CIVIL PROCEDURE II

C.A APPEAL FROM MASTER — Further and better Particulars: Interrogatories Master refuses leave to have plaintiff deliver further and better particulars of reply. also refuses leave for defendant to deliver interrogatories to plaintiff. HELD ON APPEAL (1) Re: Request for further and better particulars — facts requested not material — only JAMAICA attempt to ascertain evidence proof wanted use to prove case (2) Re: Interrogatories — proposed interrogatories not necessary either for "disposing of matter fairly or saving costs."

Interrogatories

F & B. Particulars

APPEAL DISMISSED.

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 20/88

BEFORE: THE HON. MR. JUSTICE CAREY, PRESIDENT (AG.)
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (AG.)

BETWEEN	SANDRA ATLAS BASS JOHN McGRATH ARTHUR ROTH	-	DEFENDANTS/APPELLANTS
A N D	AVALON INVESTMENTS LIMITED	-	PLAINTIFFS/RESPONDENTS

Mrs. Pamela Benka-Coker and
Charles Piper for Appellants

Michael Hylton for respondents

October 4, 5 and 24, 1989

CAREY P. (AG.):

This appeal raises interesting points of procedure in relation to a request for further and better particulars and also the scope of interrogatories. The present appellants, the defendants in an action for specific performance were refused leave by Master Vanderpump to have the respondents, the plaintiffs in that action, deliver to the appellants further and better particulars of the Reply filed in the action. The learned Master also refused the appellants leave to deliver to the respondents certain interrogatories, which will hereafter appear.

With respect to the request to deliver further and better particulars, the notice (so far as is material) was expressed in these terms:

"1. UNDER PARAGRAPH 2(a)

REQUEST: Specify all facts and matters being relied upon in support of the allegation that on the 24th April, 1987 the Defendants were unable to give vacant possession of the lands to the Plaintiff.

2. UNDER PARAGRAPH 2(b)

REQUEST: Specify all facts and matters being relied upon in support of:

(i) the alleged delays which had been caused solely by the Defendants, and

(ii) the alleged defaults of the Defendants."

As to the interrogatories, they were in the following form:

"1. Has the Plaintiff executed the Form of Transfer?

2. If the answer to 1 is in the affirmative, on what date was it executed?

3. If the answer to 1 is in the affirmative, was the duly executed Transfer ever delivered to the Defendants' Attorneys?

4. If the answer to 3 is in the affirmative, on what date was the said executed Transfer delivered to the Defendants' Attorneys?

5. Has the balance Purchase Price for the said sale been paid to the Defendants or their duly authorised agents?

"6. If the answer to 5 is in the affirmative, on what date was payment made?

7. If the answer to 5 is in the affirmative, to whom was the payment made?

8. On what date is it being alleged that the Plaintiff's right to vacant possession accrued?

9. Were the Defendants ever called upon to deliver up possession of the said lands?

10. If the answer to 9 is in the affirmative on what date was the demand for possession made?

11. If the answer to 9 is in the affirmative was the demand made orally or in writing?"

Mrs. Benka-Coker argued that contrary to the conclusion of the Master that the particulars being requested are not for clarification of the allegations contained in the pleadings but seek information as regards the evidence to be adduced, the further and better particulars sought were of material facts not evidence. Mr. Nylton in his usual economic style pointed out that in relation to the first request, facts and matters relied upon in support of the allegation that the defendants were unable to give vacant possession, " the term 'vacant possession' speaks for itself. Further, it was argued, the term appears:

(i) in the Agreement between the parties,

(ii) in the statement of claim and,

(iii) in the defence and counter-claim.

There was no uncertainty what it meant at any of those stages. Its repetition for the fourth time in the Reply, can amount to nothing more than an attempt to find evidence to enable the plaintiffs to prove their case.

With respect to the request at 2(b), Mr. Hylton said it was clear on any fair reading of the plaintiffs' pleading, what delays and defaults were being alleged. The defendants cannot be heard to complain about the Reply when the particulars have already been given.

By Section 168 of the Civil Procedure Code Law, - "every pleading shall contain and contain only a statement in "a summary form, of the material facts on which the party "pleading relies for his claim or defence but not the evidence "by which they are to be proved." The purpose of pleadings is to enable the opposite party to know what is being alleged against him so that the parties are aware of what the contest is all about. The court is entitled to know what are the issues. They fulfil the function of defining the issues. Cotton L.J. in Phillips v. Phillips (1878) 4 Q.B.D. at p. 139 stated the general rule:

> "In my opinion it is absolutely essential that the pleading, not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard, and tell them what they have to meet when the case comes on for trial."

