**[1991–92 Gib LR 88]**

## EUROPA CONSTRUCTION SERVICES LIMITED v. INVERSION HOGAR, DAHL HOLDINGS and ATLANTIC FINANCE AND COMMERCIAL CENTRE LIMITED

SUPREME COURT (Kneller, C.J.): June 7th, 1991

*Civil Procedure—discovery—specific discovery—documents already inspected—applicant to show further inspection of documents needed for fair disposal of case before ordinary discovery process—insufficient that documents merely relevant—no order if respondent shows good cause, e.g. privilege, not in possession, or subject to lien*

*Civil Procedure—discovery—place of inspection—normally at offices of holder's solicitors or if documents in constant business use, at usual place of custody—may be inspected by legal or other professional adviser, or by other person in interests of justice without danger of breach of confidentiality*

The plaintiff in proceedings against the three defendant companies applied for orders for discovery of documents.

The plaintiff's solicitors applied for the defendants' solicitors to produce the written permissions required under Spanish law from the Ministerio de Economia Y Hacienda, authorizing the first defendant's investment in two property development projects in Gibraltar. They also sought inspection of the first defendant's copy of the commercial agreement between it and the plaintiff. The first defendant's solicitors refused to comply with either notice, stating that the plaintiff's legal

representative had already inspected the investment permissions and so knew that permission had been obtained, and that it already had a copy of the agreement (as did the Ministerio de Economia Y Hacienda) and would have to give reasons for wanting to inspect it.

The plaintiff applied for an order under O.24, r.11 of the Rules of the Supreme Court, requiring the first defendant to produce the documents for inspection. It submitted that (a) it could ask to inspect a document it had already seen to check whether it had been altered, was the final draft of the ultimate document, or differed in some way from its own copy, and therefore discovery should not be refused on the ground that it had a copy or had seen the original; (b) in this case the plaintiff's copy of the agreement contained several clauses with blank spaces, and it needed to check the number and sufficiency of the permissions; (c) the defendants had referred to the agreement and the permissions in its pleadings, and they related to matters in issue in the proceedings, not least allegations of fraud against the plaintiff; and (d) the documents were not privileged, nor was there any other reason why they should not be produced.

The defendants submitted in reply that (a) to obtain further inspection of documents prior to ordinary pre-trial discovery, the plaintiff would have to give reasons to the court, if not to the defendants; (b) the permissions had already been viewed, and the commercial agreement had not been amended or altered in any way; the defendants had only their own copy and not the original; and (c) the plaintiff had not shown that discovery of the documents at this stage was necessary for the fair disposal of the case or to save costs, and would have to file an affidavit demonstrating this.

**Held,** ordering discovery:

(1) Under O.24, rr. 10, 11 and 13, the court could order discovery of particular documents directly referred to in a party's pleadings or affidavits whether or not the documents were in that party's possession, custody or power. The court had a discretion under r.11(1) as to whether to order discovery, provided first that the applicant had satisfied it that an order was needed to dispose fairly of the cause or matter before it or in order to save costs (r.13(1)). It was not enough to show that the documents were relevant. If the party requested showed that the documents were privileged or showed some other good cause why they should not be produced, no order would be made. The fact that the party did not have the documents in its possession, custody or power, or that that party had a lien over the documents as against the requesting party *might* be good cause (paras. 13–15).

(2) Inspection would normally take place at the offices of the holder's solicitors, or at the usual place of custody in the case of documents in constant use for the purposes of trade or business. Production could be ordered to take place elsewhere (including overseas if necessary) and occasionally the court might order that documents be deposited in court for inspection. Any dispute as to the proper place for inspection should be

resolved without recourse to the court if possible. Inspection could be by a legal adviser or professional expert, or by any person whose assistance could be shown to be essential in the interests of justice without breach of confidentiality (para. 16).

(3) The plaintiff had shown, for the purposes of r.13, that its inspection of the documents was necessary for the fair disposal of the case before the court. It would be ordered to take place at the offices of the defendants' solicitors. In the circumstances, the fact that the plaintiff had previously inspected the permissions and had a copy of the agreement were not reasons for refusal. There was no need for the filing of further affidavits, though the plaintiff would have been wise to tell the defendants why it wished to inspect the documents, in the interests of saving time and costs (paras. 22–26).

