

*Sup. Court*  
*Application by summons - whether respondent entitled to answer - a publican's affidavit S 290(5) Judicature*  
*Civil Procedure Code - Order in favour of respondent*  
IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. R021/1991

BETWEEN

RESTAURANT OF JAMAICA LIMITED

APPLICANT

AND

JAMAICA MUTUAL LIFE ASSURANCE  
SOCIETY

RESPONDENT

Mr. R. Braham for applicant instructed by Livingston, Alexander & Levy.

Mr. Michael Hylton & Miss Minette Palmer for Respondent instructed by Myers, Fletcher & Gordon.

HEARD: June 8, 1993 &

LANGRIN, J.

October 8, 1993

This is an application by Summons for an Order for Production of Documents and Inspection. It arises from an agreement between the parties for the construction of a dwelling house in which there are alleged escalation and fluctuations in the costs of construction.

The Pleadings have been settled and served on the parties. On an order for Direction on 16th July, 1992 by the Learned Master both sides have exchanged Affidavit of Documents.

Defendants' attorney-at-law, Patricia Taylor has deposed that since that time it was discovered, that a number of documents were erroneously included in Part 1 of the First Schedule of the Affidavit. These documents do not relate to this suit and are therefore irrelevant. Similarly a number of relevant documents were inadvertently excluded from the affidavit.

This summons sets out a schedule of documents which the applicants seek to have the respondents produce for inspection. The summons is supported by the affidavit of Mark George Myers, Director of applicant's Company.

Section 290 (5) of the Judicature Civil Procedure Code in dealing with an application for an order for inspection state as follows:-

- "5. The Court or a Judge, may, on the application of any party to a cause or matter at any time,

and whether an affidavit of documents shall or shall not have already been ordered or made, make an order requiring any other party to state by affidavit whether anyone or more specific documents to be specified in the application, is or are, or has or have at anytime been, in his possession or power; and, if not then in his possession, when he parted with the same and what has become thereof  
....."

The section appears to correspond with Order 24 Rule 7 of the White Book (1967 Edition).

Mr. Braham, on behalf of the applicant cited a number of authorities of which I am not in any disagreement submitting in the main that the documents indicated in the summons should be produced for inspection.

Mr. Hylton Counsel for the respondent took a contrary view in his brief reply and submitted that an opportunity should be given to the respondent to answer the applicant's affidavit, correct the error and claim privilege where necessary.

It appears that the documents referred to in the summons relate to some matter in question in the action within the meaning of the Rules and undoubtedly bear upon the issues between the parties. However, there is no clear evidence that many of these documents are in the defendant's possession or power. Besides there ought not to be a conflict of affidavits as to the truth of an affidavit of documents.

While I am of the view that a sufficient case has been made out by the applicant, in accordance with the usual practice a further affidavit of documents seems appropriate. The words of the statute as indicated in Section 290(5) (supra) point unambiguously to such a result.

That being so, it seems to me to follow irresistibly that the respondent should answer the applicant's affidavit swearing what, if any documents, it has which were not included in the original

Affidavit.

Accordingly, the order is as follows:-

- (I) The respondent to make a further affidavit of Documents stating whether or not the respondent has or has had the document or class of documents specified in paragraph (1) (a) (i) (ii) as well as (i) (ii) (iii) (iv) of the summons. If not then in his possession or power, when he parted with them, and what has become of them.
- (II) In respect to paragraph 2 (A) (B) and (C) of Summons, Respondent to make a further affidavit correcting the error and claiming privilege if necessary.
- (III) The Costs of this application should be in the Cause.