THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE
(CIVIL DIVISION)

CLAIM NO. ANUHCV2023/0138

BETWEEN:

ORANGE LIMITED

Claimant

and

SABANA HOLDINGS LTD.

Defendant

and

CARIBBEAN DEVELOPMENTS (ANTIGUA) LTD.

Interested Party

Appearances:

Ms. Andrea Smithen-Henry and Ms. Chantal Marshall for the Claimant
Mr. Anthony Astaphan SC, with him, Dr. Errol Cort and Ms. Claneisha Gomes for the Defendant

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2024: May 31st;
June 28th.

DECISION

[1] **MICHEL, M.:** The claimant, Orange Limited ("**Orange**") commenced these proceedings against the defendant, Sabana Holdings Ltd. ("**Sabana**") claiming payment of the sum of EC$1,796,916.00 being the sum allegedly due and owing to Orange by Sabana in breach of a clause of a Share Purchase and Debt Assumption Agreement ("the **SPA**") and being trust funds derived from the working capital of the interested party, Caribbean Developments (Antigua) Ltd. ("the **Interested Party**"). Orange also seeks damages for breach of contract on its claim.

[2] Sabana filed a defence denying any breach of the operative clause of the SPA and made a counterclaim against Orange seeking a declaration and an order that Orange pay the sum of EC$529,227.00 to it, or alternatively, a declaration that it is entitled to set-off the said sum against monies owing by it to Orange.

[3] At the first case management conference of the matter, the Court issued directions to the Parties for standard disclosure and the filing of witness statements, which directions were duly complied with by the Parties.

[4] Sabana has now applied for an order for specific disclosure pursuant to rule 28.5 of the Civil Procedure Rules (Revised Edition) 2023 ("**CPR**"). Sabana seeks an order that Orange do make and file a further supplemental list of documents verified by a disclosure statement containing the following documents or class of documents:-

a. All email or other means of communication sent by Wilhelm Berends and/or Orange Limited to Grant Thornton Antigua, and particularly Ms. Kathy David between 18th July, 2022 and 12th August, 2022;
b. All email or other means of communication received by Wilhelm Berends and/or Orange from Grant Thornton Antigua, and particularly Ms. Kathy David between 18th July, 2022 and 12th August, 2022; and
c. All WhatsApp communication between Wilhelm Berends and/or Orange Limited to Grant Thornton Antigua and particularly Ms. Kathy David, and responses by Grant Thornton Antigua and particularly Ms. Kathy David between 18th July, 2022 and 12th August, 2022.

[5] Sabana's application is supported by the affidavit of Joseph Krohn, Chief Executive Officer and Financial Officer of Sabana. Orange filed the affidavit of Wilhelm Berends, Managing Director of Orange in response to Sabana's application. Thereafter, Sabana filed a further affidavit of Joseph Krohn in reply.

[6] Before I delve into the substance of Sabana's application, it is necessary to set out the background to this matter and the Parties' cases in some detail to place the application in its proper context to aid in its consideration.

Background

[7] The essential background to Orange's claim which does not appear to be disputed by Sabana, can be gleaned from Orange's statement of claim.

[8] Orange, along with Orange International Limited and APAC B.V. were the Vendors ("the Vendors") pursuant to a Share Purchase and Debt Assumption Agreement in relation to the sale of the entire shareholding of the Interested Party, Caribbean Developments (Antigua) Limited and its affiliated entities ("the SPA"). Sabana was the Purchaser pursuant to the SPA.

[9] Pursuant to Clause 2 of the SPA, the purchase price payable by Sabana to the Vendors for the shareholdings was the sum of US $12,883,333.67 (the

"Purchase Price"). The Purchase Price was subject to certain adjustments, post completion of the sale, as provided in the SPA.

[10] One of the mechanisms for adjusting the Purchase Price is contained in Clause 4.5.2 of the SPA which provided that Sabana was to cause the auditor Grant Thornton ("the Auditor") to produce and deliver to the parties, within 120 days of closing, the Closing Balance Sheet and other calculations to be determined up to the date of Closing in relation to the receivables, expendables and working capital of the Interested Party ("the Closing Calculations").

[11] The closing took place on 7th September, 2021. The Closing Calculations were to show whether any further sums were due from Sabana to the Vendors thereby increasing the Purchase Price or whether, alternatively, the Purchase Price would be reduced.

