Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. P-090 OF 1987

BETWEEN	THE PEPPERSOURCE LIMITED	PLAINTIFF
A N D	GRAINS JAMAICA LIMITED	FIRST DEFENDANT
A N D	ANTHONY Y. HART	SECOND DEFENDANT

W. Clark Cousins intructed by Rattray, Patterson, Rattray for the Plaintiff.

Leighton Pusey instructed by Grant, Stewart, Phillips and Company for the Defendants.

HEARD: 6th, 7th November, 1997
and 17th December, 1997

SMITH, J.

By Notice of Motion dated 2nd October, 1996 the plaitiff seeks orders that:

1. Writs of attachment be issued against Mr. William Taylor the Managing Director of the First Defendant and Mr. Anthony Hart the Second Defendant for disobedience of the Orders of Discovery made on the 18th day of April, 1994, 7th November, 1994 and 9th November, 1995 pursuant to Sections 292 and 651 of the Judicature (Civil Procedure Code) Act.

2. The Defence and Counterclaim of the First Defendant and the Defence of the Second Defendant be struck out and Interlocutory Judgment be entered for the Plaintiff with Damages to be assessed and costs be agreed or taxed pursuant to S.293 of the Judicature (Civil Procedure Code) Act and/or the inherent jurisdiction of the court.

The plaintiff company is engaged in marketing and distribution of several varieties of peppers and pepper based products.

The first defendant grows and processes hot pepper. The second defendant was at the material time the Chairman of the Board of Directors of the first defendant. By Amended Writ of Summons dated 8th May, 1987 and amended Statement of Claim dated December 9, 1992 the plaintiff seeks damages against the first defendant for breach of contract and against the second defendant for inducing a breach of contract.

It is necessary to state the background to this motion. On

On the 18th of April 1994 at the hearing of the Summons for Direction the Master ordered Discovery of Documents within 30 days of the Order.

On the 17th June, 1994 the plaintiff deliverd to the defendant its Affidavit of Documents. By appplication dated the 7th day of July, 1994 the plaintiff sought an Order to compel the defendant to comply with the Order for Discovery. Consequently the first defendant on the 19th July, 1994 filed an Affidavit of Documents. It would seem as if this was not accepted as in compliance with Order for Discovery because on the 7th day of November, 1994 on the application of the plaintiff W.A. James, J. ordered the Defendants to comply with the Order wihtin 30 days failing which the Defence and Counterclaim be struck out. The Defendants failed to comply within the time frame.

On the 6th December, 1994 they swore to an Affidavit of Documents filed it on the 8th and served the plaintiff with same on the 13th December, 1994.

On the 15th December, 1994 they filed a Summons seeking an extension and enlargement of time within which to comply with Order of James, J. made on the 7th November, 1994. This summons was heard on the 6th and 9th November, 1995 and the application granted by the Master who ordered that the Affidavit of Documents sworn to on the 6th December, 1994 and served on the 13th be accepted as valid and in compliance with the Order of the Court.

Subsequently the plaintiff contacted Durkee Foods - S.C.M. Corporation, a manufacturer of hot pepper sauce with whom the plaintiff had a contract to supply peppers and who had dealings with the defendants.

In consideration for the plaintiff's releasing Durkee Foods from all claims arising out of its dealings and transactions with the defendants, Durkee Foods supplied the plaintiff with copies of documents relating to the sale of hot peppers to it by the Defendants.

Armed with these documents, the plaintiff, on the 2nd October, 1996 filed the Notice of Motion that is now before me. The plaintiff also on the 4th October, 1996 filed a further Affidavit of Documents wherein it listed the documents obtained from Durkee Foods and an affidavit exhibiting the documents in support of the Notice of Motion.

In the latter the plaintiff contends that the defendants deliberately deceived the court by supression of material documents. On the 10th October, 1996 the then Senior Puisne Judge ordered the defendants to show cause why writs should not be issued.

The defendants in reply filed a further Affidavit of Documents. In this affidavit the defendants referred to the fact that the first defendant had at all times diclosed in its pleadings that it had a business relationship with Durkee Foods. This fact, the defendant's claim was not an issue between the parties. Paragraphs 8, 9 and 10 read as follows:

> "8. That the first defendant was not aware that the file in relation to Durkee Foods was relevant.
>
> 9. That on the request for Discovery and an Affidavit of Documents our Attorneys prepared the Affidavit of Documents from the files they had in their possession.
>
> 10. That at no time did our Attorneys request files in relation to Durkee Foods. That I was not aware that the documents in relation to Durkee Foods were necessary to be disclosed."

This Affidavit was sworn to by Mr. William Taylor the Managing Director of the first defendant.

