

THE HIGH COURT**[2011 No. 7213 P.]****BETWEEN****PAUL CAMPION****PLAINTIFF****AND****PATRICIA WAT****DEFENDANT****JUDGMENT of Mr. Justice Sean Ryan delivered the 8th February 2013**

This is an application to dismiss the plaintiffs claim because of his failure to make discovery of documents as ordered by this Court.

According to the statement of claim delivered on the 22nd November, 2011, the plaintiff and defendant were married in Hong Kong on the 10th September, 1991 and divorced there on the 30th May, 2002. The plaintiff claims that he is the owner of rare stamps and associated certificates and a security deposit cheque, as scheduled in the statement of claim. He pleads that the defendant is and has been since a date unknown prior to July 2006 wrongfully in possession of the said stamps. The plaintiff seeks delivery of the stamps and cheque, damages for detention, conversion and other reliefs.

The defence was delivered on the 14th December, 2011. It begins with preliminary objections that the plaintiff's claims are statute barred; that he has been guilty of inordinate and inexcusable delay leading to prejudice of the defendant in her defence of the action; that the statement of claim fails to disclose any reasonable cause of action in detinue or conversion; and that the action is vexatious and abuse of process.

Paragraph 2 of the defence denies that the plaintiff was or is the owner of the stamps and associated documents or entitled to their possession; denies that the defendant has been in possession of such materials; denies the plaintiffs alleged demands and any alleged refusals by her to deliver up the same materials; denies that she ever had them in her possession or sold them; denies that she converted the same to her own use or deprived the plaintiff of them; denies that the plaintiff has suffered loss or damage; and denies that she destroyed or disposed of them.

The defendant also denies that she converted the security deposit cheque that in respect of which the plaintiff claims, which is a reference to the that the plaintiff was beneficially entitled to the proceeds of a security deposit cheque written to a Mr Iain Finnegan in the sum of €2,500.

The plaintiff that the value of the items allegedly detained by the defendant from him have a value of approximately €631,592.

Mr. Matthias Kelly, SC presented this application on behalf of the defendant. In support of his application he submitted a document containing a procedural summary; detailed information about the chronology; a series of complaints about the adequacy of the discovery that was provided; submissions on behalf of the defendant in support of the application to dismiss; and relevant authorities.

When the matter came on for hearing before me on the 24th January, 2013 the plaintiff furnished a "second supplemental affidavit of discovery of Paul Campion" which his counsel, Mr. O'Reilly, says is Mr. Campion's best endeavour to deal with all the deficiencies, which he candidly acknowledges were present in the previous affidavits of discovery. He contends that there was no intention to mislead or deceive and that the matter has now been put right. Whatever admitted deficiencies were present, the situation has been remedied. It would in the circumstances be unreasonable and unjust to deprive the plaintiff of the opportunity of presenting his case.

Mr. Kelly maintains however, that the situation is incapable of being remedied and that the latest affidavit is not sufficient to avert the justice that must now be visited upon the recalcitrant plaintiff. Mr. Kelly points out that discovery was ordered by Cross J. in this Court in June 2012. There was, he says, an abysmal failure to comply with the discovery. Now we are at the stage, not only of having had a supplementary affidavit of discovery but at the last minute a second supplemental affidavit of discovery. He says that the explanations contained in the affidavit are manifestly unbelievable and that this latest deposition is wholly insufficient to avert the wrath of justice.

Mr. Kelly refers to the history of the proceedings as outlined in his helpful summary. He argues that the detailed list of stamps that is contained in the statement of claim implies that the plaintiff must have documents relating to them and that he therefore should be in a position and is in a position to list such documents and make them available for inspection in the course of the proceedings.

Mr. Kelly points to deficiencies in the form of the original affidavits of discovery which do not apply to this latest deposition.

Mr. Kelly suggests that internal evidence in the affidavit and in the statement of claim, when the two documents are put side by side and contrasted, demonstrate that the plaintiff has failed in fact to make proper and full discovery. He must, in other words, have some documents notwithstanding his denials and he points to the request in relation to an apartment and suggests that the plaintiff has produced or listed documents relating to a different apartment.

The requirement under O.31 r.12 is for the party to make an affidavit detailing documents that are or were in his possession or power relating to any matter in question in the case. An order may not be made if the Court is of the opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs. The jurisdiction to strike out a claim or a defence for failure to make discovery exists for the purpose of enforcing and ensuring compliance with the court's orders. Discovery is ordered when it is necessary to do so for the fair disposal of the action.

But once discovery has actually been made, it is not generally the function of this Court to make determinations of fact in order to

decide whether the claim should be struck out. It would not be possible on the basis of the affidavits alone for this Court to do that. It would obviously be necessary to have a hearing at which the plaintiff was cross-examined. This is in accordance with the jurisprudence in respect of discovery of the Supreme Court as decided in *Murphy v. J. Donohue Limited* [1996] 1 I.R. 123 and the cases therein cited. The headnote states at para. 2 as follows:-

"That O. 31, r. 21 of the Rules of the Superior Courts, 1986, existed to ensure compliance with orders for discovery rather than to punish those who default; and that while cases might exist where a defence should be struck out because one party might not be able to get a fair trial as a result of the other parties wilful refusal to comply with an order for discovery, such cases would be extreme.

Since the plaintiff has now made discovery in appropriate form, I do not think that it is for me to determine on the basis of probability or improbably whether his explanations are correct or not. Neither am I able to contrast the pleadings to date with the contents of the discovery affidavit or affidavits in order to determine the truth. In the circumstances, it is not appropriate for me to make an order dismissing the plaintiff's case and it would not be just to do so.

The defendant has not asserted any special or particular prejudice that arises out of the late filing of this second supplemental affidavit of discovery in proper form. Neither has he sought an adjournment of the matter in order to put forward new material that would seek to establish such a case. I think that was a wise decision because it would inevitably mean further delay in the prosecution of these proceedings which have already been considerably delayed. Indeed, delay and prejudice are pleaded by the defendant as defences in the action. Therefore, it is obviously not in the defendant's interest to have the whole matter prolonged even further.

It was clearly reasonable and prudent and appropriate for the defendant to bring this motion, because it was only at the last minute that the plaintiff actually produced the affidavit in proper form. As to whether it is correct or credible or is any other way to be criticised, that is best considered in the context of the trial as a whole in light of the evidence. Nothing in my decision will inhibit the exploration by the defendant's counsel of any of the matters that he raises by way of comment or criticism of the conduct of the plaintiff including, in particular, the manner in which he has dealt with the order of Cross J. in respect of discovery of documents. Indeed, it is in my view most convenient just and appropriate that the consideration of the veracity of assertions made by the plaintiff should be carried out in the course of the trial of the issues in accordance with the pleadings.

In view of the fact that the plaintiff has now complied or purported to comply with the order for discovery as made by Cross J. I refuse this application to dismiss the claim on the ground of failure to make discovery.