[12] Clause 4.5.2 of the SPA further provided that if any party had any objections to the Closing Calculations issued by the Auditor, the objecting party was to serve written notice of those objections on the other party within 10 business days, providing reasonable details and the amounts involved. If no such objections were served within the required period, the Closing Calculations were to be final, conclusive and binding without the possibility of amendment or appeal.

[13] As previously stated, the closing of the SPA took place on 7th September, 2021. It is the matter of Closing Calculations that were to be produced by the Auditor in accordance with Clause 4.5.2 of the SPA that is the subject of the dispute between the Parties.

Orange's Claim

[14] Orange has brought these proceedings on behalf of all the Vendors. At paragraph 8 of its statement of claim, Orange pleaded that by its prompting, the Auditor issued a first draft of the Closing Calculations in or around December 2021. Orange averred that Sabana took issue with the draft Closing Calculations and corresponded with the Auditor between December 2021 and June 2022 to have changes made to the draft Closing Calculations and that this took the process for production of the Closing Calculations well past the 120-day deadline for doing so in accordance with Clause 4.5.2 of the SPA.

[15] The essence of Orange's case as pleaded at paragraph 9 of its statement of claim is that after some delay past the 120-day period in which the Auditor was supposed to deliver the Closing Calculations in accordance with Clause 4.5.2 of the SPA, the Auditor issued and delivered the final Closing Calculations in respect of the Interested Party by email of 15th July, 2022. Orange pleaded that

the said final Closing Calculations showed a working capital surplus of EC$2,903,325.00. This, Orange averred, meant that subject to the service of any contractual objections, the sum of EC$2,903,325.00 was to be paid by the Defendant to the Claimant, over and above the Purchase Price, per Clause 2.1.2 of the SPA.

[16] Orange further averred in its statement of claim that in accordance with Clause 4.5.2 (b) of the SPA, the 10-business day deadline for objections in relation to the final Closing Calculations was 29th July, 2022 and that Sabana served no Objection Notice on it in accordance with the requirements of Clause 4.5.2 (b). As such, it averred, the Closing Calculations delivered to the parties by the Auditor on 15th July, 2022 and showing the sum of EC$2,903,325.00, are final and conclusive, without any scope for review, discussion, amendment or appeal. Orange therefore averred that Sabana is obligated to pay the sum of EC$2,903,325.00 to it.

[17] At paragraph 12 of its statement of claim, Orange pleaded that in fundamental breach of the SPA, Sabana, instead of paying the sum of EC$2,903,325.00 or causing the Interested Party to release the same to Orange, Sabana unlawfully sought by email dated 19th July, 2022 and letter dated 10th August, 2022 to have the Auditor withdraw its Closing Calculations. Orange averred that this alleged unlawful course of action was substantially challenged by it.

[18] At paragraph 13 of its statement of claim, Orange pleaded that in response, the Auditor highlighted that the SPA contains a set mechanism for objections to the Closing Calculations of which the Auditor is not involved. Orange further pleaded at paragraph 14 of its statement of claim that it made demands to Sabana for payment of the said sum of EC$2,903,325.00, and that in response, on or about 27th January, 2023, Sabana paid the sum of EC$1,106,409.00 or US$409,781.11, leaving a balance due and owing to the Claimant of EC$1,796,916.00. Orange pleaded that Sabana is therefore in fundamental breach of the SPA, having failed, refused and/or otherwise neglected to pay the full sum of EC$2,903,325.00 and/or having failed to cause the Interested Party to release the same to Orange.

[19] In the premises, Orange claims the sum of EC$1,796,916.00 being the alleged balance due and owing to it arising from the Closing Calculations pursuant to Clause 4.5.2 of the SPA. Orange also seeks damages for breach of contract.

Sabana's Defence and Counterclaim

[20] In its defence and counterclaim, Sabana contends that at or around midday on 15th July 2022, the Auditor issued a first draft of the Closing Calculations ("V1")

to Orange and Sabana which indicated that an amount of EC$2,342,691.00 was due to the Vendors, including Orange, from Sabana. Sabana further contends that before the close of business on 15th July, 2022, the Auditor issued a second draft of the Closing Calculations ("V2") to Orange and Sabana and that this draft indicated that an amount of EC$2,903,325.00 was due to the Vendors (including Orange) from Sabana. Sabana further averred in its defence that on 19th July, 2022 after reviewing the draft V2 Closing Calculations, it wrote to the Auditor and Orange formally objecting to these Closing Calculations on the basis that there were a number of material errors contained therein, which would materially affect the Closing Calculations. Sabana averred that notwithstanding the notice of objections, and in disregard of the objections made by it, the Auditor proceeded on 19th July, 2022 to re-issue the same V2 Closing Calculations in what was purported to be a final version of the Closing Calculations ("RV2"). Sabana contends that this was done without any consultation or discussions with it with respect to the said material errors pointed out by it.

