



**IN THE SUPREME COURT
TURKS AND CAICOS ISLANDS**

ACTION NO. CL 158/22

BETWEEN:

DONNA LYNN CASTELLANO Plaintiff

-and-



MAVIS LOUISE ALLISON CLARK Defendant

Before: Registrar Narendra Lalbeharry

Appearances: Mr. Ariel Misick KC of Misick and Stanbrook for the Plaintiff/Applicant
Mr. Conrad Griffiths KC of Griffiths and Partners for the Defendant.

Hearing Date: 27th April 2023

Venue: Virtual

Date Delivered: 2nd June 2023

RULING

1. This is a ruling on the Plaintiff's Summons for Specific Discovery filed on 28th February 2023 ("the summons").

BACKGROUND

2. By Statement of Claim filed 8th November 2019, the Plaintiff, the former common law wife of Clark ('the deceased') and the named Executrix of the Last Will and Testament of the deceased filed an action against the mother of the deceased (Defendant) in TCI courts alleging that the Defendant has abused the court's process by applying for and receiving Letters of Administration in the TCI whilst proceedings on the issue of Probate of the Will of the deceased is still ongoing in the Manitoba Supreme Court. The Plaintiff alleges that the Letters of Administration is premature and seeks an order to that effect.
3. The Defendant denies that the Plaintiff is the former common law wife and submits *inter alia* that the deceased moved to TCI in early 2013. The Defendant alleges that there was no abuse of process as she disclosed all relevant matters relating to the court matter in Manitoba when applying for Letters of Administration in TCI. The Defendant filed a counterclaim for loss and damage on the basis that due to the current proceedings she is unable to sell the property forming part of the estate.
4. The Plaintiff in response claims *inter alia* that she and the deceased lived in a husband and wife relationship between the period 1998 and early 2016 which ended with a Separation Agreement in Manitoba in 2016.

THE SUMMONS

5. By way of the summons the Plaintiff seeks an order in the following terms:

- "1. Further Directions as to the future disposal of this action;
2. The Defendant be required to make an affidavit stating whether any of the classes of documents set out in subparagraphs 2(1) to 2(10) below which relate to one or more of the matters in question in this action are or have at any time been in her possession, custody or power and if not in her possession, custody or power, when she parted with it and what became of it:

(1) Scotia Bank account statements from 2013 to January 2015

- (2) All other Bank statements from 2013 to close of accounts, including Bank of America, TD Bank, CIBC
 - (3) Copy of full passport
 - (4) Suzuki copy of The Security and General Motor Insurance Schedule and/or Security and General satisfaction listing Rebecca as owner
 - (5) Police Reports regarding death and incidents relating to the death of Andrew Clark and the incident involving Rebecca Strohl's unlawful entry into the deceased's condominium unit.
 - (6) Any surety/bond upon Mavis Clark relating to her acquiring and being given access to assets of the deceased prior to the grant of representation.
 - (7) Vehicle repair documentation to Avalanche and Suzuki pursuant to approved 2018 insurance claim (Grace Bay Motors)
 - (8) Interim estate accounts to date
 - (9) Financial report on Alexandra Resort (condo 4504) for 2018-current
 - (10) IMG Insurance receipt \$25k repatriation of deceased body to Manitoba
 - (11) CG Bytes Corporation financial overview 2018- current."
6. The affidavit in support of the summons was sworn to by Ms. Shanique Been a legal secretary with the firm of Misick & Stanbrook. She referred to an order dated 20th July 2022 of Hylton J K.C. (Ag), which included an order for discovery. Ms Been indicated that the Plaintiff had not complied with the order and by letter dated 14th February 2023 and by email of 21st February 2023 the Plaintiff sought to correct his non-compliance, but received no response.
 7. Ms. Been further swears that after exchange of documents on 21st and 24th of November 2022, by letter dated 19th January 2023, a request was made for documents from the defendant not included in discovery, but no response was received.
 8. Ms. Been swears that all requested documents would have been in the possession of the deceased, and due to the grant issued to the Defendant, it is her belief that the Defendant has them in her possession and that "[a]ll of the documents requested relate to one of more of the matters in question in this action".
 9. Mr Misick KC submits that the application is necessary due to the Defendant's failure to respond to requests made for specific discovery.
 10. At the hearing of this Summons on the 27th April 2023 the Court was informed by Mr Misick KC that the request for specific discovery of documents mentioned at sub-

paragraphs 2 (3) to (11) of the Order was not being pursued, instead, only the documents mentioned at sub-paragraphs 2 (1) and (2) of the Order (“the bank statements”). I then directed that, Skeleton Arguments be filed by the Plaintiff by 11th May 2023 and by the Defendant by 12th May 2023.

