

**JAMAICA**

**IN THE COURT OF APPEAL**

**BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA  
THE HON MRS JUSTICE DUNBAR GREEN JA  
THE HON MR JUSTICE BROWN JA**

**SUPREME COURT CIVIL APPEAL COA2021CV00098**

<b>BETWEEN</b>	<b>KLAS SPORTS RADIO LIMITED</b>	<b>APPELLANT</b>
<b>AND</b>	<b>JAMAICA ASSOCIATION OF COMPOSERS AUTHORS &amp; PUBLISHERS LIMITED</b>	<b>RESPONDENT</b>

**Neco Pagon instructed by Vacciana & Whittingham for the appellant**

**Joerio Scott instructed by Samuda & Johnson for the respondent**

**14 and 17 May 2024**

**Civil Procedure – Specific disclosure – Scope of disclosure where there is a default judgment - Whether the documents ordered to be disclosed were directly relevant - Whether specific discovery should have been ordered - Rules 28.1(4) and 28.6(5) of the Civil Procedure Rules, 2002**

**ORAL JUDGMENT**

**DUNBAR GREEN JA**

[1] The Jamaica Association of Composers, Authors and Publishers Limited (‘the respondent’) is a copyright licensing body with the sole and/or exclusive rights in Jamaica to broadcast or licence the broadcast of, and to transmit or authorise the transmission of musical works in its repertoire, by radio, television or otherwise. On 6 November 2014, the respondent commenced proceedings in the Supreme Court against KLAS Sports Radio Limited, a company responsible for the operation of the national radio broadcast station, KLAS-ESPN Sports FM 89 (‘the appellant’). The claim form reveals that, among other things, the respondent sought (a) an inquiry as to the damages payable (including

statutory damages) for infringement of copyright by the appellant for the period "September 1 2009 to date", and (b) an order for the payment of all sums found due upon taking such inquires or account, together with interest thereon pursuant to the Law Reform (Miscellaneous Provisions) Act. The particulars of claim, at para. 27, also expressed an entitlement to damages for the same period.

[2] Conversely, at para. 13 of the particulars of claim, the respondent claimed damages for the period "1 September 2009 until the commencement of these proceedings and continuing", and further, at para. 2 of the prayer, an entitlement to damages "for the period March 1993 to date". Among the documents attached to the particulars of claim are (a) letter, dated 10 December 2012, to the appellant from the respondent requesting "payment of licence fees outstanding from 1998 to September 2012 [and that they provide] gross annual revenues from the sale of air time, so we can advise you of your total indebtedness to date", and (b) a demand letter, dated 14 May 2013, in respect of "licence fees outstanding as at August 2012".

[3] Service of the claim form and particulars of claim was effected upon the appellant on 20 November 2014. The appellant filed its acknowledgement of service on 31 January 2017 but failed to file its defence. Consequently, on 19 September 2018, upon hearing the respondent's application for judgment, the court entered judgment in default of defence, and the matter was fixed for assessment of damages.

[4] During the trial for the assessment of damages, on 14, 15 October 2020 and 16 July 2021, the respondent sought an order of specific disclosure of the appellant's audited financial statements ('the documents') for the period 2015-2020. On 16 July 2021, Nembhard J ('the learned judge'), in granting the respondent's application, ordered the appellant to disclose the documents by 24 September 2021.

[5] The appellant, aggrieved by the learned judge's decision, filed a notice of appeal summarised as follows: (a) that the learned judge was wrong to consider a request for specific disclosure at the end of the assessment of damages hearing and in circumstances

where the record of proceedings/minute of orders disclosed that there was no record of the application for specific disclosure before her or that judgment was reserved; (b) the learned judge was wrong in law when she heard and granted an oral application for specific disclosure contrary to rule 28.6(3) of the Civil Procedure Rule, 2002 ('CPR'); (c) the learned judge failed to consider rules 11.3, 11.6, and 11.9(2) of the CPR in arriving at her decision for specific disclosure; (d) the learned judge was plainly wrong to grant the application for specific disclosure as there was no evidence before her which would have enabled her to arrive at the conclusion that the respondent made requests for information prior to any oral application for specific disclosure consistent with part 34 of the CPR; (e) the learned judge was plainly wrong to conclude, in the absence of any evidence, that the documents ordered to be disclosed either existed or have existed; (f) that by referencing the evidence of a witness the learned judge acted in contravention of 11.9(2) of the CPR and prejudged the matter, thus depriving the appellant of the right to a fair hearing; (g) the appellant was denied the opportunity of a response, thus depriving it the right to a fair hearing; and (h) the learned judge failed to consider the issue of relevance in the context of the default judgment.

[6] Two significant points of conflict were (a) whether the application for specific disclosure was made at the beginning or end of the trial for assessment of damages and, (b) whether the documents ordered to be disclosed were directly relevant to one or more of the issues in the assessment of damages. The appellant contended that the application for specific disclosure was made at the end of closing submissions. The respondent's position was that the necessity for such an order was raised at the commencement of the trial for assessment of damages, and this was confirmed by the judgment of the learned judge. The respondent also contended that the documents were directly relevant to the period for which damages were claimed.

[7] Mr Neco Pagon, appearing for the appellant, relied on the authorities of **William Clark Partnership Limited v Dock ST PCT Ltd** [2015] EWHC B5 TCC and **Mark Sefton Peniuk & Ors v Barclays Bank PLC** [2014] EWHC 2946 (QB) in support of his

submissions that the court should refuse an application for specific disclosure where it is made late in the proceedings. Counsel also argued that the documents referred to in the order are not yet in existence, as only the financial audit of the year 2014 was completed. In the circumstance, the documents were not capable of being disclosed. Furthermore, the default judgment is conclusive on the issue of liability, and the documents went beyond the date of the claim, and the judgment. Counsel referred to **Lunnun v Sing and Others** [1999] Lexis Citation 2979 to support this point.