[21] Sabana avers that the RV2 Closing Calculations indicated that an amount of EC$2,903,325.00 was due to the Vendors (including Orange) from Sabana.

[22] The crux of Sabana's case as pleaded at paragraph 15 of its defence is that between 21st July, 2022 and 3rd August, 2022 it made detailed written and oral submissions to the Auditor in respect of the alleged material errors contained in the RV2 Closing Calculations. Sabana further pleaded that it was assured by the Auditor that its submissions to it were simultaneously being shared with Orange by the Auditor which Sabana believed to be true. Sabana averred that, therefore, at all material times Orange was fully aware and had notice of its objections to the RV2 Closing Calculations as issued by the Auditor on 19th July, 2022. Sabana further contends that the Auditor subsequently relayed to it and Orange that it was expecting the adjusted Closing Calculations ("V3") on 4th August, 2022.

[23] At paragraph 17 of its defence, Sabana pleaded that on 4th August, 2022 within 10 business days of having issued the RV2 Closing Calculations of 19th July, 2022, the Auditor corrected the material errors contained in the RV2 Closing Calculations, which were pointed out by Sabana, and issued the V3 Closing Calculations to Orange and Sabana. Sabana pleaded that the V3 Closing Calculations indicate that an amount of EC$529,997.00 is due to Sabana from the Vendors (including Orange).

[24] At paragraph 18 of its defence, Sabana pleaded that the V3 Closing Calculations disclosed an EC$3,433,322.00 swing in favor of it from the RV2 Closing Calculations. It averred therefore that the V3 Closing Calculations show that its objections to the errors made by the Auditor in the RV2 Closing Calculations

were fully justified, and further that Orange knew or ought to have known that the errors existed in RV2, and nevertheless remained silent.

[25] Therefore, Sabana contended in its defence that the V3 Closing Calculations issued by the Auditor on 4th August, 2022 are the accurate, final and operative Closing Calculations as mandated by Section 4.5 of the SPA and this was confirmed by the Auditor in its letter dated 12th August, 2022 to Orange and Sabana.

[26] Sabana averred in its defence that Orange did not object to the V3 Closing Calculations within the timeframe provided by Clause 4.5.2 (b) of the SPA or at all; consequently, it contended, the V3 Closing Calculations are conclusive, final and binding on the Vendors (including Orange) without the possibility of amendment or appeal and constitute the final Closing Calculations. Sabana pleaded that pursuant to Clause 1.12 of the SPA, all obligations and liabilities of the Vendors are joint and several and as a consequence thereof, it is entitled to the sum of EC$529, 997.00 from Orange.

[27] Sabana averred in its defence that in view of the abovementioned, it complied or substantially complied with Clause 4.5.2 (b) of the SPA in giving Orange and the Auditor notice of its objections. It pleaded that in any event, the Auditor repeatedly assured it that, in accordance with its fiduciary or contractual duties, it was in constant communication with Orange in relation to the objections made by the Defendant in relation to the V1 and RV2 Closing Calculations, and the need to address the errors for the purposes of the Closing Calculations.

[28] At paragraph 30 of its defence, Sabana pleaded in the alternative that, if, which it denied, no formal notice was given as required by Clause 4.5.2 (b) of the SPA, Orange was put on notice of Sabana's objections and therefore Orange is estopped from relying on section 4.5.2 (b) of the SPA and/or it would be, and is, inequitable for Orange to seek to rely on Section 4.5.2 (b) of the SPA with knowledge of the objections and material errors, especially, as it averred, the V3 Closing Calculations show conclusively that the V1 and RV2 Closing Calculations contained, as the Auditor accepted in the V3 Closing Calculations and its letter dated 12th August, 2022, errors which materially affected the final Closing Calculations.

[29] At paragraph 31 of its defence, Sabana pleaded further, or in the further alternative, that Orange would be unjustly enriched in the sum of EC$3,433,322.00 as the V3 Closing Calculations and the Auditor's letter of 12th August, 2022 in relation to the V3 Closing Calculations, show that the V1, V2 and RV2 Closing Calculations were significantly inaccurate, and therefore the Claimant would not be, or ought not to be, entitled to that sum.