PLAINTIFF’S SUBMISSIONS

11. The Plaintiff’s application for specific discovery is made pursuant to Ord. 24 r. 7 and 8. Mr. Misick KC submits that the bank statements go to the issue of whether the parties were cohabiting in a conjugal relationship up to March, 2016 which is an important consideration in determining whether the Plaintiff was receiving financial support from the deceased before his death. Mr. Misick KC avers: -

- i) The bank statements sought, relate to the broad question of the date of separation of the parties. They are likely to shed light on one of the relevant factors, namely, financial support.
- ii) Financial support is a fact, but not a material fact which must be pleaded. It is evidence of the existence of conjugal relationship.
- iii) The bank statements are in the hands of the Defendant.
- iv) Disclosure of the bank statements is necessary for the fair disposal of the action.
- v) The bank statements sought, other than those related to Scotiabank, are relevant to the question of dissipation.

12. Mr. Misick KC referred to **Berkley Administration Inc. v McClelland [1990]**, where Mustill LJ restated the principles under Ord. 24 r. 7 as follows:

“(1) There is no jurisdiction to make an order under Order 24, rule 7, 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.

(2) When it is established that those three prerequisites for jurisdiction do exist, the court has a discretion whether or not to order disclosure.

(3) The order must identify with precision the document or documents or categories of documents which are required to be disclosed, for otherwise the

person making the list may find himself in serious trouble for swearing to a false affidavit, even though doing his best to give an honest disclosure.

13. On the issue of whether the documents exist and are within the Defendant's power, Mr. Misick KC submits that there is a presumption that the documents exist, since the Defendant has not claimed they do not exist, but instead claim disclosure is not justified. He further asserts that the Defendant is in control of the requested documents as she was appointed the sole personal representative of the deceased's estate on 27th June 2019 and thus would be in possession of all documents forming part of the estate including access to the respective bank accounts.
14. On the issue of whether the requested documents relate to the matter in issue, Mr. Misick KC referred to the following authorities:

"Compagnie Financiere du Pacifique v Peruvian Guano Co. [1882] 11 QBD 55 at 63 – Brett LJ ruled "that every document relates to the matters in question in the action which not only would be evidence upon an 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 to damage the case of his adversary.

Thorpe v Chief Constable of Greater Manchester [1989] 1 WLR 665 – The court considered that Ord. 24 r. 8 refers to documents which are necessary, for disposing fairly of the cause or matter...

Chang Hung v Yung Kwong Chung [2009] HKEC 74 – DJ *It may be argued that what are "matters in question" should be deduced from the pleadings, and the distinction between a "matter in question" and a "pleaded issue" is a distinction without difference.* In my view while it is basically correct to say that relevance is determined by reference to the pleadings, for discovery purposes one is not concerned with the detailed particulars of the parties' pleaded case. Rather one is concerned with the pleaded claims or defence in the broad sense. In reference to the case of **O Company v M Company [1996] 2 Lloyd's Law Rep 347** and relying on the test formulated by Brett LJ it was stated that the test is not one of relevance to a pleaded issue, but whether the document relates to a matter in question. He further stated that "*I agree with Coleman J. For the purpose of discovery, the relevance of a document should not be solely tested against the detailed particulars pleaded by parties. It is the pleaded case of the parties in the broad sense that one should be concerned with. A document may be generally relevant to a party's case as pleaded (many so-called "background documents" are of this nature) although its relevance cannot be*

specifically pinned to some pleaded particulars. For discovery purposes, the pleadings have to be looked at broadly.”

15. Mr. Misick KC submits further that they requested bank statements from 2013 onwards, but the Defendant has provided statements only for the period 2015-2018.

