

of motion for orders of writ of attachment and the striking out of the defence and counterclaim in the appellant's action against the respondents ("the defendants").

The background to the motion is relevant. By an amended writ issued on the 8th May, 1987, the plaintiff claimed against the defendants damages for inducing a breach of contract between the plaintiff and SCM Corporation and also for breach of contract. When the summons for directions came up for hearing on the 18th April, 1994, it was ordered, inter alia, as follows:

"That the first and second defendants within thirty (30) days file and deliver to the Plaintiff an Affidavit of Documents relating to the issues raised in the Defence and counterclaim."

The defendants did not comply with the order, and on the 7th November, 1994, the court made a further order in the following terms:

"IT IS HEREBY ORDERED THAT:

- 1) The Defendants comply with the Order of this Honourable Court dated 18th day of April, 1994 within thirty (30) days of the Order hereon failing which the Defence and Counterclaim be struck out and Interlocutory Judgment in Default of Defence be entered for the Plaintiff with Damages to be assessed.
- 2) Costs to the Plaintiff to be agreed or taxed."

Again, the defendants did not comply in time with the order of the court. However, the defendants applied to the court for extension and enlargement of time to comply with the order, and on the 9th November, 1995, the following order was made:

"IT IS HEREBY ORDERED THAT:

1. That the time limited by the Order of the Honourable Mr. Justice W. A. James on the 7th day of November, 1994 for the Defendants to comply with the Order of this Honourable Court dated the 18th day of April 1994 be extended by twelve (12) days from the 7th day of December 1994 to the 19th day of December, 1994.
2. That the Affidavit of Documents sworn to on the 6th day of December 1994 and served on the 13th day, of December 1994 be accepted as valid and in compliance with the Order of the Court.
3. That costs be costs in the cause."

The affidavit of documents mentioned in paragraph 2 above was served on the plaintiff on the 13th December, 1994. It should have been served no later than the 7th December, 1994. An earlier affidavit had been served in July, 1994, but not only was it filed out of time, but it contained errors and omissions, and consequently, was withdrawn and replaced by that mentioned in paragraph 2 above. This affidavit enumerated 182 documents in Schedule I, and in Schedule II "correspondence between the defendant's attorneys-at-law and plaintiff's attorneys-at-law and between defendant and its attorneys-at-law for the period May 1987 to present time."

The plaintiff did not appeal against the order of the 9th November, 1995, The defendants complied with the orders of the court, and those orders were now spent.

The power of the court to order the parties to any cause or matter to file an affidavit of documents is contained in section 284 of the Judicature (Civil Procedure Code) Law ("the Code"). It reads as follows:

"284. Any party may, without filing any affidavit, apply to the Court or a Judge for an order, directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession or power relating to any matter in question therein."

The affidavit of documents under this rule must include all documents in which the party has any possession or property or which are in his corporeal possession, and which are relevant to the issues in the cause or matter. In **4811 v. Kennedy** (1884) 27 Ch. D. 1, Cotton, L.J. stated the conclusiveness of the affidavit. This is what he said (at page 19):

"The general rule is undoubtedly this, that in all questions of discovery where you have the oath of the party claiming discovery challenging the oath of the party giving discovery, the oath of the latter is for this purpose conclusive."

Then later on (at pages 19-20) the learned Lord Justice continued:

"With regard to these affidavits of documents... it was held that the party making the affidavit could not be cross-examined, the party requiring it could not file affidavits to shew that it was false, and it was held to be conclusive. But if from any documents produced, or any statements in the pleadings, it appears that the party making the affidavit has in his possession documents other than those which are mentioned in his affidavit, the Court requires, him to make a further affidavit. The production was only ordered of those documents which he admitted to be in his possession. If there was a probable ground for supposing that he had more, then he was required

to make a further affidavit, but that proceeded upon the footing that the oath of the deponent was conclusive as against the party requiring the production. But as the Court was not restricted to requiring the deponent to make one affidavit only, it might require him to make another at any time if there was reasonable probability of there being other documents not mentioned in his former affidavit."

The sage words of Cotton, L J are true today as they were then. The relevant provision (section 284) of our law is in the same form as the rule in force in England at the time that *Lyell v. Kennedy* (supra) was decided. If it appears that a particular document or a class of documents is or are missing from an original affidavit of documents, then it is open to the requesting party to make an application for an order for discovery of the particular document or class of documents. The relevant provision is section 290(5) of the Code, which reads as follows:

"(5) The Court or Judge may, on the application of any party to a cause or matter at any time, and whether an affidavit of documents has or has not already been ordered or made, make an order requiring any other party to state by affidavit whether any particular document or documents or any class or classes of documents specified or indicated in the application, is or are, or has or have at any time been, in his possession, custody or power, and if not then in his possession, custody, or power, at what time he parted with the same and what has become thereof. **Such** application shall be made on an affidavit stating that in the belief of the deponent the party against whom the application is made has, or has at some time had in his possession, custody or power the particular document or documents or the class or classes of documents specified or indicated in the application, and that they relate to the matters in

question in the cause or matter, or to some or one of them."