**Cases cited:**

(1) *Davies* v. *Eli Lilly & Co. (No. 1)*, [1987] 1 W.L.R. 428; [1987] 1 All E.R. 801, applied.
(2) *Dolling-Baker* v. *Merrett*, [1990] 1 W.L.R. 1205; [1991] 2 All E.R. 890, applied.
(3) *Dubai Bank Ltd.* v. *Galadari (No. 3)*, [1990] 1 W.L.R. 731; [1990] 2 All E.R. 738, applied.
(4) *Leslie* v. *Cave*, [1886] W.N. 162; (1887), 56 L.T. 332, applied.
(5) *Quilter* v. *Heatley* (1883), 23 Ch. D. 42, applied.
(6) *Rafidain Bank* v. *Agom Universal Sugar Trading Co. Ltd.*, [1987] 1 W.L.R. 1606; [1987] 3 All E.R. 859, applied.
(7) *Roberts* v. *Oppenheim*, (1884), 26 Ch. D. 724; 50 L.T. 729, applied.
(8) *Whyte & Co.* v. *Ahrens & Co.* (1884), 26 Ch. D. 717; 50 L.T. 344, applied.
(9) *Woodworth* v. *Conroy*, [1976] Q.B. 884; [1976] 1 All E.R. 107, applied.

**Legislation construed:**

Rules of the Supreme Court, O.24, r.1(1): The relevant terms of this paragraph are set out at para. 12.
r.10(1): The relevant terms of this paragraph are set out at para. 12.
(2): The relevant terms of this paragraph are set out at para. 12.
r.11(1): The relevant terms of this paragraph are set out at para. 12.
r.13(1): The relevant terms of this paragraph are set out at para. 12.

*J.E. Triay, Q.C.* and *R. Triay* for the plaintiff;
*P.J. Isola* for the first and third defendants;

1 **KNELLER, C.J.:** There are two summonses in chambers filed by the plaintiff before the court. The first is dated January 31st, 1991 and the second is that of March 19th, 1991. The plaintiff asks for an order that the defendants produce to them for its inspection the appropriate permissions for investment by the first defendant in the project "Atlantic Village" and

in the project "Commercial Centre A" with the appropriate supporting documentation. The second summons asks for an order that the defendant produce for inspection by the plaintiff "at such time and place and in such manner as the court thinks fit" the agreement entered into between the first defendant and the plaintiff dated May 31st, 1989.

2 The summonses are supported by the affidavits of Mr. R.A. Triay, a partner in the firm of solicitors for the plaintiff. Copies of the notices addressed by Triay & Triay to Isola & Isola, the solicitors for the first and third defendants, are exhibited to the affidavits. The one asking Messrs. Isola & Isola to produce the appropriate permissions for the investment by the first defendant in the project "Atlantic Village" and "Commercial Centre A" with the appropriate supporting documentation is dated January 22nd, 1991.

3 The notice to Isola & Isola from Triay & Triay asking the first defendant to produce the agreement entered into between the first defendant and the plaintiff dated May 31st, 1989 is dated February 14th, 1991. The solicitors for the defendants failed to comply with the provisions of O.24, r.10 of the Rules of the Supreme Court. They acknowledged each notice and wrote to Triay & Triay saying that they had no intention of complying with either notice.

4 Isola & Isola, in their letter of January 29th, 1991 to Triay & Triay, explained that a legal representative of the plaintiff called Mr. Luis Fabiano had been to the Ministerio de Economia Y Hacienda and had inspected all the files and applications for investments in a foreign country made by the first defendant in respect of Atlantic Village Ltd. and Atlantic Finance and Commercial Centre Ltd., so Mr. Fabiano would have been able to discover that permission or authorization for the investment in Gibraltar of the first defendant company had been obtained.

5 It is open to any member of the public or any interested party, Isola & Isola continued, to make an inspection at the ministry in respect of any foreign investment. This must have been why Triay & Triay were able to make the allegation they did in para. 26(d) of the statement of claim. A Spanish bank of any standing would not transfer funds outside Spain without the appropriate authority. Any payment out, however, would have to have specific permission to make a specific payment, which, in turn, would have to be supported by appropriate receipts and so forth. Otherwise any payment would be an offence according to Spanish law.

6 Thus it was that the defendant now realized that the plaintiff could not produce the justifying vouchers and proofs of payment, because the plaintiff's representations to the first defendant were false and fraudulent, and by then the plaintiff had obtained large sums of money from the first defendant. The plaintiff had also broken deposit funds which the plaintiff should not have broken.

7 So Isola & Isola advised the first defendant that the plaintiff was not entitled to the production and inspection of the permissions referred to in Triay & Triay's notice, because the plaintiff had already had an opportunity of seeing them through its Spanish lawyers, and, secondly their production was not necessary for disposing fairly of the action, for saving costs, or for preparing a reply to the defence and counterclaim. The application was merely an excuse on the part of the plaintiff to delay matters.

8 Mr. Fabiano would also have been able to discover during his visit that the agreement between the parties was lodged with that ministry in Spain.

