In The Supreme Court of Bermuda

COMMERCIAL JURISDICTION
2021 No: 322

IN THE MATTER OF THE EVIDENCE ACT 1905
AND IN THE MATTER OF ORDER 70 OF THE RULES OF THE SUPREME COURT 1985

AND IN THE MATTER OF A CIVIL ACTION NOW PROCEEDING BEFORE THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK , CASE NO. 17-cv-06424 (VSB), ENTITLED:

MEXICO INFRASTRUCTURE FINANCE LLC

Plaintiff

And

THE CORPORATION OF HAMILTON

First Defendant

THE BANK OF NEW YORK MELLON

Second Defendant

RULING

Dates of Hearing:	17 March 2023
Date of Ruling:	07 June 2023
First Defendant / Applicant (COH):	Mr. Mark Diel and Changez Khan (Marshall Diel & Myers Limited)
Respondent	Mr. Mark Chudleigh and David Thom (Kennedys Chudleigh Limited)
(Mr. Johann Oosthuizen)	

Application to set aside order for examination – RSC O. 70 of the Rules of the Supreme Court Powers of the Court to order examination under section 27Q of the Evidence Act 1905

RULING of Shade Subair Williams J

Introduction

1. On 5 November 2021, I made an *ex parte* Order (the "*Ex Parte* Order") exercising this Court's powers under section 27Q of the Evidence Act 1905 ("the Evidence Act") and under Rule 70 of the Rules of the Supreme Court ("RSC") to provide judicial assistance in the granting of a request from a foreign Court for the obtaining of evidence in Bermuda. The *Ex Parte* Order was made in answer to an *ex parte* summons (the "*ex parte* application") filed by the Corporation of Hamilton ("COH" / the "Applicant") on 15 October 2021.

2. The foreign Court in this case is the United States District Court for the Southern District of New York (the "District Court") sitting on Case No. 17-cv-06424 (VSB) (the "New York Action"). This Court was made to understand that the New York Action concerns the release

of $13,749,858.00 representing funds held by the Bank of New York Mellow ("BNY Mellon") as an escrow agent.

3. The background facts on the origins and purpose of those funds, which were part of a bridging loan (the "Bridging Loan") advanced by Mexico Infrastructure Finance LLC ("MIF") for the benefit of Par La Ville Hotel and Residences Limited ("PLV"), are outlined in numerous previous decisions of this Court and Courts of concurrent and superior jurisdiction.

4. The application now before me was brought by Mr. Johann Oosthuizen (the "Respondent"), a barrister and attorney of Wakefield Quin Limited ("WQ") who formerly represented PLV. The relief sought by the Respondent is for the *Ex Parte* Order to be either varied or discharged in its entirety.

5. Having heard arguments from Counsel for both the Applicant and the Respondent, I reserved my ruling and indicated that I would provide written reasons.

The *Ex Parte* Application and the *Ex Parte* Order

6. The *ex parte* application was motivated by the Applicant's pursuit of evidence from (1) Ms. Francesca Fox (2) Mr. Michael MacLean and (3) the Respondent. It was supported by the affidavit evidence of Mr. Kenneth I. Schacter, a Partner of New York law firm Morgan Lewis & Bockius LLP and legal representative of the COH. The *ex parte* application also comprised a draft of a Request for International Judicial Assistance issued by the District Court on 23 July 2021 (the "Request") and letters rogatory (the "Letters Rogatory") (collectively the "Request Documents") .

7. This Court granted the *ex parte* application in respect of all three intended deponents so that each of those persons were directed to answer to the questions and requests set out in the Request Documents in the form of an examination in chief only.

8. The questions which apply to the Respondent relate to various agreements, communications, transactions and governmental consents underlying the Bridging Loan and PLV's development of the luxury hotel on the car park in Hamilton City ("the Building Project"). These matters were also the subject of the examination and disclosure requests which this Court sanctioned in the *Ex Parte* Order. The Respondent was also directed to disclose and to speak to the legal opinions by Terra Law in relation to these matters.

