

ROYAL COURT
(Samedi Division)

174

30th August, 1994

Before: The Judicial Greffier

Between: Andrew Gordon Plaintiff

And: David Roderick Kirch First Defendant

And: Channel Hotels & Properties
Limited Second Defendant

(by original action)

And:

Between: Channel Hotels & Properties
Limited Plaintiff

And: Andrew Gordon Defendant

(by counterclaim)

Application by the Plaintiff for the Answer and Counterclaim of the Defendants to be struck out and Judgment entered on behalf of the Plaintiff as a consequence of the Defendants' failure to honour an agreement for the voluntary provision of further and better particulars of their Answer.

Advocate P.C. Sinel for the Plaintiff in the original action
(hereinafter referred to as "the Plaintiff").

Advocate J.G.P. Wheeler for the Defendants in the original
action (hereinafter referred to as "the Defendants").

JUDGMENT

JUDICIAL GREFFIER: I have already given a decision in relation to this matter but I have been asked by counsel to provide brief reasons for that decision. I believe that this may be of some assistance to the legal profession generally.

On 28th June, 1994, I was due to hear, amongst other matters, a Summons on behalf of the Plaintiff for further and better particulars or for a statement of the nature of the Defendants' case. The date for the hearing of that matter and other matters was adjourned and by a letter dated 28th June, 1994, Advocate Sinel wrote to Advocate Voisin, acting for the Defendants, confirming agreement that the Defendants would provide the further and better particulars requested in this Summons and would submit to a Consent Order in respect thereof on that day. It is common ground between the parties that an agreement was made to the effect that a Consent Order should be made. However, although I received a copy of the letter I never received any confirmation from Advocate Voisin to his consent to such an Order. It is generally my practice not to issue a Consent Order unless either verbal consent or written consent is provided to me by all parties and so, as no consent was forthcoming from Advocate Voisin, no Order was ever issued. Subsequently, Advocate Voisin filed a response to the requests in which he indicated that he wished to amend the Answer and Counterclaim in order to remove all reference to the words which gave rise to the applications for further and better particulars and/or a better statement of case.

Advocate Sinel argued that the Defendant had simply not complied with the Order of the Court which ought, in his view, to have been made, and stated that he was therefore seeking a Striking Out Order or alternatively an Unless Order.

I have taken the view in a number of cases that an application for a Striking Out Order for failure to comply with a Court Order includes, by implication, an application for an Unless Order as the greater must include the less.

In this case, I would not be prepared to grant an Unless Order, even if absolutely nothing had been filed by the Defendants, as no original Order had been made. If parties reach an agreement under which one party will furnish further and better particulars to the other party, and that party then fails to abide by that agreement, the appropriate remedy is an application for an Order that those particulars be provided within a short period and an application for full indemnity costs upon the basis of breach of the original agreement. Failure to abide by such an Order would then shortly lead on to a further application for an Unless Order.

However, in this case, it is not clear to me, at this stage, either that I should make an Order for the particulars to be provided or that the Defendants have failed to provide proper particulars.

The complication in this case is that the Defendants are seeking to withdraw part of their case. Normally when that occurs, no Order for particulars will be made in relation to the

part of case that has been withdrawn. However, in this case, the relevant part of the Defendants' case of which particulars are being sought is an admission. The Defendants now wish to withdraw that admission and the Plaintiff will be opposing this at a subsequent hearing. I have decided that I will consider the matter as to whether or not I should make an Order for the provision of particulars at the same time as I consider the application for an amendment of the pleadings. If the amendment is allowed then the application for particulars will fall away. If it is not allowed because I find that the Defendants should not be allowed to withdraw their previous admission, then I will have to consider as to whether I can meaningfully order particulars of something which a party no longer wants to say.

Accordingly, I dismissed the application for striking out, declined to make an Unless Order, and indicated that the original Summons seeking an Order for particulars should be heard at the same time as the Summons for an amendment to the Answer and Counterclaim. I also made an Order for costs against the Plaintiff in relation to the Summons for striking out.

No Authorities.