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ROYAL COURT
(Samedi Division)

5th June, 1997

106.

Before: The Deputy Bailiff and
Jurats Vibert and de Veulle.

Between:	David William L. Dixon	Plaintiff
And:	Jefferson Seal Limited	Defendant.

Application by the Plaintiff for an Order that the Defendant make specific discovery of the documents or other material referred to in the schedule attached to the Plaintiff's summons by providing a list of the same, verified by affidavit and by providing facilities for proper inspection and copying of the same.

Advocate M.St. J. O'Connell for the Plaintiff.
Advocate A.D. Hoy for the Defendant.

JUDGMENT

THE DEPUTY BAILIFF: This further summons in an action which is set down for five weeks later this month, has been strenuously argued by the contesting parties. The Defendant is summoned by David William L. Dixon, one of the contesting parties, to make specific discovery of ten classes of documents.

The matter is both clarified and complicated by the fact that the same parties appeared before the Judicial Greffier who delivered a ten page judgment on 21st March, 1996. It is necessary to cite an early part of that judgment, although we have had the whole judgment read to us *in extenso*. At p.2 the Greffier said this:

> *"The usual Order in relation to general discovery was made by me upon setting down and the relevant Order was dated 8th August, 1995. On 12th December, 1995, Advocate Hoy wrote to Advocate O'Connell enclosing the affidavit of discovery which had been sworn by Mr. Beadle on behalf of the Defendant. In that letter, Advocate Hoy indicated that discovery in respect of the Defendant had been limited to documents relating to matters in issue between the parties in the proceedings. Advocate Hoy clearly envisaged that Advocate O'Connell might disagree with him in relation to the ambit of the discovery which ought to be made and, in particular, in relation to the question as*

to what was in issue between the parties in the proceedings. Advocate Hoy was right on this point because Advocate O'Connell subsequently issued a request for specific discovery. During his opening address, Advocate O'Connell indicated that my decision would depend, to a great extent, upon how I viewed the pleadings. His view was that the seventeen categories of documents in the request related to matters which were relevant to matters in issue in the action. However, it rapidly became clear that Advocate Hoy's view was that that was not so".

We have also, of course, had the benefit of reading the judgment of the Court of Appeal in Victor Hanby Associates Ltd & Hanby -v- Oliver (1990) JLR 337 CofA. This judgment rightly states that once general discovery has been made a party seeking further discovery much show by evidence on oath a *prima facie* case that his opponent holds documents not yet disclosed which are relevant to the issues to be decided by the Court. Relevance is not enough. The test is whether the information sought but not yet disclosed will in the words of the judgment ***"enable the party applying for discovery to advance his case, damage that of his opponent, or lead to a train of enquiry which may have either of those consequences".***

Clearly, and in this case, importantly, in view of the time before the case opens, the Court has to be certain that an order for specific discovery is essential to dispose fairly of the cause or matter.

A wide ranging series of specific discoveries were sought by Advocate O'Connell when he appeared before the Greffier. The Greffier applied what he termed the wider relevance test to the requests which he explained meant that the requests must be relevant to matters in issue in the action. He was not prepared to allow discovery which would have involved the private transactions of other parties. Apparently, the Plaintiff also sought information on bonds other than the Confederation Life Bond. That is the objection that we had to parts of the reports of the Plaintiff's expert witnesses containing specific detail of the background of dealings of other parties, some of whom were not yet involved in the particular litigation.

The Greffier carefully analysed each request and dismissed the application for each and every category of documents ordering the Plaintiff to pay the costs of and incidental to his summons in any event. We do not conceive in the way that the requests were drawn that he could have come to any other conclusion. We were therefore not surprised by the strong opposition from Advocate Hoy to these new proposals. He says in his affidavit that he was surprised to receive what he calls the third application. He relates this application to the first application in February and has gone to some lengths to show what he terms a remarkable

similarity between the two. The second application is, however, not unimportant. It was settled between the parties and a supplemental list of documents was disclosed under an affidavit filed on 2nd May. It is, in our view, those documents that to some extent open the door properly closed by the Judicial Greffier.

Mr. Morley-Kirk, the expert retained by this Plaintiff, has filed an affidavit. It is of course his third. What Advocate O'Connell says, in essence, is that he regrets his much wider application so firmly dealt with by the Greffier. It was, and we agree with him, much too wide and much broader than this application. He now says that the production of the deal tickets which were tendered voluntarily by the Defendant and which allowed the second application to be compromised after a partly heard application has opened up an entirely new line of argument relative to the matters in issue. The deal tickets appear to show a different charging rate for the investors there named. That may be important when an undated letter to the Plaintiff to which he replied in unequivocal terms on 7th April, 1995, enclosed what is termed "an important document". With that important document is contained a schedule of commissions and charges. The letter states:

> *"Please note that we have classified you as a private client and accordingly enclose our Private Client Agreement. This formalises the manner in which we have always conducted investment business on your behalf. It is an important document and would request you to read it carefully. This is accompanied, where appropriate, by further literature in respect of our services and charges".*

Within the important document, under the heading `Commissions and Charges' appear these words:

> *"Our charges will be in accordance with our standard published scale of charges in effect at the time the charges are incurred. A copy of our current standard scale of charges is available on request".*

There are two matters in the pleadings which may be relevant. We put it in these terms because we must make it very clear that we are not taking a view on the merits of the case in any way at all. It is pleaded that there was an implied or expressed contractual duty, *inter alia*, to act in the best interests of the Plaintiff and then, again, at paragraph four:

> *"The consideration or cause for the said contract was the charging by the Defendant of commissions when a particular acquisition was made within the Plaintiff's investment portfolio or alternatively the price at which the*

Defendant, acting as principal, sold stock to the Plaintiff".