An important requirement is the need to plead "facts" and not "evidence":

> "It is an elementary rule in pleading that when a state of facts is relied on, it is enough to allege it simply without setting out the subordinate facts which are the means of producing it, or the evidence sustaining the allegation."
>
> [Per Lord Denman, C.J. in Williams v. Wilcox (1833) 8 A & E at p. 331].

Although it is not always easy to distinguish facts and the evidence to prove them, there are dicta which make it clear that the question is inevitably one of degree. Brett L.J. said in

Phillips v. Phillips (1878) 4 Q.B.D. at p. 133:

> "The difference, although not so easy to express, is perfectly easy to understand."

In the present case, which was an action for specific performance, the plaintiff was required to allege material facts which would prove an agreement, the terms of the agreement and the breach. By paragraphs 12-16 of the statement of claim, the plaintiffs averred the breach of the agreement as follows:

> " .....
>
> 12. The Defendants were not on the 24th day of April 1987, nor have they been at any time thereafter ready to complete the said sale, in that:
>
> (a) the lands which the Defendants are able to transfer to the Plaintiff comprises approximately Eight and a half acres instead of the almost ten acres provided for in the Agreement;
>
> (b) the said land was not on that date and has not been at any time since then vacant.
>
> 13. The aforesaid notice was therefore invalid and of no effect.
>
> 14. In the alternative, the notice period was unreasonable in all the circumstances.
>
> 15. The Plaintiff is and has since May 19, 1987 (sic) ready, willing and able to complete the said sale, and has demanded that the Defendants do so.
>
> 16. In breach of the said Agreement, the Defendants have failed and/or refused to complete the sale, but demanded that the Plaintiff accept the reduced acreage and the land with the occupants.
>
> 17. The Plaintiff will, at the trial of this action, refer to the correspondence between its Attorneys and the Defendants' Attorneys for their full terms and effect."

The defendants pleaded to those paragraphs and in their Reply, the plaintiffs pleaded in paragraph 2 thus:

> "The Plaintiff says that the Notice dated 24th April 1987 which purported to make time of the essence of the Contract was ineffective in Law having regard to -
>
> (a) the fact that the Defendants were not on said date ready or able to complete the sale, since contrary to the expressed terms of the Agreement, they were unable on that date to give vacant possession of the lands to the Plaintiff; and
>
> (b) the Notice was unreasonably short having regard to the delays which had been caused solely by the Defendants' defaults and having regard to the fact that the Plaintiff and the Defendants were resident outside of Jamaica."

The request was for the plaintiffs to provide facts and matters in support of the defendants' inability to provide vacant possession. Such facts cannot in my opinion qualify as "further and better particulars." The plaintiffs were not required, in point of pleading, to allege any other particular or fact except the fact of the defendants' inability to provide vacant possession. Certainly the term 'vacant possession' can hardly be described as vague or uncertain. It was mentioned as Mr. Hylton pointed out in course of argument in the agreement between the parties, in the statement of claim and in the defence. The circumstances had not altered in so far as the pleadings went. I would agree with Mr. Hylton that at this late stage of the proceedings when the term was being referred to in the final pleading, the conclusion was

inevitable that evidence was being sought. It was wholly unnecessary for the plaintiffs to intimate to the defendants how they intended to prove the defendants' inability to give vacant possession. Such particulars would not, in my judgment be regarded as material facts for purposes of pleading.

By parity of reasoning the particulars requiring the plaintiffs to specify all facts and matters to support "alleged delays" and "alleged defaults" also amounted to a request for evidence and not facts. "Facts and matters being relied upon in support of" any allegation of delays and defaults can only relate to the evidence which the plaintiffs would adduce to prove a fact in issue. On the one side, the plaintiffs were alleging that the defendants were guilty of delays and defaults, and, on the other, there was a denial of those allegations. Mr. Hylton was also correct in saying that the nature of the defaults and delays were pleaded in the statement of claim in the paragraphs previously set out and the request for further particulars was therefore wholly unnecessary.

