



In the Royal Court of the Island of Guernsey

The

18th day of January, 2001 before Alan Robin Winston Hancox, Esquire,
E.G.H., C.B.E. Lieutenant Bailiff; sitting alone

Between:

(1) BARRY SEYMOUR

and

Plaintiffs

(2) JOHN CLARKSON

and

(1) G.J.D. MacDONALD

(2) S.F. CARNEGIE

(3) F. FARRIMOND

(4) S.A. MATHESON

(5) M.J. WILSON

Defendants

WHEREAS on the 12th day of January, 2001 the
Lieutenant Bailiff considered an application by the Defendants for discovery in
the terms attached hereto and heard Advocates J.P. Greenfield Counsel for the
Plaintiffs and R.J. Collas, Counsel for the Defendants;

THE LIEUTENANT BAILIFF this day handed
down judgment also in the terms attached hereto and ORDERED the Plaintiffs to
verify their list of documents of the 19th day of April, 2000 by Affidavit within
fifteen days and DIRECTED that the Defendant shall thereafter have leave to file
a further affidavit, if so advised, within a further fifteen days.

Her Majesty's Deputy Greffier.

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

Between:

(1) BARRY J SEYMOUR and (2) JOHN CLARKSON.....Plaintiffs

and

(1) G J D MACDONALD }
(2) S F CARNEGIE }Defendants
(3) F FARRIMOND }
(4) S A MATHESON }
(5) M J WILSON }

Judgment

The present application under Rule 39 of the Royal Court Civil Rules, 1989, filed by the Defendants on 27th October, 2000, seeks the discovery of all correspondence and communications passing between the Plaintiffs and the late Kevin Sexton and the four entities named in sub-clauses 1.1 to 1.4 of Clause 1 of the Application, to which was added by way of amendment on 13th November sub-clause 1.5 which sought discovery as between the plaintiffs and Kevin Sexton and

".....the architects employed by the Plaintiffs in connexion with the development at Brignoles in France."

The second part of the application which sought discovery in relation to the more recent events relating to the sale of the parcels of land in question in May, 2000, is, at least temporarily, in abeyance, as the Plaintiffs have disclosed certain documents under this head and are prepared, through Advocate Greenfield, to discover such further documents as they have, which are requested by Advocate Collas on behalf of the Defendants, within twenty-eight days of receipt of the request.

In order fully to understand the nature of the application it is necessary to delve as briefly as possible into the background of the case. The substantive action was commenced by the two Plaintiffs against the partners in the Chartered Accountants formerly known as Peat Marwick, now KPMG, on 29th July 1994, for alleged negligent professional advice relating to the purchase of five pieces of land at Brignoles in France, coupled with two membership/permits in the Barbaroux Golf Club as an amenity attached to each of the respective plots. The former Second Defendant, N.R.Ashman, was by consent removed from the action shortly after its inception. Also, some time after the action was commenced, the death occurred of Mr. Kevin Sexton, who is alleged, certainly by the Defendants, to have played a pivotal role in the transactions, and it is principally in relation to correspondence passing to and from him that this application is made.

It is alleged by the Plaintiffs that the financial structure recommended by the Defendants to enable them to carry through this transaction caused them extensive losses as particularised in sub-paragraphs 1 to 3 of paragraph 13 of the Cause, more details of which are given in the Plaintiffs' reply to the Defendants' Requests for further & better particulars of 12th June, 1997. The financial structure alleged, briefly, was that the five parcels of land (and their appurtenant golf memberships) were purchased by the five respective companies referred to in paragraph 8 of the Cause. They were United Kingdom registered companies also resident in the United Kingdom. The shares in those companies were held by E.L.Limited, a Guernsey property holding company of which the Second Plaintiff and Mr.Sexton were directors. They were also directors of the five U.K.companies. According to the Defendants the scheme involved eight pieces of land and the formation of eight companies, six of which were owned as to 44% each by the two Plaintiffs and 11% by Mr.Sexton.

