Court of Appeal

166

6th November, 1990

Before: John Murray Chadwick, Esq., Q.C., (President)
John Martin Collins, Esq., Q.C., and
Edward Anthony Machin, Esq., Q.C.,

Between: **Victor Hanby Associates, Limited, and Victor John Belton Hanby** Appellants

And: **John Hyde Oliver** Respondent

Appeal by the Appellants against the Order of the Royal Court (Samedi Division) of the 17th July, 1990 (on appeal from the decision of the Judicial Greffier of the 8th June, 1990) whereby the Royal Court ordered that specific discovery be made by the appellants to the Respondent.

Advocate J.G. Wheeler for the Appellants.

Advocate P.C. Sinel for the Respondent.

Reasoned Judgment, prepared by the President.

(decision given on the 27th September, 1990; reasoned judgment handed down on the 6th November, 1990).

FILE NO 88/248

FILE NO 89/199

IN THE COURT OF APPEAL OF THE ISLAND OF JERSEY

BETWEEN	Victor Hanby Associates Limited	PLAINTIFF
AND	John Hyde Oliver	DEFENDANT
AND	Victor John Belton Hanby	THIRD PARTY

AND

BETWEEN	John Hyde Oliver	PLAINTIFF
AND	Victor John Belton Hanby	FIRST DEFENDANT
AND	Victor Hanby Associates Limited	SECOND DEFENDANT

JUDGEMENT

This is an appeal from a judgement of the Samedi Division of the Royal Court (the Bailiff and two Jurats) delivered on 17 July 1990 in proceedings between Victor Hanby Associates Limited and Victor John Belton Hanby on the one hand and John Hyde Oliver on the other hand. The effect of that judgement was to require Mr Hanby and the Hanby company to make discovery of certain banking and other documents which are said to be material to the issues in the proceedings. At the conclusion of the hearing we indicated that we would allow the appeal, and that we would put our reasons into writing. We now give those reasons.

The first action in the proceedings between the parties was commenced by Order of Justice dated 7 September 1988. In that action the Hanby company, as plaintiff, claimed injunctions against the defendant, Mr Oliver, to restrain him from destroying, disposing of or dealing with documents relating to a system of computer programmes known as "Securities Trading and Management of Portfolio System". That system is referred to in the pleadings by its acronym as the STAMPS system; and we shall so describe it in this judgement. The basis of the claim in the first action was that the Hanby company, which was said to carry on the business of computer consultancy, employed Mr Oliver, who was a computer programmer, as an independent contractor to write computer programmes for the STAMPS system; that Mr Oliver duly did so; and that subsequently, the parties having fallen out, Mr Oliver removed from the premises of the Hanby company certain software and documents, said to be the property of the Company, and has threatened to destroy that documentation.

In October 1988 Mr Oliver filed an Answer and Counterclaim in the first action. By his Answer Mr Oliver alleged, in effect, that the development of the STAMPS system was carried out under an agreement of partnership between himself and Mr Hanby; and that the role of the Hanby company was to act as agent for that partnership. Accordingly it was denied that the Hanby company had any legal or equitable title, as against the partnership, to software and documents which Mr Oliver admits that he has removed from its offices. By way of Counterclaim Mr Oliver set up the alleged partnership agreement between himself and Mr Hanby,

asserted that Mr Hanby has been in breach of that agreement, and further asserted that the partnership had been determined by notice. It is not clear what relief was sought by way of Counterclaim at that stage.

By their Replies and Answers to Counterclaim Mr Hanby and the Hanby company admitted the existence of the partnership between Mr Hanby and Mr Oliver, and admitted the role of the Hanby company as agent for the partnership. It was further admitted that the partnership had been terminated. With the pleadings in that state, it was far from clear what the real issues between the parties were. But matters did not stop there.

The second action was commenced by an Order of Justice dated 16 August 1989. In the second action Mr Oliver, as plaintiff, set up, for the first time, his own exclusive right to possession and control of the STAMPS system. He also indicated that it was his intention to amend his Answer and Counterclaim in the first action. This was duly done shortly thereafter.