Submissions

Mr. Clark Cousins for the plaintiff submitted that these documents went to the heart of the issues between the plaintiff and the defendants. He argued that Mr. Taylor the Managing Director of the first defendant cannot be believed when he said he was not aware that the file in relation to Durkee Foods was relevant. He contended that in the context of the several breaches by the defendants of the Orders of the Court, the evidence of Mr. Taylor in this regard is unacceptable. He referred to SS.292, 294 and 651 of the C.P.C., **Halse Hall Ltd. et al v. Martina Robinson et al 15 J.L.R. 131; Caribbean General Insurance Ltd. v. Frizzell Insurance Brokers Ltd. T.L.R., Nov. 4. 1993 at p. 544.** He asked the court for an Order in terms of paragraphs 1 and 2 of the Motion.

Mr. Pusey on the other hand submitted that the defendants had not failed to comply with the order of the court for discovery. He

contended that the various affidavits of documents filed were in compliance with the order of the court. Any insufficiency in such affidavit would not amount to a non-compliance, he argued. In support of this contention he referred to **British Association of Glass Bottle Manufacturers Ltd. v. Nettleford** [1911-13] All E.R. 622, Discovery and Interrogatories by Simpson, Bailey and Evans pp.183 and 191-195 and The Supreme Court Practice 1995 Vol. 1 0.24r 16, inter alia. He submitted that the remedy available to the plaintiff is to apply to the court for a further and better list or affidavit.

Before considering whether or not the defendants have shown cause, having regard to the submissions made before me I am constrained to deal with the primary issue raised in the Notice of Motion.

It seems to me that the issue may be formulated as follows. Whether a party can properly move the court to issue writs of attachment and to strike out the pleadings of the other party where the list or affidavit is shown to be defective or insufficient in content by reason of the exclusion of discoverable documents.

Mr. Pusey is contending that this motion is misconceived, that the proper step to be taken is to apply for a further and better list or affidavit. Mr. Cousins argues that the stage for such an application had long past and that the issue before the court is whether there were repeated breaches of the court's order.

It seems to me that by virtue of the order of the Master made on the 9th November, 1995 granting the defendants an extension and enlargement of time within which to comply with the order of court for discovery and that the list or affidavit sworn to on the 6th December, 1994 be accepted as valid and in compliance with the Order of the court, the previous "repeated breaches" to which Mr. Cousins referred cannot be the subject of any complaint now. This court can only consider now a complaint in respect of any defect in the list of the 6th December, 1994.

As a general rule the party's list of documents which is verified by affidavit is regarded as conclusive as to the possession by the party of documents relating to matters in issue in the action -

See **Discovery and Interrogatories** (supra) at p.187 and **Edmiston v. Br. Transport Commission** 1956 1 Q.B. 191. This presumption, however, can be displaced if the court is satisfied that there are "reasonable grounds for being fairly certain" that there are other relevant documents in the possession of the party which ought to have been discovered - **British Association of Glass Bottle Manufacturers Limited v. Nettleford** 1912 A.C. 709 at 714.

The following passage from Discovery and Interrogatories (supra) at p.191 is instructive:

> "When a party considers that its opponents's affidavit of discovery is insufficient in content the rules provide means for obtaining further and better discovery. The most important of these are the applications for (i) an order for further and better affidavit of documents, and (ii) the discovery of particular or specified documents. It is important to note that they are not mutually exclusive: one may be used before the other or, they may be used together.
>
> The introduction of the specific discovery procedure was not intended to and does not limit or affect the power of the court to order a further affidavit in general terms, and particular discovery is certainly not a replacement for further and better discovery."

S. 292 of the Civil Procedure Code provides:

> "If any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents he shall be liable to attachment.
>
> He shall also, if a plaintiff, be liable to have his action dismissed for want of prosecution, and if a defendant to have his defence, if any, struck out....."

A party is only liable to attachment etc. if he "fails to comply with an order....." The question then is whether an insufficiency in content of the list or affidavit is a failure to comply.

I think not. Non compliance, to my mind, in the context of S.292, is where no list or affidavit is delivered or the list or affidavit delivered was not in proper form or did not appear to be made in good faith so that it could not fairly be described as a list or affidavit.

An insufficiency in content of list or affidavit made pursuant to an order for general discovery will not attract the highly penal provisions of sections 292 and 651 of the Civil Procedure Code. These penal provisions will only be invoked in the last resort where it seems clear that the party in default really intends not to comply

with an order of the court - see Odgers on Civil Court Actions 24th Edition at p. 313.

It would seem therefore that where there is reasonable ground to believe that the list verified by affidavit is defective or insufficient in content the party on whom it is served should apply for an order for <u>further and better affidavit</u> and/or an order for <u>particular discovery</u>. Failure to comply with these orders will no doubt render the defaulting party liable to attachment or to have his action dismissed or defence struck out.

In the instant case the plaintiff did not follow this course. Instead, in the words of Mr. Clark Cousins, "by its own enterprise, efforts and initiative" the plaintiff obtained from Durkee, copies of documents in its possession relating to the sale of hot peppers to Durkee by the defendants. As said before the plaintiff claims that these documents prove conclusively that the defendants on at least three separate occasions deliberately deceived the court by the supression of material documents and by seeking and obtaining an order to accept the Affidavit of Documents sworn to by the Defendants as valid and in compliance with the Order of the court. He contends that the defendants fail to disclose these documents because they expose the breach of contract and the tortious interference with contract.

