

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

Civil Suit No. 1132 of 2012

BETWEEN:

ST. PHILIP LAND LIMITED (IN LIQUIDATION) CLAIMANT

AND

CHIEF SURVEYOR DEFENDANT

Before Master Deborah Holder, BSS, Master of the High Court

2015: December 14

Appearances:

Mr. Dale Marshall, Q.C. for the Claimant

Ms. Donna Brathwaite, Q.C. for the Defendant

INTRODUCTION

[1] This is an interlocutory application by the Claimant for specific disclosure pursuant to Part 28 of the Supreme Court (Civil Procedures) Rules 2008 (C.P.R.).

[2] The Claimant seeks specific disclosure by the Defendant of the full contents of the files of the Chief Town Planner relating to town planning applications numbered 1757/10/95D, 1289/06/98D, 1063/01/02D and 1346/05/04D and the files of the Ministry of Public Works, including a file with the Reference number 27T87, which

relate to the abandonment of Fairfield Road in the parish of St. Philip by the Crown and the construction of an alternative road by the Claimant.

[3] The Defendant manages the Lands and Surveys Department and advises the Ministry and the Government on matters relating to surveying and mapping.

[4] The substantive matter began on 2nd July 2012 when the Claimant filed a Fixed Date Claim Form seeking compensation in the sum of \$53,494,686.00 together with interest thereon at the rate of 6% per annum in respect of lands at Bushy Park, St. Philip (the land) which were compulsorily acquired by the Crown on 1st July, 2010.

FACTS

[5] The application was accompanied by the affidavit of Mr. David Rolph, a joint liquidator of the Claimant's company. He stated that by letter the Claimant, through its attorney, submitted a claim for compensation in the sum of \$53,494.686.00. The Chief Legal Officer of the Ministry of Housing and Lands rejected the said claim and instead offered compensation in the sum of \$17,335,000.00 with interest thereon at the rate of 6% from 12th July, 2010. This was rejected by the Claimant.

- [6] The Claimant contended that the land was being used for commercial purposes, namely the construction of a golf course, hotel, villa plots, shops, auxiliary building and subdivision of lots for residential use, consequently the amount requested was reasonable.
- [7] Mr. Rolph, in support of this contention, outlined the planning history of the estate. He noted that in the last twenty (20) years, a number of planning applications were made for the development of the golf course and that each application built upon the other. Further, that in 1993, an application numbered 0031/01/93D was made to the Chief Town Planner for permission to develop a golf-centred resort on the land and this was given outline approval on 3rd September, 1993. Another application numbered 1757/10/95D was made seeking permission to construct a road to be used to divert traffic around the perimeter of the golf resort development and permission was granted on 18th June, 1996.
- [8] He said that the Claimant sought and obtained permission of the Government of Barbados to abandon 750 metres of an existing road at Bushy Park subject to the construction of the perimeter road. The Cabinet approved the application on 30th August, 2001.

- [9] The Claimant made another application number numbered 163/01/02D for permission for a subdivision, which separated part of the Claimant's original estate and further subdivided the tenantry land into lots for residential, communal open space and recreational purposes. The Chief Town Planner approved this application on 4th April, 2003.
- [10] Mr. Rolph referred to application numbered 1346/05/AD, where the Claimant sought permission to develop the golf course, a hotel, villa plots, apartments, shopping facilities and the subdivision into lots for residential purposes. The application was approved on 10th February, 2006.
- [11] He said that at the date of the acquisition the land was not being used for agricultural purposes since part of the land was under lease and being used for recreational purposes as a motor track and the remainder was totally uncultivated. He also said that application 1346/05/04D was valid and current and had been acted upon by the Claimant who took steps pursuant to the planning permission, in that the bypass road around the perimeter was excavated, filled and rolled and it only had to be paved and the plant nursery was put fully into operation.

