

*Production of documents - [last] and further affidavit of documents
[re]admitted - whether defendant has done so in its business records, has
of [?] - whether affidavit of documents satisfied judge of court - affidavit of
[?] - notice to produce documents - \$290 Judicial Civil Process
[?] - whether conflict as to possession or power over documents - leave
to then and for production - based on [?] - Order granted - leave
a [?] granted.*

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON - LAW

IN CHAMBERS

SUIT C.L. 1991/H145

BETWEEN

CARLTON HOLLINGWORTH

PLAINTIFF

A N D

ST. ANDREW DEVELOPERS LIMITED

DEFENDANT

Ransford Braham of Messrs. Livingston, Alexander & Levy for Plaintiff.

Alexander Williams of Myers, Fletcher & Gordon for Defendant.

HEARD: March 17, 1994

JUDGMENT

HARRISON J.

By this summons filed on the 22nd day of June 1993, the plaintiff seeks an order for production and inspection of certain documents and to be permitted to make notes and take copies thereof. Such documents being,

"All documents, bill of quantities, plans and other documents in relation to the Infrastructure referred to in clause 11 (f) of the Agreements for Sale referred to in paragraph 1 of the Statement of Claim and paragraph 2 of the Defence and all documents relating to how the increases of \$111,418.00 are arrived at."

The relevant facts are as hereunder:

By two agreements in writing made in May 1989 the plaintiff purchased from the defendant two lots numbered 179 and 404 at Chancery Hall Estate for the sums of \$155,000 and \$160,000 respectively.

Each agreement contained a clause 11, in identical terms:

"11 (f) The purchase price shall be adjusted upwards at any time during or after completion of the infrastructure if the cost of construction of the infrastructure is increased to the vendor as a result of:-

- (1) increases in the costs rates and for charges in respect of materials and other things and matters mentioned in sub-clause (c) (i) hereof after the date stated thereon, and/or

- (ii) increases in the wages and labour rates mentioned in sub clause (e) (ii) hereof with the approval of J.I.C.; and/or
 - (iii) variations in the said plans, specifications and work which result in extra work, materials or equipment.
 - (iv) any increased cost to the Contractor as a result of any of the delays caused by forces beyond its control.
- (g) Any such increases as aforesaid shall form an addition to the purchase price. A certificate from Davidson & Hanna, Quantity Surveyor or such other Quantity Surveyors as the Vendor shall nominate, as to the amount of such increase in the Purchase Price payable by the Purchaser shall be final and conclusive and binding on the parties hereto. In arriving at the said increase regard may be had to the fact that the project is being developed in phases."

Relying on a certificate dated the 22nd day of January 1991 issued by Messrs. Davidson & Hanna, Quantity Surveyors, the defendant, by letter each dated the 8th day of April 1991, demanded from the plaintiff in respect of each of lots 179 and 404, as escalation costs, the sum of \$111,418.00.

Correspondence followed between the parties. As a consequence the plaintiff filed a writ on the 25th day of July 1991 claiming, inter alia:-

"An order that the defendant do furnish to the plaintiff a detailed and duly vouched account and or a breakdown showing how the said sum of \$111,418.00 under both agreements is calculated."

Appearance was duly entered and a defence and counter-claim were subsequently filed. The plaintiff thereafter filed his reply and defence to counter claim.

On 11.3.92 the Honourable Master ordered on the summons for directions, that the defendant deliver, to the plaintiff within thirty (30) days, the further and better particulars of the Defence specified in paragraphs (a) to (f) of the documents delivered with the summons for directions.

The particulars required were,

- " (a) If any escalation relate to various categories of labour then state what categories the costs of which were increased;
- (b) As from what date and by what percentage and what amounts were the costs of each such category increased:

- (c) On what dates were the works done (describing the works) in respect of which escalation took place;
- (d) Are there any bills, vouchers or documents relating to any of the particulars sought in (a) to (c) hereof and if so what are they;
- (e) If any escalation related to materials give the nature of such materials and quantities of some as also the dates some were purchased, from whom purchased and at what price;
- (f) In relation to (a) to (e) above state the dollar value of each item of increase."

