



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2011HCV01657

BETWEEN	RELANA PHILLIPS	CLAIMANT
AND	RICHARD MCHAYLE	1 ST DEFENANT
AND	CHRISTOPHER MURPHY	2 ND DEFENDANT

Mr. Richard Reitzin instructed by Reitzin & Hernandez for the Claimant
 Mr. David Johnson instructed by Samuda & Johnson for the Defendants

Heard: April 9 and 25, 2014

Application for Cross-examination

C. Brown J (Ag.)

At the end of submissions made by Counsel the issues for determination were identified by me as follows:

- [1] Whether the application to cross-examine Mrs. Tammara Graves-Hucey on her affidavit filed on the 29th July 2013 is spent.
- [2] Whether an application for cross-examination can be heard in the absence of a specific application for Court Orders for the inspection of documents.
- [3] Whether an oral application for inspection of the documents in question is to be allowed/permitted.

[4] Whether cross-examination is to be allowed.

[5] Whether inspection is to be allowed (or whether the document is privileged).

[6] I am grateful to Counsel, in particular Mr. Reitzin, for the bundle of authorities provided to the court.

[7] An application was made by the claimant for Specific Disclosure filed on the 10th June 2013.

[8] In response and in opposition to the said application, Mrs. Tammara Graves-Hucey swore and filed an affidavit on the 25th July 2013 asserting a claim of privilege.

[9] On the 29th July 2013, the claimant filed a Notice of Application for Court Orders that Mrs. Tammara Graves-Hucey be required to attend for cross-examination on her said affidavit, which application was fixed for hearing on the 30th July 2013.

[10] The Application for Specific Disclosure came on for hearing on the 30th July 2013 where an order was made *inter alia* for the defendants to give specific disclosure of:

1. *"All motor vehicle accident claim forms (or report forms) submitted by either or both of the defendants to the insurer of the motor vehicle owned by the first defendant and driven by the 2nd defendant at the time of the accident which is the subject of these proceedings concerning the said accident."*

[11] In compliance with the said order, the defendants filed a Supplemental List of Documents disclosing the existence of a Motor Vehicle Accident Report form and claiming privilege from inspection.

[12] In the Notice of Application for Court Orders filed 29th July 2013 by the claimant in giving the grounds upon which the order for cross-examination was being sought stated at paragraph 3:

- "3. *The claimant is desirous of eliciting facts from the maker of the affidavit which are directly relevant to the*

issues arising on the claimant's application for specific disclosure."

[13] The Application for Specific Disclosure having been heard and determined before King, J. on the 30th July 2013, there is no further basis for the application for cross-examination.

[14] Counsel's submission on behalf of the defendants that the application became spent on the orders being made by King, J. on the 30th July 2013 is well founded and I am constrained to agree.

[15] In the event I am wrong in my determination what would the requested cross-examination relate to?

[16] Counsel, Mr. Reitzin submitted that an application for production is premature until the question of privilege is dealt with. Cross-examination then, he said, is to get at the real truth why the documents were brought into existence and will question and say there were several purposes for which the document was brought into existence and that some of those reasons are equally or more important than for submission to attorneys in relation to litigation.

Can cross-examination be allowed for such a purpose?

[17] In **Birmingham and Midland Motor Omnibus Company Limited v. London and North Western Railway Company** [1913] 3 KB 850 Buckley LJ said (at p. 5 of case supplied to court):

"An affidavit of document is sworn testimony which stands in a position which in certain respects is unique. The opposite party cannot cross-examine upon it and cannot read a contentious affidavit to contradict it. He is entitled to ask the court to look at the affidavit and all the documents produced under the affidavit and from those materials reach the conclusion that the affidavit does not disclose all that it ought to disclose. In that case he can obtain an order for a further and better affidavit. Further ... he may file further documents and calling upon the party

making the affidavit of documents to account for them. But subject to these qualifications the affidavit of documents cannot be called into question but must be accepted as being correct."

[18] Hamilton LJ in the said case (at p. 6) said:

"Although an Affidavit of Discovery cannot be controversially challenged, as by cross-examination, counter affidavit or administration of interrogatories ..."

[19] This position was accepted by Mangatal J (Ag) as she then was in **Junior Anderson v. Maritime Towing Company Limited v. Hylton Maxwell and Michael Campbell** (unreported).

In that case Counsel for the claimant had obtained an order that **Maritime Towing** produce to the court certain documents. Counsel had indicated an interest in cross-examining Dr. Hylton Clarke, Managing Director of **Maritime Towing** in respect of his Affidavit of Documents.

[20] It was the opinion of Mangatal J (Ag) as she then was, that based on the authorities and she cited the **Midland** case above, such a course could not be adopted.

[21] I accept this view as a correct interpretation of the law and I would hold that no cross-examination could be permitted for the purpose sought. This in as much as I agree with the submission, that the claim of privilege is not unimpeachable.

[22] In view of these findings it is not necessary to answer issue two.

[23] Based on the authorities referred to, the court may, in its discretion, inspect the document "for the purpose of deciding as to the validity of the claim for privilege" (**Midland** case).

[24] This is in fact provided for in the Civil Procedure Rules (CPR) 2002 as amended. Rule 28.15 (5) states that:

"A person who does not agree with a claim of right to withhold inspection or disclosure of a document may apply to the court for an order that such document be disclosed or made available for inspection."

Rule 28.15 (7) states that where a person:

- a. *"Claims a right to withhold inspection ... the court may require the person to produce that document to the court to enable it to decide whether the claim is justified."*

[25] It is therefore in this context that I consider whether an oral application for inspection should be permitted, as well as the overriding objective of the CPR to deal justly with a case.

[26] The general rule is that an application must be made in writing (CPR Rule 11.6(1)). An application may be made orally if the court dispenses with the requirement for the application to be made in writing (CPR Rule 11.6 (27) (b)).

[27] Notice of the application is required to be given to each respondent (CPR Rule 11.8 (1)) and must be served at least seven (7) days before the court is to deal with the application (CPR Rule 11.11 (1) (b)).

[28] Importantly, a draft order must be filed with the application (CPR Rule 11.7 (3)) and the applicant may not ask at any hearing for an order which was not sought in application unless the court gives permission (CPR Rule 11.13).

[29] These requirements serve to give respondents the opportunity to take issue with the application in particular where the issues are joined. This opportunity is not to be lightly denied and it is more likely that such an application will be permitted to be made orally where there is no contest between the parties.

[30] In the instant case, to allow the application to be made orally would deny the defendants the opportunity to raise any objection and more importantly put forward their own position.

[31] Therefore the court will not dispense with the requirement that the application be made in writing.

[32] There is therefore no basis for the consideration of issue five (5) as to whether the document is privileged.

[33] It is therefore ordered as follows:

1. The Application for Mrs. Tammara Graves-Hucey to attend for cross-examination is denied.
2. Permission is refused for the Application for Court Orders for Inspection of Document to be made orally.
3. Costs of Application to be the defendants to be taxed if not agreed.
4. Permission to appeal is granted.
5. Defendants' attorney to prepare, file and serve order.