

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT**

**CIVIL DIVISION**

**No. 1299 of 2010**

**Between**

**SOUTH CENTRAL ENTERTAINMENT INC.**

**CLAIMANT**

**-AND-**

**STERLING COMMUNICATIONS INC.**

**1<sup>ST</sup> DEFENDANT**

**SCOTT NEIL WEATHERHEAD**

**2<sup>ND</sup> DEFENDANT**

**MIX MEDIA SERVICES INC.**

**3<sup>RD</sup> DEFENDANT**

**Before the Honourable Madam Justice Jacqueline A.R. Cornelius, Judge of the High Court**

**2015: March 24;**

**November 13;**

**Ms. Lani Daisley with Ms. Marilyn Moore of Messrs Elliot D. Mottley & Co. for the Claimant**

**Mr. Bryan Weekes of Messrs Bryan I. Weekes & Associates for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants**

**DECISION**

[1] The claimant (South Central Entertainment) in this matter, which is a promoter of entertainment events, was engaged as a marketing consultant for the defendants. The first defendant ("Sterling") is a provider of communications services. The second defendant ("Weatherhead"), in conjunction with Sterling is the proprietor of Mix 96.9 FM Radio Station.

Mr. Weatherhead is a Director of the first defendant and by virtue of a form of registration dated 22<sup>nd</sup> March 2004 trades as Mix Media Services carrying on the business of advertising, but ceased trading under that name since 2008. The third defendant, Mix Media Inc. carries on the business of a radio station. Except for Mr. Weatherhead, all are Barbadian companies.

- [2] On 22<sup>nd</sup> September 2010, South Central filed a claim form in seeking damages for breach of contract. They claimed that the defendants failed to settle outstanding debts as per invoices submitted by the claimant for payment. South Central stated that it was agreed that he would receive a 25% commission on all paid media spots on the radio station Mix 96.9 FM that it obtained.
- [3] On 8<sup>th</sup> May 2014, upon Pre-Trial Review coming on for hearing, this Court made an Order For Specific Disclosure for, *inter alia*, (1) a list of documents to be filed by the Third Defendant and (2) for specific disclosure (in accordance with ***Supreme Court (Civil Procedure) Rules 2008 (CPR)***) with reference to invoices dated 20<sup>th</sup> December 2008 – 30<sup>th</sup> July 2009. Part 2 of the Order for Specific Disclosure related to four things;
- (a) Corresponding booking orders and/or requests for radio time;
  - (b) Relevant radio logs for the period
  - (c) Invoices for Mount Gay Distilleries, Banks Holdings for the period, and

(d) Actual radio advertisements that have been played to be filed by 27<sup>th</sup> June 2014.

[4] The Order was filed by the claimant's Attorney on 12<sup>th</sup> December 2014. Part 4 of the Order was in the following terms

“the sanction which may be imposed for failure to comply with the foregoing directions is that the pleadings may be struck out and Judgment with costs entered in favour of the other party.”

### **The Application**

[5] The claimant's application, filed 16<sup>th</sup> October 2014, is to strike out the Statement of Case filed by the 1<sup>st</sup> and 2<sup>nd</sup> defendants. Ms. Daisley argues that there has been non-compliance with Part 28 CPR and/or the Master's order by the 1<sup>st</sup> and 2<sup>nd</sup> defendants. She stated that where there was non-compliance, the Court could always strike out. Part 28 dealt with disclosure and inspection of documents and the obligation to comply with this part is specific to each party. Part 28 specified the requisite sanction and where the party was a defendant, the Court could order Judgment.

[6] The defendants argue that the claimant's application does not state the exact complaint. They assumed that it was a failure to file. They stated that they had not flouted the rules and further that the Order was one for specific disclosure and not for standard disclosure. Mr. Weekes stated further that

there was no clarity with respect to what was necessary for standard disclosure. CPR 28.4 dealt only with directly relevant documents and it was sufficient to say that they had no relevant documents. He stated further that if they had relevant documents they could not rely on them and in his view, striking out was very harsh.

### **The Law**

[7] Part 28 of the **CPR** sets out the provisions for disclosure and inspection of documents. In this matter, the court is particularly concerned with parts 28.4 and 28.5 which provide as follows:

28.4 Where a party is required by any direction of the court to give standard disclosure, that party must disclose all documents which are directly relevant to the matters in question in the proceedings or to any particular issue which may be specified by the court in the direction.

28.5 (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.

### **The Instant Matter**

[8] The order for disclosure was made during pre-trial review on 8<sup>th</sup> May 2014 but not filed until 12<sup>th</sup> December 2014. The defendants were specifically ordered to disclose a number of documents subject to the possibility of their pleadings being struck out and judgment with costs entered in favour of the

claimants. To date there has been no compliance with the Order by the defendants yet they suggest that they would be happy to comply with the Order. They state further (1) that it is sufficient to say that they have no relevant documents; and (2) that they would be happy to comply and striking out was quite harsh.

[9] What then must a court consider in these circumstances?

[10] The sanction under Part 28.13 is quite clear in instances of failure to comply with disclosure orders. Part 28.13 (2) (c) states that ‘where the party in default is the defendant, there shall be judgment or an Order against him’.

[11] At the date of hearing in March 2015, the defendants would have had 10 months to comply with the order of the Court, but have failed to do so. The flaw in Mr. Weekes’ argument is that it referred to the elements of standard disclosure and the order in question was one of specific disclosure.

### **DISPOSAL**

[12] Despite the failure of the defendant with respect to the order, the Court considers that the matter should not be immediately struck out. Instead, the order of the Court is that unless the defendants comply with the Order for specific disclosure given on 12<sup>th</sup> December 2014 within 14 days then the defendants case will stand as struck out and Judgment entered for the claimants accordingly.

[13] The claimants shall have her costs for one Attorney-at-Law to be assessed if not agreed

**Jacqueline A.R. Cornelius  
Judge of the High Court**

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