Royal Court - Samedi Division

31st October, 1991

159.

Before: Mr. V. A. Tomes, Deputy Bailiff
Jurat the Hon. J. A. G. Coutanche
Jurat Mrs. M. J. Le Ruez

Arya Holdings Limited — **Plaintiff**

Minories Finance Limited — **Defendant**

Advocate R. J. Michel for plaintiff
Advocate A. J. Dessain for defendant

The defendant, by summonses dated respectively the 19th June, 1991, and the 16th September, 1991, has summoned the plaintiff or its advocate, to show cause why the plaintiff's Order of Justice and amended Order of Justice respectively should not be struck out: (a) in that they disclose no reasonable cause of action; or (b) in that they are frivolous or vexatious; or (c) in that they are an abuse of the process of the Court; or (d) pursuant to the Court's inherent jurisdiction to strike out.

Consequently, the plaintiff has summoned the defendant, or its advocate, to show cause why, at the hearing of the defendant's summonses to strike out, Mr. Martin John Harper, the deponent of an affidavit sworn on the 22nd May, 1991, in support of the application for striking out the Order of Justice should not be ordered to appear to be sworn as a witness and be examined and cross-examined as to the statements made by him in the said affidavit and any other affidavit which he may swear herein.

The hearing yesterday and today is concerned only with the plaintiff's summons seeking an order for Mr. Harper to be produced for cross-examination.

The Royal Court Rules, 1982, deal with striking out at Rule 6/13, as follows:-

"The Court may at any stage of the proceedings order to be struck out or amended any claim or pleading, or anything in any claim or pleading, on the ground that -

(a) it discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court; and may make such consequential order as the justice of the case may require."

Rule 6/13 is almost identical to Order 18 rule 19(1) of the Rules of the Supreme Court (The Supreme Court Practice 1991 (The White Book) Vol. 1 p.324, para. 18/19). Therefore, it is reasonable and proper for the Court to have regard to the White Book for guidance in these matters.

Order 18 rule 19 has an additional paragraph (2): "No evidence shall be admissible on an application under paragraph (1)(a)". There is no like provision in the Royal Court Rules, 1982, so that, on the face of the Rules, evidence is admissible under each of grounds (a) (b) (c) and (d).

However, by Practice Direction of the 15th November, 1988 (1987 - 88 JLR N.5) The learned Bailiff directed that every application to strike out any claim or pleading under sub-paragraphs (b) (c) and (d) of Rule 6/13 should be supported by an affidavit. This implies that no evidence is required for an application under Rule 6/13(a) and, by its very nature - striking out any claim or pleading or part thereof on the ground that it discloses no reasonable cause of action or defence as the case may be - an application under

rule 6/13(a) is to be argued on the basis of the claim or pleading itself, without evidence. Moreover, we interpret "should" in the Practice Direction as mandatory, with the result that an application for a striking-out under sub-paragraphs (b), (c) and/or (d) of Rule 6/13 must be supported by an affidavit.

In the present case, Mr. Martin John Harper, a Director of the defendant, has sworn an affidavit in support of the defendant's application to strike out the plaintiff's Order of Justice on all four grounds referred to in the defendant's summons. Mr. Harper at page 30, para. 76 of his affidavit respectfully submits that the plaintiff's Order of Justice should be struck out. The plaintiff wishes to cross-examine Mr. Harper as to the statements made by him in the affidavit.

Para. 18/19(2) at p. 326 of the White Book, after dealing with the fact that evidence is not admissible where the application is made under Rule 18/19-(1)(a), states that:-

" ...... in applications on any of the other grounds mentioned in the Rule or where the inherent jurisdiction of the Court is invoked, affidavit evidence may be and ordinarily is used."

At p.340 of the White Book, under para. 18/19/18, one finds that:-

"When application is made to the inherent jurisdiction of the Court all the facts can be gone into; and affidavits as to the facts are admissible".