Particulars of the alleged breaches of duty of care owed by the Defendants to the Plaintiffs, and the consequences to the Plaintiffs, are set out in paragraphs 11 (i) to (ix), 12 and 13 respectively of the Cause. They represent, principally, the difference between their liabilities to tax on the resale of the five plots under French and Guernsey taxation rates: that is to say, the tax for which they actually became liable because of the Defendants' alleged negligence and breach of contract, as opposed to that for which the Plaintiffs would have been liable if they had been able to take advantage of the Guernsey tax rates. They also claim for their liability to fiscal guarantee, and the loss of the opportunity to reclaim that which is referred to as TVA, which is the French equivalent of Value Added Tax. The damages claimed (as particularised) total £216,463.89.

Both counsel agreed that the Guernsey Rule 39 is, to all intents and purposes, the same as Rule 3 (1) of Order 24 of the 1999 Rules of the Supreme Court. It was Mr.Collas' submission that Mr.Sexton was heavily involved in all the correspondence and negotiations leading up to the purchase of the French parcels of land. He referred in detail to the correspondence in the Plaintiffs' bundle which he submitted shed considerable light on the status of Mr.Sexton. It was the Defendants' contention that he was a partner, or at least, an agent, of the Plaintiffs and, accordingly, the documents sought in the first part of the Application were discoverable. He cited the commentary in the 1999 White Book to Order 24 Rule 2 which sets out the obligations of the parties generally in relation to discovery independently of any Order of the Court. In his reply he relied on the Jersey case of Victor Hanby Associates Ltd & Hanby v.Oliver [1990] which dealt with the corresponding Royal Court Rule 6/16 which is virtually on all fours with our Rule 39.

I turn to consider the correspondence. On 14th April, 1988, Hambros Bank advised the Second Plaintiff that they would grant a further loan facility of £400,000 (which was to replace a

previous facility of £600,000) on the security, *inter alia*, of a joint and several guarantee by the two Plaintiffs and Mr.Sexton. This was followed by a request to the well-known international estate agents and surveyors, Jones Lang Wootton, who wrote to Mr. Sexton of Colline Holdings, Guernsey, on 22nd April, 1988, with a comprehensive assessment and valuation of eight plots near Brignoles (which included the five in issue in this case), as had been suggested by the Bank. This facility was shortly replaced on 11th May by one for £1 million to assist in the development of property in Guernsey and the Isle of Man, for which, again, a joint and several guarantee by the Plaintiffs together with Mr.Sexton was required.

The French property did not feature in the second letter but it resurfaced a year later in an exchange of letters between Mr.Sexton, who stated that finance was now available from National Westminster Bank, S.A, and Chaney Baudoin Connor of Paris. They generally advised Mr.Sexton on the tax position in relation to the purchase and sale of specific pieces of land in France. Mr.Collas suggested that the reply to this letter, purportedly written by Mr.Sexton on 5th July, 1989, from EL (Management) Ltd, showed that he was taking the lead role in the project. This inference was reinforced by a further comprehensive letter sent by K.P.M.G to Mr.Sexton at E.L Management Ltd on 18th July, advising on all the tax implications attendant on property development in France, and distinguishing the tax liabilities according to the different ownerships of French private limited companies. The letter concluded by suggesting that one of the ways in which the eight plots could be transferred to a 'French entity' would be to liquidate the eight U.K.companies, leading to their intermediate transfer to E.L.Limited. This is followed by a further letter, apparently from successors to K.P.M.G, also to Mr.Sexton, amplifying the previous advice on 27th July, and yet another on 15th November from Peat Marwick in Guernsey to Mr.Sexton, referring to their meeting six days earlier and containing very detailed alternative proposals aimed at minimising the French and Guernsey taxes in the event of the project materialising.