DEFENDANT’S SUBMISSIONS

16. Mr. Griffiths KC submits that for the present purposes of specific discovery, the relevant issue in the action involves a claim by the Plaintiff that she and the Deceased (the son of the Defendant) were in a ‘common law’ relationship and that a formal separation agreement did not terminate the Plaintiff’s rights under a will as a matter of Manitoba law. The Defendant alleges that the Deceased and the Plaintiff had lived separate and apart prior for 3 years prior to his death. This is disputed by the Plaintiff. It is alleged the Will and Separation Agreement are governed by Manitoba law.

17. Mr. Griffiths K.C admits that, the questions of whether the Deceased and the Plaintiff:

- (i) lived separate and apart for three years prior to his death (per the Defendant in her Amended Defence and Counterclaim), and

conversely, whether they cohabited (per the Plaintiff in her Amended Reply and Defence to Counterclaim), are issues in the Action.

18. He refers to the fact that the Summons is issued under O. 24, r. 7, but notes that this is not mentioned in the Summons. He also refers to the notes at 24/7/2 on page 471 of the White Book (3rd paragraph) which provides:

“The second (and more important) qualification is that under the present rule an application may be made for an affidavit as to specific document or classes of documents. This must be supported by an affidavit stating that in the belief of the deponent the other party has or has had certain specific documents **which relate to matters in question**. But this is not sufficient unless a prima facie case is made out for (a) possession, custody or power, and (b) relevance of the specified documents.

- (a) there is sufficient evidence that the that the documents exist which the other party has not disclosed; (b) **the document or documents relate to matters in issue in the action**; (c) there is sufficient evidence that the document is in the possession, custody or power of the other party.”

(emphasis added)

19. Mr. Griffiths KC further submits in relation to this point that *"It is now conceded by the Plaintiff that the items listed at 2 (3) to (11) in the Summons are not relevant and are not pursued which, perhaps, is indicative of what the Defendant submits is an over reach in the Summons"*.
20. As it relates to the bank statements, Mr. Griffiths KC submits that disclosure turns on the pleadings and the extent to which discovery is required under O. 24, r.1 which provides:

*"1 (1) After the close of pleadings in an action begun by writ there shall, subject to and in accordance with the provisions of this Order, be discovery by the parties to the action of the documents which are or have been in their possession, custody or power **relating to the matters in question in the action.**" [Emphasis added]*
21. Mr. Griffiths KC submits that the affidavit of Ms. Been, is deficient and provides no explanation or reference at all as to the source of instructions as to relevance of the bank statements to the pleaded issues, other than a bare assertion that *"[a]ll of the documents requested relate to one or more matters in question in this action."*
22. Learned King's Counsel further submits the issue as to whether the Deceased provided financial support to the Plaintiff during the relevant period of alleged cohabitation is not pleaded by the Plaintiff, either in the Writ and Statement of Claim or in the amended Reply to Defence and Defence to Counterclaim. He submitted that since the allegation that the Deceased provided financial support to the Plaintiff during the period 2013 - 2016 is simply not a pleaded issue, there is no reasonable basis on which the Defendant could or should have appreciated this was a matter in issue.
23. He further submits that the amendments to the Reply and Defence to Counterclaim need to plead the allegation properly, and particularise what financial support was provided to the Plaintiff so that particulars can then be ascertained and a narrow discovery search undertaken. He should not be left to guess what the other party means by its pleading or be taken by surprise which is the case here.
24. Counsel referred to O.18 which I set out verbatim:

"15. The pleading requirement is set out in the Rules as follows:

(i) At Ord. 18, r. 8(1):

"8- (1) A party **must in any pleading subsequent to a statement of claim plead specifically any matter**, for example, performance, release, the expiry of any relevant period of limitation, fraud, or any fact showing illegality-

(a) which he alleges makes any claim or defence of the opposite party not maintainable; or

(b) which, if not specifically pleaded, might take the opposite party by surprise;

(c) which raises issues of fact not arising out of the preceding pleading."
[Emphasis added]

16. The plea that the Deceased provided financial support is a matter which must be specifically pleaded. It is mandatory, not discretionary. As the notes at 18/1/2 state:

"18/8/2 Para (1) -Whenever a party has a special ground of defence or raises an affirmative case to destroy a claim or defence, as the case may be, he must specifically plead the matter on which he relies for such purpose. "The effect of the rule, is for reasons of practice and justice and convenience to require the party to tell his opponent what he is coming to the Court to prove" ..." [Emphasis added]