Order 38 rule 1 (at page 620 of the White Book), as does rule 6/18 of the Royal Court Rules, 1982, provides that at the trial of any action by the evidence of witnesses any fact shall be proved by the examination of the witnesses orally and in open court. Rule 6/18(1) contains the following:-

Provided that the court may "(a) subject to the provisions of para. (3) of this rule, order that any particular facts to be specified may be proved by affidavit; (b) order that the affidavit of any witness may be read at the hearing; .... " Para. (3) provides that: "Where it appears to the Court that any party reasonably desires the production of a witness for cross-examination and such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit".

However, this Rule refers only to evidence at "the hearing of any action" i.e. at the trial; it refers to a general rule of the law of evidence, but is of limited application. Para. 38/1/1 of the White Book says that:-

"It does not apply to any motion, petition or summons, or any other proceeding except an action commenced by writ, and it does not apply to any interlocutory proceeding in such an action, but only to the trial, though it also applies to trials of issues or questions of fact or law, references, inquiries and assessment of damages."

Order 38 rule 2-(3), at p. 623 of the White Book provides that:-

"(3) In any cause or matter ......, and on any application made by summons or motion, evidence may be given by affidavit unless in the case of any such cause, matter or application any provision of these rules otherwise provides or the Court otherwise directs, but the Court may, on the application of any party, order the attendance for cross-examination of the person making any such affidavit, and where, after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence without the leave of the Court."

Para 38/2/3 at page 624 of the White Book includes the following:-

"The court may refuse to act on an affidavit where the deponent cannot be cross-examined (Shea v. Green (1886) 2 T.L.R. 533; and see The Parisian (1887) 13 P.D. 16).

"There is a discretion to order cross-examination of a deponent after his affidavit has been used (Strauss v. Goldschmidt (1892) 8 T.L.R., 239).

"Where there is a question of motive or of good faith of a deponent, the Court ought not to be asked to act without cross-examination, see Re Smith and Fawcett (1942) Ch. 304 C.A."

Whilst the Royal Court rules do not contain any Rule similar to Order 38 rule 2 - (3) of the Rules of the Supreme Court, we have no doubt that where we extend to applications made by summons the duty to adduce evidence on affidavit, as has been done by the Practice Direction, justice requires us, in the exercise of our inherent jurisdiction, also to take to ourselves the power to order the attendance for cross-examination of the person making the affidavit.

In our judgment, we have a wide discretion to order the deponent to attend for cross-examination and to refuse to act on the affidavit where the deponent cannot be cross-examined.

In practice, cross-examination does not often take place on interlocutory applications. (Halsbury's Laws of England, 4th Edn. Vol. 17, p.216, para. 311). However footnote 2 to that paragraph states that:

"In interlocutory proceedings, where there is a genuine application to cross-examine a deponent on his affidavit, that application should normally be granted. Comet Products UK Ltd v. Hawkex Plastics Ltd (1971) 2 Q.B. 67 at 76, (1971) 1 All E.R. 1141 at 1146 C.A. per Megaw L.J." We have examined the report of the case but the note is sufficient for our purposes. Nevertheless we note that at p. 76 Megaw L.J. uses the term "bona fide application" rather than "genuine application". We too prefer "bona fide application". And

that at p.77 Cross L.J. went rather further and said: "It is, I think, only in a very exceptional case that a judge ought to refuse an application to cross-examine a deponent on his affidavit."

Therefore, although in practice cross-examination does not often take place on affidavits used in interlocutory applications, if we are satisfied that the plaintiff's application is bona fide, that application should normally be granted.

The affidavit in this case is not within the exceptions listed in para. 311 where cross-examination will not generally be ordered.

It follows that the plaintiff is entitled to the order which it seeks, provided that its application is bona fide.

Mr. Michel does not ascribe to Mr. Harper any criminal intent or dishonesty but claims that the affidavit is misleading. He alleges areas of non-disclosure. He claims that the affidavit gives rise to very grave doubts as to the deponent's veracity; that there has been a lack of open-handedness with the Court on the deponent's part; and that there are important matters to "discuss" with him in cross-examination. According to Mr. Michel there has been either a conscious decision to conceal matters from the court or a cavalier disregard of duties to the Court.