By that amendment to the Answer and Counterclaim in the first action further allegations were pleaded on behalf of Mr Oliver. Paragraph 23, in the Counterclaim, is in these terms:-

> ..."23. Mr Hanby induced the Defendant to enter into the aforementioned [partnership] Agreement by virtue of the following representations:-
>
> (1) that Mr Hanby was a person of integrity.
> (2) That Mr Hanby was a person of solvency and financial stability and wealth.

> (3) That he intended to deal honestly and forthrightly with the defendant.
> (4) That he intended to implement the [partnership] Agreement ...
> (5) That Mr Hanby was a reputable business man.
> (6) That he had expertise to and experience to market fully the software systems the Defendant was capable of producing.
>
> The above representations caused the Defendant to enter into the [partnership] Agreement ... The above representations were false hence the Plaintiff may avoid the contract as if never entered into"...

It seems likely that the reference to "the Plaintiff" in the penultimate line of that paragraph is in error. The thrust of Mr Oliver's case, as we understand it, is that he, the defendant in the first action, is entitled to set aside the partnership agreement ab initio. But nothing turns on this point in the appeal before us.

Paragraph 24 of the Counterclaim in its original form, alleged that Mr Hanby had wilfully and persistently been in breach of the terms of the partnership agreement. Particulars of the alleged breaches were given. By way of addition to those particulars it was alleged in the amended Counterclaim that

> ..."(a) Mr Hanby is not a person of solvency or integrity and has not dealt with the Defendant in good faith and has lied to the Defendant"...

These allegations led to the averment in paragraph 25, as amended, that

> ..."by virtue of the behaviour of Mr Hanby as herein set out including without prejudice to the generality of the foregoing his misrepresentations to the Defendant and breaches of the Agreement the Defendant elects to rescind the said Agreement, to claim full and uninhibited legal and equitable title to the said Stamps System and damages"...

In their amended Answers to the Amended Counterclaim both Mr Hanby and the Hanby company put in issue the allegations in paragraphs 23, 24 and 25 which have been set out above.

It is apparent that, during the course of the pleadings in these proceedings, the Hanby company and Mr Oliver have each changed their position significantly. The principal issues, as now defined, may be summarised as follows: (i) is Mr Oliver entitled to set the partnership agreement aside ab initio, by reason of the falsity of the representations alleged in paragraph 23 of his amended Counterclaim - with the consequence that he alone, and not the partnership, is entitled to the STAMPS system - and, if not, (ii) is Mr Oliver entitled to partnership accounts and to damages for the breaches of the partnership agreement alleged in paragraph 24 of his amended counterclaim.

Discovery and inspection of documents, in proceedings in this Island, are regulated by Rule 6/16 of the Royal Court Rules 1982. Paragraphs (1) and (2) of that rule are in these terms

> ..."(1) The Court may order any party to a cause or matter to furnish any other party with a list of the documents which are or have been in his possession, custody or power relating to any matter in question in the cause or matter, and to verify such list by affidavit.

> (2) An order under paragraph (1) of this Rule may be limited to such documents or classes of documents only, or to such only of the matters in question in the cause or matter, as may be specified in the order."...

Paragraph (3) requires that any claim to privilege must be made in the list of documents. Paragraph (4) requires a party who has furnished a list of documents in compliance with paragraph (1) to allow the other party to inspect the documents referred to in the list. Paragraph (5) empowers the Court to make a specific order for the production for inspection of documents to which reference is made by a party in his pleadings or affidavits. Paragraph (6) is in these terms

> ..."(6) Before applying by summons, a party may apply by letter to any other party to furnish him with such a list and allow him to inspect and take copies of the documents referred to there in."...

In the present case the procedure envisaged by paragraph (6) of Rule 6/16 - voluntary discovery - was not adopted. Rather, the parties sought and obtained an order for mutual discovery under paragraph (1). That order, made on 3 May 1990, required each party to furnish each other party with a list verified by affidavit of the documents in his or its possession, custody or power relating to any matter in question in the action. By a further order made on 17 May 1990 the time for complying with that order of 3 May 1990 was abridged, with the effect that compliance was required by 5.00pm on 25 May 1990.