17. The further notes at 18/8 onwards illustrate the importance of properly pleading a case. At 18/8/3 (half way through the note) it is stated:

"But all these defences must be clearly and distinctly pleaded, and the facts upon which each is grounded should be stated separately."
[Emphasis added]

25. Mr Griffiths KC further submits that if the Plaintiff alleges that Manitoba law has a special meaning and intent then that too must be specifically pleaded. Therefore, if the Plaintiff intends to rely on principles of Manitoba law which suggest financial support is (i) relevant and (ii) happened then that must be expressly pleaded. And that the Plaintiff is not permitted to give evidence of Manitoba law on this Summons or through submissions as that is a question of foreign law and requires expert evidence.

AUTHORITIES

26. The case law suggests that to succeed on an application for specific discovery the applicant must show that the document *"relates to one or more of the matters in question in the cause or matter"*. In **Thorpe v Chief Constable of Greater Manchester Police [1989] EWCA Civ J0321-1** (UK), the Court of Appeal stated:

*"A party to an action is required to give discovery in accordance with R.S.C. Order 24, rule 2, of all documents "relating to any matter in question" between the parties. It is clearly established, however, that **"the matters in question" cover wider ground than the issues as disclosed in the pleadings. Thus a party is obliged to disclose any document which it is reasonable to suppose contains information which may enable the party applying for discovery either to advance his own case or to damage that of his adversary or which may fairly lead to a train of enquiry which may have either of these two consequences. It follows that discovery is not necessarily limited to documents which would be admissible in evidence.**"*
(Emphasis added)

27. In Gotha City v Sotheby's (No.2) (UK) [\[1997\] EWCA Civ 10619-13](#), the Court of Appeal stated:

"It is important when applications for specific discovery under Order 24, rule 7 are made, that the documents or classes of documents for which discovery is being sought are clearly and carefully defined. A deponent of the required affidavit must consider carefully whether he can say on oath that each document, or all the documents within a class, have been in the possession, custody or power of the other party, and that all the documents the subject of the application relate to the matters in question. The rule specifically requires an affidavit in support. No solicitor should swear an affidavit without being satisfied that the application is not too widely drafted and the opinion he expresses is soundly based".

(Emphasis added)

28. In Tan Chin Seng and Others v Raffles Town Club Pte Ltd (No 2) [2002] SGHC 110 (Singapore), the Court of Appeal citing *O Co. v M Co* (UK) discussed relevance:

"In my view, whether a class of documents as a whole would be relevant and should be produced for the purposes of discovery must depend upon the court's evaluation that the documents sought would contain such information that might enable the plaintiffs to advance their own case or damage that of the defendants". Colman J in O Co. v M Co. [1996] Vol. 2 Lloyd's LR 347 at 351 observed: [T]he document or class of documents must be shown by the applicant to offer a real probability of evidential materiality in the sense that it must be a document or class of documents which in the ordinary way can be expected to yield information of substantial evidential materiality to the pleaded claim and the defence to it in the broad sense which I have explained. If the document or class cannot be demonstrated to be clearly connected to issues which have already been raised on the pleadings or which would in the ordinary way be expected to be raised in the course of the proceedings, if sufficient information were available, the

application should be dismissed. The applicant must show which issue or matter in the pleadings the discovery of the document(s) is directed (see Halifax Financial Services Ltd (Plaintiff) v Intuitive Systems Ltd [\[1998\] EWHC J1221-15](#))

(Emphasis added)

29. In **Dolling Baker v Merrett 1991 2 ALL ER 890** Parker LJ referring to ***Science Research Council v Nasse* [1979] 3 All ER 673** stated with reference to RSC 24.R. 7 the House of Lords, in relation to discovery sought in proceedings before an industrial tribunal, “*held that relevance alone, although 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.*”

30. In **Molnlycke and another v Procter & Gamble Ltd and another (no 3) [1990] RPC 498** reference was made to the judgement of Aldous LJ's recent judgment in ***City of Gotha v Sotheby's* [1998] 1 WLR 114** at page 123:

“It is important when applications for specific discovery under Ord 24, r 7 are made, that the documents or classes of documents for which discovery is being sought are clearly and carefully defined. A deponent of the required affidavit must consider carefully whether he can say on oath that each document, or all the documents within a class, have been in the possession, custody or power of the other party, and that all the documents the subject of the application relate to the matters in question. The rule specifically requires an affidavit in support. No solicitor should swear an affidavit without being satisfied that the application is not too widely drafted and the opinion he expresses is soundly based.”