Accordingly, Mr. Michel seeks to rely on Re Smith and Fawcett (supra) because, he claims, there is a question of motive or of good faith of the deponent, in which case the Court ought not to be asked to act upon the striking-out applications without cross-examination.

The relevant passage in Re Smith and Fawcett is at page 545 of the report. Lord Greene M.R. said this:-

"Speaking for myself, I strongly dislike being asked on affidavit evidence alone to draw inferences as to the bona fides or mala fides of the actors. In the present case the principal director has sworn an affidavit which, if accepted, makes it clear that,

whether rightly or wrongly, the directors have bona fide considered the interests of the company and come to the conclusion that it would be undesirable to register the transfer of the totality of these shares.

"We are invited to say that that does not represent the fact and that the real motive which influenced the deponent was not a consideration for the interests of the company but a consideration for his own personal interests. I for one, except in a clear case, am strongly opposed to drawing an inference of that kind from mere affidavit evidence. If it is desired to charge a deponent with having given an account of his motives and his reasons which is not the true account, then the person on whom the burden of proof lies should, in my judgment, take the ordinary and obvious course of requiring the deponent to submit himself to cross-examination."

The first objection taken by Mr. Dessain is that the application is premature. The parties were agreed that a further affidavit and response would be filed in connection with the second striking-out application to deal with the amendments made in the Amended Order of Justice to the original Order of Justice and the Amended Answer. The summons sought an order for cross-examination on Mr. Harper's affidavit of 22nd May, 1991, "and any other affidavit which he may swear herein". It is impossible for the Court to exercise a discretion on a document that does not exist. There has to be reasons given by the plaintiff as to why cross-examination would be necessary. A further application of the same kind would be necessary. The parties had agreed to prepare skeleton arguments for the striking-out applications and a timetable had been set down. The present application should be adjourned.

Mr. Dessain sought to rely on one sentence in Halsbury's Laws of England (supra) at paragraph 310:- "Leave to cross-examine will not be granted until evidence by affidavit is complete". Superficially, this appeared to prevent the Court making the order sought by the plaintiff, even if it wished to do so. We therefore adjourned until to-day to enable copies of the two cases cited by Halsbury to be

obtained. We are grateful to Counsel for their efforts in this regard.

The first case is Muir v. Kirby (1887) 32 Sol. Jo. 139. The short report is as follows:-

"This was a motion for leave to cross-examine on affidavits before an examiner. It appeared that the affidavits were not yet complete.

"Chitty J., in making an order as asked, said that in such cases the proper practice was to direct that the cross-examination should not commence until the affidavit evidence was complete, and made a direction to that effect".

That decision does not assist Mr. Dessain. An order was made in advance. Clearly, in the present case, the cross-examination, during the striking-out hearing, will not commence until the affidavit evidence is complete.

The other case is Lancefield v. Iggulden (1872) 41 LJ Ch. 473. This case is not in point. The headnote reads:-

"As a general rule a party should file his affidavit before cross-examining a party on the other side. Consequently an affidavit filed in a creditor's administration suit by defendant executors subsequently to their cross-examination of the plaintiff upon his affidavit in support of his claim is not generally admissible in proceedings in chambers for the adjudication of the plaintiff's claim, but it was allowed to be used upon leave given to the plaintiff to reply".

That decision could be relevant only if the plaintiff sought to file a further affidavit in the striking-out proceedings after Mr. Harper's cross-examination was complete. We are sure that this is not in the contemplation of the parties. What is surprising about the

Lancefield case is that the defendant was granted leave to use an affidavit filed after cross-examination was complete.

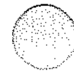
In our view, the sentence in paragraph 310 of Halsbury is misleading. It is not leave to cross-examine that will not be granted until evidence by affidavit is complete but the actual cross-examination that will not take place until the evidence by affidavit is complete. It is to Mr. Dessain's credit that this afternoon, with the benefit of the two case reports, he no longer seeks to rely on the quoted sentence from Halsbury.

Counsel have traced and obtained a copy of a third case, namely Re Davies, Issard v. Lambert (1890) 44 Ch. D. 253 which appears to be directly in line with Lancefield v. Iggulden. It makes the point that the evidence is to be considered closed when the cross-examination begins. In the instant case, under the agreed timetable, the evidence on affidavit will be closed long before the cross-examination begins.