- [12] The Claimant, through its agent Major Louis Belle obtained a valuation report from Franklin Group Inc. dated 1st April, 2009 showing that the market value of the land was \$53,494,686.00.
- [13] Ms. Yolanda Alleyne, a Chartered Town Planner, filed an affidavit on behalf of the Claimant. She stated that the Minister responsible for Town and Country Planning had the legal authority to issue planning permission for agricultural land of more than two (2) acres.
- [14] She stated that the Chief Town Planner approved planning applications 1757/10/95D, 1289/06/98D, 163/01/02D and 1346/05/04D without referring to the Minister pursuant to Section 18 of the Town and Country Planning Act Cap 240. This implied that he did not hold the view that the land was agricultural land. Otherwise, he would have been obliged by law to refer the decision to the Minister.
- [15] She stated that the Barbados Development Plan showed areas approved as golf course sites in the island and that Bushy Park was named as one of those sites to be a golf course by 2003. She argued that to state that the lands at Bushy Park were agricultural lands was contrary to the Physical Development Plan, which at the time of acquisition considered the lands to be golf course lands.

- [16] The Defendant and other public officers submitted affidavits.
- [17] The Chief Surveyor, Mr. Marcus Brathwaite verified that the requisite notices pertaining to Compulsory Acquisition were published, that the Governor-General authorised his entry on the said lands to do work connected therewith, that he delegated his authority to the Chief Technical Officer and that his department was responsible for the plans used for the Schedules used in the notices.
- [18] Valcia Stoute, Supervising Valuer of the Land Tax Department, indicated that at the request of the land owner, her department granted an agricultural rebate for the years 2002/3 and 2003/4. She presented a valuation report for the land prepared by her department on 16th August, 2012. She said that at the material time the land was valued at \$10,000,300.00.
- [19] The Chief Property Manager, Mr. Herman Smith, whose duties include the management of crown lands, stated that at the material time the land was undeveloped and disused agricultural land and that the sum being claimed as fair compensation by the Claimant was unreasonable. In his supplemental affidavit he produced a valuation report dated January 2013, prepared by BCQS International.

- [20] Mr. James Pollard, Senior Valuation Surveyor of BCQS International also filed an affidavit.
- [21] The Chief Town Planner, Mr. Mark Cummins, in his affidavit outlined his duties. He went through each application, and suggested that the Claimant had not fully outlined the planning history in that there was no mention of Application 1289/06/1998D.
- [22] With respect to the several applications, he detailed instances of non-compliance with specified conditions to which the permission was subjected and non-compliance with statutory requirements. He said that Application 1757/10/95D was for the construction of a road and not a golf course. Not only was there non-compliance with a condition of the planning permission but the requisite fees were not paid and the work *“was not done within the requirements of the grant of planning permission.”*
- [23] He said that Applications 1289/06/1998D was for construction of an 18 hole golf course, villa plots, apartments, shops for commercial use at Bushy Park. On 24th June, 2003 planning permission was refused because of deficiency of the Environmental Impact Assessment thus at that date there was no planning permission for construction of any golf course or ancillary facilities.

[24] He stated that permission was granted for the plant nursery, there having been no change of use of the land but “no site preparatory or engineering works were allowed.” He disagreed with David Rolph that the plant nursery was completely constructed and put into operation.

[25] Concerning the perimeter road, the Chief Town Planner stated that it was to provide a new public access and there were conditions precedent which were not challenged yet no work was carried out at the site. Also that it was erroneous to say that the road was “only awaiting paving” and that the Claimant never handed over a completed road to government.

[26] In his supplemental affidavit he responded to Yolanda Alleyne. He stated that the subject lands (Applications 1757/10/95D and 0163/01/02D) did not meet the two acre requirement for referral to the Minister responsible for Town Planning. In relation to applications 1289/06/98D and 1346/05/04D, the Physical Development Plan was in an advanced state of preparation and planning law allowed its use as “material consideration.” Even though the plan had categorized the site as a “golf course”, it was still necessary to submit a specific

planning application for the development and all relevant criteria had to be satisfied in order for it to be accepted.

[27] He also stated that the original application 0031/01/93D had lapsed and the land had reverted to agricultural land on the said date.

