BARBADOS
[Unreported]

IN THE SUPREME COURT OF JUDICATURE
HIGH COURT
CIVIL DIVISION

No. 564 of 2009

BETWEEN:

JONATHAN ENTERPRISES LTD	**Applicant**
AND	
RYAD INVESTMENTS LIMITED	**First Respondent**
ELYMAR INVESTMENTS LIMITED	**Second Respondent**
FREANT LIMITED	**Third Respondent**
CHEFETTE RESTAURANTS LIMITED	**Fourth Respondent**
ASSAD HALOUTE	**Fifth Respondent**

Before the Honourable Madam Justice Margaret A. Reifer, Judge of the High Court

2014: March 3rd,
April 15th,
May 6th,
August 28th

Appearances:

Mr. Barry Gale Q.C. and Mrs. Laura Harvey-Read Attorneys-at-Law for the Second Respondent/Applicant – Elymar Investments Ltd.
Mr. Marcel El Daher with Mr. Alair Shepherd Q.C. Attorneys-at-Law for the Applicant/Respondent
Mr. Ryan Moseley and Ms. Mikala Springer Attorneys-at-Law for the Third Respondent
Sir Richard Cheltenham Q.C. and Ms. Shelly-Ann Seecharan Attorneys-at-Law for the First, Fourth and Fifth Respondents

DECISION

Nature of Application

[1] This interlocutory application was filed by the Second Respondent to this action, Elymar Investments Ltd, seeking an Order for specific disclosure of documents in the following terms:

> "1. The Fourth and Fifth Respondents within 14 days from the date hereof disclose the following documents under Part 28.5:
>
> (i) The minute books of all shareholders and directors meetings for the companies: Chefette Restaurants Ltd, Mill Reefs Company Ltd and Chef Food Manufacturing Inc for the years 1994 to present;
> (ii) Financial statements for Chefette Restaurants Ltd for the years 1994, 1995 and 1996;
> (iii) Agreement for sale and completion statement for the sale of Chefette Restaurant's Holetown property;
> (iv) MOU of 9th July 2003."

[2] The Affidavit in Response of the First, Fourth and Fifth Respondents was filed herein on April 30th 2014.

The Substantive Action and Background to this Matter

[3] The background to this application is the substantive action (itself a claim for disclosure among other relief being sought) by Jonathan Enterprises Limited the Applicant, filed March 27th 2009 seeking relief under **sections 228** and **235 of the Companies Act Cap. 308** (the oppression remedy), and/or under the inherent jurisdiction of the Court for oppressive, and unfairly prejudicial conduct.

[4] The principal company from which disclosure is sought in the substantive action and in this interlocutory application is Chefette Restaurants Limited, the Fourth Respondent.

[5] The Applicant and the Respondents are all shareholders/beneficial owners of the Fourth Respondent, and in the case of the Fifth Respondent, a director and alleged 'de facto' controller of the First and Fourth Respondents.

[6] Chefette Restaurants Limited (hereinafter referred to as Chefette) is the owner of all the issued share capital of Mill Reefs Company Limited and Chef Foods Manufacturing Inc. According to the Applicant's Affidavit in Support filed March 27th 2009, Mill Reefs Company Limited owns the real estate and Chef Foods Manufacturing Inc. looks after the purchasing of foods and processes the food for sale to Chefette.

The Ancillary Claims

[7] By subsequent Application, the Second and Third Respondents have sought and been granted leave (see Order of **Richards J.** on July 5th 2012) to file an Ancillary Claim respectively, against the First, Fourth and Fifth Respondents. These Ancillary Claims are

largely the same, namely an Order directing the First, Fourth and Fifth Respondents to purchase their shares at a price to be agreed or set by the Court, or by an independent valuer to be agreed between the parties, or in default of agreement a panel of three arbitrators to be appointed; and for such further and/or other relief as the Court may deem necessary and just.

[8] These parties all make the same or similar complaint as the Applicant, which is generally, that the business and affairs of the Fourth Respondent and the powers of the Directors of the Fourth Respondent have been carried on or conducted in a way that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of the Second and Third Respondents. In other words, that the conduct of the First, Fourth and Fifth Respondents has been oppressive and prejudicial to ALL the minority shareholders.