However, Mr. Dessain persisted in his submission that the application is premature. We do not agree.

We reject the submission that we should adjourn the present application. Having heard this interesting matter we consider that it is in the interests of the administration of justice that we should decide it. However, we accept that our decision should be restricted to the affidavit of 22nd May, 1991. We would hope that in the light of our decision any question relating to the future affidavits might be resolved by consent, but if such is not possible the present reasoned judgment may be of assistance to the Court hearing a similar application by summons.

Mr. Dessain handed up extracts of the judgment of Hoffman J. of the 16th January, 1986. We have no doubt that Hoffman J.'s appraisal of the qualities of Mr. Harper and the character of Mr. Shamji were both astute and justified. But we have to judge the present application upon its own merits.



The defendant in the instant case is attempting to oust the plaintiff from the "driving-seat" of this litigation. We are given to understand that the hearing of the striking-out applications will be of substantial duration. Obviously, there will be considerable duplication between the striking-out hearing and the actual trial. Mr. Dessain disclosed only two grounds for the striking-out applications: 1) that the plaintiff's Order of Justice discloses no reasonable cause of action; and 2) that the plaintiff's action is prescribed or time-barred. We can only observe that the first ground for a striking out could be heard in isolation and without evidence and that the second ground would more regularly be heard as a preliminary point at or before the trial. The defendant has chosen instead to seek a striking-out of the whole action on very wide grounds further details of which will not be disclosed until the agreed outline arguments are produced. In the circumstances, the defendant can hardly be heard to complain if the Court accepts the arguments of Mr. Michel, an officer of this Court, at their face value, as constituting a 'bona fide' application.

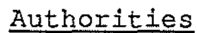
This Court is not prepared at this interlocutory stage to discuss the facts of this case. We have considered very carefully the arguments and submissions of both counsel and the affidavits of both Mr. Harper and Mr. Brian Graham Robinson, on behalf of the plaintiff. Mr. Robinson, who is a Solicitor of the Supreme Court, describes Mr. Harper's affidavit as a "contentious document". He submits that the defendant and Mr. Harper "continue to mislead". He claims that Mr. Harper's outline of the background is "selective and misleading". Mr. Robinson alleges a number of "failures" or omissions and non-disclosures on Mr. Harper's part and a "misleading picture". Finally, Mr. Robinson claims that the allegations of Mr. Harper on behalf of the defendant are "fatally flawed by his misrepresentation". These are all matters which can properly be explored in cross-examination.

In our judgment, Mr. Michel has satisfied us that the application in the plaintiff's summons is a "bona fide" application and that it should be granted.

Accordingly, we order that at the hearing of the two summonses issued by the defendant on the 19th June and 16th September, 1991, respectively, Mr. Martin John Harper, the deponent of the affidavit sworn on the 22nd May, 1991, should appear to be sworn as a witness and be examined and cross-examined as to the statements made by him in the said affidavit.

The cross-examination will be restricted to those matters which are relevant to the striking-out applications but we are not prepared to try to usurp the functions of the trial Judge by seeking to define the boundaries of cross-examination beyond that general statement.

The Court further orders that the defendant shall pay the plaintiff's costs of and incidental to the plaintiff's summons and this hearing on a taxation basis.



Authorities

Royal Court Rules, 1982: Rule 6/18.

Supreme Court Practice, 1991: Ord. 38 (pp. 620-625).

4 Halsbury Vol. 17: paras. 307-311.

Comet Products -v- Hawkex Plastics [1971] 2 QB 67.

Re Smith & Fawcett [1942] 1 All ER 542.

Re S.B.A. Properties [1967] 2 All ER 615.

Re a Debtor (No. 2283 of 1976) [1979] 1 All ER 434.

Muir -v- Kirby [1887] 32 SJ 139.

Lancefield -v- Iggulden [1872] 41 LJ Ch. 473.

In Re Davis Issara -v- Lambert [1890] 44 Ch. D. 253.

Butterworths Digest Vol. 22 p.379.