**Zaksat General Trading Co Ltd v**
**Yousef Al Shaibani & Ors**
**(2000) SLR 60**

Ramniklal Valabhji for the plaintiff
Pesi Pardiwalla, and France Bonte for the defendants

*Appeal by the Defendant was set aside on 12 August 2001 in CA 20 of 2000.*

**Ruling delivered on 6 July 2000 by:**

**PERERA J:** The attorney for the plaintiff has served a "notice to produce" the originals of 24 documents listed therein, on the attorneys for the defendants. In a reply to particulars sought by the defendants, the attorney for the plaintiff has already disclosed 5 of those documents on 15 February 1999 in a list of 12 documents, some of which have already been exhibited in the case. Mr Pardiwalla, counsel for the defendants objected to the procedure of serving such a "notice to produce" under the laws of Seychelles. His objections could be summarised as follows:

(1) The provisions of the Code of Civil Procedure are exhaustive regarding matters of discovery of documents.

(2) The issuing of "notice of produce" - being a procedure under English Law, is not applicable in Seychelles.

(3) That discovery of documents is always a pre-trial procedure and hence the attorney for the plaintiff cannot seek discovery in this case as the plaintiff's case has been closed.

(4) That in any event, the circumstances under which a "notice of produce" is permitted in English Law are where the original in the possession of the adverse party has emanated from the party seeking the production.

(5) That order 27, rule 5 of the Supreme Court Rules of the United Kingdom, provides that a notice to produce a document should be served within 21 days after the cause or matter is set down for trial. But the date of trial in this case had been fixed on 30 March 2000, and the notice was served on 24 June 2000, well out of time.

Mr Valabhji, counsel for the plaintiff submitted that "notice to produce" the originals of documents has been filed under the provisions of English Law, by virtue of section 12 of the Evidence Act (Cap 74) - that section reads as follows:

Except where it is otherwise provided in this Act or by special laws now in

> force in Seychelles or hereafter enacted, the English Law of Evidence for the time being shall prevail.

In the case of *Kim Koon & Co Ltd v R* (1965-1976) S.C.A.R. 60 at 64**,** the Court of Appeal interpreting the term "for the time being" stated:

> We have no doubt that it is not competent for the Seychelles legislature, to delegate the power to legislate, and so far as section 12 of the Evidence ordinance as amended may purport to apply to Seychelles future amendments of the English Law of Evidence, it is inoperative. In our judgment, the effect of the section is to apply to Seychelles the English Law of Evidence as it stood on 15 October 1962, the date of enactment of the Seychelles Judicature Ordinance 1962.

Hence for purposes of section 12 of the Evidence Act (Cap 74), it is the Civil Evidence Act 1938 (U.K) that applies.

The procedure under the Evidence Act is governed by the Rules of the Supreme Court. As was held in the case of *Casino Des Seychelles Ltd* (unreported) SCA 1/94, by virtue of section 3(a) of the Courts Act, powers, authorities and jurisdiction of the High Court in England given to the Supreme Court in Seychelles are such as the High Court of Justice in England possessed and exercised as at 22 June 1976 and not such as are vested in it by statute after that date.

Hence in terms of the Rules of the Supreme Court of the United Kingdom prevailing at that time, the filing of a *"notice to produce"* is governed by Order 27, rule 5(4), which incidentally is the same under the R.S.C. Rules of 1965. It provides that:

> (4) Except where rule 4(3) applies, a party to a cause or matter may serve on any other party a notice requiring him to produce the documents specified in the notice at the trial of the cause or matter.

Rule 4(3) is where there is mutual discovery of documents by lists served by parties. This is the equivalent of section 84 of the Code of Civil Procedure (Cap 213). Mr Valabhji cited paragraph 36-26 of *Phipson on Evidence* (14th Edition), wherein it is stated that:

> When a document is in the possession of the adverse party or someone bound to give up possession thereof to him (eg. His solicitor, banker etc) any such party refuses to produce it either after notice, or when notice is excused, the other party may, in civil cases, provided that it was duly stamped, give secondary evidence of its contents.

Paragraph 36-27 states that:

> The object of a notice to produce is to enable the adversary to have the document in court, and if he does not, to enable his opponent to give secondary evidence thereof, so as to exclude the argument that the latter has not taken all reasonable means to procure the original.

The procedure of serving a "notice to produce" is based on the "best evidence" Rule, that when a document was put in as evidence, the original had to be produced. In Seychelles, this rule is contained in article 1334 of the Civil Code. However that rule has now lost its rigidity. The modern attitude to the rule is set out by Lloyd LJ in *R v. Government of Pentenville Prison Exp Osman* (1989)3All ER 701 at 728, thus:

> .....The Court would be more than happy to say goodbye to the best evidence Rule. We accept that it served an important purpose in the days of Parchment and Quill Pens. But, since the invention of Carbon Paper and, still more, the photocopier and the telefacsimile machine, that purpose has largely gone. Where there is an allegation of forgery the Court will attach little, if any, weight to anything other than the original; so also if the copy produced in Court is illegible. But to maintain a general exclusionary Rule for those limited purposes is, in our view, hardly justifiable.

In this respect Beldam J in the case of ***R v Wayte*** (1983) 76 Cr. App. R. 11O at 116 stated:

> First, there are no degrees of secondary evidence. The mere fact that it is easy to construct a false document by photocopying techniques does not render the photocopy inadmissible.
>
> The fact that the documents were only copies merely went to weight, not admissibility.

It was on the basis of these principles that copies of documents were admitted so far in examination in chief and cross examination of witnesses in the present case. However the present matter that calls for a ruling, is different.

A "notice of produce" in English Law, is different from the procedure for inspection of documents contained in section 84 of the Code of Civil Procedure. It is a mere notice to the adverse party that he is required to produce the documents specified at the hearing. It does not oblige such party to produce the document, even though he has it. When it is called in court, his counsel may say that he does not produce it, in which case it would be open to the party who served the notice to put in a copy or give oral evidence of its contents. In short, the effect of giving a notice to produce, is to enable a party to give secondary evidence of the contents of any document referred to in the notice if it is not produced at the hearing (see Odgers on pleadings and practice 20th Edition: page 297).

There is no such provision as Order 27, rule 5(4), in the Code of Civil Procedure of Seychelles. Hence where it becomes necessary, the English Law of Evidence, and Order 27, rule 5(4) can be resorted to under the provisions of section 12 of the Evidence Act (Cap 74). Where the original is in the possession of the adverse party, secondary evidence of a document is not admissible unless notice has been served on him. Barnard and Houghton in *"the New Civil Court in Action*" states at page 229 that the Court will admit secondary evidence, if:

> The original is in the possession of the opposing party and he has been served with notice to produce that original at the trial, but has failed to do so. In the High Court, where there has been discovery by list each party is deemed to have been served with notice requiring him to produce all documents he has listed as being in his possession. In all other High Court cases and in all country court actions each party must serve on the other specific notice to produce any original documents held by the other side which he wishes to put in as part of his case. The practice followed is that when counsel comes to the stage in his case where he wishes to put in the original document, he "calls for its production". If his opponent does not then produce the original. Counsel may at once prove its contents by, for example, producing a copy and calling evidence to show this corresponds with the original.

Hence where the party serving the notice to produce is the plaintiff, generally, it must be done before the close of his case as the object of notice is to adduce secondary evidence to establish his case, if the original in the possession of the defendant is not forthcoming. The notice therefore provides a foundation for reception of secondary evidence.

In the present matter, the plaintiff's case has been closed, and hence it remains for counsel for the plaintiff to cross examine the defendant's witnesses.

The object of cross-examination is two-fold, to weaken, qualify or destroy the case of the opponent, and to establish the party's own case by means of his opponent's witnesses. Mr Pardiwalla referred to Order 27, rule 5(1) where the notice is required to be given within 21 days after the cause or matter is set down for trial. However, that rule applies to notices to "admit the authenticity of the documents specified in the notice".

Order 27, rule 5(4) which provides for the serving of a notice to produce documents, has obviously no time limit as it applies to both the plaintiff and the defendant and could be served at any stage of the proceedings to establish his own case through his witnesses or by cross-examining the opponent's witnesses. However, the scope of this procedure is limited. The original documents in the possession of the adverse party

must have a connection or relation to the copy in the hands of the plaintiff. As Cross on evidence states:

> notice to produce is not served in order to give the opponent notice that the documents mentioned in it will be used by the other party, and thus to enable the opponent to prepare counter-evidence, but so as to exclude the objection that all reasonable steps have not been taken to procure the original document.

In the case of *David Sopha v. Robert Melanie and Ors* (unreported) C.S. 229 of 1992, the plaintiff, who was a prisoner, claimed damages for personal injuries caused by prison officers while in custody. He was consequently hospitalised. His counsel sought to produce in evidence copies of letters sent by the plaintiff himself and by him to the superintendent of the Prisons and Hospital Authorities. The copies were with the counsel for the plaintiff, and the originals with those authorities. Objection was raised by the counsel for the defendants that notice to produce the original had not been served. I, as trial judge, upheld that objection. However where correspondence from those authorities to Counsel for the plaintiff had acknowledged receipt of such letters, and hence there was some internal reference which made it safe to conclude that the copies of the letters established a link in correspondence, the copies with the plaintiff were admitted.

Similarly, by a notice to produce, the plaintiff cannot achieve the same object as discovery of documents under section 84, for inspection. Neither can it be used to 'fish' for evidence. Hence where the plaintiff is in possession of a copy of a document, and in the ordinary course of correspondence or business the original ought to be with the defendant, then secondary evidence could be adduced as notice to produce has been served, if the defendants refuse to produce the originals. Documents not falling within that category ought to have been applied for inspection under section 84 of the Code of Civil Procedure.

The defendants however are deemed to have received notice of documents numbered 1, 3, 7, 9 and 16 of the notice to produce dated 24 June 2000.

Ruling made accordingly.

**Record: Civil Side No 247 of 1998**