[9] In effect, the "fight" is between the Applicant Jonathan Enterprises Ltd, the Second Respondent Elymar Investments Limited and the Third Respondent Freant Limited against the First Respondent Ryad Investments Limited, the Fourth Respondent Chefette Restaurants Limited and the Fifth Respondent Assad Haloute. The director and shareholder of the Applicant company specifically states in his first Affidavit in Support that he has no complaints against either the Second or Third Respondents and maintains that they are not guilty of misconduct, but that the Applicant Company in joining them as Respondents, is merely seeking to protect its rights and interests given that these Respondents may have an interest in the outcome of the case.

The Case for the Second Respondent/Applicant

[10] At the hearing of this application counsel for the Second Respondent/Applicant revealed that only items 2(i) and (ii) were being pursued, as item (iii) had been disclosed in the (First, Fourth and Fifth) Respondents' Affidavit of Defence of March 28th 2014 and item (iv), the request for an MOU of July 2003 was being abandoned.

[11] Counsel for the Second Respondent/Applicant grounds his claim in **CPR Part 28.5** which speaks to orders for Specific Disclosure and what they may contain. **Part 28.6** speaks to the criteria for specific disclosure.

[12] The submissions of the Second Respondent/Applicant were as follows:

(i) The Minute Books of all Shareholders and directors meetings for Chefette Restaurants Ltd, Mill Reefs Company Ltd and Chef Food Manufacturing Inc. for the years 1994 to present:

The inclusion of Mill Reefs Company Limited and Chef Food Manufacturing Inc. in the request for disclosure is rationalized on the basis that they are wholly owned subsidiaries of the Fourth Respondent and they are intricately involved in the business of their parent. He adverts to the fact that his client and the Third Respondent were removed as directors in November 2003 as a consequence of which, they were thereafter not privy to the contents of the minutes.

[13] In his submission counsel argued that the minutes of the directors meetings are relevant to show how the Fourth Respondent has been managed to the (former) directors'

exclusion for the last eleven (11) years, and that this disclosure is essential to the Court determining how the company was run and whether it was run in an oppressive and prejudicial manner.

[14] He submits further, that these are "train of inquiry documents" as they deal with the management and operation of the Company and so, may lead to a "train of inquiry" that may assist the Second and Third Respondents and the Applicant to advance their case and perhaps undermine the other side's case. Interestingly, he used these words: "We have no alternative but to speculate."

[15] He strongly denies that this is a question of 'fishing' and states further that the onus is on the other side to put everything on the table and not just those documents that assist you (counsel accused the Fifth Respondent of 'cherry picking' which documents he disclosed and failing in his duty of 'full disclosure' as required by CPR).

(ii) Financial Statements for Chefette Restaurants Ltd for the years 1994, 1995 and 1996:

[16] No specific submission was made with respect to these documents, and it was assumed by this Court that they fell under the broad submission by counsel that they were "relevant" documents necessary "for the fair disposal of the case".

[17] It was the general submission of counsel and (presumably) the foundation of his case of shareholder oppression, that this was primarily a family business with full disclosure and involvement of all the shareholders in the operations of the Fourth Respondent; and that by the termination of the Applicant, Second and Third Respondents directorships in the company, these parties have since 2003 been completely in the dark, having been relegated to shareholder status and the limited information which the Companies Act legally allows them to obtain.

[18] As stated by counsel, at the heart of this application (and that of the Ancillary Claims) is to have the Fifth Respondent buy their shares at their fair market value.

[19] Counsel made the significant submission that, in the determination of what is relevant, the Court must make that determination in the context of the overall story and not just in the context of the pleadings. In the interest of fairness, all facts and circumstances must be relevant considerations to the Court as to what or, if any remedies are appropriate.

The Case for the First, Fourth and Fifth Respondents

[20] The above Respondents have opposed this application for the following reasons:

1. That the Second Respondent has merely made a bald assertion that the requested financial statements and minutes of the Fourth Respondent are relevant, but has failed to demonstrate their relevance to the issues in dispute in the proceedings;

2. There is no obligation by the Fourth Respondent to disclose minutes of directors meetings to shareholders;

3. The Fourth Respondent in accordance with its statutory duty under **section 170 of the Companies Act Cap. 308** maintains a minute book of shareholder meetings which a shareholder or its agent may view during usual business and no request has been made by any shareholder;

4. As regards the shareholders' and directors' minute books for Mill Reef Company Ltd and Chef Food Manufacturing Inc., these two companies are not parties to these proceedings and further, no allegations of shareholder oppression have been made against them.

