basis for disclosure in the interests of fairness and justice. Instead, in keeping with the wording of the applicable rules engaged in that case, it ought to have been shown that it was "likely" or that there was a "reasonable probability" that the documents would disclose material of assistance to the party seeking disclosure.

[114] When this reasoning of the Court of Appeal and House of Lords in **Air Canada** is applied to our disclosure regime in the context of our CPR, Old National would have to go further than showing that the specimen signatures (which is what it wants) are "likely" or "reasonably likely" to be of assistance to its case. By way of reminder, Old National itself has asserted in its ground for making the application that "it is likely that a fair disposal of the claim will require expert evidence" in relation to the handwriting of Gilbert Baron Jobson and the respondents. However, in satisfying the higher threshold test of the CPR, Old National is obliged to show that the specimen signatures "tend to" support its case or "tend to adversely affect" the respondents' case regarding the respondents' alleged complicity in the fraud in question. This, Old National has failed to do. In the premises, it could not be said that an order for specific disclosure of the requested documents, or more specifically, the specimen signatures, is necessary in order to dispose fairly of the claim.

[115] It also follows that since it would not be fair to use the procedure in the manner contemplated by Old National, specific disclosure would not save costs. Old National has requested between 40 and 60 documents, which are unspecified beyond saying they should bear the genuine signatures of the respondents and their deceased father. There is no description of the documents with reasonable precision.

[116] The search for and the production of so many unspecified documents required by Old National, which are not proven to be directly relevant and necessary for a fair disposal of the case, would be disproportionate and wasteful of expenses, costs and resources. Therefore, specific disclosure would not save costs.

[117] In all these premises, it would have been open to the learned judge to conclude that specific disclosure of the requested documents was not necessary to fairly dispose of the claim or to save costs. Accordingly, specific disclosure would not be in keeping with the dictates of the overriding objective.

[118] For these reasons, I am propelled by the force of the applicable law to the ultimate finding that the learned judge would not have erred in exercising his discretion to refuse Old National's application for specific disclosure. Therefore, even if he had had regard to irrelevant considerations or failed to take into account any other relevant consideration as contended by Old National, that would not be fatal to his decision. His conclusion that the documents being sought are not directly relevant or necessary for the fair disposal of the claim would have been unassailable and dispositive of the application.

[119] Ground e must, therefore, fail.

Conclusion

[120] The judge's refusal of Old National's application for specific disclosure was an exercise of his discretion. In keeping with the well-known principles set out by Morrison JA (as he then was) in **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1 ('**John Mackay**'), an appeal from such a decision will ordinarily succeed where this court is satisfied that the learned judge erred in the exercise of his discretion to refuse the application for specific disclosure as it was based on a misunderstanding of the law or evidence, an inference of fact that was demonstrably wrong, or was a decision "so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it" (para. [20] of **John Mackay**).

[121] Having applied the established standard of review, I conclude, for the reasons expressed above, that Old National has failed to show that the learned judge erred in the exercise of his discretion to refuse its application for specific disclosure, thereby warranting the interference of this court. Even in the absence of full reasons for his decision, it is evident that the learned judge was correct to conclude, as he did, that the requested documents were not directly relevant to one or more matters in issue in the proceedings as prescribed by rules 28.1(4)(b) and (c).

[122] It also would have been open to the learned judge to conclude that disclosure of the documents requested was not necessary for fair disposal of the claim or to save costs. There is no need for Old National to seek specific disclosure of so many documents merely for the signatures of the respondents to be examined to provide evidence for Old National to prove the respondents' complicity in the fraud it has averred. Indeed, it can safely be said that the specific disclosure machinery under the CPR is not suited for the purposes contemplated by Old National. The application for specific disclosure is not a genuine attempt to obtain any specified documents for use in the proceedings. It is, instead, an attempt to secure evidence from the respondents to assist them in establishing the respondents' complicity in the fraud by way of the court's compulsion of the respondents to provide their specimen signature for examination. This is unfair to the respondents and not permissible by rule 28.4 of the CPR and on the strength of solid and persuasive authority. Accordingly, the learned judge's refusal of the application must stand.

[123] Regarding the consequential costs order the learned judge made against Old National, that, too, must stand. Given that the learned judge had properly exercised his discretion to refuse Old National's application for specific disclosure, the ordinary rule that costs follow the event would apply. Therefore, the respondents would have been entitled to their costs in the proceedings below.

[124] Accordingly, the learned judge would have been correct to order costs against Old National, as he did.

Disposition of the appeal

[125] For all the foregoing reasons, I would dismiss the appeal and affirm the learned judge's order. I would also award the costs of the appeal to the respondents to be agreed or taxed. This proposed costs order is in keeping with the general rule that costs follow the event as there is nothing in the circumstances to justify a departure from the general rule.

FOSTER-PUSEY JA

[126] I have read, in draft, the judgment of McDonald-Bishop JA. I agree with her reasoning and conclusions and have nothing to add.

DUNBAR-GREEN JA

[127] I, too, have read, in draft, the judgment of McDonald-Bishop JA and agree with her reasoning and conclusions.

MCDONALD-BISHOP JA

ORDER

1. The appeal is dismissed.

2. The order of K Anderson J made on 27 January 2023 is affirmed.

3. Costs of the appeal to the respondents to be agreed or taxed.