9 Triay & Triay's reply was that Isola & Isola had disclosed no ground of privilege justifying the refusal to comply with the defendants' procedural obligations in the matter of discovery and inspection. The plaintiff was not trying to delay the progress of the action.

10 So far as the agreement between the parties is concerned, Isola & Isola, on February 15th, 1991, wrote to Triay & Triay and said that the plaintiff should explain why the defendants were required to produce the agreement when the plaintiff was in possession of a copy of it. The request was unnecessary, but they were prepared to reconsider it if Triay & Triay would elaborate on what caused them to ask for this.

11 Triay & Triay replied on March 4th this year and said that the notice was given pursuant to procedural entitlement which placed no burden on the party entitled to it to explain the necessity or expediency of the notice. They asked Isola & Isola to reconsider their refusal in order to avoid the necessity of the plaintiff's making an application to the court. Isola & Isola replied on March 7th, saying that the plaintiff was in possession of a copy of the agreement, and the defendants did not believe the court would make an order for them to produce a copy of it.

12 Order 24 of the Rules of the Supreme Court is the Order under which the plaintiff asks the defendants to produce these documents for inspection. I set out its relevant rules:

> "1. (1) After the close of pleadings in an action begun by writ there shall, subject to and in accordance with the provisions of this Order, be discovery by the parties to the action of the documents which are or have been in their possession, custody or power, relating to matters in question in the action.
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> 10. (1) Any party to a cause or matter shall be entitled at any time to serve a notice on any other party in whose pleadings or affidavits reference is made to any document requiring him to produce that

document for the inspection of the party giving the notice and to permit him to take copies thereof.

(2) The party on whom a notice is served under paragraph (1) must, within 4 days after service of the notice, serve on the party giving the notice a notice stating a time within 7 days after the service thereof at which the documents, or such of them as he does not object to produce, may be inspected at a place specified in the notice, and stating which (if any) of the documents he objects to produce and on what grounds.

11. (1) If a party . . . served with a notice under rule 10(1)—

. . .

(b) objects to produce any document for inspection,

then, subject to rule 13(1) the Court may, on the application of the party entitled to inspection, make an order for production of the documents in question for inspection at such time and place, and in such manner, as it thinks fit.

. . .

13. (1) No order for the production of any documents for inspection or to the Court or for the supply of a copy of any document, shall be made under any of the foregoing rules unless the Court is of opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs."

13 The learned editors of *The Supreme Court Practice 1991* include these commentaries on rr. 10, 11 and 13. The court has jurisdiction under rr. 10 and 11 to order discovery of a document referred to in a pleading or affidavit, whether or not the document is in the possession, custody or power of the party in whose pleading or affidavit the reference is made: see *Rafidain Bank* v. *Agom Universal Sugar Trading Co. Ltd.* (6). The pleading or affidavit must make a direct allusion to the document or class of documents in question, and not just a reference by inference: see *Dubai Bank Ltd*. v. *Galadari (No. 3)* (3).

14 The court has a discretion whether or not to make such an order, and an order will not be made if good cause to the contrary is shown. The absence of possession, custody or power may sometimes amount to good cause, but will not invariably do so; the decision depends on the facts of each particular case: see *Rafidain Bank* (6) and *Quilter* v. *Heatley* (5) (23 Ch. D. at 48–51). The party against whom the order is sought will be excused if he is privileged from producing the document in question: see *Roberts* v. *Oppenheim* (7). The notice to produce may be served at any time.

15 Under r.13, it is for the party applying for the order for production to satisfy the court that the order for production and inspection is necessary for disposing fairly of the cause or matter, or for saving costs: see *Dolling-Baker* v. *Merrett* (2). It is not enough for the applicant to show that the documents are relevant; he must also show that their production and inspection are necessary for one or more of the purposes mentioned in the rule. A lien over the documents as against the other party may be a valid ground for objecting to produce them for inspection, but the court may override the objection if, applying the test in r.13(1), production is necessary for disposing fairly of the action: see *Woodworth* v. *Conroy* (9).

16 The usual or proper place for inspection is the office of the party's solicitor, or in the case of bankers' books or other books of account or books in constant use for the purpose of any trade of business, their usual place of custody. These words are not in the present r.10, but these are still the appropriate places for production and inspection. The production may be ordered elsewhere, and even abroad if circumstances warrant it: *Whyte & Co*. v. *Ahrens & Co*. (8). It should never be necessary to bring to the court a dispute as to the appropriate place for inspection, but the court has a complete discretion in the matter. It may still order that the documents be deposited in court to be inspected there in accordance with the old Chancery practice: see *Leslie* v. *Cave* (4). A party to an action may appoint a person who is neither his legal adviser nor a professional expert, to inspect the opposing party's documents on discovery, provided that he can show that such person's assistance is essential in the interests of justice, and the opposing party is unable to satisfy the court that there will be a breach of confidentiality in respect of the documents to be inspected: *Davies* v. *Eli Lilly & Co.* (1).