[21] Generally, it was counsel's submission that the Second Respondent/ Applicant was 'fishing' and commended to the Court the judgment of Lord Justice Chadwick in the case of **Harrod's Ltd v Times Newspaper Ltd and Ors [2006] EWCA Civil 294** where Chadwick LJ stated that there must be some demonstrated relevance to the pleadings and to the issues to be determined: see also **Simba-Tola v Trustees of Elizabeth Fry Hostel [2001] EWCA Civil 1371**.

[22] Further, counsel submitted that Mr. Gale's reference to "train of inquiry" is a consideration under Standard Disclosure and not necessarily to Specific Disclosure where the considerations are Admissibility and Relevance. Counsel submitted that the case of **Nichia Corporation v Argos Ltd [2007] EWCA Civil 741** demonstrates that the Court now has a greater responsibility to scrutinize applications for Specific Disclosure for the reasons set out in that decision.

[23] She submitted that the Second Respondent/Applicant is not at liberty to examine every decision of the Board for the last twenty (20) years in the hope of strengthening its case and making new allegations. To do so, it would be embarking on a 'roving inquiry' which is impermissible in law. Counsel reiterated that the boundaries of the discretion to be applied by the Court are clear; it is limited to relevance either to the issues pleaded or to credibility.

[24] In conclusion, she submitted that the Second Respondent/Applicant simply has not met the legal criteria to enable this Court to exercise its discretion to order the disclosure requested.

The Case for the Third Respondent

[25] The Third Respondent made no response to the Application.

The Applicant's Response to the Application

[26] Counsel's submission was limited to his forceful observation that the documents exhibited in the Fifth Respondent's recent Affidavit of March 28th 2014 were not disclosed in the standard disclosure (that is, his List of Documents of June 11th 2010). This, he submitted, is a critical observation as a witness may seek to rely on a document

that was not disclosed. If that happens he would have to make an application to strike out those documents. He submitted further that this was evidence of withholding when the first List was filed.

[27] Secondly, and in response to the fact that the Fifth Respondent exhibited some of the Minutes and not all, he posed the following question: Can the Fifth Respondent say that the other Minutes (that is the Minutes being sought in the application for specific disclosure) do not touch on the question in issue when the lie has been put on his standard disclosure?

[28] He indicated that this was all he wanted to say in support of the Application.

Discussion

CPR Provisions on Specific Disclosure

[29] **Part 28 of the Supreme Court (Civil Procedure) Rules (CPR) 2008** speaks to disclosure and inspection of documents.

[30] **Part 28.1(4)** provides a definition of 'relevance'. It states as follows:

> "For the purposes of this Part,
>
> (a) a document is "directly relevant" if
>
> (i) the party with control of the document intends to rely on it;
>
> (ii) it tends to affect adversely that party's case; or
>
> (iii) it tends to support another party's case;
>
> (b) the rule of law known as "the rule in Peruvian Guano" does not apply to make a document "directly relevant".

[31] **Part 28.5** sets out what a party against whom Specific Disclosure is sought is required in law to disclose. **28.5 (1)(b)** uses the term defined above, that is, "directly relevant". In effect, what is being required here is that where the Court makes an order for specific disclosure, a party must disclose the documents specified in the order, "directly relevant" to the issues in the proceedings.

[32] **Part 28.6** is critical in this exercise as it enumerates the criteria for ordering specific disclosure as follows:

> "(1) When deciding whether to make any, and if so what, order for disclosure, the court must consider whether the contemplated order for disclosure is necessary, or necessary at that stage of proceedings, in order to dispose fairly of the litigation or to save costs.
>
> (2) The court must have regard to

(a) the likely benefits of the disclosure contemplated by any party;

(b) the likely burden in time, cost and otherwise of such disclosure; and

(c) whether it is satisfied that the financial resources of the party against whom the order would be made are likely to be sufficient to enable that party to comply with any such order.

(3) Where, having regard to sub-rule (2)(c), and in all the circumstances, the court would otherwise refuse to make an order for disclosure sought by a party, it may make such an order on terms including that the party seeking that order must pay the other party's costs of such disclosure, either in any event or, alternatively, subject to further order."