ARGUMENTS

[28] **Mr. Marshall, Q.C. made the following submissions:**

(1) The Court must consider whether the order sought was necessary to fairly dispose of the litigation. (2) In keeping with the overriding objective to deal with cases justly, the parties were under a duty to disclose documents which would assist either case. (3) With respect to the likely benefit of the disclosure, the contents of the files would demonstrate that the only basis for the construction of the road was to allow the Claimant to more effectively utilize the land for the purpose of the golf course and resort. (4) The road was constructed by the Claimant in pursuance of the planning permissions that were granted for the golf course and resort and that the said road was integral to the development. He referred to the affidavit of Major Louis Belle who stated that there were numerous consultations and meetings between the functionaries of the Crown and the Claimant's representative on the importance of the road to the development and that memoranda

had been exchanged between the parties. (5) The Chief Town Planner's assertion that the road was "only loosely connected to the resort" made this an issue, proof of which would be of benefit to the judge in ascertaining the value of the property which was compulsorily acquired. Also that the statements of the Chief Town Planner require greater clarity. (6) The discovery of the files would potentially save time and costs and would either support the Claimant's position or refute it. (7) The Crown maintains comprehensive files and it was relatively easy to produce them at minimal costs.

[29] To justify the application, he submitted as follows:

(1) They were aware that the Chief Town Planner's files contained much more than the applications and related permission. They were advised that the files contain "various documents such as internal memoranda, opinions, correspondence, plans, amended plans and other documents" which would provide a "full picture" of the matter to be determined by the court. (2) The road was to facilitate the development of the golf course and certain correspondence and memoranda on file would clarify this. (3) The files of the Ministry of Public Works were relevant because this Ministry would have been

required to consider the Claimant's request for the abandonment of the existing road and be satisfied that they were good and sufficient reasons for abandonment before seeking Cabinet's approval. (4) The Claimant intended to show that the land had the benefit of planning permission which was acted upon.

[30] **Ms. Donna Brathwaite, Q.C. made a number of submissions which will be specifically addressed.** However her main submission was that the order sought ought not to be granted because the application was a clear example of a fishing expedition. She argued that it was "inadequate in terms of its imprecision with respect to the specifics of the documents requested and also in terms of the lack of evidence relied upon in support of its application."

[31] Counsel cited *Mohammed Taranissi, ARGC Ltd. v British Broadcasting Corporation [2008] EWHC 2486* and submitted that on nearly every application for further or specific disclosure the concept of fishing would have to be addressed at some stage.

[32] She argued that disclosure in the hope of eliciting some impropriety was frowned on by the Courts. She referred to *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed*

and Small Businesses Ltd. [1982] AC 617 at 664 paragraphs C and

D, where **Lord Roskill** said:

“I would only add that Mr. Harvey (counsel for the Federation) urged that something advantageous, to his client might emerge on discovery. He submitted that your Lordships ought not to dispose of that appeal on the basis of the affidavit evidence alone. My Lords, the federation started that these proceedings on the basis of an affidavit, which was fully answered by the two affidavits to which I have just referred. With all respect to counsel’s argument for the federation I can see no reason to allow what I am afraid must necessarily regard as a fishing expedition in the hope of obtaining on discovery something which might counter that which appears so clearly from the affidavits filed on behalf of the Revenue.”

[33] She maintained that the Claimant was required to establish the precise documents requested, then outline the evidentiary basis on which the court could make the order.

LAW

[34] **Part 28 of the C.P.R.** sets out rules about the disclosure or discovery and inspection of documents.

[35] **Part 28.1(4)** defines relevance as follows:

- (1) “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".

[36] **Part 28.2(1)** A party's duty to disclose documents is limited to documents which are or have been in the control of that party.

- (2) For this purpose a party has or has had control of a document if
- (a) it is or was in the physical possession of the party;
 - (b) the party has or has had a right to possession of it; or
 - (c) the party has or has had a right to inspect or take copies of it.

[37] **Part 28.5** provides that:

- (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 application for specific disclosure may identify documents
 - (a) by describing the class to which they belong; or
 - (b) in any manner.