[30] Sabana also made a counterclaim against Orange. The counterclaim is based on its averment that in accordance with the contractual obligation to provide the Closing Calculation as at 7th September, 2021 the Auditor did on 4th August, 2022 provide both Orange and Sabana with the finalised V3 Closing Calculations which indicated that there is a net sum of EC$529,227.00 due and owing to Sabana by Orange and that it is therefore entitled to the sum of EC$529,227.00 from Orange.

[31] Sabana further pleaded in its counterclaim that pursuant to the provisions of Clause 1.1.13 (Bad Debt) and Clause 5.2.18 (Accounts Receivable) of the SPA, Sabana is entitled to set-off amounts owed by Orange to Sabana. It averred that acting in accordance with the aforesaid provisions of the SPA and taking into account the initial Working Capital calculation, Sabana did on or around 27th January, 2023 pay the sum of EC$1,106,409.00 to the Claimant.

[32] Sabana therefore seeks on its counterclaim (i) a declaration that the V3 Closing Calculations prepared by and delivered by the Auditor to Orange and Sabana on 4th August, 2022 are the correct and final Closing Calculations as required by the provisions of the SPA, (ii) a declaration that Sabana is entitled to the sum of EC$529,227.00 from Orange in accordance with the V3 Closing Calculations; (iii) an order that Orange do pay the sum of EC$529,227.00 to Sabana; (iv) alternatively, a declaration that Sabana is entitled to set-off the sum of EC$529,227.00 against monies owing by Sabana to Orange; (v) damages;

Orange's Reply

[33] In its reply, Orange maintained that the Auditor issued the Final Closing Calculations in accordance with Clause 4.5.2(a) of the SPA on 15th July, 2022 and as such it averred that it was entitled to and did treat the Final Closing Calculations as what they were stated by the Auditor to be, namely, final.

[34] Orange also maintained its position that Sabana failed to serve any objection notice to the Final Closing Calculations on it as required by Clause 4.5.2(b) of the SPA. Orange further averred that Sabana's written and oral submissions to the Auditor after the issuance of the Final Closing Calculations demonstrated Sabana's disregard for the SPA and that Sabana remained content to continue in its breaches of Clause 4.5.2. 11.

[35] Orange also averred in its reply that at no time has it ever been accepted by Orange that any documentation passing between the Auditor and Sabana after the Final Closing Calculations of 15th July, 2022 are valid or legally binding as it relates to the clear provisions of Clause 4.5.2 of the SPA. It contended that there is no provision whatsoever in Clause 4.5.2 for the Auditor to issue new or revised

Final Closing Calculations on the mere say-so or objection of a party. It averred that the correct mechanism per Clause 4.5.2(b) and (c) of the SPA would have been for Sabana to serve its objection notice on it and for an independent firm of chartered accountants to review and determine the matter, without the involvement of the Auditor in this process. It contended that Sabana failed to do so.

[36] Orange further resisted Sabana's alternate averments of estoppel and unjust enrichment and relied on much of the facts pleaded in its statement of claim and reply in its defence to Orange's counterclaim.

Sabana's Application for Specific Disclosure

[37] Sabana's application for specific disclosure is brought on some 14 grounds but the essence of its application that the documents it is requesting be disclosed go to the heart of its contention that Orange had full notice of its objection to the disputed Closing Calculations and knowledge of the particulars of those detailed objections as the Auditor was simultaneously keeping both sides informed of the developments. This, Orange contends, is also directly relevant to Sabana's case on estoppel, equity and/or unjust enrichment.

[38] Sabana contends that in its list of documents filed in compliance with the Court's order for standard disclosure, Orange did not include all correspondence sent directly from Orange to the Auditor during the critical period for which Sabana was advised that communication on the disputed balance sheet was taking place between the Auditor and Orange.

[39] Sabana contends that there would be email exchanges between the Auditor and Orange which would warrant a reply being provided by the Auditor and also emails from the Auditor that would require a reply from Orange, but these emails have not been disclosed by Orange.

[40] In response to Sabana's specific disclosure application, the evidence of Wilhem Berends on behalf of Orange is that the Auditors are the accountants/auditors for Orange and therefore, there are correspondences passing between him and the Auditor between 18th July, 2022 and 12th August, 2022 which are not disclosable because they are not relevant in any way to the proceedings. He deposed that correspondence surrounding the financial affairs of Orange are of no concern to Sabana and are not in issue as between the Parties.