The provisions governing the administering of interrogatories are to be found in Section 273:

> "DISCOVERY OF INTERROGATORIES
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> In any cause or matter the plaintiff or defendant may, by leave of the Court or a Judge, deliver interrogatories in writing for the examination of the opposite parties or any one or more of such parties, and such interrogatories when delivered shall have a note at the foot thereof stating which of such interrogatories each of such persons is required to answer:
>
> Provided, that interrogatories which do not relate to any matters in question in the cause or matter shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness."

and Section 274:

" APPLICATION FOR LEAVE TO DELIVER INTERROGATORIES

A copy of the interrogatories proposed to be delivered shall be delivered with the summons or notice of application for leave to deliver them at least two clear days before the hearing thereof (unless in any case the Court or a Judge shall think fit to dispense with this requirement) and the particular interrogatories sought to be delivered shall be submitted to and considered by the Court or Judge. In deciding upon such application, the Court or Judge shall take into account any offer that may be made by the party sought to be interrogated to deliver particulars, or to make admissions, or to produce documents relating to any matter in question, and leave shall be given as to such only of the interrogatories as shall be considered necessary either for disposing fairly of the cause or matter or for saving costs."

In granting leave the Master will consider whether the interrogatories are relevant to the matter in issue and whether they are necessary to dispose fairly of the cause or to save costs. The rule was stated by Stirling L.J. in Plymouth Mutual Co-operative and Industrial Society, Limited v. Traders' Publishing Association, Limited, [1906] 1 K.B. at p. 416 - in short, interrogatories are admissible which go to support the applicant's case or to impeach or destroy the opponent's case. Interrogatories can be of great benefit where there are no material documents to be disclosed for in those cases there is almost always a conflict of evidence. It is a misconception however that because a matter is not raised in the pleadings, it cannot be the subject of interrogatories. Lord Esher M.R. in Marriott v. Chamberlain [1886] 17 Q.B.D. 154 at p. 163 laid it down that:

> "The right to interrogate is not confined to the facts directly in issue, but extends to any facts the existence or non-existence of which is relevant to the existence or non-existence of the facts directly in issue."

The pleadings in the present case acknowledge the existence of correspondence between the parties and aver that the parties will refer to them for their full terms and effect. One would doubt the efficacy of interrogatories in this sort of case but I am not to be taken as suggesting that in general, it is impermissible to require them.

Mrs. Benka-Coker argued that the questions were relevant to the question whether the defendants were ready, willing and able to complete the contract as alleged in paragraph 15 of the statement of claim.

Mr. Eylton's riposte was that the questions put were not necessary either for disposing of the matter fairly or for saving costs. He contended that all the questions except No. 1 could be answered by a reading of the correspondence, discovery of which had been ordered. As to the first question, it does not assist in disposing fairly of the cause or in saving costs and it offends the prohibition that interrogatories will not generally be allowed where it is plain that no admission can be obtained.

I begin by dealing with the first question whether the plaintiff has executed the form of transfer. The rule is that where there is on the pleadings a denial of a fact, an interrogatory designed to secure an admission of the fact, will not be allowed. The object of an interrogatory is to obtain admissions to facilitate the proof of one's own case and to ascertain, so far as is possible, the case of the other party. But, he is not entitled to discover in what way

the opponent intends to prove his case. In the present case, the defendants aver that the plaintiffs have not executed the transfer. The plaintiffs join issue. It is plain that no admission can be obtained. The interrogatory will thus neither dispose fairly of the matter nor save costs.

With regard to the other questions, the Master had to be satisfied as the relevant provision of the Civil Procedure Code ordains that the questions will fairly dispose of the matter or save costs. This case will depend almost wholly on the construction of documents. The contract for sale is not to be gathered from any conversation or oral negotiations. The action relates to an agreement in writing, specific performance of which is being sought. The answers to these remaining questions can only be ascertained by reading and construing the correspondence and the agreement. Plainly therefore, no saving in costs would result. The learned Master came to the correct conclusion in refusing leave to administer all these interrogatories. The English R.S.C. Order 26 Rule 1 replaced R.S.C. Order 31 Rule 1 and is to the like effect. The gloss appearing in the current White Book is therefore a relevant and useful guide in this regard.

For these reasons I concluded therefore that the learned Master ruled rightly in respect of both processes although her reason in the latter was misconceived. The appeal is, of course, against the ruling and not the reasons therefore.

WRIGHT J.A.

I agree.

GORDON J.A. (AG.)

I agree.