[33] Lord Bingham in the case of **Tweed v Parades Commission for Northern Ireland [2006] UKHL 53** adroitly captures the 'pros and cons' of disclosure as follows:

> "[2] The disclosure of documents in civil litigation has been recognized throughout the common law world as a valuable means of eliciting the truth and thus of enabling courts to base their decisions on a sure foundation of fact. **But the process of disclosure can be costly, time-consuming, oppressive and unnecessary.**" (my emphasis).

[34] Loughlin and Gerlis in their text **Civil Procedure,** 2nd ed at page 435 under the rubric *Procedure for applying for Specific Disclosure* states that an application for specific disclosure:

> "… must be supported by evidence justifying the applicant's belief that documents have not been disclosed which should have been, or why wider disclosure than standard disclosure is necessary in this case, in order to satisfy the court that the application is not a 'fishing expedition'. The grounds must be set out either in the application notice itself, or in any supporting evidence."

[35] See also **Harrod's Ltd v Times Newspaper Ltd & Ors supra** where Chadwick J. citing **Gartside v Outram [1856] 26 LJ Ch. 113 at pages 114-115** observed that a party who seeks disclosure of documents should not be permitted to go on a roving exercise (fishing expedition). In that case the House found and stated:

> "[12] In my view the judge was plainly correct to approach the application for further disclosure on the basis that it was essential, first, to identify the factual issues that would arise for decision at the trial.

> Disclosure must be limited to documents relevant to those issues. And, in seeking to identify the factual issues which arise for decision at the trial, the judge was plainly correct to analyze the pleadings. The purpose of the pleadings is to identify those factual issues which are in dispute and in relation to which evidence can properly be adduced. It is necessary, therefore, to have in mind the issues as they emerge from the pleadings and are relevant in the present context."

[36] In the Anguillan case of **Lindsay v Webster Dyrud Mitchell (a Partnership) et al AXAH CV 60 of 2003 (decision of April 2007)** George- Creque J (as she then was) had this to say:

> "[5] It is to be noted, that CPR 2000 specifically rules out the application of the "Peruvian Guano Test" which test, succinctly stated, treats as relevant any document which may fairly lead a party to a train of inquiry which may uncover information which may either advance his own case or damage the case of his adversary.
>
> [6] Part 28.5 CPR 2000 deals with Specific Disclosure. Subparagraph (5) says that 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. I am unable to discern any substantive difference between the use of the expression "matters in question" as used in the provisions for standard disclosure in Part 28.4 and the expression "matters in issue" used in Part 28.5 dealing with specific disclosure. The following quotations from the Text "Discovery" (Litigation Library – by Paul Matthews & Hodge M. Malek) at paragraph 4.11 warrants reference: "If an allegation of the plaintiff is admitted, then it is not a "matter in question" and there can be no discovery in relation to it." At paragraph 4:13 the authors say this: "The fact that an issue is raised in the pleadings is not determinative as to whether it relates to a matter in question. Discovery is not required of documents which relate to irrelevant allegations in pleadings which even if substantiated could not affect the result of the action."
>
> [7] With regard to specific disclosure, quite apart from the direct relevance test, Part 28.6 CPR 2000 imports a further bar which must be met. It must be shown that such disclosure is necessary in order to dispose fairly of the claim or save costs. As to what "necessary" means in this context, in the case of **Tele-Art Inc & Anr. v. Ming Kown Koo (ECSC – Civil Appeal No. 3 of 1996 (BVI)** Floissac C. J cited a passage from the judgment of Lord Salmon in **Science Research Council v. Nasse [1980] AC 1028 at 1071** where he opined as to its meaning, thus: "it .... includes the case where the party

> applying for an order for discovery and inspection of certain documents could not possibly succeed in the proceedings unless he obtained the order; but it is not confined to such case. Suppose, for example, a man had a **very** slim chance of success without inspection of documents but a **very** strong chance of success with inspection, surely the proceedings could not be regarded as being fairly disposed of, were he to be denied inspection."

[37] This case law and discussion makes clear that the intent of the 'new' Rules is to control unnecessary and disproportionate expense. These cases make the distinction between Primary and Secondary evidence, which (secondary evidence) must be kept "firmly in its place": **Nichia Corporation v Argos Ltd supra**. The inclusion of unnecessary secondary evidence generally leads to increased costs.

[38] See also **Simba-Tola v Elizabeth Fry Hostel supra** and (closer to home) **Rohit Persaud v Planning Development Authority Grenada GDAHCV 2010/0564 (decision of May 29th, 2014)**.

