

THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2021/CLE/gen/001260

BETWEEN

FEDERICO RIEGE

Plaintiff

AND

(1) SARKIS D IZMIRLIAN

(2) THE PRESERVE DEVELOPMENT COMPANY LTD.

(Formerly CRIOLLO ONE LIMITED)

Defendants

Before Chief Justice Sir Ian Winder

Appearances: Gail Lockhart -Charles with Terrell Butler for the Plaintiff

Wilfred Ferguson Jr with Aquelle Tuletta for the Defendants

23 March 2023

WINDER, CJ

This is the Plaintiff's application for specific disclosure. The Supreme Court (Civil Procedure) Rules 2022 (the CPR), which came into effect on 1 March 2023, now uses the term disclosure instead of the former term discovery.

1. On 4 November 2022, following upon the case management conference, this court ordered (amongst other things) that the parties each file and serve a list of documents on or before 13 January 2023.
2. The Defendants each filed their respective lists of documents on 16 January 2023.
3. The Plaintiff is dissatisfied with the extent of the lists of documents and has applied for an order for specific disclosure. In particular, they seek an order that Sarkis Izmirlan, First Defendant and the President of the Second Defendant make an affidavit stating whether he has or has had possession, custody or power of any document of the following classes of documents:
 - (i) Emails, letters, text messages and other correspondence and documents exchanged between the First Defendant, his agents or representatives and the Second Defendant, its agents or representatives relating to the land purchase, project or other matters referred to in the Statement of Claim other than those disclosed on the list of documents filed by the Defendants
 - (ii) Emails, letters, text messages and other correspondence and documents exchanged between the First Defendant, Whitney Their, Thomas Dunlap, Delaney Partners, Viana Gardiner or any of them in relation to the Project as defined in paragraph 3 of the Statement of Claim and or in relation to the matters pleaded in the Statement of Claim other than those disclosed on the list of documents filed by the Defendants
 - (iii) All communications and other documents in the possession of Delaney Partners in connection with the Project or other matters pleaded in the Statement of Claim including correspondence with the First Defendant, the Second Defendant, McKinney Bancroft and Hughes, the Bahamas Investment Authority or other Governmental Agencies other than those other than those disclosed on the list of documents filed by the Defendants

(iv) other documents relating to the Project or the matters pleaded in the Statement of Claim other than those disclosed on the list of documents filed by the Defendants.

4. The Plaintiff says that the ground of the application is that it is evident from the disclosure that has been provided by the Defendant that there are a significant number of documents that the Defendants were required to provide. They say at paragraph 6 of their submissions:

[6.] The list filed by the First Defendant contained mainly documents which have already been disclosed in the Plaintiff's List or which were e-mails that were copied to or addressed to the Plaintiff. All of the internal communications between the First and Second Defendants and their agents and advisors relating to the land acquisition and the Plaintiff's involvement (including the internal exchanges between the Defendants and their agents in relation to the Plaintiff's option) would clearly be relevant, yet less than a handful of such documents have been disclosed. It is also apparent from the disclosure itself that there are numerous documents that have been omitted from the Defendants' lists that ought clearly to have been included. The Second Defendant's list, which contained only three (3) items, is also plainly deficient.

5. The Plaintiff's application is supported by the first affidavit of the Plaintiff expressing his belief that the disclosure was incomplete. The Plaintiff has however not identified any specific document, merely classes which they suspect have been omitted.

6. Ord 24, rule 7 of the Rules of the Supreme Court (the RSC) provided as follows:

7. (1) Subject to rule 8, the Court may at any time, on the application of any party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any document specified or described in the application or any class of document so specified or described is, or has at any time been in his possession, custody or power, and if not then in his possession, custody or power when he parted with it and what has become of it.

(2) An order may be made against a party,

7. The CPR, which came into effect on 1 March 2023, sets out at Rule 28.5, as it relates to specific disclosure, as follows:

(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 or categories of documents specified in the order;

(b) disclose documents relevant within the principles relating to discovery of documents, or, alternatively, directly relevant, to a specified issue or issues in the proceedings; or

(c) carry out a search to the extent stated in the order for —

(i) documents relevant, in the sense indicated in paragraph (b), or directly relevant to the proceedings or to a specified issue or issues; or

(ii) documents of a particular description or class or in a particular category or identified in any other manner, and disclose any documents within the scope of the order 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 is to be made on notice and unless in special circumstances 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.

8. The CPR is not centered around the making of an affidavit as the former RSC did. An order requiring specific disclosure under the new rules however, requires an applicant to only disclose documents which are directly relevant to the one or more matters in issue in the proceedings. The distinction is noted as *Lord Woolf* stated in his *Access to Justice Report, 1996*, which ushered in the civil procedure reforms in the UK, that “*two of the major generators of unnecessary cost in civil litigation were uncontrolled discovery and expert evidence*”.

9. The Defendants rely on the guidance to be found in the case of ***Berkeley Administration Inc. and McClelland 1990 FSR 381*** and the dicta of Mustill LJ discussing the relevant principles in respect of Order 24 Rule 7. Having regard to Rule 28.5(1)(b) I accept that this authority is as relevant for the purposes of the RSC as the CPR. According to Mustill LJ in ***Berkeley Administration Inc. and McClelland*** there is no jurisdiction to make an order for the production of documents unless (a) there is sufficient evidence that the documents exist which the other party has not disclosed; (b) the document or documents relate to matters in issue in the action; and (c) there is sufficient evidence that the document is in the possession, custody or power of the other party.

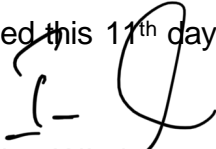
10. I have considered the application of the Plaintiff, the gist of which is that there ought to be other material which may be available and disclosable. I am satisfied that the Plaintiff's application is speculative. The Plaintiff holds the view that there must be some other relevant internal communication between the defendants and their agents which supports their case of fraudulent misrepresentation on the part of the Defendants. I am not satisfied that they have satisfied the threshold set in ***Berkeley Administration Inc. and McClelland*** in that there is insufficient evidence that these other documents exist which the Defendants have not disclosed or that there is sufficient evidence that these documents are in the possession, custody or power of the Defendants.

11. In any event, notwithstanding the absence of evidence that some specific disclosure is warranted, I am satisfied that the relief sought in the application has already

been provided by the Defendants. The affidavit of Sakis Izmirlian avers that there are no relevant non-privileged documents in the possession of the Defendants which have not been disclosed in their respective lists of documents.

12. In the circumstances, I am satisfied that the application ought to be refused. As costs ought to follow the event I order that the Defendants are entitled to their reasonable costs. I propose to summarily assess these costs and therefore invite the Defendants to provide any representations they wish as to the time that was reasonably spent in defending the application and preparing for and attending the hearing. These representations, extending no more than 3 pages, must be submitted within the next 14 days.

Dated this 11th day of April 2023



Sir Ian Winder
Chief Justice