[38] **Part 28.6** sets out the criteria for ordering specific disclosure. It provides:

- (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.

DISCUSSION

[39] Firstly, I will address the initial submissions which were made by counsel for the Defendant.

- (1) *The application was procedurally flawed. On the face of it there was no rule pursuant to which the order was being made and the Court was left to do guess work.*

I agree that the Claimant did not state the rule pursuant to which the application was made but the Claimant did indicate that the application was made pursuant to Part 28 which deals with specific disclosure.

- (2) *The application ought to have been supported by an affidavit and it was not sufficient for the Claimant to say that the evidence could be taken from the affidavit of others.*

She relied upon **Part 11.4(5) of the C.P.R.** which provides that where evidence in support of an application is required it must be contained in an affidavit unless a rule, a practice direction or a court order otherwise provides.

Counsel also cited **Part 11.8.(4)(a)** which provides that the notice must be accompanied by any evidence in support.

Mr. Marshall, Q.C. contended that evidence in support of an application was not needed unless required by the nature of the case, a rule, a practice direction or a court order. He relied on **Part 11.4(3) of the C.P.R.**

It seems to me that the general practice is to provide a supporting affidavit but **Part 11.4(3) of the C.P.R.**, on which the Claimant relies allows flexibility.

In *Jonathan Enterprises Ltd. v Ryad Investments Ltd et al BB 2014 HC 78*, Reifer J, in dealing with an application for specific disclosure quoted Loughlin and Gerlis, “**Civil Procedure**” 2nd edition at paragraph 34 of her judgment. She said that an application for specific disclosure

“...must be supported by evidence justifying the Applicant’s belief that the 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.” (My emphasis)

In light of the flexibility of the rules and the fact that the Claimant did set out the grounds in the application itself,

I am prepared to hold that failure to file a supporting affidavit is not fatal to the application.

- (3) *Specific disclosure should not be given before standard disclosure. Standard disclosure was being by passed. The application for specific disclosure should be made after standard disclosure was given and documents inspected.*

Mr. Marshall Q.C. countered that standard disclosure was not necessary and that relevant documents could be secured by specific disclosure.

On this matter I am guided by **Blackstone's Civil Practice 2011 at Chapter 48.30** which states:

“Applications for specific disclosure are most frequently made after standard disclosure has been given and the disclosed documents inspected. There is no restriction in this respect and the court has jurisdiction to order specific disclosure before standard disclosure has taken place (Dayman v Canyen Holdings Ltd (2006) LTL 11/1/2006). An early application may not accord with the overriding objective particularly if its effect is to increase costs. Until an issue is pleaded specific disclosure will not be ordered. (Taranissi v B.B.C. [2008] EWHC 2486 OB LTL/24/10/2008.”

- (4) *The documents being sought for disclosure are not in the possession of the Defendant.*

Counsel for the Claimant did not respond to this submission.

Part 28.2(1) of the C.P.R. limits a party's duty to disclose to documents which are or have been in control of the party. Rule 2.(2) defines "control".

The Chief Town Planner and the Ministry of Public Works are not parties to this matter but the Chief Town Planner is a witness.

The C.P.R. is silent on the court's power to order specific disclosure by a non-party. However once proceedings have started the documents may be obtained by the issue and service of a witness summons. See **The Caribbean Civil Practice 2011 Note 24.18.**

Disclosure against non-parties will only be granted where the documents sought are relevant (as opposed to disclosable under standard disclosure). See **American Home Products Corporation v Novartis Pharmaceuticals UK Ltd (2001) LTL 13/2/2001.**
Blackstone's Civil Procedure 2011 Chapter 48.78.

The House of Lords case of *Conway v Rimmer and Another [1968] AC 910* is instructive with respect to documents which emanate from a government department, where there is an objection on the grounds of public interests. (See also **Part 28.14 C.P.R.**)

- (5) *The Claimant did not “first establish the precise documents requested and then outline the evidentiary basis” for the order being sought.*

In an application for specific disclosure the documents “must be described with reasonable precision. An 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 Neeham (1999) The Times, 5 November 1999.*” (See **chapter 48.30 Blackstone’s Civil Practice 2011**).