By the said order the defendant was ordered to, within the said thirty (30) days,

"... file and deliver to the plaintiff an affidavit of documents limited to documents relating to the sum of \$111,418.00 referred to in paragraph 4 of the defence, this is, the certification by Messrs. Davidson & Hanna, Quantity Surveyors, and notification of the aforesaid sum."

In compliance with the said order, the defendant, by an affidavit of documents sworn to on the 2nd day of July, by one Edwin Cohen, stated, inter alia,

"2. The defendant has in its possession or power the documents 'relating to the sum of \$111,418.00 referred to in paragraph 4 of the defence, that is the certification of Messrs. Davidson & Hanna, and notification thereof'

3. The Defendant has had but has not now in its possession

4. Neither the Defendant nor its Attorneys-at-law nor any other person on their behalf has now or ever had in their possession and document 'relating to the sum of \$111,418.00..' other than the documents enumerated in the First and Second Schedule."

The documents referred to in the affidavit were confined to copies of the escalation certificates dated the 22nd day of February 1991 in respect of lots 179 & 404 and letters from the defendant's attorney dated 8th day of April 1991, and the originals of such documents.

On the 11th day of May 1993, Mr. Justice G.G. James ordered,

"That the defendant make, file and delivera further Affidavit of Documents stating whether it has or has had at any time in its possession or power certain documents relating to the matters in question in this action and in particular; the working papers and notes of the Quantity Surveyors Messrs. Davidson & Hanna relevant to the Quantity

Surveyors' preparation of Escalation
Certificate for lot 179 dated 22nd February 1991."

As a consequence of this latter affidavit the plaintiff filed the instant summons on the 22nd day of June 1993. The plaintiff swore to an affidavit on the 20th day of July 1993, in support of the latter summons, and stated that the firm of Davidson & Hanna were nominated by the defendant and that such firm "could not have certified increases without having documents showing the original costs of those relating to increases from the original estimates." The plaintiff pointed out further that the further and better particulars filed show that the defendant was aware of 'the categories of labour cost and works which were the subject of increases (although they failed to state the amount of increases.) They admitted that there are bills, vouchers and documents relating to increases in labour and materials as well as contractors wage sheet, labour records, suppliers and sub-contractors invoices and quotations." The plaintiff sought the production of these latter documents.

Mr. Braham for the plaintiff argued that there is evidence that the defendant has document which it has neglected to discover; he relied on section 290 of the Judicature Civil Procedure Code, conceding that that no notice to produce was filed in compliance, but stated that the order for production could be construed as adequate notice and if not this was a mere irregularity making the plaintiff liable to pay costs; that the pleadings show the existence of the said documents in question in the hands of the defendant; that, in any event, the quantity surveyors, Messrs. Davidson & Hanna, are employed by the defendants, and the documents being sought are the said documents which belong to the project developers the defendants, and which documents the said quantity surveyors did rely on to do their work. The defendant could have effected the calculations itself - but chose to then give the documents to a third party, the quantity surveyors; the defendant had a present legal right to the documents - an entitlement and therefore if they were not presently in its physical possession, it could, ask for, obtain and produce them. He relied on Wiedeman vs. Walpole (1890) 24 Q.B.D. 537 and Lonhro vs. Shell Petroleum [1980] 1 WLR 632.

Mr. Williams for the defendant submitted that the affidavit of documents already supplied by the defendant was sufficient to satisfy the

court order of the 11th day of May 1993 which refers only to the "working papers and notes of the quantity surveyors"; that the defendant cannot produce documents in the custody and powers of third parties, the quantity surveyors - and moreso - they are in joint control and so cannot be produced by the defendant; that no notice to produce was served on the defendant as required by section 290, that there is a conflict as to possession or power over some of the documents and in all the circumstances, no order for production should be made, but the defendant should be allowed to file an affidavit of documents indicating what documents are in its possession and may be produced. He relied on Kearsley vs. Phillips et al (1882) 10 Q.B.D. 36, Restaurants of Jamaica Ltd. vs. Jamaica Mutual, Suit C.L. R021/91 dated 8th September, 1993, and the Digest of the Law of Discovery by His Hon. Judge Bray.