On 25 May 1990 Mr Hanby swore an affidavit to which he exhibited a list of documents which he described, on oath, as ..."the list of documents which are or have been within the possession custody or power of myself my legal advisers or third parties acting on my behalf relating to the action"... The affidavit was said to be made on his own behalf and on behalf of the Hanby company. The list which was exhibited was entitled ..."List of documents of the Plaintiff and Third Party in the above first action"... It has not been suggested on behalf of Mr Oliver that the list and the affidavit were in any way defective in form. For all practical purposes, no doubt realistically, Mr Hanby and the Hanby company have been treated as indistinguishable.

My Oliver was not satisfied with the discovery made by Mr Hanby's affidavit and list. On 5 June 1990 a summons was issued requiring Mr Hanby and the Hanby company to show cause why they should not be ordered to make specific discovery of documents described under ten categories, set out in sub-paragraphs (a) to (j) of that summons. The summons was accompanied by an affidavit, sworn by Mr Oliver, and said to be in support of his application for specific discovery. In that affidavit Mr Oliver deposed to his belief that the documents in respect of which he had applied for specific discovery were or had been in the custody or possession of Mr Hanby or the Hanby company; and set out, category by category, the reasons upon which that belief was said to be founded. He did not, in that affidavit, explain why the documents which Mr Hanby or the Hanby company were said to have - and which, ex hypothesi, ought to have been disclosed

in the list which had been furnished on 25 May 1990 - did in fact relate to any matter in question in the action.

The application for specific discovery came before the Judicial Greffier for hearing on 8 June 1990. On 11 June he ordered Mr Hanby and the Hanby company to make discovery of the documents in six of the categories set out in the summons of 5 June 1990. He refused to order discovery of the documents in the remaining four categories - that is to say in categories (d), (e), (i) and (j) of that summons. It is clear from his judgement, which is confined to those categories of which he refused discovery, that the Judicial Greffier was concerned as to the legal basis upon which the application was made. He said, correctly, that

> ..."There is no specific provision in the Royal Court Rules for an application for specific discovery with the exception of Rule 6/16(5) which is not applicable in this case. Accordingly, any order for specific discovery must be under Rules 6/16(1) and 6/16(2). In England there is a specific order 24 rule 7 which deals with the matter. In my view the provisions of Rule 6/16(1) and (2) are sufficiently wide to cover the need for specific discovery"...

He then referred to the practice notes which then appeared at paragraph 24/7/1 at page 427 of the Supreme Court Practice 1988; and continued

> ..."Although Order 24 Rule 7 is not part of our Rules the underlying principles are sound and practical and I applied them in this case"...

In our view the Judicial Greffier did correctly identify the relevant principles upon which to base his decision to refuse discovery of documents in categories (d), (e), (i) and (j); but, for reasons which we will explain in this judgement, we think that practice notes from the Supreme Court Practice which are directed to specific provisions in the English Rules of the Supreme Court 1985 which have no counterpart in the Royal Court Rules 1982 must be treated with caution.

On 13 June 1990, following the Order made by the Judicial Greffier on 11 June 1990, and for the purpose of complying with that Order in respect of the six categories of documents of which specific discovery was ordered, Mr Hanby made a further affidavit. Again, this was made on his own behalf and on behalf of the Hanby company. In the penultimate paragraph of that affidavit Mr Hanby says this

> ..."13. I am aware that Mr Oliver through his legal adviser has been very critical of the discovery which I have made and has suggested that I have been less than frank in making discovery. I wish to put it on record that I have not at any time wilfully or knowingly withheld or failed to disclose the existence of any documents relevant to this action and I refute totally any allegations to the contrary"...

Mr Oliver appealed against the Judicial Greffier's refusal to order discovery of the documents in the four categories which we have referred to. The Royal Court allowed that appeal in part, and ordered specific discovery of the documents in categories (d) and (e). It is against that order that Mr Hanby and the Hanby

company appeal to this Court. The Royal Court refused to order discovery of the documents in categories (i) and (j); and there has been no cross appeal by Mr Oliver in respect of those categories.

