

ROYAL COURT
(Samedi Division) 76
24th April, 1995

Before: The Judicial Greffier

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| Between | Beghins Shoes Limited | First Plaintiff |
| And | Island Gift Shops Limited | Second Plaintiff |
| And | Avancement Limited | Defendant |
| | (action and counterclaim) | |

Application by the Defendant for the date fixed for the hearing of this action and counterclaim to be vacated and for an Order that a further hearing date for this action should not be fixed until the Plaintiffs shall have completed Discovery.

Advocate A.D. Hoy for the Plaintiffs;
Mr. R.L. Weston, a Director, on behalf of the Defendant.

5 THE JUDICIAL GREFFIER: This action and counterclaim were set down on
the hearing list on 29th March, 1993 and, at the same time, the
usual Order for mutual Discovery of documents within a twenty-
eight day period was made. Subsequently, on 21st July, 1994, as
neither party had complied with that Order, by consent mutual
Unless Orders were made against both parties to the effect that
they must comply with the original Order by 5.30 p.m. on 29th
July, 1994. Advocate A.D. Hoy, who acts for the Plaintiffs,
swore an Affidavit on 29th July, 1994 which had attached to it a
list of documents.

15 Subsequently, the trial of the action and counterclaim was
fixed for 28th September, 1994. On that occasion the Defendant,
through Mr. Weston, raised the issue as to whether full and
proper Discovery had been made. Advocate Hoy, who represented
the Plaintiffs at that hearing, was unable to assure the Court
that this had occurred and accordingly the Court adjourned the
trial to a later date. The note of the Greffier Substitute who
assisted the Court on that date includes the following words, "as
20 Discovery on the part of the Plaintiffs does not appear to have

been completed matters adjourned for a date to be fixed after Discovery completed."

5 Advocate Hoy told me that he was able subsequently to
examine all the files held by the previous lawyers of the
Plaintiffs and was satisfied that no relevant documents were held
on these which needed to be discovered. Accordingly,
subsequently a further hearing date of 15th and 16th December,
10 1994, was fixed but both the parties agreed to vacate that date
and subsequently a date of 26th, 27th and 28th April, 1995 was
fixed.

15 The Defendant is still complaining that it has not received
all the documents which it should have received. However, the
Defendant also complains that the Affidavit sworn by Advocate Hoy
was not in the correct form in accordance with Practice Direction
90/4. That Practice Direction contains in its Second Schedule a
precise form of Affidavit under the terms of which the statements
made in paragraphs 1, 3 and 4 of the list of documents must be
20 sworn to as being within the own knowledge of a person making the
Affidavit on behalf of a Company and as being true. The
Affidavit sworn by Advocate Hoy did not follow the form of the
Second Schedule.

25 Mr. Weston, on behalf of the Defendant, also drew my
attention to the terms of Practice Direction 92/3 dated 22nd
December, 1992. This Practice Direction provides that a party
shall not apply to the Bailiff for a date to be fixed for the
trial or hearing of an action before all parties to the action
30 shall have completed Discovery in accordance with any Order made
by the Judicial Greffier at or before the date upon which the
proceedings were set down for hearing.

35 The issue arose in this case as to whether the form of
Affidavit sworn by Advocate Hoy was sufficient in order to enable
him to seek to fix a date for the hearing of the action and
counterclaim without being in breach of Practice Direction 92/3.
This issue is of some importance to the legal profession as a
decision on it would assist in defining at what stage and in what
40 manner a party complies with an Order for general discovery.

45 Discovery is an important procedure and should never be
seen as a mere hurdle to be jumped in order to be able to fix a
date for the hearing of an action. The duties placed upon both
the parties and their lawyers are onerous. It is a vital
component of the Discovery procedure that the Affidavit of
Discovery be produced in accordance with the form in Practice
Direction 90/4. If it is, then a presumption arises in favour of
the party producing the Affidavit that Discovery has been duly
50 made by that party and that presumption can only be rebutted in
the case of an application for further specific Discovery, by
clear evidence that relevant documents which had not been
discovered must exist and must be relevant to the matters in
issue. If the Affidavit is not produced in the correct form then

the usual form of Order for Discovery has not been complied with and that presumption will not arise. Furthermore, until all the parties to the action have either completed such Discovery or had their pleadings struck out under an Unless Order for failure to make Discovery, no party is at liberty to apply to the Royal Court for the fixing of a date for trial.

I am aware that the practice has crept in in some legal offices of seeking to persuade the Bailiff's Secretary to fix a date for trial upon the basis that the applying party has satisfactorily completed Discovery. That practice is clearly in breach of Practice Direction 92/3 which requires that all the parties to the action shall have completed Discovery in accordance with the Order of the Greffier before an application for the fixing of a date for the hearing of an action can be made.

On the other hand, I can see that a situation could arise in an action where all parties would have completed the Affidavit for Discovery in the appropriate form but where one of the parties would remain dissatisfied that full Discovery had been made. In my view, that dissatisfaction would not be sufficient to prevent an application being made for a date to be fixed. The onus would be upon the dissatisfied party to make an application by Summons at the earliest possible date, for the determination of the question as to whether there were further documents or categories of documents which ought to be discovered.

Accordingly, in this case, I ordered that the trial dates be vacated upon the basis that the Plaintiffs had not complied with the original Order for Discovery and were, therefore, not at liberty to proceed to fix a date for the hearing thereof. I also ordered that a further date for the hearing of the action and counterclaim ought not to be fixed until such time as an Affidavit of Discovery had been produced in accordance with Practice Direction 90/4 and I ordered that the Plaintiffs pay the costs of and incidental to the Defendant's Summons seeking the adjournment.

No Authorities.