The Claimant relies on *Inland Revenue Commissioners v Exeter City AFC Ltd and Anor [2004] BCC 519.* In this case specific disclosure of the following documents was sought:

“All minutes, notes, memoranda, records, written communication, attendance notes, correspondence and/or other documents....”

“In this case extensive disclosure was ordered of Inland Revenue documents relating to voluntary agreement cases involving about 20 to 30 football clubs. The issue raised had national importance and the costs of the exercise were not disproportionate.” **(See Chapter 48.31 Blackstone’s Civil Procedure 2011).**

His Honour **Judge Weeks, Q.C.** said at paragraph 15 of the judgment:

“So I have to bear in mind the overriding objective of dealing with the case justly which, in my judgment, requires the parties, so far as possible and so far as economically reasonable, to have access to documents which may assist their case.”

I agree that documents “must be described with reasonable prevision.” The documents as described by the Claimant will be examined later. However there is no factual similarity between the Exeter City case and the instant case. It is clear that the national importance of the issue raised was a significant factor which the court considered in making the order. Also the order for the

disclosure of communication between the Inland Revenue and the football clubs “were train of enquiry documents which could have advanced the Defendant football club’s case that the Inland Revenue had not been unfairly treated by the club’s voluntary arrangement.”
(See Chapter 48:18 Blackstone’s Civil Procedure 2011.)

SPECIFIC DISCLOSURE

[40] In an application for specific disclosure, **Mohammed J** in the case of **FitzWilliam v Panton TT 2012 HC 241** quoted from “**Civil Procedure**” by Adrian Zukerman at paragraph 6 of his judgment, where at chapter 14.1 Zukerman said:

“[A]lthough the C.P.R. has introduced a few notable changes to discovery, the objective remains the same as before: to afford litigants access to relevant documentary materials in the possession of their opponents or in the hands of non-parties.”

[41] At paragraph 7 he continued to quote Zuckerman. He said:

“At 14.02, the purpose of disclosure is further elaborated upon.” There it is stated that: “access to relevant documentary material that is in the hands of other parties to the dispute promotes equality of arms and contributes to the ascertainment of truth. Mutual disclosure of information helps reduce information inequality and iron out resource inequality....Litigant access to all relevant

materials in the hands of opponents or others is necessary in order to ensure that the court is in possession of all pertinent evidence and that is able to ascertain the truth”.

[42] **The rules of court stipulate that the documents must be relevant within the principles relating to discovery or alternatively directly relevant to a specified issue or issues in the proceedings. (Part 28.5)**

[43] The case law also demonstrates that there must be some evidential basis on which documents are said to be relevant. See *Re Skyward Builders plc [2002] EWHC 1788 Ch.*

[44] Counsel for the Claimant submitted that relevance should be analysed by reference to the pleadings and factual issues. He cited *Harrods Ltd. v Times Newspapers Ltd. [2006] EW HC 83(Ch)* where this was done by the judge.

[45] In the said case at the Court of Appeal [2006] EWCA Civ. 294, Chadwick LJ said, at paragraph 12 of his judgment:

“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 would arise for decision at the trial, the judge was plainly correct to analyse the pleadings. The purpose of the pleadings is to identify the 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.”

[46] The Court of Appeal also made it clear that a roving exercise or fishing expedition was not permitted.

[47] In the case of *Mohamed Taranissi ARGC v British Broadcasting Corporation* [2008] EWHC 2486 (Q.B.) Mr. Justice Eady in an application for specific disclosure, outlined some general considerations:

(1) The starting point in this process is to identify the pleaded issues to which the documents in question are said to relate. (2) The fundamental criterion is whether or not the relevant documents will assist one party to establish its case or to undermine the other. (Help or Hinder Test). (3) The relevant train of enquiry is supposed to offer potential assistance in resolving pleaded issues. It is not supposed to enable a party to fish for a new case that hitherto was not pleaded. (4) Whether the additional disclosure sought is necessary and or proportionate to the illumination it is likely to throw on the pleaded issues. (5) The documents must, to whatever degree is appropriate, be shown to have a bearing on the resolution of a pleaded issue.