Categories (d) and (e) in the summons dated 5 June 1990 are described in these terms

> ..."(d) Contracts, correspondence and documents from 1985 to the present between the Benmore Business Centre and/or the Business Centre and the Plaintiff and/or the Third party which are not referred to in the Affidavit of Discovery of the Plaintiff and Third Party.
>
> (e) Bank accounts, credit details and all bank statements of the Plaintiff and the Third Party from the commencement of [business of the Plaintiff]"

The words which we have placed in square brackets were subsequently amended, by agreement, to read "the Partnership".

In relation to these two categories of documents, Mr Oliver deposed, in paragraph 3 of his affidavit sworn on 5 June 1990 in support of the summons, that

> ..."(d) Documents are requested regarding the Benmore Business Centre and/or the Business Centre as all documents referred to in the Affidavit of Discovery [meaning Mr Hanby's affidavit of 25 May 1990] related to Room 16 of the premises leased from the Benmore Business Centre (which later became the Business Centre) which was my office, and no reference is made to room 15 which was the Third Party's office. Moreover, I

> am aware that letters requesting late payment of rental in respect of the leased premises are missing.
>
> (e) There are no references made to any of the documents requested in paragraph (e) of the Summons for specific discovery in the Affidavit of Discovery "...

The only other evidence which throws any light on what the correspondence sought under category (d) might disclose is contained in Mr Hanby's own affidavit sworn on 13 June 1990, to which we have already referred. At paragraph 12 of that affidavit Mr Hanby says this:

> ..."12. In addition to the original discovery of invoices, receipts and correspondence in relation to Benmore Business Centre, there has also been correspondence between Mr R H Morel and myself between March, 1988 and April, 1989 concerning payment of outstanding monies. This was not disclosed by me on discovery because I did not consider it relevant to the action particularly bearing in mind that all sums owed to Benmore Business Centre have now been paid. It was not and is not my intention to withhold such documents other than on the basis that they were irrelevant but I understand from my legal adviser that Mr Morel has agreed to make available both to Advocate Sinel and my legal adviser copies of this file. Although I remain of the view that this is not relevant I do not raise any objection to its being disclosed."

In its judgement the Royal Court directed itself, correctly in our view, that, on appeal against a decision of the Judicial Greffier, it was entitled to approach the matter de novo and to exercise its own discretion unfettered by the previous exercise of discretion by the Greffier; although, of course, the view taken by him should be given due weight. That is not the approach which this Court should take in considering an appeal

from the Royal Court. Our task is to apply those well known principles which limit the role of an appellate court when asked to review the exercise of discretion by the court below. We should not interfere unless satisfied that the Royal Court has exercised its discretion on a wrong basis. It is necessary, therefore, to examine the basis upon which the Royal Court acted.

The Court correctly identified the general principle which determines whether or not a document ought to be disclosed on discovery. That is set out in the passage from Halsbury's Laws of England (4th Edition), volume 13 at paragraph 38, which is cited in the judgement

> ..."A document relates to the matters in question in the action if it contains information which may - not which must - either directly or indirectly enable the party requiring the discovery either to advance his own case or to damage the case of his adversary or which may fairly lead to a train of enquiry which may have either of those two consequences"

The Royal Court, again correctly, directed itself that the relevance of a document or category of documents to matters in question must be tested by reference to the allegations in the pleadings. The Court referred to the allegations made in paragraph 23 and 24 of the Amended Counterclaim which we have already set out. The Court then held, in relation to the category (d) documents that

> ..."we are satisfied that although (d) does not appear to be limited to matters of the partnership, having looked at the amended answer we think we can take a wide view as invited

> to do so by Mr Sinel [who appeared on behalf of Mr Oliver] of what is needed and we find that the Greffier took a somewhat narrower view than was necessary. We think these matters should be available to Mr Oliver to substantiate, if he can, the allegations in the amended answer"...