The Application to Set Aside the Ex Parte Order

9. The principal objection to the *Ex Parte* Order is that it is oppressive in nature. The basis for the Respondent's complaint may be summarised as follows:

    i. All the documents being requested in the New York Action are already available to the COH. Mr. Chudleigh argued that this is so because:

        - The COH itself was a party to the agreements requested and so would have already been in possession of the agreements and documents ancillary to the agreements;

        - The requested documents are obtainable by MIF (a party to the New York Action) via its former attorneys, Conyers Dill & Pearman ("CDP"). Barring an entitlement to legal professional privilege, these documents are discoverable in the New York Action. In a letter from MIF's New York Counsel to the District Court, MIF stated that it instructed its New York Counsel to direct CDP to cooperate with the production of documents. This Court was also told that both Mr. Michael MacLean and Ms. Francesca Fox had been deposed and that all categories of documents requested of Ms Fox were included in the documents requested of the Respondent. So it begs to question, as Mr. Chudleigh would put it, why the Respondent is being pursued for the same documents.

- To Mr. Diel's surprise, Mr. Chudleigh advised that WQ's position is that it had already provided PLV, via CHW as Counsel for its liquidators, with the file of all its documents. Mr. Chudleigh informed this Court that shortly prior to the hearing, Carey Olsen confirmed that PLV consented, without qualification, to all of its privileged documents being disclosed and that these documents are now in the possession of MIF and accessible to the COH through the party to party discovery process.

ii. The Respondent is being asked to carry out a time-consuming and costly exercise, a burden akin to pre-trial discovery, which should be reserved only for the parties to the action who would be seeking to confirm the extent and obtain the full picture of liability and damages.

iii. Most of the documents requested are conjectural documents as opposed to specific documents which actually exist, making this more of a fishing expedition.

iv. The terms sought in the request are so wide that it is beyond remedy by the Blue Pencil principle and could only move the Court to improperly engage in the redrafting of the Request.

10. Mr. Chudleigh accepted that the documents and questions identified for production and examination were all relevant but maintained that their relevance could not remedy the objectionable points relied on.

11. Mr. Chudleigh also took issue with the fact that the issued request is not before the Court. He described the irregularity as 'particularly odd' and complained that it ought to have been cured prior to the hearing. Mr. Diel, however, pointed to the uncontroverted affidavit evidence from Mr. Schacter, the COH's New York attorney, that what was given was in identical form as the issued Request. In his third affidavit he deposed [11]:

"*The Request was issued in hard copy by the U.S. Court and bound in a manner which was not conducive to copying. For these reasons, Hamilton [the COH] attached the unsigned version*

to its application to this Court. I can confirm that the unsigned version was identical to the version that was signed by the U.S. Court except that the latter bore the signature of U.S. District Judge Vernon S. Broderick and was bound."

12. Opposing the legal professional privilege points on the application, Mr. Diel emphasized that the owner of the documents has expressly consented to the production of the documents. This, Counsel submitted, disposes of any objection grounded on legal professional privilege or that the Respondent has no authorisation from his employer, WQ, to release those documents. Mr. Diel emphasised that the lawful owner of the documents not only consented to the application but went so far as to instruct the release of the documents. This, he contended, means that the Respondent has no *locus standi* to make the application to set aside the order for the production of the documents.

13. Mr. Diel also flagged that the *Ex Parte* Order was made over a year prior and that the Respondent is single-handedly responsible for delaying full compliance with the *Ex Parte* Order. Mr. Diel invited the Court to note that no affidavit had been filed by the Respondent, PLV or WQ during that past one-year period. Mr. Diel stressed that there was no evidence before the Court to confirm that WQ ever delivered all of the requested documents or all of the documents in its possession to PLV. Mr. Diel contended that, at the very least, an undertaking should be made by Mr. Chudleigh to provide affidavit evidence from WQ stating that all such materials were in fact provided to PLV. While Mr. Chudleigh was not averse to offering such an undertaking, he drew the Court's attention to WQ's statutory obligation to have provided the liquidators of PLV with all such documents years prior when PLV went into liquidation.