Law on Specific Disclosure
Disclosure under the Civil Procedure Rules

[41] The Court is empowered by CPR 28.5 and 28.6 to make an order for specific disclosure.

[42] CPR 28.5 provides:-

> **"Specific disclosure**
> 28.5 (1) An order for specific disclosure is an order that a party must do one or more of the following things –
> (a) disclose documents or classes of documents specified in the order;
> (b) carry out a search for documents to the extent stated in the order; or
> (c) disclose any document located as a result of that search.
> (2) An order for specific disclosure may be made on or without an application.
> (3) An application for specific disclosure may be made without notice at a case management conference.
> (4) An application for specific disclosure may identify documents –
> (a) by describing the class to which they belong; or
> (b) in any other manner.
> (5) 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."

[43] CPR. 28.6 provides:-

> "**Criteria for ordering specific disclosure**
> 28.6 (1) When deciding whether to make an order for specific disclosure, the court must consider whether specific disclosure is necessary in order to dispose fairly of the claim or to save costs.
> (2) The court must have regard to –
> (a) the likely benefits of specific disclosure;
> (b) the likely cost of specific 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.
> (3) If, having regard to paragraph (2) (c), the court would otherwise refuse to make an order for specific disclosure, it may

nonetheless make such an order on terms that the party seeking the order must pay the other party's costs of such disclosure in any event.

(4) If the court makes an order under paragraph (3), it must assess the costs to be paid in accordance with rule 65.12.

(5) The party in whose favour such order for costs was made may apply to vary the amount of costs so assessed."

[44] Having considered CPR 28.5 and 28.6, it is apparent that in accordance with CPR 28.5(5), an order for specific closure may only be in respect of documents which are directly relevant to one or more matters in issue in the proceedings and that in exercising its discretion to make an order for specific disclosure, the court must consider whether specific disclosure is necessary in order to dispose fairly of the claim or to save costs (CPR 28.6(1)).

[45] Both Parties have relied on the Court of Appeal's decision in **Dr. The Honourable Timothy Harris v Dr. The Right Honourable Denzil Douglas**[1] as the authority on the principles guiding the Court' consideration of an application for specific disclosure under the CPR. Paragraphs 14, 15, and 16 of the judgment of Baptiste JA are instructive:-

> "[14] When deciding whether to make an order for specific disclosure, the court must consider whether specific disclosure is necessary in order to dispose fairly of the claim or to save costs. The court must have regard to the likely benefits of specific disclosure; the likely costs of specific disclosure; and whether 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.[5] (See CPR 26.6(1) and (2)
>
> [15] For the purpose of disclosure, the relevance of the documents is analysed by reference to the pleadings and the factual issues that would arise for decision at the trial.[6] (See Harrods Ltd v Times Newspaper Ltd [2006] EWCA Civ 294) Disclosure must be limited to documents directly relevant to those issues. In seeking to identify the factual issues which would arise for decision at the trial, the judge is obliged to analyse the pleadings. The critical question is whether the documents are directly relevant, and if they are, the court is enjoined to consider whether the order is necessary to dispose of the case fairly. It is necessary to pay regard to the overriding objective

[1] SKBHCVAP2019/0026 (delivered 9th December 2021, unreported).

of the CPR which is to enable the court to deal with cases justly; this also engages the issue of proportionality.

[16] The rationale for the discretion to order specific disclosure is that the overriding objective obliges the parties to give access to those documents which will assist the other's case. The court has discretion as to whether to make an order for specific disclosure and will need to be satisfied that the documents are directly relevant within the parameters of the rule. However, the test for relevance is not a matter for the exercise of discretion. What documents parties are entitled to is a matter of law, not discretion."

[46] With the above principles in mind, I will further consider Sabana's application.

[47] Whilst the principles guiding the consideration of an application for specific disclosure are not in dispute between the Parties, what is in dispute is the applicability of the principles to the present case. In particular, the Parties differed as to whether the documents in respect of which Sabana seeks specific disclosure are directly relevant to these proceedings.

Sabana's Submissions

[48] Sabana submits that the main issue for determination by the trial judge will be which of the Closing Calculations are operative and final. Sabana submits that the documents requested to be disclosed are directly relevant to Orange's knowledge of Sabana's notification of objection which indicated errors were made, and the Auditor's revision to cure and correct the errors made in the Clasing Calculations issued prior to 4th August, 2022.