The category (e) documents were dealt with in not dissimilar terms

> ..."So far as paragraph (e) is concerned, the basis for the Judicial Greffier's refusal is also on a somewhat narrow approach to the difficulties between the parties. He does refer in his judgement to the documents being sought, he thinks they are a "fishing expedition" and that their only relevance would be to the general financial position of the third party and the plaintiff; that is precisely what Mr Sinel seeks to find out. We disagree respectfully with the Greffier that it is [not] a fishing expedition. We do not think it is. We do not think that the wording is too wide. We think that having regard to the allegations in the particulars and the pleadings which we have referred to, there again paragraph (e) should properly be provided"...

We can well understand why the Royal Court took the view that there might have been expected to be documents in categories (d) and (e) which might be relevant to the allegations as to the integrity and financial stability of Mr Hanby which were being made in the Amended Counterclaim. But to make an order for the specific discovery of the documents in those categories in the circumstances which existed in the present case appears to us to ignore the position which had been reached under the Royal Court Rules and the order already made; and to reflect a misunderstanding of the Court's role in relation to the application which was before it.

The position at the time of the Royal Court's decision was this. An order for general discovery had been made under Rule 6/16(1). An affidavit had been sworn by Mr Hanby in response to that order. That affidavit contained, expressly or by implication, an assertion that there are no documents in categories (d) or (e) - other than those which had been disclosed in the list - which were relevant to the matters in question; that is to say that there are no documents in those categories in the possession or control of the deponent which may - not which must- enable Mr Oliver to advance his own case or to damage the case of his adversaries, or which might fairly lead to a train of enquiry which might have either of those consequences. That assertion was reinforced by the subsequent affidavit sworn by Mr Hanby on 13 June 1990. That assertion might, perhaps, appear surprising; but there it was, on oath, in an affidavit sworn in response to an order of the Court.

The importance of full and frank discovery to the proper administration of justice in this Island has been re-affirmed by this Court in the recent appeal of Taylor v Haytor (5 July 1990, unreported). At page 12 of the transcript of the judgement supplied to us, Sir Patrick N ll emphasised that proper compliance with an Order for discovery imposes a high and continuing obligation on the parties and in particular on their advocates. He drew attention to the passage in volume 13 of Halsbury's Laws of England (4th Edition) at paragraph 45. We echo his comment that what is said there about the position of a solicitor applies to advocates in this Island. The advocate owes

a duty to the court carefully to go through the documents disclosed by his client to make sure so far as possible that no relevant document has been withheld from disclosure. But 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 which is verified by an affidavit in proper form, ought to be regarded as conclusive, save in exceptional circumstances.

The principle adopted in England following the introduction of the Rules of the Supreme Court 1875 - which provided a uniform code of procedure in conjunction with the changes in jurisdiction made by the Judicature Act 1875 - was formulated by the Court of Appeal in Jones v The Montevideo Gas Company (1880) 5 QBD 556. Order XXXI Rule 12 of those Rules was in similar terms to those of Rule 6/16(1) of the Royal Court Rules 1982; and now appears as Order 24 Rule 3(1) of the English Rules of the Supreme Court 1985. We take the following statement from the judgement of Lord Justice Brett, at p.558

> ..."We have consulted all the other members of the Court of Appeal who usually sit and act, and we are of opinion that the rule to be observed is as follows: either party to an action has a right to take out a summons that the opposite party shall make an affidavit of documents: when the affidavit has been sworn, if from the affidavit itself, or from the documents therein referred to, or from an admission in the pleadings of the party from whom discovery is sought, the master or Judge is of opinion that the affidavit is insufficient, he ought to make an order for a further affidavit; but except in cases of this description no right to a further affidavit exists in favour of the party seeking production. It cannot be shown by a

> contentious affidavit that the affidavit of documents is insufficient ... It may be urged that a party seeking production may be injured by the wrongful withholding of a document, and that an affidavit in contradiction ought to be admitted under supervision. But this mode of proceeding cannot be allowed: the affidavit of documents must be accepted as conclusive "...

The object of this practice was identified, in Jones v The Montevideo Gas Company, by Lord Justice Cotton as being ..."to prevent a conflict of affidavits as to whether the affidavit of documents was sufficient"...; and by Lord Justice Thesiger, in the same case, as having the beneficial tendency to keep down the costs of interlocutory proceedings.