Specific Discovery by a Non-Party

[39] The Barbados and ECSC CPR do not contain any specific power by the court to order disclosure by a person who is not or whom it is not intended to join as a party: see **The Caribbean Civil Court Practice 2011 Note 24** and **Mable Phillip (Acting through her Attorney Nancy McKenzie Greene) v Corrine Clara GDAHCV 2013/0362 at para. 24 (decision of June 30th 2014)**.

[40] This is directly applicable to the requested disclosure of Shareholders and Directors' minutes of Mill Reefs Company Ltd and Chef Foods Manufacturing Inc. which said companies are not parties in this matter.

Disposal

Are the Documents being sought Relevant to the Issues in these Proceedings?

[41] The accepted test in a determination by a Court as to whether to exercise its discretion to order Specific Disclosure is that of: (1) Relevance, (2) Proportionality and (3) the Overriding Objective (dealing with cases justly and reasonably).

[42] Generally, the Court seeks to ensure that the parties, so far as possible, and so far as economically reasonable, have access to documents which might help their case: see **Blackstone's Civil Practice 2010 at 48.31; Whitebook Civil Procedure Vol. 1 at 31.12.2; Commissioner of Inland Revenue v Exeter City AFC Ltd [2004] BCC 519.**

[43] This determination can only be made against the backdrop of the circumstances of the action.

[44] In her submission, counsel for the First, Fourth and Fifth Respondents made a useful analysis, which not being contradicted by the Applicant, Second and Third Respondents, this Court accepts (having also reviewed all the affidavits) as an accurate analysis.

[45] It is her submission that this Oppression Action references four (4) major allegations as follows:

1. The sale of the Holetown property and the use of its funds;
2. The termination of J. Naime as General Manager in 2003;
3. The shareholders' claims that they are entitled to participate in the management of the companies either directly or through their children (that is, the wrongful removal of the Claimants as directors); and
4. The acquisition of the majority shareholding by the First Respondent Ryad Investments Ltd.

[46] This is significant in so far as the Court can only satisfy itself as to "relevance" by an analysis of the pleadings, particularly the factual issues in dispute on the pleadings: see **Harrod's Ltd v Times Newspaper Ltd.**

[47] It is of note that the Second Respondent/Applicant's application is phrased in very broad and general terms, that is, that this disclosure is necessary to "fairly dispose of the litigation".

[48] Since the directorships ended in 2003, the "relevance" of financial statements for the periods 1994, 1995 and 1996 arises (there being no allegation that they were falsely prepared). In any event all the Applicants would have previously been provided with copies of these documents when they were directors of the Company.

[49] The same query arises with respect to the Minutes of Shareholder and Directors' Meetings for the period 1994 to present.

[50] This Court accepts the submission of the Respondents, that pursuant to **section 170 (1)(b)** the minutes of shareholders meetings are available for inspection at the Fourth Respondent's registered office, but there has never been a request for inspection of these documents. In consequence, the application for an order for specific disclosure of the minutes of the shareholders meetings appears to be premature.

[51] With respect to the minutes of directors meetings, there is no corresponding entitlement under the **Companies Act** and the Applicant has failed to satisfy this Court of the "direct relevance" of these documents.

Conclusion

[52] Having considered the requirements of **CPR Part 28**, this Court holds the view that the Second Respondent/Applicant has failed to demonstrate the relevance, likely benefits, savings in time savings or otherwise to the issues outlined above.

[53] In applying the above Rules to the instant case, it can be said that the documents sought are "directly relevant" if (i) the First, Fourth and Fifth Respondents intend to rely on them; (ii) these documents adversely affect the First, Fourth and Fifth Respondents' case or (iii) the documents tend to support another party's case.

[54] It is not enough to state baldly that they are relevant to the "fair disposal" of the matter. Tightly drawn interrogatories may be the way forward in some cases. Consideration should be given by the Applicant to this modality.

[55] Certainly all of these documents were in the possession of the Applicants prior to 2003. It is also noted that the Affidavit of Assad Haloute of March 28th 2014 contains exhibits of minutes of the shareholders and directors in the various companies.

[56] The Second Respondent/Applicant has not demonstrated or satisfied the Court that this application is not a 'fishing expedition'.

[57] In view of the foregoing, this application is dismissed with costs to the First, Fourth and Fifth Respondents, assessed in the sum of $2500.00 plus VAT.

MARGARET A. REIFER
Judge of the High Court