This drew forth the letter of 22nd November, 1989, from Mr.Sexton which contained for the first time a hint of acrimony, complaining at 'something like twice the tax originally envisaged' and using such expressions as 'naive' and 'subterfuge'. This caused Peat Marwick to review the whole situation in their letter of 20th December and to recommend the second proposal as the most beneficial in the circumstances. Then came the draft letter of 19th February, 1990, on which Mr.Collas laid considerable emphasis. Sent to K.P.M.G 'as amended', it referred to a partnership, which, he submitted, was obviously between Mr.Sexton and the Second Plaintiff, and supported his contention that Mr.Sexton was central to the project from the outset and thus justified the discovery which he sought. Last but not least, Mr.Collas said, there were the accounts of E.L Limited showing that Mr.Sexton had, jointly with the Plaintiffs, injected cash into E.L.Management Ltd; that he had drawn cash and expenses from the company and also received at least two salary payments.

I now turn to consider Mr.Greenfield's submissions. As I understood him, while he did not accept that Mr.Sexton was an agent of the Plaintiffs or had their authority to bind them in any of the transactions, he agreed that there was a degree of involvement between Mr.Sexton and the Defendants' firm at the material time and, on that basis, they were entitled to apply for discovery of the classes of documents sought in Clause 1 of the Application. He said, however, that, as stated in Advocate Dunster's letter of 20th April 2000, forwarding the Plaintiff's discovery list, his firm had written to Mr.N.E.Sexton, the deceased's brother and next of kin, on the 6th April, but had had no response. According to his instructions his clients did not now have any of these documents in their possession or power and there was nothing to show that they had had control of them in the past and that they had lost or relinquished such control. Moreover, the Plaintiffs would have no right or power to compel Mr Sexton's estate to produce any of the documents sought, even assuming they existed.

In these circumstances Mr.Greenfield submitted that the Plaintiffs had done all they could to comply with the request and it was difficult to see that any further obligation rested on them in this respect. This was an unusual situation where a party had submitted his list of documents and the other party was not satisfied with that list. Unless the Court was able to find as a fact that the documents mentioned in the Application are, or were, in his clients' custody or power then the discovery List, which he was prepared to verify by Affidavit, should be accepted. Otherwise the Court would betray itself into making a finding as whether Mr.Sexton was an agent of the Plaintiffs, or the extent of his authority to bind them, as was alleged in the Pretensions, which are matters of fact for the Jurats.

I would certainly appear from the documentation that there was substantial involvement of Mr.Sexton in the negotiations leading to the purchase of these parcels of land in France. However I entirely agree with Mr.Greenfield that the extent of it is not a matter on which I can pronounce in this application for discovery. To do so would, in my opinion, usurp the functions of the Jurats in whose province the facts of this case will eventually be for decision. At the same time I cannot do other than agree with Mr.Collas that any letters passing between Mr.Sexton and the five entities named in the Application during the material period, are, equally undoubtedly, very relevant to the matters in issue. For these reasons I think that the application is validly made.

As Mr.Collas commented in his letter of 19th October, 2000, in the instant case no Affidavit verifying the Plaintiffs' List of Documents has yet been forthcoming. Normally a party's affidavit verifying his list is accepted unless there is reason to believe that there are other documents which he has not disclosed. This may arise in two ways: first, it may be apparent from the list of documents or on the face of the documents themselves (or, possibly, on admissions in the pleadings) that the party making discovery has, or has had, other relevant documents in his control

(which, I understand would have been Mr. Collas' submission regarding the second part of the instant application had that remained a live issue). Secondly, as appears from the Hanby case an application can be made on the grounds that the party seeking discovery believes that the disclosure has been incomplete, supported by an affidavit specifying specific documents or classes of documents that have been withheld.