(Emphasis added)

ANALYSIS

31. I have been asked to decide, whether the requested bank statements should be disclosed. ***Thorpe (supra)*** suggests that any document “*which it is reasonable to suppose contains information*” can be used offensively (in support of a claim) or defensively (in support of a defence), should be disclosed. ***Dolling (supra)*** suggests that the ultimate test is whether discovery is necessary for disposing fairly of the proceedings. Mr. Misick KC argues that the bank statements are relevant to show financial support and to capture patterns relating to annual payments or other substantial payments. The difficulty Mr. Misick KC faces in advancing this submission, is that for the court to determine whether the bank

statements contain information which can be used by the Plaintiff in advancing his claim, and to determine whether they are “*necessary for disposing fairly of the proceeding*”, evidence must be provided to show this necessity, and how they are related to disposal of the claim fairly. The question then becomes did the affidavit in support of the Summons provide sufficient evidence. Both ***Gotha City*** (supra) and ***Molnlycke*** (supra) suggest that the deponent to an affidavit in support of an application for specific discovery must be able to, under oath, clearly and carefully define the documents or classes of documents for which discovery is being sought, state that they are within the possession or control of the other party, and explain how the documents relate to a matter in question. (see also ***Tan Chin citing O Co. v M Co.*** supra).

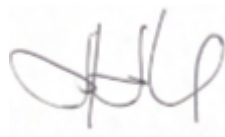
32. In order for a Defendant to understand clearly the reason for the request, and to be able to accept or defend the application, the affidavit must explain in detail which documents are requested and which matter in issue it is related to in the pleadings. The deponent must be able to say with certainty that the requested documents would assist in the fair disposition of the substantive matter.
33. The affidavit of Ms. Been makes mention of the respective list of documents and the documents being sought in this summons. Ms. Been states that she is of the belief that the requested documents are in the possession of the Defendant, however no evidence was provided to support this belief. Besides swearing that “[a]ll of the documents requested relate to one or more of the matters in question in this action”, no other information or evidence was provided by the deponent showing how the requested documents relate to the matters in question, or specifically which matters in issue they relate to.
34. As stated by the Singapore Court of Appeal in **Tan Chin** (supra) the applicant must show in the supporting affidavit that the requested documents (bank statements) offer “*a real probability of evidential materiality which yields information of substantial evidential materiality to the pleaded claim*” thus creating the link between the pleadings and any application for specific discovery. If the Plaintiff cannot demonstrate that the bank statements are connected with issues in the pleadings or issues expected to be raised in the course of proceedings, then the application should be dismissed. **Tan Chin**, went further to state that the applicant must show which issue or matter in the pleadings the discovery of the document(s) is directed. In my view, Ms. Been’s affidavit did not show how the bank statements offer “*evidential materiality*” to the pleaded claim, nor did it demonstrate their connection to the issues raised by the pleadings.

35. It is the prerogative of the Plaintiff to decide whether financial support is a matter in issue. If in issue it should be pleaded. The plaintiff did not plead any such facts relating to financial support. If the Plaintiff's request for bank statements is related to the fact of financial support, then she has failed to show how her application for specific discovery *"relates to one or more of the matters in question in the cause or matter"* **Thorpe** (*supra*).
36. The pleadings in any case, forms the foundation upon which all claims and applications are based. For the purposes of this application for specific discovery, the Plaintiff has failed to provide any evidence that the bank statements offer evidential materiality and are necessary for the fair disposal of the matter. For all the above reasons, in the exercise of my discretion, and as expressly enjoined by Ord. 24, r. 8, I refuse this application. I thank learned King's Counsel for their submissions.

DISPOSITION

37. It is ordered that:

- a) The Plaintiff's summons filed on 28th February 2023 for specific discovery under Order 24 Rule 7, is dismissed.
- b) A date to be scheduled for further directions in this matter.
- c) Costs to be costs in the cause.




Narendra J. Lalbeharry

Registrar Supreme Court Turks and Caicos Islands