[48] The stated considerations are useful. However the old rule in the case of *Compagnie Financiere et Commercial du Pacifique v Peruvian Guano Co.* (1882) 11 QBD55 per Brett LJ at page 63 and commonly known as “**the Rule in Peruvian Guano**” is excluded by the C.P.R. Part 28.1(4). Therefore the concept of “train of enquiry” which was

allowed in the case of *IRC v Exeter City AFC Ltd and Anor (supra)* is no longer available.

[49] **In seeking to comply with the requirements of C.P.R. the principle of proportionality is applicable.** This principle limits the extent of the searches required to find disclosable documents.

[50] In *Harrods Ltd. v Times Newspaper Ltd. (supra)* Warren J at paragraph 37 of his judgment had this to say:

“Proportionality is of course important....It would be wrong to order disclosure which was hugely disproportionate to the information which could reasonably be expected to be relevant.”

[51] **The order must be necessary in order to dispose fairly of the litigation or to save costs.**

[52] In the case of *Science Research Council v Nassé [1980] AC 1028*, (in an application for the discovery of confidential documents) the House of Lords held that relevance alone though a necessary ingredient did not provide an automatic test for ordering discovery, the ultimate test being whether discovery was necessary for disposing fairly of the proceedings.

[53] In that case **Lord Salmon** at page 1071 paragraphs F and G defined “necessary” as follows:

“What does “necessary” in this context mean? It of course, 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 cases. Suppose, for example, a man has 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.”

[54] **The court must have regard to the likely benefits of disclosure and likely burdens in time or costs and otherwise and the financial resources of the party against whom the order is made.**

[55] The Claimant expects the files to be beneficial because they will show that the Ministry of Public Works had good reasons for the abandonment of the old road and that the purpose of the new road was to facilitate the golf course development.

[56] I can see no analogy between the “deep pockets” mentioned in *IRC v Exeter City AFC Ltd. & Enor (supra)*, to which counsel referred and the instant case but there may be some merit in his suggestion that the government’s filing system should allow easy retrieval at minimum costs. Nevertheless the amount of files and documents involved will determine costs.

DISPOSAL

- [57] The pleadings in this matter are extensive but I have analysed them and I agree that the main issue is whether the land was being used for agricultural purposes at the time of acquisition. Also to be determined is whether there is a relationship between the abandonment of Fairfield Road, the construction of the new road and the development of the golf course. In this regard the terms and conditions under which planning permission was granted will have to be assessed.
- [58] The Defendant's witnesses did respond to the issues but the Claimant seeks "further clarity."
- [59] Has the Claimant proved that the "full contents" of the files of the Chief Town Planner relating the four planning applications, and a file, probably no. 27T87 and "all relevant files" of the Ministry of Public Works should be disclosed?
- [60] The Claimant seeks access to:
- (1) "[I]nternal memoranda, opinions, correspondence, plans, amended plans and other documents."
 - (2) "[S]ignificant correspondence and memoranda between officers of the crown" with respect to the construction of the road. (Application 1757/10/95D).
 - (3) "[D]ocumentation which make it clear that that application was related to and must be viewed in the context of the development of a golf course." (Application 0163/01/02D).

- (4) “[D]ocumentation as is to be found on the files [which] will clearly inform and give body to the application and to the permission relating thereto.”
- (5) The Ministry of Public Works’ files which “will demonstrate that the raison d’être for the new road is to facilitate the development of the golf course.”

[61] Blackstone describes standard disclosure as “wide ranging”. By way of standard disclosure the Defendant is obligated to 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. **(Part 28.4)**. Consequently the Claimant is entitled to have documents which the Defendant intends to rely on, documents which tend to adversely affect the Defendant’s case or support the Claimant’s case.