The Senior Puisne Judge no doubt was persuaded by the forceful and skilful argument of Mr. Clark Cousins and thus made the order for the defendants to show cause.

It is to this aspect of the matter that I must now turn. Incidentally the matter would normally have gone back before the Judge who made the order for cause to be shown. However this is not now possible on account of the retirement of the Judge.

<u>HAVE THE DEFENDANTS SHOWN CAUSE</u>?

In the normal run of things the defendants would have relied on the advice of their attorneys-at-law as to what document would be relevant.

In paragraph 18 of their Defence the Defendants admitted that they shipped 40,000 pounds of Red Cayenne Peppers to Durkee Foods. No doubt this put the plaintiff on its enquiry.

The first defendant said in its affidavit dated 29th October, 1996 that it was not aware that the file in relation to Durkee Foods was relevant. Thus this file was not submitted to its attorneys-at-law.

The attorneys did not request the files in relation to Durkee Foods. If the attorneys were of the view that documents in relation to Durkee Foods might be necessary to be disclosed, it would be their duty to to request that the file be submitted to them.

From the evidence before me it does not seem to me that the defendants intended to deceive the court by the suppression of material documents.

The contention that their intention was to deceive the court would probably have some merit if no mention was made of the fact that the defendants had a business relationship with Durkee Foods.

Where the insufficiency is demonstrated by reference to the party's pleadings the court may go behind an affidavit of documents - See eg. **Br. Association of Glass Bottle Manufacturers Limited v. Nettleford**. However before seeking the intervention of the court it seems to me that it would be appropriate for the plaintiff's attorneys-at-law, in light of the reference to Durkee Foods in the defendant's pleadings, to write the defendants asking them for discovery of documents in respect of their business relationships with Durkee Foods. If this was refused on the ground that they were not relevant, the plaintiff could seek an order of the court for further discovery since the ultimate determination of the question of relevance is one for the court on a consideration of the pleadings.

One should not be quick to impute to a party an intention to deceive merely because certain documents were not disclosed even if these documents were held to be relevant.

Before making such imputation the court must be satisfied that the defendants knew that the documents which were not disclosed were relevant and hid them.

I am firmly of the view that the defendants have shown cause why writs of Attachment should not be issued against them and why their Defence and Counterclaim should not be struck out.

Further, I would venture to think that the plaintiff having by its own enterprise obtained documents which it claims the defendants have deliberately omitted from the list, may not thereafter seek to have the defendant attached for such failure. This must be so since the purpose of attachment is to compel the defaulting party to comply with the court's order.

S. 651 provides:

> "A judgment or order requiring any person to do any act other than the payment of money, or to abstain from doing any act, may be enforced by attachment.
>
> .....
> .....
>
> A person imprisoned under a writ of attachment may apply for his discharge by summons.....
> .....
> and on the hearing of such summons, the court or Judge may discharge him either unconditionally or upon such terms as to his furnishing security for the performance of the judgment or order ....."

It is clear, in my opinion, that under S.651 attachment is issuable to enforce compliance and not merely to punish for contempt.

As the documents are now in the possession of the plaintiff, a writ of attachment pursuant to S.651 is in my view not issuable.

The case of **Halse Hall Limited v. Robinson and Others** (supra) in which the provisions of S.651 of the Civil Procedure Code were closely examined does not in my view support the contention of the plaintiff.

Mr. Clark Cousins further submitted that if the court is not of the view that writs of attachment should be issued that the court should at least strike out the defence on account of the defendant's persistent breaches. He referred to **Caribbean General Insurance Ltd. v. Frizzell Insurance Brokers Ltd.** The Times Law Reports November 4, 1993 at p.544.

In that case there were persistent breaches of peremptory Orders. The report does not give the details, however it seems that in that case there was a complete disregard of the orders of the court and also absence of excuse for such conduct. That was not a case of insufficiency in content of the list.

None of the cases cited by Mr. Clark Cousins deals with the

deliberate exclusion of discoverable documents from the list.

I cannot escape the conclusion stated above that where a party has good reason for supposing that documents which are material have been omitted from the list which the other party has furnished, his remedy is to apply for further discovery.

This application must be supported by an affidavit stating that the deponent believes, with the grounds of his belief, that the other party has omitted from the list discoverable documents and that those documents are relevant. See The Supreme Court Practice 1973 Volume 1 Order 24/7/1. If the existence of further documents is then disclosed and the issue of relevance is raised the court will determine this. If a prima facie case is made out the court will order an affidavit of specific documents.

Conclusion

I am of the view that in the circumstances of this case the proper procedure was not followed by the plaintiff.

In light of the order of the Master dated 9th November, 1995 the plaintiff's only remedy was to apply for further discovery as I endeavoured to show above.

However in any event the defendants have shown cause to the satisfaction of the court why they should not be attached and why their defence should not be struck out.

The Notice of Motion is accordingly dismissed with costs to the defendants to be agreed or taxed.

Leave to appeal granted.

Matter to be placed on speedy trial list.