14. Referring to Mr. Schacter's three affidavits before this Court, Mr. Diel highlighted that evidence which is not contradicted is to be taken as accepted. Positing that the Respondent's real concern is the prospect of being questioned on his own conduct as Counsel for PLV, Mr. Diel pointed out that the COH is not a party to the Bermuda proceedings by MIF against WQ and that the Respondent is protected to the extent that there is no risk of the evidence being used against WQ in those proceedings. Mr. Diel explained that the COH is being sued by MIF

in the New York Action and that it would be wrong to impede the COH's entitlement to properly and fully defend itself in those proceedings.

15. The Applicant's basis for wanting to obtain oral evidence from the Respondent is explained in the first affidavit of Mr. Schacter [paras 18-19]:

"*Testimony Required: Johann Oosthuizen*

Wakefield Quinn [sic] *represented and advised PLV at all times material in relation to the transaction between it and Hamilton. Johann Oosthuizen was the attorney with day-to-day control of the PLV matter. In a similar way to Mr. Mclean, it is likely that Mr. Oosthuizen will be able to provide the New York Court with evidence on the issues currently before it.*

Wakefield Quinn [sic] *acted for PLV at all times material to this claim including providing PLV with advice on the transaction which it is reasonably to be inferred would have comprised at least the following: agreeing, drafting and executing- materially - the Escrow Agreement; another* [sic] *related documents such as the Development Contract; the Mortgage and the Guarantee in support of the Loan. As such Mr. Oosthuizen will have intimate knowledge of some of the main issues in the suit, and be able to provide valuable evidence in relation to the same in order to assist the New York* [Court], *including… …*"

16. Mr. Chudleigh marked the above passage out for the Court as an example of the conjectural nature of the evidence being sought and relied on the following principles against speculation, as established in *Marjorie S Dean et al v Skadden, Arps, Slate Meagher & Flom et al* [1998] Bda LR 43 where Ward J (as he then was) stated [page 217]:

"*The law is that the request must be for particular documents, that is to say, individual documents separately described, so that the exact document in each case is clearly indicated. Further, the particular documents requested must in fact exist. They must be actual documents as opposed to conjectural documents which may or may not exist. On the other hand, I can*

approach the problem realistically drawing proper and reasonable inferences about the existence of documents such as replies to letters, where replies must have been sent."

17. However, Mr. Diel submitted that the Applicant's position does not offend these principles because Mr. Schacter had a strong evidential basis for drawing a reasonable inference that the Respondent could speak directly to these matters relevant to the New York Action. Mr. Diel submitted that there can be no doubt that the Respondent has intimate knowledge of the subject-matters on which he is to be examined. Mr. Diel also underscored the distinction between the materials for disclosure and the topics for oral examination. He defended the complaint that the description of documents for production under the *Ex Parte* Order were all but compendious, pointing out that the request for the stated categories of documents was made based on reasonable inferences drawn from the documents already seen.

18. Responding to the discovery-objection, Mr. Diel opened up to Mr. Schacter's third affidavit [paras 31-32]:

"*Mr. Oosthuizen is incorrect that the Request is an attempt to gather information solely for pre-trial discovery. Because Mr. Oosthuizen is not amenable to a subpoena for testimony at the trial in the case, under U.S. law, testimony given by Mr. Oosthuizen and any documents he produces, may be admissible at trial in the U.S. Court.*

That the documents and testimony would be obtained during the discovery phase of the case in the U.S. Court does not support Mr. Oosthuizen's assertion that the Request is improper. Given that these documents and testimony could be used at trial, the timing of when they are obtained is irrelevant."

Analysis and Decision

19. For ease of disposal, I start with the issue of relevance. Sensibly, Mr. Chudleigh never suggested that categories of documents for disclosure or the topics for examination are

irrelevant. So, I have no trouble in finding that relevance was established. Equally, the issue of legal professional privilege was brought to a natural end by PLV's express waiver. Therefore, I have no need to say more on that point.

20. The Respondent's grounds under the objection of "oppression" are more thought-provoking, however. The relevant legal principles outlined in my previous ruling in *Kelly v Stevanovich* [2018] Bda LR 76 were broadly agreed between the parties. Both parties accepted that in legal principle, subject to proper and reasonable inferences about the existence of documents, the Court must not endorse a fishing expedition for conjectural documents which may or may not exist. It is also without controversy that section 27Q(4) of the Evidence Act applies to "specific documents" and precludes the Court from allowing a request for the production of documents where such a request is merely a disguised method of engaging in pre-trial discovery as we know it under Bermuda law.