Section 287 of the judicature (Civil Procedure Code) "the Code", provides, inter alia,

"Every party to a cause or matter shall be entitled at any time, by notice in writing, to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice or of his solicitor, and to permit him or them to take copies thereof"

This section requires the party seeking production of the documents, to serve notice to the other party, as a pre-condition to production. No such notice was served. At the time of filing of the writ, on the 25th day of July 1991, the plaintiff claimed,

"An order that the defendant do furnish to the plaintiff a detailed and duly vouched account and or a breakdown showing how the said sum of \$111,418.00 under both agreements is calculated."

The plaintiff was thereby seeking documentary proof of the defendant's demand for such payment.

Accordingly, the order on the summons for direction on the 11th day of March 1992 and the order of James, J on the 11th day of May 1993, served to alert the defendant, albeit by seeking an affidavit of documents, that the documents which provided the information from which the quantity surveyors ultimately did their computation, were being enquired of. They are sufficient "notice" to the defendant, to satisfy the intent and purpose of section 290 of the Code, and fall within the procedural irregularity envisaged by section 678.

Documents which are in the joint possession of a party to a suit and a third person, not a party to the suit will not be ordered to be produced - Kearsley vs. Phillips et al, supra. His Honour Judge Bray, said, at page 9 paragraph 33 of the Digest of the Law of Discovery.

"33. A party cannot be ordered to produce a document unless it is in his sole legal possession or power; that is to say, unless the sole right and power to deal with it is in him The mere interest of another person in a document is not sufficient to prevent an order for production; it must be an actual property in the document or a right of possession."

In the instant case, the defendant's contention that the documents in question are in the "joint custody and control and power of Davidson & Hanna, the quantity surveyors," is without legal force.

The said quantity surveyors are the employees of the defendant, and although they may be classified as independent contractors, they remain employees who must account to the defendant for whatever property was handed to them; they would be obliged to return documents to the defendant, the legal owners.

Furthermore service of notice is excused in some instances. For example, such service is excused when possession of the document is admitted - vide Dwyer vs Collins (1852 7 Exch. 639).

The defendant in its further and better particulars dated the 2nd day of July 1992, and filed herein stated that there were increases in "labour costs and works" and that there are "bills, vouchers and documents relating to increases in labour and materials as well as contractor wage sheets, labour records, suppliers and sub-contractors invoices and quotations." The defendant therein provided detailed informations of dates, categories of workers and quantities that could only have been extracted from documents then in its possession.

It seems to this Court that these are documents from which the defendant would have justified his claim for additional payment under the said agreements for sale and from which the said quantity surveyors would have obtained the information for the issue of the said certificates.

These said documents are in the legal possession of the defendant.

Whether they were given by the contractor to the quantity surveyors or directly by the defendant, itself, they are document showing the increased costs which the defendant would be liable to bear, and as a consequence, claim from the plaintiff. They remain the property of the defendant.

This court has given consideration to section 290 (5) of the said Code.

It provides:

"(5) The Court or Judge, may, on the application of any party to a cause or matter at any time, and whether on affidavit of documents has or has not already been ordered or made, make an order requiring any other party to state by affidavit whether any particular document or documents or any class or classes of documents specified or indicated in the application is or are, of has or have at any time been, in his possession, custody or power, at what time he parted with the same and what has become thereof"

In view of the findings of the Court it is unnecessary to order the defendant to file an affidavit envisaged by the subsection (5), as contended for by counsel for the defendant.

For the above reasons, the court granted to the plaintiff the order sought, with costs; leave to appeal was granted.

Cases referred to

- ① Widdeman v Macfarlane (1840) 21 Q. B. 532
- ② Sontheim v Sherrill Petrolchem [1980] 1 W. L. R. 632
- ③ Keirsey v Phillis et al (1882) 10 Q. B. 336
- ④ Restaurants of Jamaica Ltd v Jamaica Mutual Sav. C. L. Ro 3/91
- ⑤ Deyon v Collins (1852) 7 Exch. 629

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