[62] The Claimant must satisfy the court that it is entitled to “wider disclosure than standard disclosure” ¹ in order for the court to grant the order. To do this the criteria discussed above namely relevance, proportionality and fair disposal which is the overriding objective, must be proved.

[63] The Claimant seeks disclosure of what can be described as a “wide sweep” of documents, which are allegedly necessary for the fair disposal of this matter. These documents are found in an unknown

¹ “Civil Procedure” by Loughlin & Gerlis (ibid)

number of unnamed files which are not specifically identified and which may or may not exist. Consequently the Chief Town Planner and the Ministry of Public Works are being asked to open up their files to scrutiny.

[64] The Claimant expects access to documents which will give the “full picture”, “clearly inform and give body to”, “make it absolutely clear”, “clearly inform”, etc. In this regard the issues raised will be answered.

[65] The number of files requested from the Ministry of Public Works is not specified and the names are not given except that there may be a file with the number 27T87. The files of the Chief Town Planner are said to “relate” to each stated planning application and therefore can be said to be more narrowly identified.

[66] There is no indication of the number of documents on the files of the Chief Town Planner, the authors of the documents or the subject matter. Nevertheless the Claimant seeks access to all internal memoranda, opinions, correspondence, plans, amended plans and significant correspondence between officers of the Crown.

[67] Mr. Marshall, Q.C. mentioned numerous consultations and meetings between functionaries of the Crown and the Claimant’s

representatives on the importance of the road to the development and also that memoranda was exchanged between all parties.

[68] On the assumption that he deemed the subject matter of these meetings to be directly relevant to resolving the issues, one would have expected an application for the minutes of those specific meetings instead of the “full contents” of the Ministry’s files.

[69] The question that arises therefore is whether the Claimant has proved that every internal memorandum, opinion and piece of correspondence can be considered material to the issues in this case.

[70] The Claimant seems to have embarked upon a speculative exercise and in the process is utilizing the train of inquiry concept. This will be of no avail, the C.P.R. having abolished the **Peruvian Guano Rule** as previously indicated.

[71] In the case of *O. Co v M. Co. [1996] 2 Lloyds Reports 347* at 350-1 **Coleman J**, commenting on the said rule made a statement which in my view is applicable to this case. He said:

“This principle was never intended to justify demands for disclosure of documents at the far end of the spectrum of materiality which on the face of it were unrelated to the pleaded case of the plaintiff or defendant and which were required for purely speculative investigation...that formulation must not, in my judgment be understood as justifying discovery

demands which would involve parties to civil litigation being required to turn out their filing systems as if under criminal investigation merely on the off chance that something may show up from which some relatively weak inference prejudicial to the case of the disclosing party might be drawn”. (My emphasis). See also Blackstone Civil Practice 2011 Chapter 48:18.

[72] The Claimant’s request is extensive and clearly disproportionate. The “full contents” of all those files cannot reasonably be expected to be relevant. The files and documents have not been adequately identified or described. The broad expressions that documents will give the “full picture”, “clearly inform” and so, are not useful or meaningful.

[73] I accept the submission by Counsel for the Defendant that documents requested must be precisely ascertained and the evidentiary basis outlined. The Claimant has done neither. The documents are not described with “reasonable precision”.

[74] The Claimant has not done enough to prove that the “full contents” of the files are directly relevant. Apart from failing the direct relevance test, the Claimant has not proved that the order is necessary for fair disposal of the matter. And, blanket statements notwithstanding the Claimant did not demonstrate likely benefits and savings in time and costs.

[75] The Claimant has failed to persuade the court that this is not a fishing expedition.

[76] In any event, standard disclosure remains available to the Claimant.

Non-Party Disclosure

[77] I accept the Defendant's unchallenged submission that the documents requested are not in his possession and therefore he is not liable under Part 28.2 of the C.P.R. to disclose. This was essentially a non-party application and should have been treated as such by the Claimant.

CONCLUSION

[78] After having considered the arguments, the case law and the requirements of the C.P.R., I dismiss the application for the reasons stated above.

[79] I will hear counsel on costs.

**Ms. Deborah Holder, BSS
Master of the High Court**