[49] Learned Senior Counsel for Sabana submitted that when the pleadings are reviewed, it would become apparent that the documents Sabana is seeking to be disclosed are directly relevant to the case as an order of specific disclosure of these documents, which are in control of Orange, will have the effect of disproving Orange's case and saving the Court's time and resources.

[50] Learned Senior Counsel for Sabana also submits that there is evidence that Orange failed to disclose directly relevant correspondence between it and the Auditor. He pointed out that at paragraph 8 of the affidavit of Mr. Berends in reply to Sabana's specific disclosure application, he admits that there exists correspondence between the requested persons in the same period in which communication more than likely surrounded Sabana and the Interested Party. Learned Senior Counsel submits however that Mr. Berends assertion that the

correspondence is not relevant is misguided as that would be for the Court to decide. Further, the admission of there being correspondence surrounding "financial affairs" reveals that there is communication which the court should have the opportunity to assess for relevance.

[51] Learned Senior Counsel for Sabana further submitted that the documents Sabana is seeking to have disclosed are relevant for the purpose of providing evidence that the Claimant's principal, Mr. Berends, knew that the Auditor, Grant Thornton was still working on the Closing Calculations and that the 15th July, 2022 version could not reasonably be final.

Orange's Submissions

[52] In resisting Sabana's application, Orange further relied on the Court of Appeal's judgment in **NG Min Hong v Soemarli Lie**[2] in relation to the requirement of relevance on an application for specific disclosure. Orange relied on the following quote from the headnote of the judgment:

> "The aim of disclosure in civil litigation is to ensure that all the parties to a civil claim are aware of all the documents that have a bearing on the claim. The duty of disclosure in litigation arises under Part 28 of the Civil Procedure Rules 2000 ("CPR") which prescribes the appropriate basis for the disclosure of documents. The key factors which must be borne in mind by a judge contemplating an order for disclosure are "relevance" and "control". A document is liable to be disclosed if it is directly relevant to the issues that would arise for determination at trial and it arises if the party with control of the document intends to rely on it or if it tends to adversely affect that party's case; or if it tends to support another party's case."

[53] Learned Counsel for Orange submitted that in the affidavit in response of Mr. Berends, he clearly deposes that the communications between him, on behalf of Orange, and the Auditor between 18th July, 2022 and 12th August, 2022 arise out of their relationship of auditor and client and those communications touch and concern financial matters pertaining to Orange. Learned Counsel for Orange submitted therefore that with this in mind and when one examines the pleadings of the parties as well as the witness evidence filed to date, it is indubitable that correspondence surrounding the accounting records, financial statements and any other financial and/or monetary and/or budgetary data or affairs of Orange Limited are not matters which are either directly or even

[2] BVIHCMAP2022/0068 (delivered 28th July 2022, unreported).

indirectly relevant to what is raised in the claim, defence, counterclaim and defence to counterclaim.

[54] Learned Counsel for Orange further submitted that the Closing Calculations per Clause 4.5.2 of the SPA are in relation to the financial affairs of the Interested Party, Caribbean Developments (Antigua) Ltd., only, and have nothing to do with the financial affairs of Orange. Learned counsel for Orange submitted that accordingly, applying CPR 28.1(4) and the dicta in **NG Min Hong** to the case at bar, such communications during the period in question are not documents which Orange intends to rely on in these proceedings, are not documents which tend to adversely affect Sabana's case and are certainly not documents which support Sabana's pleaded case. Such communications she submitted are therefore not disclosable, and that an order for specific disclosure cannot be made in these circumstances.

[55] Learned Counsel for Orange further rejected the assertion of Sabana that there is any prima facie or compelling evidence that there exist written communications between the Auditor and Orange as to the matters being raised by Sabana in its Application.

[56] On the issue of whether the documents sought to be disclosed are necessary to dispose fairly of the claim, learned Counsel for Orange submitted that such correspondence are also not necessary for the fair disposal of the claim and the counterclaim. Learned Counsel for Orange further clarified that, emails and any other communications between Orange and its Auditors between 18th July, 2022 and 12th August, 2022 which all reference the finance matters of Orange and which therefore have nothing to do with these proceedings, are not necessary for the fair disposal of these proceedings.