Mr. Morley-Kirk carefully details why he required the documents. He says that they will assist in establishing the duty owed by Jefferson Seal to the Plaintiff and that all the documents will assist in establishing whether Jefferson Seal fulfilled its best execution obligation. Best execution, as we understand it, is a stockbrokers term of art which is not difficult to understand. Best execution is no doubt part and parcel of the best interests pleaded by the Plaintiff. But those best execution terms have - according to the important letter - always applied.

We must recall that in Matthews & Malek: Discovery: (1992) at p.94 cited by the Greffier it is stated:

> *".... "matters in question" covers a wider ground than the issues as disclosed in the pleadings. The Court on discovery is entitled to look outside the pleadings in order to determine what matters are in issue between the parties. Indeed, there need not be pleadings for a matter to be said to be in issue".*

In Mr. Morley-Kirk's third affidavit he alludes to the three deal tickets which were disclosed after Advocate O'Connell's second application. A superficial analysis of those deal tickets apparently shows a commission earned by the Defendant in excess of half a per cent of the consideration paid. We say that it appears to be so because we cannot begin to take even a preliminary view of the conclusions that might be drawn. There may be a perfectly obvious explanation; if there is it will come out at trial, but surely the Plaintiff is entitled to seek other documentation in order to examine any inconsistency and then be able to question the Defendant upon it. The letter from Jefferson Seal Ltd to Mr. Dixon is possibly relevant. It may be highly relevant but of course - and we have to say this - it may have no relevance at all. But it does say that the so-called Private Client Agreement formalises the manner in which Jefferson Seal Ltd *"have always conducted investment business on your behalf".*

Advocate Hoy's protest at the level of charging commission should, in our view, be examined before trial in order to allow the relationship between broker and client to be examined at trial. One of the problems regarding the Plaintiff's deal ticket now disclosed is that it does not identify the market maker. We only have a photo-copy and not the original. We presume that it was still not decipherable on inspection.

Despite Advocate Hoy's protestations we remain convinced that most of the discovery asked for should be allowed. His argument in our view is flawed where he says that a small relevant item cannot now be allowed because it was contained in a vastly wider

series of disallowed items. That is not an example of *chose jugée* as we understand it.

The items are dealt with as follows:

1. The contract note issued by the Defendant in respect of the purchase by the Plaintiff of the bond is allowed.

2. The contract note from the party from whom the Defendant purchased the bond is allowed.

3. The "deal slips" or other documentation however described which reveal the steps taken by the Defendant to fulfil its "best execution" obligations to the Plaintiff is allowed.

4. Any documentation on the internal client file maintained by the Defendant (or elsewhere) for and in respect of the Plaintiff's investments, which will contain information connected with both sides of the transaction (i.e. the acquisition of the bond by the Defendant and its subsequent sale to the Plaintiff) is allowed.

5. All documentation used by the back office function of the Defendant to reconcile the said transaction is allowed.

6. All documentation and other material which was produced in the course of the review of the business practices of the Defendant following the collapse of Confederation Life Insurance of Canada is allowed.

7. All internal deal tickets or other document or documents, howsoever described, relating to the purchase of the bond by the following Plaintiffs in other cases instituted against the Defendant in which the identity of the party from whom the Defendant purchased the bond is revealed; and which reveals the price at which the bond was purchased by the Defendant is allowed, but only in respect of the seven parties called in the present action.

8. The contract notes in respect of all of the Plaintiffs listed in paragraph 7 above from the party from whom the Defendant purchased the bond for those Plaintiffs, respectively, is allowed but only in respect of the seven parties called in the present action.

9. The "deal slips" or other documentation howsoever described which reveal the steps taken by the Defendant to fulfil its obligations of "best execution" to each of the Plaintiffs listed in paragraph seven above is allowed but only in respect of the seven parties called in the present action.

10. All documentation used by the back office function of the Defendant to reconcile the said transactions between the Plaintiffs listed above in paragraph seven and the Defendant is allowed but only in respect of the seven parties called in the present action.

Authorities

Dixon -v- Jefferson Seal Ltd (21st March, 1996) Jersey Unreported.

Victor Hanby Associates Ltd & Hanby -v- Oliver (1990) JLR 337 CofA.

Matthews & Malek: Discovery (Sweet & Maxwell) (1992) p.94.

RSC (1997 Ed'n) O.24 r.7: pp.446, 447, 451.