It should be noted that these provisions are quite independent of those contained in section 284 of the Code and in no way do they interfere with the rights conferred thereunder. The applicant for an order under section 290(5) of the Code must make out a prima facie case of the existence of a document or class of documents which are relevant to the matters in issue and which had not been included in the other party's affidavit of documents.

The sanctions which attach to the non-compliance with an order for discovery is provided for in section 292 of the Code, which reads as follows:

"292. If any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall be liable to attachment.

He shall also, if a plaintiff, be liable to have his action dismissed for want of prosecution, and if a defendant to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating may apply to the Court or a Judge for an order to that effect, and an order may be made accordingly."

My first observation is that a valid order of the court must be in existence to ground an application for attachment. The application must be made by notice of motion and must comply with section 487 of the Code. An order for attachment will not be made unless the court is satisfied that the party to be attached:

- a) has been served with a copy of the order indorsed with a memorandum in the words and to the effect stated in section 452 of the Code;
- b) has willfully neglected to obey the order by the time therein limited. (Casual or unintentional disobedience will not justify an order - it must be contumelious);
- c) is endeavouring to avoid a fair discovery. If a party is shown to be unable to make the affidavit, **the court will not order his attachment.**

Where the application is for the dismissal of the plaintiff's action for want of prosecution, or for the striking out of the defendant's defence, the above conditions will apply.

I turn now to the appeal in this case. By notice of motion dated 2nd October, 1996, the plaintiff sought the following orders:

1. "Writs of attachment be issued against Mr. William Taylor Managing Director of the First Defendant and Mr. Anthony Hart the Second Defendant for disobedience of the Orders of Discovery made on the 18th day of April 1994, 7th November 1994 and 9th November 1995 pursuant to Sections 292 and 651 of the Judicature (Civil Procedure Code) Act.
2. The Defence and Counterclaim of the First Defendant and the Defence of the Second Defendant be struck out and Interlocutory Judgment be entered for the Plaintiff with Damages to be assessed and costs to be agreed or taxed pursuant to Section 292 of the Judicature (Civil Procedure Code) Act and/or the inherent jurisdiction of the Court."

The affidavit in support sworn by the Chief Executive Officer of the plaintiff company acknowledges the order of the court made on the 9th November, 1985, which regulated the obligations of the defendants: It could not be then that that was the basis for the application. However, paragraphs 16 to 18 of the affidavit state:

16. "That in consideration of my releasing Durkee Foods from all claims arising out of the dealings and transactions between Durkee and the Defendants Durkee has supplied me with copies of all documents in its possession relating to the sale of hot peppers to it by the Defendants which are exhibited hereto and marked '1-22' for identity.
17. That the aforesaid documents establish not only the breaches of contract alleged by the Plaintiff but prove conclusively that the Defendants on at least three (3) separate occasions deliberately deceived this Honourable Court by the suppression of material documents and by seeking and obtaining an Order to accept the Affidavits of Documents sworn to by the Defendants as valid and in compliance with the Order of the said Court in the full knowledge that they were false.
18. Wherefore I humbly pray that this Honourable Court will grant the reliefs prayed in this Motion in support of which this Affidavit is filed."

The basis of the notice of the motion was the insufficiency of the affidavit of discovery, in that it did not list documents in relation to dealings with SCM Corporation. It was not related to a failure to comply with an order

of the court. Smith, J. identified what he described as the primary issue in the motion and formulated it in this way:

"Whether a party can properly move the court to issue writs of attachment and to strike out the pleadings of the other party where the affidavit is shown to be defective or insufficient in content by reason of the exclusion of discoverable documents."

In my opinion, Smith, J. correctly interpreted the provisions of section 292 of the Code when he said:

"Non-compliance, to my mind, in the context of S.292, is where no list or affidavit is delivered or the list or affidavit delivered was not in proper form or did not appear to be made in good faith so that it could not fairly be described as a list or affidavit.

An insufficiency in content of list or affidavit made pursuant to an order for general discovery will not attract the highly penal provisions of sections 292 and 651 of the Civil Procedure Code. These penal provisions will only be invoked in the last resort where it seems clear that the party in default really intends not to comply with an order of the court - see Odgers on Civil Court Actions 24th Edition at p. 313."

I am of the view that the motion was misconceived. Having regard to the defence filed by the first defendant, the plaintiff had reason to believe that the defendants had in their possession documents other than those mentioned in the affidavit of documents. The proper course for the plaintiff to have adopted in the circumstances was to apply to the court for an order

for further and better affidavits of discovery (under section 284) or for discovery of particular documents (under section 290(5)).

I concluded that Smith, J. was right in dismissing the motion. The appeal was dismissed, therefore, with costs to the respondent.