However, as both Counsel agreed, there is no provision in the Guernsey Rules matching Rule 7 of Order 24 of the Rules of the Supreme Court which specifically permits further and better discovery if the application is supported by an affidavit of the party seeking discovery stating that in his belief the other party (here the Plaintiffs) has or has had other relevant documents beyond those already disclosed. I would at this juncture make two observations. First, it has to be remembered that the Court of Appeal said in Hanby Associates Ltd & Hanby v. Oliver (*supra*) that practice notes from the White Book which are directed to specific provisions of the Rules of the Supreme Court which have no counterpart in the Royal Court Rules should be treated with caution. Secondly, the reason why the party seeking discovery cannot go behind an affidavit verifying the opposite party's list of documents is, in the words of Chadwick J.A at page 347 because:

"The advocate owes a duty to the court carefully to go through the documents disclosed by his client to make sure, so far as is possible, that no relevant document has been withheld from disclosure. The existence of this duty on the advocate enables--and, indeed, requires--the court to proceed on the basis that a list of documents which appears to have been prepared with the assistance of the party's advocate and is verified by an affidavit in proper form ought to be regarded as conclusive, save in exceptional circumstances."

It is apparent therefore that there are potentially two stages in the process of discovery (leaving aside cases where the parties agree to exchange lists of documents without a Court order, as provided in Rules 1 and 2 of Order 24 of the English Rules). The first is the provision of a list of documents under Rule 39(1), verified by affidavit under sub-paragraph (b) (matched by the English Order 24 Rule 3(1)), and the second is that which was referred to by Stuart-Smith L.J in Lonrho plc v. Al Fayed & Others (No 3) (*infra*) 'a further and better or amending affidavit' in response to an application under Order 24 Rule 7, for which there is no counterpart in Jersey or Guernsey. Nevertheless in Hanby's case the Court of Appeal envisaged a second stage, albeit in exceptional circumstances, for they said at page 349:

"The courts in this Island are not bound by a practice that was adopted in England during the last' (i.e the nineteenth century.....Unless there is something in the language of r.6/16 of the Royal Court Rules 1982 which compels a contrary conclusion, it is open to the Royal Court to develop its own practice as to the circumstances in which it allows a party to challenge the opposing party's affidavit of documents."

Mr.Greenfield did not shrink from offering to file an affidavit verifying the List of Documents of April 19th, but he doubted whether the court had any further powers once that was done. It seems to me that the course that should then be followed, assuming Mr.Collas remains dissatisfied after considering the affidavit, is admirably stated in this further passage from the Hanby Associates case (*supra*), at page 350, which I now set out:

"A party seeking further discovery after an affidavit has been made following an order under r.6/16(1), must persuade the Court that, despite the affidavit, his opponent has not complied with the order.....it must be necessary in these circumstances for the party seeking further discovery to show, by evidence on oath, not only a prima facie case that his opponent has, or has had, documents which have not been disclosed, but also that those documents must be relevant to matters in issue in the action. The court must be satisfied that the documents will contain information which may enable the party applying for discovery to advance his case, damage that of his opponent, or lead to a train of enquiry which may have either of those consequences."

This accords with the text in Odgers on Pleading and Practice 18th Edition at page 233 from which it appears that once the party producing the list has made an affidavit then further discovery can only be obtained by displacing that party's oath.

If Mr.Collas, as appears likely from point 1 of his letter of 19th October, 2000, decides to adopt the course approved of by the Jersey Court of Appeal, which, in my judgment is applicable equally in Guernsey, clearly it will call for a response from the Plaintiffs by way of a further Affidavit. It is not usually desirable for a court to rule on situations which have not yet arisen, but in view of the arguments that have been advanced, and in the interests of saving costs I propose briefly to state that which I consider to be the law regarding the conclusiveness of affidavits in interlocutory proceedings.

The situation arose in Lonrho plc v.Al-Fayed & Others [1993] (No 3) The Times 24th June, which appears to have been the last instalment of the long-running dispute over the take-over in 1985 of the House of Fraser which owned, *inter alia*, Harrods department Store.Following the reference of an earlier proposed take-over by it to the Monopolies Commission by the Secretary of State, Lonrho gave an undertaking not to acquire more than thirty percent of the equity share capital, whereupon the Defendants stepped in with an offer which was accepted by House of Fraser.In the ensuing litigation Lonrho claimed damages for the torts of interfering with business by unlawful means and conspiracy to injure. The Defendants' application to strike out the statement of claim was allowed by Pill J, on first appeal from the Master, but it was partially restored, as regards the allegations relating to the tort of interfering with business by unlawful means, by the Court of Appeal, and, on cross appeals by both sides, the House of Lords on 27th June 1991 restored the statement of claim in its entirety.