17 The submissions of counsel on the summonses were, in brief, as follows: Mr. Triay, Q.C. said that sometimes a party applies for specific discovery of a document it has already seen because it may be necessary to see if it has been altered or if it is the final draft or otherwise. The pleader should make sure that he knows what document he relies on. It was not a sufficient reason to deny discovery and inspection on the ground that the plaintiff has a copy or has seen the original. Again, the fact that the "permissions" were said to have been seen by an adviser of a party would not amount to sufficient reason. The defendants had pleaded the agreement and the "permissions," so the plaintiffs were entitled to specific discovery of them. They related to a question in the cause or matter. The defendants might have some "permissions" and not others, which would justify default.

18 It was no answer to the application, he said, to say that the applicant is able to see the document elsewhere. Its own copy might have to be compared against that of the defendants. Sometimes its solicitors would

wish to see if the copies matched. Here they were said to be the bases for serious allegations of fraud. That made specific discovery of them all the more necessary. There was no suggestion that any of them were privileged or that they were not discoverable at any stage.

19 Mr. Isola said there was indeed a procedural right but Isola & Isola had asked the plaintiff why it wanted to see them, and the reply was that the plaintiff did not have to explain. In fact r.13(1) showed that the plaintiff must explain to the court, if not to the defendants, that such an order was necessary. Each party had very strong views about the other in this case. The defendant knew that the plaintiff's legal agent in Spain had seen the "permissions," and the defendants now wanted to know why the plaintiff wanted to see them all over again. There was no dispute about the agreement dated May 31st, 1989. It had not been altered or amended, so far as Mr. Isola could recall. He did not have the original. It was reasonable for the defendants to ask why they should produce their own copy for specific discovery. They had been rebuffed by the plaintiff's solicitors, who said they would not explain why. There was no mention in any affidavit in support of the application for the order that it was necessary for disposing fairly of the matter or for saving costs. When it came to ordinary discovery, then all those documents would be made available.

20 Mr. Triay, Q.C. asked for leave to file a supplementary affidavit to comply with r.13(1). He added that he did not wish to expand on his client's internal strategic reasons for asking for specific discovery. The defendants had not seen the agreement that the plaintiff had. He then went on to reveal that in the copy the plaintiff had, several clauses, important ones, had blank spaces in them.

21 It is apparent now to the court that an order for specific discovery and inspection of the agreement and permissions is necessary for disposing fairly of the cause or matter and for saving costs, and I so order. This will be in the usual and proper place for inspection, namely the office of the defendants' solicitor.

22 I do not agree that the plaintiff need not give reasons for requiring specific discovery. Order 24, r.13 indicates that it must be shown that it is necessary for disposing fairly of the cause or matter or for saving costs. The court should certainly be told why it is necessary and it would be wise to let the party served with the notice know why, for that would probably save time and costs.

23 In this case, the fact that the applicant has a copy of the agreement or that his legal adviser has seen the "permissions" in a Spanish Ministry is not a sufficient reason for refusing to give the applicant discovery here in Gibraltar if it is possible.

24 I am satisfied, therefore, that the plaintiff as a consequence of revealing that its copy of the agreement has blank spaces in several important clauses and it needs to check whether the "permissions" are in order and sufficient in number have made out that an order for production and inspection is necessary. The relevance of documents, of course, is not sufficient: see *Dolling-Baker* v. *Merrett* (2).

25 In the circumstances, I see no need to give leave to the solicitors for the plaintiff to file a supplementary affidavit indicating why such an order was necessary either for disposing fairly of the cause or matter or for saving costs. If that were done, then leave to file and serve a replying affidavit would have to be given to the solicitors for the defendants, and, as I have indicated, the matters that they would put in the replying affidavit or would be likely to put in a replying affidavit, would probably not be sufficient to sustain an objection to the production of these documents for inspection by the plaintiff. It would only delay matters.

26 I order as follows:

1. The defendants are to produce to the plaintiff for its inspection the appropriate "permissions" for the investment by Inversion Hogar S.A. in the project "Atlantic Village" and in the project "Commercial Centre A," with the appropriate supporting documents.

2. The defendants are to produce to the plaintiff for its inspection, the agreement entered into between the first defendant and the plaintiff, dated May 31st, 1989.

3. The place of inspection is to be the offices of the defendants' solicitors unless otherwise agreed by the parties.

4. The date and time of such inspection are to be agreed by the solicitors for the parties.

5. Liberty is given to each party to apply.

6. Costs will be in the cause.

*Order accordingly.*