IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION

1998 No. 60

BETWEEN

"The Devisees" of the Estate of the late John Augustus Alexander Virgil — Plaintiffs

and

John William David Swan — Defendant

Mr. L. Scott for the Plaintiffs
Mr. Coles Diel Q.C. for the Defendant

JUDGMENT

PRELIMINARY

This is an application by the Plaintiffs for discovery prior to the commencement of proceedings which may or may not happen in relation to the Defendant. With the consent of the Court and without any objection being raised by Counsel for the Defendant, Counsel for the Plaintiffs cured a defect in their Originating Summons by informing the Court that the Plaintiffs are Marion Johnson, Barbara Lucille Brown, Glenn Ming and Marie Diane Spence.

The issue is whether the Defendant is in law liable to make discovery.

THE LAW

It is common ground that Order 24 Rule 7 of the Rules of the Supreme Court 1985 does not apply. In his oral submissions before the Court Counsel for the Plaintiffs stated that there was no action before the Court and that "this is merely discovery to see if wrongdoing has happened".

First, I think that discovery is not obtainable if the Plaintiff has not established wrongdoing. This is borne out in *Norwich Pharmacal Co. v Commissioners of Customs and Excise [1973] 2 All ER 943.* Lord Reid at 947 d said that the "question now is whether the respondents are in law liable to make discovery of the names of the wrongdoers who imported the patented substance." He continued thus:

> " Discovery as a remedy in equity has a very long history. The chief occasion for its being ordered was to assist a party in an existing litigation. But this was extended at an early date

to assist a person who contemplated litigation against the person from whom discovery was sought. If for various reasons it was just and necessary that he should have discovery at that stage. such discovery might disclose the identity of others who might be joined as defendants with the person from whom discovery was sought. Indeed in some cases it would seem that the main object in seeking discovery was to find the identity of possible other defendants. .....

But it is argued for the respondents that it was an indispensible condition for the ordering of discovery that the person seeking discovery should have a cause of action against the person from whom it was sought. Otherwise it was said the case would come within the mere witness rule.

I think that there has been a good deal of misunderstanding about this rule. It has been clear at least since the time of Lord Hardwicke that information cannot be obtained by discovery from a person who will in due course be compellable to give that information either by oral testimony as a witness or on a subpoena duces tecum. Whether the reasons justifying that rule are good or bad it is much too late to enquire; the rule is settled. But the foundation of the rule is the assumption that eventually the testimony will be available either in an action already in progress or in an action which will be brought later. It appears to me to have no application to a case like the present case. Here if the information in the possession of the respondents cannot be made available by discovery now, no action can ever be begun because the appellants do not know who are the wrongdoers who have infringed their patent. So the appellants can never get the information."

He said at 948 a:

" But that does not mean, as the appellants contend, that

discovery will be ordered against anyone who can give information as to the identity of a wrongdoer. There is absolutely no authority for that. A person injured in a road accident might know that a bystander had taken the number of the car which ran him down and have no other means of tracing the driver. Or a person might know that a particular person is in possession of a libellous letter which he has good reason to believe defames him but the author of which he cannot discover. I am satisfied that it would not be proper in either case to order that the person who has suffered damage might be able to find and sue the wrongdoer. Neither authority, principle nor public policy would justify that.

So discovery to find the identity of a wrongdoer is available against anyone against whom the plaintiff has a cause of action in relation to the same wrong. It is not available against a person who has no other connection with the wrong than that he was a spectator or has some document relating to it in his possession."

He continued at 948f:

" My noble and learned friends. Lord Cross of Chelsea and Lord Kilbrandon, have dealt with the authorities. They are not very satisfactory, not always easy to reconcile and in the end inconclusive. On the whole I think they favour the appellants, and I am particularly impressed by the views expressed by Lord Hatherley LC in *Upmann v Elkan.* They seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious act of others so as to facilitate their wrongdoing he may incur no personal liability, but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers."

Lord Morris at 951 d said:

"The appellants are in a position to assert that the persons

who have imported, whoever they are, must have been infringers and therefore wrongdoers. The respondents know the names and addresses of these people."

At 953 f Lord Morris stated thus:

"To prevent a denial of justice must at all times be the aim of a judge and the concluding words of Hall V-C would surely have been regarded as wholly commendable in any court of Equity:

'In this case the Plaintiff do not know, and cannot discover, who the persons are who have invaded their rights, and who may be said to have abstracted their property. Their proceedings have come to a deadlock, and it would be a denial of justice if means could not be found in this Court to assist the Plaintiffs'".

Lord Kilbrandon stated thus at 973 e:

"The most attractive way to state an acceptable principle, intellectually at least may be as follows. The dispute between the plaintiff and the defendants is of a peculiar character. The plaintiff is demanding what he conceives to be his right, but that right insofar as it has patrimonial substance is not truly opposed to any interest of the defendants; he is demanding access to a court of law, in order that he may establish that third parties are unlawfully causing him damage. If he is successful, the defendants will not be the losers, except insofar as they may have been put to a little clerical trouble. If it be objected that their disclosures under pressure may discourage future customers, the answer is that they should be having no business with wrongdoers."

He continued at 974 b:

"Turning then, from the imaginary dock authority we have been considering to the respondents, do they stand in some relation to the appellants or to their property which makes

> the respondents bound to disclose, on an order of the court, the name of the persons who imported goods in prejudice appellants' rights, in order to enable them to sue? In my opinion they do.
>
> .....
>
> The importation of these goods infringes the appellant's property right and the functions which they perform must I think place the respondents in a relation with the appellants which entitles the latter to demand from them the names of the infringers.".

I adopt and apply the above principles to the instant case. As regards the Norwich case I think that it is easily distinguishable from the instant case. In the Norwich case there was a tortious infringement of the appellants' right: there was a wrongdoing and the appellants sought to discover the identity of the wrongdoer. In the instant case there is no wrongdoing: the discovery is to see if a wrongdoing has happened.

It is clear that there is no principle in law which says that the condition for ordering discovery is to see if a wrongdoing has happened.

It is to be noted that in the instant case the Plaintiffs have not said that they have property rights and those rights have been infringed.

Secondly, it is "clear that a bill for discovery cannot be used to enable a plaintiff to fish for information of any causes of action he may have against other persons than the defendant." Per Lord Cross at 967 e in the Norwich case quoting Orr v Diaper (1887) 11 NE at 547, 548.

In my view the Plaintiff's application amounts to a fishing for information to see if there is any wrongdoing.

CONCLUSION

In the circumstances the Plaintiffs' application is refused.

Dated the 22nd day of May, 1998.

Vincent W. Meerabux

VINCENT W. MEERABUX
PUISNE JUDGE