21. Section 27Q(4) provides:

> *(4) An order under this section shall not require a person—*
>
> *a. to state what documents relevant to the proceedings to which the application for the order relates are or have been in this possession, custody or power; or*
>
> *b. to produce any documents other than particular documents specified in the order as being documents appearing to the Court to be, or to be likely to be, in his possession, custody or power.*

22. In my judgment, the documents listed under the Request are not conjectural, notwithstanding the language imported in the Request that the Respondent is "likely to possess key information…". On Mr. Schacter's uncontroverted evidence, the Respondent acted for PLV at all material times, providing advice from which it may be reasonably inferred that he was directly involved in the drafting and executing of the Escrow Agreement, the Argyle Agreement and the Development Agreement and the other agreements supportive of the

Bridging Loan. At the very least, it may be reasonably inferred that he had intimate knowledge of these agreements and that those documents do in fact exist.

23. The next step in my analysis must be whether the requirement for the Respondent to produce these documents is oppressive in nature, particularly since he is not a party to the New York Action. In the course of this part of my deliberation, I must also consider whether the COH already has possession or otherwise has access to these documents. This Court was made to understand that Ms. Fox, as former Counsel of MIF, asserted privilege where it was applicable, so that not all of the documents ordered for her production were delivered. Mr. Maclean was also deposed and it was made known to me that PLV directed WQ to produce all of its documents in cooperation with the *Ex Parte* Order. So to the extent that any of the requested documents have already been provided in the course of either of those depositions, the Respondent ought not to be required to produce duplicate copies.

24. Contention arose on the absence of an evidential basis for finding that WQ provided Counsel for the liquidators of PLV with all of its documents, notwithstanding any statutory obligation for it to have done so. As I see it, this assertion of fact should be particularised and recorded in affidavit evidence before this Court on or prior to a specified date. Subject to that caveat, I find that MIF as a party to the New York Action has either constructive or actual possession of those documents, thereby making these documents otherwise accessible to the COH in the New York Action.

25. In respect of any residual documents which have not already been produced or otherwise made accessible to the COH as outlined above, I find that the Respondent's obligation to produce such documents is not oppressive in the sense that the volume of documents would be akin to a pre-trial discovery exercise. In making that finding, I have factored into my consideration that the Respondent is a practising attorney who is still employed with WQ where the remaining documentation would likely be housed, organised and accessible to him in either hard-copy or electronic version or both.

26. As for the oral testimony required, I find that there is nothing improper or oppressive about subjecting the Respondent to questions about the various agreements of which it may be reasonably inferred that he had intimate knowledge, subject to the ordinary rules of evidence.

27. On the final point in relation to the unsigned and unsealed Request, I find that this procedural irregularity may be easily cured by a direction for the COH to file a photographic image of the signature page of the Request.

Conclusion

28. The *Ex Parte* Order shall be varied to the following extent:

    (i) The Respondent shall not to be required to produce duplicate copies of any documents which have already been provided in the New York Action by either Ms. Francesca Fox or Mr. Michael Maclean.

    (ii) Affidavit evidence shall be filed in this Court by either the Respondent or another representative of WQ stating and particularizing the documents or categories of documents which it provided to Counsel for the liquidators of PLV and the date or timeframe during which those documents were handed over. Such evidence shall be filed and served within 21 days of this Ruling.

    (iii) Subject to compliance with paragraph (ii) above, the Respondent shall not be required to produce duplicate copies of any documents which WQ already provided to PLV.

    (iv) The Respondent shall be required to produce any documents in his or WQ's possession which have not yet been provided to PLV within 21 days of this Ruling.

29. The COH shall file and serve a photographic image of the signature page of the Request within 21 days of this Ruling.

30. All other parts of the *Ex Parte* Order are otherwise confirmed.

31. If either party wishes to be heard on costs, a Form 31D shall be filed within 28 days of the date of this Ruling.

Dated this 7th day of June 2023

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HON. MRS JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT