

ROYAL COURT  
(Samedi Division)

58A.

21st March, 1996

Before: The Judicial Greffier

Between  
And

David William L. Dixon  
Jefferson Seal Limited

Plaintiff  
Defendant

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Application by the Plaintiff for the specific discovery of  
certain categories of documents.

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Advocate M.St.J. O'Connell for the Plaintiff;  
Advocate A.D. Hoy for the Defendant.

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JUDGMENT

THE JUDICIAL GREFFIER: This action is one of a number which have been brought against the Defendant in connection with the failure of the Confederation Life Insurance of Canada 9.875% 3-3-2003 Bond (hereinafter referred to as "the Bond"). The Plaintiff was a private investor and the Defendant was a firm of stockbrokers. The Plaintiff alleges that in 1987 he engaged the Defendant to act as investment advisers and brokers for him. The Plaintiff alleges breach of contract and negligence in connection with advice given by a Mr. Beadle, an employee of the Defendant in relation to the Bond. It is alleged that as a result of that advice the Plaintiff invested just under £200,000 in the Bond all of which has been lost. The Plaintiff alleges that he should only have been advised to invest in bonds which were rated AA or above and that the rating of this Bond at the relevant time was A-. The Plaintiff also alleges in the Order of Justice that the Defendant did not adequately review the ongoing position of the Bond and advise the Plaintiff accordingly.

Paragraph 4 of the particulars which the Plaintiff filed on 9th February, 1996, contained a response to the following request-

"Under paragraph 3  
Of: "The basis of such engagement was not reduced to writing but the Plaintiff avers that pursuant to

such engagement the Defendant owed to the Plaintiff, inter alia, the following implied or express contractual duties".

5                    Request

4.            So that the Defendant might know the nature of the case which is being advanced against it please state each and every fact and matter which will be relied upon at trial in support of the Plaintiff's contention of the existence and extent of the duties pleaded."

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15            In that response the Plaintiff claimed that the Defendant owed a variety of contractual, tortious and fiduciary duties and then went on to state a number of these. However, in so doing, the Plaintiff went beyond the implied or express contractual duties set out in the Order of Justice.

20            The usual Order in relation to general discovery was made by me upon setting down and the relevant Order was dated 8th August, 1995. On 12th December, 1995, Advocate Hoy wrote to Advocate O'Connell enclosing the affidavit of discovery which had been sworn by Mr. Beadle on behalf of the Defendant. In that letter, Advocate Hoy indicated that discovery in respect of the Defendant had been limited to documents relating to matters in issue between the parties in the proceedings. Advocate Hoy clearly envisaged that Advocate O'Connell might disagree with him in relation to the ambit of the discovery which ought to be made and, in particular, in relation to the question as to what was in issue between the parties in the proceedings. Advocate Hoy was right on this point because Advocate O'Connell subsequently issued a request for specific discovery. During his opening address, Advocate O'Connell indicated that my decision would depend, to a great extent, upon how I viewed the pleadings. His view was that the seventeen categories of documents in the request related to matters which were relevant to matters in issue in the action. However, it rapidly became clear that Advocate Hoy's view was that that was not so.

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40            The leading case in Jersey in relation to specific discovery is the Court of Appeal case of Victor Hanby Associates Limited v. Oliver (1990) JLR 337. The position is very clearly and succinctly set out on pages 350 and 351 commencing on line 19 of page 350 and the section reads as follows -

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50            " We have already expressed the view that the court ought to proceed on the basis that a list of documents which appears to have been prepared with the assistance of the party's advocate and which is verified by an affidavit in proper form ought to be regarded as conclusive save in exceptional circumstances. Those

5                    *circumstances may include not only inherent evidence*  
                     *from the sources described in the passage which we have*  
                     *cited from the judgment of Brett, L.J. but also evidence*  
                     *which satisfies the test posed by Tomlin, J. in Astra-*  
10                    *National Prods. (1), that is to say evidence sufficient*  
                     *to displace the oath of the party who has verified the*  
                     *list, by making a prima facie case that there are in*  
                     *that party's possession documents which are relevant to*  
                     *matters in issue in the action. In this connection we*  
                     *note the practice direction given by the Deputy Judicial*  
                     *Greffier in his judgment in Jones v. Atkinson (3) that -*

15                    "...every application for an order for specific  
                     discovery must be supported by an affidavit  
                     stating that the deponent believes, with the  
                     grounds of his belief, that the other party has,  
                     or has had, in his possession, custody or power  
                     the document, or class of document, specified in  
20                    the application and that it is relevant ...)

25                    A party seeking further discovery after an affidavit  
                     has been made following an order under r.6/16(1), must  
                     persuade the court that, despite the affidavit, his  
                     opponent has not complied with the order. It seems to  
                     us that it must be necessary, in these circumstances,  
                     for the party seeking further discovery to show, by  
                     evidence on oath, not only a *prima facie* case that his  
                     opponent has, or has had, documents which have not been  
                     disclosed, but also that those documents must be  
30                    relevant to matters in issue in the action. The court  
                     must be satisfied that the documents will contain  
                     information which may enable the party applying for  
                     discovery to advance his case, damage that of his  
                     opponent, or lead to a train of enquiry which may have  
                     either of those consequences. It is not enough to show  
                     only that the documents may be relevant in the sense  
                     described. A court faced with evidence which would not  
                     be entitled to disregard the oath of the party who,  
                     having (*ex hypothesi*) seen and examined the documents  
40                    with the assistance of his advocate, has sworn, in  
                     effect, that they are not relevant.

45                    We should add that, even where a *prima facie* case of  
                     possession and relevance is made out, an order for  
                     specific discovery should not follow as a matter of  
                     course. the court will still need to ask itself the  
                     question whether an order for specific discovery is  
                     necessary for disposing fairly of the cause or matter.  
                     It must be kept in mind that O.24, r.7 of the English  
50                    Rules of the Supreme Court is itself subject to r.8 of  
                     the same order, which makes this further requirement  
                     explicit."

5 The first question that I had to ask myself was the question  
as to what was the effect of the particulars given under  
paragraph 4 of the response of the Plaintiff to the request of  
the Defendant for further and better particulars of the Order of  
Justice. Can a Plaintiff properly, in his further and better  
10 particulars, extend the allegations which he has made in the  
Order of Justice? In my view, he cannot and this for the  
following reasons:-

15 (1) Firstly, the function of particulars is to provide  
additional detail in relation to an existing allegation.  
For that reason the custom is to specify the paragraph  
under which particulars are being sought and a question  
is then asked in relation to that paragraph. The  
question that was asked was that the Plaintiff state  
each and every fact and matter which will be relied upon  
at trial in support of the Plaintiff's contention of the  
20 existence and extent of the duties pleaded. What the  
Plaintiff has actually done is to plead additional  
duties to those already pleaded. In my view, this is  
completely inappropriate in answer to a request for  
particulars.

25 (2) Any Plaintiff who wishes to widen his case against the  
Defendant must seek either the consent of the Defendant  
to an amendment to his pleading or the leave of the  
Court to an amendment to his pleading. Such consent or  
30 leave is normally only given on the usual terms as to  
costs. If a Plaintiff were to be free to add additional  
allegations in his particulars then this would be a  
means of circumventing the requirement for consent or  
leave.

35 (3) If an additional allegation is made in particulars which  
are filed then there is no provision for the Defendant  
to file an answer to such particulars. If a Defendant  
were to seek to file an amended answer to cover this  
40 point then we would have the strange situation in which  
the Plaintiff's claim was contained partly in an Order  
of Justice and partly in particulars thereunder with the  
answer being contained in one document which would have  
to refer to both other documents. Clearly this would be  
45 very inconvenient.

50 I then had to go on and consider the effect of the filing of  
these particulars. Clearly, as I have already said, this is in  
the wrong form. However, the Defendant has not sought to strike  
out these particulars and so they still remain on the file.  
Advocate O'Connell submitted that I could not merely ignore them.  
However, the Defendant has never pleaded to them and is not

obliged so to do and so how can I know whether or not they are in issue?

5 I decided that for the purposes of this application, I would  
treat the particulars filed as not widening the claim contained  
in the Order of Justice and would, therefore, treat the matters  
in issue in the action as being purely those matters in issue by  
reason of the claims contained in the Order of Justice. Upon  
10 that basis, I was satisfied that the Plaintiff failed to meet the  
test that the documents in relation to which specific discovery  
is sought "must be relevant to matters in the issue in the  
action".

15 However, I then went on to consider the question as to  
whether, if I treated the additional allegations in the  
particulars as giving rise to matters which were in issue in  
relation to the action, I was satisfied that the documents sought  
must be relevant to matters in issue in the action.

20 It was brought to my attention that paragraph 4.13 on page 94  
of Matthews and Malek on Discovery (London, 1992) reads as  
follows:

25 *"Pleadings*

30 *4.13 In practice relevant is primarily tested by reference to  
the pleadings. However "matters in question" covers a  
wider ground than the issues as disclosed in the  
pleadings. The Court on discovery is entitled to look  
outside the pleadings in order to determine what matters  
are in issue between the parties. Indeed, there need  
not be pleadings for a matter to be said to be in issue.  
"*

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On page 99 of Matthews and Malek on Discovery there is a  
section on Fishing which reads as follows:-

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*"(g) Fishing*

45 *Discovery will not be ordered to enable a party to frame  
a new case or to fish for evidence. Nor will discovery  
be ordered to enable "checks" to be made on opponents'  
statements on oath regarding existing discovery."*

50 Advocate Hoy brought to my attention the section commencing  
on page 140 of Matthews and Malek on Discovery which reads as  
follows:-

"(d) Confidentiality for third parties

5 6.21 At the outset it must be made clear that it is confidentiality pure and simple, not amounting to public interest immunity, that is being considered here. As Lord Wilberforce said in *Science Research Council v. Nasse*:

10 "There is no principle in English law by which documents are protected from discovery by reason of confidentiality alone. But there is no reason why, in the exercise of its discretion to order discovery, the Court should not have regard to the fact that documents are confidential, and that to order disclosure would involve a breach of confidence."

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20 It appears that this is one of the considerations to be taken into account when weighing whether or not discovery of certain documents is necessary. In this particular case under a number of the categories the documentation which would have been sought would, of necessity, have involved the private transactions of other parties and this was a factor which I took into account when weighing the test of "necessary for disposing fairly of the cause or matter".

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30 When I gave my brief statement of reasons on 21st March, 1996, I did not give detailed reasons of the categories which failed the "*prima facie* case of existence" or the "necessary" test but I indicated that if there were to be subsequently an appeal then I would do this and I have done this in this Judgment.

35 I turn now to the detailed categories of request for specific discovery. References hereinafter to "the wider relevance test" are references to the test of "must be relevant to matters in issue in the action" upon the basis of treating the additional allegations in the particulars as giving rise to matters which were in issue in the action.

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45 Request category 1 was for all and any documents which will identify the number and size of all trades entered into by the Defendant in the Confederation Life Bond ("the Bond") since its issue in March 1992. This was the first of a number of categories where the reasons why the documents are being sought relate to insinuations of the Plaintiff that there must be some hidden agenda or secret motive as to why he and others were advised to acquire the Bond. However, even in the particulars the insinuations are not clearly pleaded. Accordingly, I was not satisfied that this satisfied the wider relevance test. I was satisfied *prima facie* that such documents would exist. I was not

5 satisfied that the request would satisfy the test of an order being necessary for disposing fairly of the cause or matter because it was much too widely framed and, in particular, the dates are from March 1992 when the purchase, in this case was made in May, 1994.

10 The Request under category 2 was for all and any documents which show that the Defendant held the Bond as a principal. The Defendant denies that it ever held the Bond as a principal. This Request did not satisfy the wider relevancy test for the same reasons to those set out below in relation to category 3 and also did not even meet the test of a *prima facie* case that such documents exist. It also fails the necessary test because again it is much too widely drawn.

15 The Request under category 3 was for all and any documents which record the positions held by the Defendant in the Bonds and its date of issue, including all documents disclosed in the price of the Bond, the total value of all holdings in the Bond and the dates of all acquisitions thereof. The Plaintiff, through Advocate O'Connell, was insinuating that the Defendant must have had some ulterior motive or that Mr. Beadle, its employee, must have had some ulterior motive for recommending the Bond. The insinuation was either that the Defendant had some personal exposure in relation to the Bond or that the Defendant was receiving some secret commission in relation to the Bond or that there was some other motive. Even in the particulars, there is no precision and clarity as to precisely what the Plaintiff is saying in this respect. Accordingly, categories 2 and 3 fail the wider relevance test. As currently worded its width would also fail the necessary test.

30 The category 4(a) documents were all and any documents which will identify the number and size of the trades concluded in stock with similar characteristics to the Bond during the period from March 1992 to August 1994. A Schedule was attached to the category which set out a number of such stocks with similar characteristics. Part (b) of category 4 related to the question as to whether the Defendant held such similar stocks as principals. Again both parts failed the wider relevance test for the same reasons to categories 2 and 3. Part 4(a) also failed the necessary test as the request was much too widely drawn. Part 4(b) failed the *prima facie* case of existence test for the same reasons as category 2 and the necessary test by reason of being much too widely drawn.

45 Category 5 documents had two parts. Part (a) related to all documentation which will identify the total aggregate holding of all clients for the Defendant in the Bond and Part (b) related to all documentation showing quarter-end aggregate totals for March 50 1992 to middle August 1994. Both of these parts failed the wider

relevance test for the same reasons as 2 to 4 and also failed the necessary test as being much too widely drawn.

5 Under category 6 the Plaintiff sought all documentation which will identify the total holding by clients of the Defendant of any Bonds which carried a rating of less than AA, as a percentage of the total number of Bonds held by clients of the Defendant. This failed the wider relevance test. There may well be other investors with the Defendant who had deliberately invested in lower rated Bonds. It would be necessary for the Defendant to perform a great deal of work to get together the documents which contain this information and it also failed the necessary test.

10 The Request under category 7 was for all documentation which will indicate what was the average weighting of the Bond in portfolios of the clients of the Defendant. This also failed the wider relevance test. The issue as to whether the Plaintiff was given proper advice as to the spread of risk in his Bond portfolio is an issue that can be dealt with by means of expert evidence as to usual practice. The actual practice of other investors employed by the Defendant is not, in my view, relevant. Again a great deal of work would be required in putting together such documentation and it fails the necessary test.

15 The Request under category 8 the Plaintiff sought all documentation which would show whether there were any sales of the Bond for clients of the Defendant from June 1994. The significance of this is that the Plaintiff is alleging that on 4th August, 1994 an announcement was made as a result of which the Bond was down rated to BBB- and that the Defendant should then have alerted the Plaintiff of the change of status so that the Bond could be sold. The purpose of seeking this documentation must be that if other clients of the Defendant were advised to sell then why was the Plaintiff not so advised. However, in his own Order of Justice at paragraph 15 the Plaintiff pleads that during the week between the announcements which led to the down rating to triple B- and the announcement on 11th August, 1994, that a liquidator had been appointed to the company, Mr. Beadle was absent from the Island on leave and that as a consequence the Defendant did not have any or any adequate expertise available within its offices properly to interpret the adverse information which it received and subsequently to recommend the disposal of the Bond. The documentation which the Plaintiff is seeking is therefore in direct contradiction to his own pleading. The request clearly fails the test of a *prima facie* case that such documents exist and it also fails the wider relevance test.

20 The request under category 9 was for all documents which will identify the turnover and profitability in bonds as a percentage of the Defendant's total business. This failed all three tests. It is most unlikely that any document would exist with this



precise information, it fails the wider relevance test and it fails the necessary test.

5 Under category 10 the documents sought were all documentation which will identify how the Defendant made a profit on each trade. This request is related to the insinuation that the Defendant was purchasing the stock as a principal and making a profit for itself, not just on commission but also by dealing in the stock. This insinuation has never been clearly pleaded. 10 Accordingly, this fails on the wider relevance test. As worded it would probably fail the necessary test as it is much too widely worded and could potentially involve looking at all trades in all kinds of stocks and shares handled by the Defendant.

15 The Request under category 11 was for all documents which will identify how many market makers were being used to trade in the Bond, and further in this type of Bond generally. Again the reason behind this related to an insinuation that the Defendant must have some ulterior motive for the advice which it gave and that one possible ulterior motive would be some special 20 arrangement with a particular market maker which would lead to a greater than usual profit being made by the Defendant. However, again these insinuations have not been directly pleaded with clarity even in the particulars and therefore this failed the wider relevance test. It would also fail the necessary test 25 because this is a rather long winded and cumbersome way of seeking to obtain the information requested.

30 The documents sought under category 12 were all documents which will identify the type and nature of the back office computer or other system and all forms of record storage systems utilised. This request related to an insinuation that the Defendant did not have a proper back office control system upon the purchase sale of stock. The insinuation is effectively that 35 the Defendant had left itself exposed and therefore had a strong reason to seek to unload the Bonds. There is no allegation anywhere in the pleadings, including the particulars, of such a faulty system and this therefore fails the wider relevance test.

40 Under category 13 there are four requests as follows:-

- (a) all dealing books for each dealer and particular for Mr. Beadle since March 1992;
- (b) all common dealing books all those striking trade since 1992;
- 45 (c) all eurobond dealing tickets relating to the Bond since March 1992;
- (d) all electronic dealing pads which record trades executed in the Bond since March 1992.

50 These requests related to a further attempt to obtain documents relating to dealings in the Bond or dealings generally by the Defendant. They failed the wider relevance test.

Requests (a) and (b) are so wide that they also fail the necessary test.

5       The documents sought under category 14 were all documentation relating to the management and control of the Defendant. This request was closely related to that under category 12 in order to check that there was a proper control and it failed for exactly the same reasons as set out under category 12.

10       Under category 15 the documents sought were all records relating to dealings in the Bond, whether hard copy, computer printout or microfiche. This is another variant on the theme of obtaining documentation relating to all dealings in the Bond. It failed the wider relevance test and the necessary test.

15       The documents sought under category 17 were all documentation relating to management control of the dealing process at the Defendant e.g. procedures manual, board directives etc. This request also related to control of the Defendant's operations and was similar to categories 12 and 14 and was refused for the same reasons.

20       Having dismissed the application for each and every category of documents, I went on to Order that the Plaintiff pay the costs of and incidental to his Summons seeking specific discovery in any event.

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Authorities

Victor Hanby Associates -v- Oliver & Hanby (17th July, 1990) Jersey Unreported; (1990) JLR N.2.

Victor Hanby Associates and Hanby -v- Oliver (1990) JLR 337 CofA.

Matthews and Malek: "Discovery" (Sweet & Maxwell, 1992): pp. 92-130, 138-141; 278.

Fearis -v- Davies (1989) 1 FSR 555 C.A.

Grand Metropolitan Nominee (No.2) Co., Ltd., -v- Evans (1993) 1 All ER 642 C.A. R.S.C. (1995 Ed'n): 18/12.