[57] Learned Counsel for Orange further submitted that it would be disproportionate for the Court to make an order to allow Sabana to go on a fishing expedition to check for correspondence which in no way relate to the pleaded positions of the parties, simply on the basis that something may turn up. She further submitted that to make such an order would result in unnecessary, additional costs for Orange as well as would lead to a delay of the progress of these proceedings.

Discussion and Analysis

[58] Having closely considered the parties pleaded cases as set out above, it is evident that the crux of Orange's case is that the Closing Calculations issued by the Auditor on 15th July, 2022 showing a working capital surplus of EC$2,903,325.00 are the final Closing Calculations under the SPA and that there was no objection by Sabana to the Closing Calculations in accordance

with Clause 4.5.2 of the SPA. In such circumstances, Orange's position is that, subject to the service of any contractual objections, the sum of EC $2,903,325.00 was to be paid by Sabana to it over and above the Purchase Price, per Clause 2.1.2 of the SPA.

[59] Sabana's position on the other hand is that the Closing Calculations issued by the Auditor on 15th July, 2022 were draft Closing Calculations and that on 19th July, 2022 it wrote to the Auditor and Orange formally objecting to the second of the draft Closing Calculations issued by the Auditor on 15th July, 2022 and that despite its objections, the Auditor purported to issue the final Closing Calculations on 19th July, 2022.

[60] In light of the above, Sabana's position is that between 21st July, 2022 and 3rd August, 2022 it made detailed written and oral submissions to the Auditor in respect of what it alleged were material errors contained in the Closing Calculations issued by the Auditor to the parties on 19th July, 2022 and that it was assured by the Auditor that those submissions were simultaneously being shared with Orange by the Auditor. The essence of Sabana's case therefore, as I understand it, is that Orange was at all material times aware and had notice of its objections to the Closing Calculations issued by the Auditor on 19th July, 2022 and that the Auditor related to it that Orange was expecting the adjusted Closing Calculations on 4th August, 2022.

[61] In such circumstances, Sabana's position is that Orange having allegedly been given notice of its objections to the Auditor's Closing Calculations and the alleged material errors of the Closing Calculations of 19th July, 2022, it complied with Clause 4.5.2 of the SPA. Sabana's pleaded basis for this is that the Auditor repeatedly assured it that in accordance with its fiduciary or contractual duties, it was in constant communication with Orange in relation to the objections made by Sabana pertaining to the draft Closing Calculations issued by the Auditor on 15th July, 2022 and the Closing Calculations issued by the Auditor on 19th July, 2022 and the need to address the errors for the purpose of the Closing Calculations.

[62] Alternatively, Sabana's defence is that if it is found that no formal notice of objection was given as required by Clause 4.5.2(b) of the SPA, because Orange was aware of its objections and the material errors in the Closing Calculations, Orange, through communications from the Auditor, was estopped from relying on Clause 4.5.2(b) and/or it would be inequitable for Orange to seek to rely on the Clause of the SPA with the knowledge of the objections and alleged material errors.

[63] Orange's key rebuttal to Sabana's case is that based on correspondence of the Auditor dated 19th July, 2022, there was no doubt that the Closing Calculations

issued by the Auditor on 15th July, 2022 were the final Closing Calculations and that whatever communications made by Sabana to the Auditor about the Closing Calculations were not in keeping with the pre-established mechanism under clause 4.5.2 of the SPA to make any objections to the Closing Calculations. In fact, Orange's pleaded position in its reply is that Sabana's written and oral submissions to the Auditor after the issuance of the Final Closing Calculations of 15th July, 2022 demonstrates Sabana's disregard for the SPA and that Sabana remained content to continue in its breaches of Clause 4.5.2.

[64] In my view, having considered the parties pleaded cases, the issue of whether the Auditor and Orange were in communication in relation to Sabana's alleged objections and allegations of material errors contained in the Closing Calculations is a factual issue that would arise for determination at trial in relation to Sabana's defence and counterclaim. Sabana has grounded its case on its contention that it had been communicated to Orange by the Auditor that Sabana objected to the Closing Calculations on the basis that there were material errors in the calculations and that they were being corrected by the Auditor.