The principle adopted in Jones v The Montevideo Gas Company was reaffirmed within a few years by the Court of Appeal in Compagnie Financiere et Commerciale du Pacifique v The Peruvian Guano Company (1882) 11 QBD 55, 59 and 61. It is now summarised at Note 24/3/5 of the Supreme Court Practice.

The position in England altered with the introduction, originally as Order XXXI Rule 19A(3), of what is now Order 24 Rule 7. That Rule provides expressly that an order for specific discovery may be made against a party under the rule ..."notwithstanding that he may already have made ... a list of documents or affidavits under .... rule 3"... That rule was introduced into the English practice for the reasons explained by Lord Justice Scott in Thornett v Barclays Bank (France) Limited [1939] 1 KB 675 at 682

> ..."Rule 19A [of Order XXXI] was invented thirty or forty years ago, in a slightly different form from that which it wears today, for the express purpose of getting over a difficulty in relation to discovery. The difficulty arose out of a principle regulating discovery under our system of procedure, which puts upon the party, whose duty it is to make discovery, the burden of honestly swearing what are the documents which are relevant, that affidavit being prima facie conclusive subsequently on the scope of relevance. It was found that documents became omitted accidentally, and there was no procedure to get at them; hence the specific rule which allowed the opposite party to impeach the view of relevancy upon which the opposing party's affidavit had been framed. The method allowed to the impeaching party was to file an affidavit saying that in his belief there was in the possession of the other party documents which did relate to the matters in question; and he had then to specify what they were. Subsequently the rule was altered by allowing the affidavit of impeachment to refer to classes of documents to get over the difficulty of specifying the individual documents"...

The application for an order under Rule 7 must be supported by an affidavit stating the deponent's belief that the document, or class of documents, specified in the application was relevant to one or more of the matters in question. As it was put by Mr Justice Tomlin in Astra-National Productions Limited v Neo-Art Productions Limited [1928] WN 218, 219, it is necessary for an applicant under this English Rule to displace the oath of the party on the other side, at any rate to this extent, by making a prima facie case that there were in existence some documents which were relevant to the matters in issue in the action which had not been included in the other party's affidavit of documents.

We have thought it right to examine the position in England, as it has developed since the introduction of the Rules of the Supreme Court 1875, for the reason that both the Judicial

Greffier and the Royal Court while recognising that the Royal Court Rules 1982 contain no provisions comparable to Order 24 Rule 7 of the current Rules of the Supreme Court, nevertheless regarded it as appropriate to apply principles which, in the English practice, are founded on that rule alone. There can be no doubt that, but for the existence of Order 24 Rule 7 - or its predecessor, Order XXXI rule 19A(3) - an English Court, bound by the practice adopted since Jones v The Montevideo Gas Company was decided in 1880, would have refused to entertain the application for specific discovery in the present case.

The Courts in this Island are not bound by a practice that was adopted in England during the last century, which was founded on the former practice of the English Court of Chancery, and which was found to be unduly restrictive. Unless there is something in the language of Rule 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. It is clear that the Court must permit itself to be concerned with the question whether there has been compliance with an order which it has made under paragraph (1) of Rule 6/16. We do not find anything in the language of Rule 6/16 which requires a Court, properly concerned with that question, to refuse to take account of relevant evidence from whatever source. Although there are passages in the judgement of Lord Justice Brett in Jones v The Montevideo Gas Company which suggest that he was regarding the question as one of construction of Order XXXI

Rule 12(1) we do not think that that was a true basis on which he reached his decision. A careful examination of all three judgements in that case shows that the question was regarded, essentially, as one of practice. As events have turned out, the practice has been altered by the introduction of a new rule - Order 24 Rule 7 - and the practical dangers foreseen by the Court of Appeal in 1880 have been found to be capable of containment.