[8] Mr Pagon added, in oral submissions, that the conflicting periods within which damages were sought, and new causes of action raised in the respondent's affidavit at the assessment of damages, taken together, would allow the respondent to seek damages in perpetuity. Accordingly, counsel argued, the orders of the learned judge should be set aside.

[9] Mr Joerio Scott, for the respondent, countered by saying that the documents were directly relevant as they are necessary to calculate the damages due to the respondent. He also submitted that the appellant had constructive notice that the documents would have been required for the assessment of damages. Counsel relied on the authority of **Miguel Gonzales and Suzette Saunders v Leroy Edward** [2017] JMCA Civ 5 for this point.

[10] Counsel further argued that, in accordance with the CPR, an application for disclosure may be made at any stage of the proceedings and need not be in writing. The appellant's complaint that it was not allowed to respond to the application was challenged as being inconsistent with the written judgment of the learned judge, who, counsel argued, was within her right to hear the application for specific disclosure as she had not yet made a final decision as to the quantum of damages.

[11] In oral submissions, Mr Scott initially relied on the authority of **Calvin Cameron v Security Administrators Limited** [2013] JMCA Civ 95 for the principle that once a cause of action exists on a claimant's case, and provided it is duly proven, the court

should grant whatever remedy the claimant may be entitled to. He subsequently conceded that a trial for an assessment of damages following a default judgment, differs substantially from a trial on liability and damages.

[12] Having reviewed the grounds of appeal, along with the submissions of counsel, we came to the view that the determinate issue was whether the documents ordered to be disclosed were directly relevant to one or more issues in the assessment of damages. It is in that context that we found it necessary to consider the requirements of rule 28.6(5) of the CPR, as well as the nature of a default judgment.

[13] Rule 28.6(5) of the CPR stipulates 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”. The import of this rule, in relation to the instant case, is that the subject of any specific disclosure order must relate to the nature of the claim and the period covered by the claim, and not merely desirable. As stated by McDonald-Bishop JA, at para. [103], in **The Attorney General of Jamaica v BRL Limited and Village Resorts Limited** [2021] JMCA Civ 14, “the fact that documents ‘may’ be relevant, or merely ‘relate’ to an issue in dispute is not sufficient to render them specifically disclosable within the ambit of the CPR, they must be ‘directly relevant’ as defined by the CPR” (see rule 28.1(4) of the CPR).

[14] A default judgment is a judgment without a trial and usually arises when a defendant fails to file an acknowledgement of service or defence (see rule 12.1 of the CPR). Usually, in the application for a default judgment, on a claim for an unspecified sum of money, the claimant will state the orders sought in the claim, and will aver that it is in a position to prove damages, in accordance with its claim (see rules 12.10 and 16.2 of the CPR). In the instant case, it is not a point of contention that the default judgment did not reflect the contents of the claim. Rather, the contention of the appellant is that the order for specific disclosure went beyond the scope of the claim and the default judgment.

[15] It is well established that, on an application for default judgment, a claimant cannot secure relief and/or damages it did not claim (see **Kingdon v Kirk** [1887] 37 ChD 141 and **Young v Thomas** [1892] 2 Ch 134 page 137). The period of entitlement which the respondent claimed was for "1 September 2009 to date". This must be taken to mean the date of the claim or, at the latest, the date of service of the claim. That was also the period indicated at para. 27 of the particulars of claim.

[16] However, at para. 13 of the particulars of claim, the respondent added the phrase "and continuing", purportedly to cover successive periods beyond the date of the claim. Further confusion was created in the prayer, which indicated an entitlement from "March 1993 to date".

[17] The learned judge, at para. [25] of her written judgment, recognised "the nature and import" of pleadings, and stated specifically that they "demarcate the parameters" of each party's case. However, at para. [28], she erroneously relied on the successive period of "2015 to 2020" in the witness statement of Lydia Rose, which was filed subsequent to the default judgment, as well as the phrase "and continuing" in the body of the particulars of claim, to extend the claim beyond the date of service which was 20 November 2014. The correct approach, as Parker J determined in **Lunnun v Sing and Others**, is for the claimant to recover in respect of what "occurred prior to the service of the writ (which was, in [that case] accompanied by the Statement of Claim)." He went on to say, "Had a full trial of liability taken place, it may well be that the court would have entertained a claim for damages in relation to subsequent escapes up to the date of judgment. But ... there was no trial".

[18] Although in the instant case, there were conflicting provisions within the body of the particulars of claim, there was no ambiguity in the prayer as regards the cut-off period for which the claim was being made, that is ... "to date". That "cut-off date", which was the critical part of the statement of case, for these purposes, would have alerted the appellant to the period over which the claim extended, and was consistent with the contents of the claim form including the prayer therein. It is, therefore, our view that the

respondent would have been entitled to damages for what occurred up to the service of the claim on 20 November 2014. Consequently, the documents within the scope of disclosure were not directly relevant to the assessment of damages.

[19] In light of the foregoing, the learned judge erred when she granted the order for specific disclosure outside the period of the claim on which the default judgment had been entered.

[20] Accordingly, the court orders as follows:

1. The appeal is allowed.
2. The order of Nembhard J, made on 16 July 2021, is set aside.
3. The oral application made for specific disclosure is refused.
4. The registrar of the Supreme Court is hereby directed to set the earliest convenient date for the continuation of the trial for assessment of damages.
5. Costs of the application down below to be the appellant's costs in the claim, in any event.
6. Costs of the appeal to the appellant to be taxed if not agreed.