[65] I consider that an issue that would arise at trial is whether such communication would satisfy the notice requirement under Clause 4.5.2 of the SPA. The parties have different positions on this issue. Not only does Orange maintain that it had no knowledge of these objections, but it contends that in any event, such objections made to the Auditor by Sabana were not in accordance with the SPA and Sabana is therefore in breach of the SPA. Nonetheless, in my view, it would be a factual matter to be resolved at trial and correspondence passing between the Auditor and Sabana would be directly relevant as to whether any information had been passed on to Orange about Sabana's objections at the material time, whether the correspondence constituted requisite notice pursuant to the SPA or whether in circumstances if it is found that information concerning Sabana's objections to the SPA were communicated to Orange, that Orange would be estopped from relying on the initial Closing Calculations or to allow it to do so would be inequitable. In my view, correspondence between the Auditor and Orange during the relevant period have much direct relevance on matters in issue on this claim.

[66] Sabana's alternative case would also thus be supported by any communication from the Auditor to Orange about any alleged objections made by Sabana about the Closing Calculations. The trial court would be called on to make a finding as to whether Orange knew of Sabana's objections and revisions being made by the Auditor to what is found to be the final Closing Calculations and whether in the circumstances Orange would be estopped from relying on Clause 4.5.2 or it would be inequitable for Orange to rely on the clause.

[67] Having considered the above, in my view, email and other electronic correspondence passing between the Auditor and Orange concerning the SPA during the period 19th July, 2022 and at the earliest 4th August, 2022 would be directly relevant to the proceedings, because it would support or contradict Sabana's case.

[68] Having reached the above conclusion, I note that the affidavit of Wilhelm Berends makes it clear that there was communication passing between the Auditor and Orange at the material time. I am also satisfied that Sabana's evidence demonstrates the existence of communication between the Auditor and Sabana. Orange's position is that the correspondence is not disclosable because they are not relevant in any way to the herein proceedings because the correspondence surrounding the financial affairs of Orange are of no concern to Sabana and are not in issue as between the parties hereto. Whilst I agree with the position of learned Senior Counsel for Sabana that it is for the Court, not Orange to determine whether the communications are relevant, I do consider that there is some merit in Orange's argument that to the extent that there is communication with the Auditor concerning Orange's financial affairs outside the bounds of the SPA, these would not be relevant to the proceedings. However, I am of the considered view that all communications concerning the Interested Party and the SPA are relevant to the proceedings based on my above findings.

[69] As to the question of whether the orders sought by Sabana are necessary in order to dispose fairly of the claim or to save costs, there is little doubt that correspondence passing from the Auditor to Orange concerning SPA would go to support or disprove the allegations made by Sabana against Orange. It would be the best evidence to consider whether or not Orange had the knowledge of the alleged objections and the extend of what, if anything, had been communicated to Orange. In my view, in such circumstances, making the order for specific disclosure is necessary to dispose fairly of these proceedings.

[70] The question for the Court now is what form the disclosure order should take. As I previously alluded to, I believe that Sabana's application has cast the net for specific disclosure too broadly. What is relevant to these proceedings is correspondence between the Auditor and Orange concerning the SPA. Correspondence outside of this would not be relevant to these proceedings.

[71] In light of the foregoing, I would therefore grant Sabana's application for specific disclosure in the following terms:

1. Orange shall, within 14 days of the date of this order, make and file a further supplemental list of documents verified by a disclosure statement containing the following documents or class of documents:

a. All email or other means of communication sent by Wilhelm Berends and/or Orange Limited to Grant Thornton Antigua, and particularly Ms. Kathy David between 18th July, 2022 and 12th August, 2022 in relation to the SPA, including all correspondence concerning the Closing Calculations and all correspondence in relation to financial information concerning the Interested Party;

b. All email or other means of communication received by Wilhelm Berends and/or Orange from Grant Thornton Antigua, and particularly Ms. Kathy David between 18th July, 2022 and 12th August, 2022 in relation to the SPA, including all correspondence concerning the Closing Calculations and all correspondence in relation to financial information concerning the Interested Party; and

c. All WhatsApp communication between Wilhelm Berends and/or Orange Limited to Grant Thornton Antigua and particularly Ms. Kathy David, and responses by Grant Thornton Antigua and particularly Ms. Kathy David between 18th July, 2022 and 12th August, 2022 in relation to the SPA, including all correspondence concerning the Closing Calculations and all correspondence in relation to financial information concerning the Interested Party.

[72] I would further order that costs be in the cause and that the matter shall be set down for further case management on 25th July, 2024.

[73] I wish to thank learned Counsel on both sides for their helpful oral and written submissions.

Carlos Cameron Michel
High Court Master

By the Court

Registrar