We have already expressed the view that the Court ought 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 which is verified by an affidavit in proper form, ought to be regarded as conclusive, save in exceptional circumstances. Those circumstances may include not only inherent evidence from the sources described in the passage which we have cited from the judgement of Lord Justice Brett, but also evidence which satisfies the test posed by Mr Justice Tomlin in Astra-National Productions; that is to say evidence sufficient to displace the oath of the party who has verified the list, by making a prima facie case that there are in that party's possession documents which are relevant to matters in issue in the action. In this connection we note the practice direction given by the Deputy Judicial Greffier in his judgement in Jones v Atkinson (19 May 1989, unreported) that

> ..."every application for an order for specific discovery must be supported by an affidavit stating that the deponent believes, with the grounds of his belief, that the other party has, or has had, in his possession, custody or power

> the document, or class of document, specified in the application and that it is relevant"...

A party seeking further discovery after an affidavit has been made following an order under Rule 6/16(1) must persuade the Court that, despite the affidavit, his opponent has not complied with the order. It seems to us that 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 or damage that of his opponent, or may lead to a train of enquiry which may have either of those consequences. It is not enough to show only that the documents may be relevant in the sense described. A Court faced with evidence which establishes no more than that the documents may or may not be relevant would not be entitled to disregard the oath of the party who, having (ex hypothesi) seen and examined the documents with the assistance of his advocate, has sworn, in effect, that they are not relevant.

We should add that, even where a prima facie case of possession and relevance is made out, an order for specific discovery should not follow as a matter of course. The Court will still need to ask itself the question whether an order for further discovery is necessary for disposing fairly of the cause or matter. It must

be kept in mind that Order 24 Rule 7 of the English Rules is itself subject to Rule 8, which makes this further requirement explicit.

In the present case, as appears from the analysis of the evidence which we have set out earlier in this judgement, there was not sufficient evidence upon which the Royal Court could be satisfied that the documents in categories (d) and (e) of the summons dated 5 June 1990 did contain material which might enable Mr Oliver to advance his case, or damage that of Mr Hanby and the Hanby company, or which might lead to a train of enquiry having those consequences. As we have said, the documents might have been expected to contain such material; but Mr Hanby had sworn, in effect, that they did not, and there was no reason why the Court should not have regarded his affidavit as conclusive on that point. It was for this reason that we allowed the appeal.

At the conclusion of the hearing we announced our decision and invited the parties to make submissions to us as to the proper order in respect of costs. Mr Sinel, as he was entitled to do, indicated that he would prefer to await the delivery of our reasoned judgement before addressing us on costs. With the object of avoiding (if it be possible) the additional costs of a further hearing we undertook that this judgement would include our provisional view as to the order which should be made. That provisional view is that the respondent, Mr Oliver, should pay the appellants' costs of and occasioned by this appeal. If any party wishes to make submissions to the Court in support of a

different order for costs, arrangements will be made for a further hearing. But if all parties are content to accept our provisional view, then the order will be as indicated.

Authorities

Royal Court Rules, 1982, as amended: Rule 6/16(1)-(4).

R.S.C. ('88 Ed'n): 24/2/5 r 3(1).
24/7.

4 Halsbury 13: paras 37-51.

Jones -v- Atkinson (19th May, 1989) Jersey Unreported.

Air Canada and Others -v- Secretary of State for Trade & anor. (1983) 1 All E.R. 910.

The Compagnie Financiere et Commerciale Du Pacifique -v- The Peruvian Guano Company (1882) 11 QBD 55.

Marshall -v- Goulston Discount (Northern) Limited [1966] 3 All E.R. 994.

Board -v- Thomas Hedley & Co. Limited [1951] AC 431.

The Consul Corfitzon [1917] AC 550.

Taylor -v- Hayter (5th July, 1990) Jersey Unreported C. of A.

Waugh -v- British Railways Board [1979] 2 All E.R. 1169.

Jones -v- The Montevideo Gas Company (1880) 5 QBD 556 at p.558.

R.S.C. (1875 Ed'n) Order XXX1; rule 12 & rule 19A(3).

Thornett -v- Barclays Bank (France) Limited (1939) 1 KB 675 at 682.

Astra-National Productions Limited -v- Neo Art Productions, Limited (1928) WN 218, 219.