Further interlocutory proceedings for discovery by the first three defendants took place in November, 1992, Lonrho being anxious to ascertain the source of the funds which had enabled the defendants to outbid them for the control of House of Fraser. Swinton Thomas J. made a specific and full order for such discovery, in purported compliance with which the defendants made affirmations of documents which Lonrho alleged were still deficient--which is the situation likely to arise here. It accordingly applied to strike out the defence under Order 24 Rule 16. Following Jones v. Monte Video Gas Co [1880] 5 Q.B.D 556 (from which the Jersey Court of Appeal had quoted extensively in the Hanby case) Stuart-Smith L.J held that once the further affidavit was made it was conclusive. The following extract is taken from the Times Report at page 36:

"What could not be done was to assert in a further contentious affidavit that the answer made, if it was in proper form, was untrue, so as to establish a breach of the other party's obligations to discovery.....on whatever ground the order for a further affidavit was made, whether because of some admission by the deponent or the belief of the opposite party that other documents existed, the deponent's oath was conclusive; it could not be contravened by a further contentious affidavit and could not be the subject of cross-examination.....The reasons for the rule were not far to seek. In the great majority of cases where it was alleged that one party or the other had suppressed documents, that issue would be crucially relevant to the issues in the trial and could only be properly determined after the judge at trial had heard all the evidence' (this was exactly Mr.Greenfield's point) 'To try the issue at an interlocutory stage could involve injustice to both sides."

As a result of the foregoing in my judgment the correct order to make in the present application is that the Plaintiffs shall in accordance with Rule 39 (1)(b) verify their list of documents of 19th April, 2000, by Affidavit within fifteen days. Once that is done the Defendants shall have leave to file a further affidavit, if so advised, in accordance with the guidelines contained in the last passage I have cited from Hanby's case, within a further fifteen days. If and when that is done the case may be listed for further directions.

A.R.W.Hancox
Lieutenant Bailiff
18th January 2001

Collas Day (RJC)
27th October 2000

**IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION**

BETWEEN:

**BARRY J SEYMOUR
AND
JOHN CLARKSON**

PLAINTIFFS

AND

**G J D MACDONALD
S F CARNEGIE
F FARRIMOND
S A MATHESON
AND
M J WILSON**

DEFENDANTS

**G J D MACDONALD, S F CARNEGIE, D FARRIMOND, S A MATHESON and M J
WILSON** of 20 New Street, in the parish of Saint Peter Port (“the Defendants”)

APPLY TO THE COURT

pursuant to Rule 39 of The Royal Court Civil Rules, 1989 **TO SEE** the Court order that **BARRY J SEYMOUR** of Le Bouillon, La Rue des Courtillets, in the parish of Saint Andrew and **JOHN CLARKSON** of Tigh-Na-Tober, Les Martins in the parish of Saint Sampson both of whose address for service is at 7 New Street, in the parish of Saint Peter Port (“the Plaintiffs”) do within 14 days serve a list of documents and file an Affidavit verifying such list limited to the classes of documents referred to, namely:-

1. All correspondence, communications and other documents between the Plaintiffs and Kevin Sexton whether by themselves, their servants or agents or otherwise howsoever and:

- 1.1 Borloo, Chartier, Stora & Associe.
- 1.2 Maitre Atteneux
- 1.3 Chaney Baudain Connor
- 1.4 KPMG France
- 1.5 *The architects employed by the plaintiffs in connection with the development at Brignoles.*
2. All correspondence, memoranda, communications and other documents relating to the sale of the areas of land in France on or about 30th May, 2000.

AND the Defendants claim costs.



Advocate