

ZHU KUAN COMPANY OF ZHUHAI SEZ, Plaintiff (Respondent) v BRICKELL LIMITED (In Liquidation), 1st Defendant (1st Appellant), MORGAN JAMES CHUBB, 2nd Defendant (2nd Appellant), JOHN ROBERT LEES, 3rd Defendant (3rd Appellant), INTERNATIONALE NEDERLANDE BANK N.V., 4th Defendant, PACIFIC CAPITAL (FINANCE) Ltd., 5th Defendant

3 April 1996

Court of Appeal

CA

No. No. 273 (Civil)

1995, No. 273 (Civil)

Citations: [1996] HKEC 303

Coram: Hon Nazareth V-P, Liu and Mayo, JJ.A.

Phrases: Civil procedure and evidence - Civil procedure -
interrogatories - application for interrogatories to be withdrawn
- whether premature

Mr John Kerr (M/S William K.W. Leung & Co.) for
Plaintiff/Respondent

Miss Maria Yuen (M/S Baker & McKenzie) for
Defendant/Appellant

JUDGMENT

Mayo JA giving the judgment of the Court:

This is an appeal against an order made by Findlay J when he declined to order that the plaintiff (respondent) should withdraw the interrogatories they had addressed to the 1st defendant, 2nd defendant and 3rd defendant (the appellants).

The respondents claim relates to a quantity of tin or the proceeds of sale of the tin which it is alleged the 1st appellant was holding in trust for it. The 1st appellant went into liquidation and the 2nd and 3rd appellants were appointed as liquidators of the 1st appellant. The respondents claim is being pursued in the commercial list.

One of the salient features of this litigation is that whereas the respondent has pleaded its case at some length the appellants have framed their defence largely upon denials and putting the respondents to prove their case against them. This has presented the respondents with some difficulty and it is in an endeavour to overcome these difficulties that the interrogatories have been directed to the appellants.

Findlay J has helpfully classified the interrogatories into three categories:

"Those under which the plaintiff seeks details of what the second and third defendants did to investigate its claim.

Those under which the plaintiff seeks details of the steps taken by the second and third defendants to ensure that there was a proper distribution of the assets of the first defendant.

Those under which the plaintiff seeks details of the stocks of tin handled by the first defendant. The purpose of the inquiries under this head is identify what the plaintiff says was its tin."

The approach which has been adopted by Ms Yuen for the appellants is basically to have canvassed virtually all of the matters referred to in Order 26 rule 1 and then submit that having regard to accepted principles the learned judge was wrong to have made an Order the effect of which would require the appellants to answer the interrogatories.

One of the main complaints made by the appellants is that the interrogatories are premature. The request was made following the delivery by the appellants of their Points of Defence. Ms Yuen submitted that a consequence of the request being made at such an early stage in the litigation was that there would inevitably be speculation as to how much of the information sought in the interrogatories would become available during the normal preparation of the case for trial. Ms Yuen was critical of the approach adopted by Findlay J when he attempted to assess what might transpire as the case proceeds to trial. Ms Yuen argued that this was not a legitimate exercise as it was impossible at this stage to predict with any satisfactory degree of certainty what material would be disclosed on discovery and inspection of documents. Indeed if the respondents were of the view that further material was required it may be open to them to seek further and better particulars or specific discovery.

There was every reason to suppose that if the litigation was to proceed in the normal way the information sought by the interrogatories would become available. The 1st Appellant would have kept written records which were discoverable and the 2nd and 3rd appellants were Accountants who would have performed their duties in an orderly manner and the fruits of their labours would be available to the respondent.

Ms Yuen contended that if the appellants were required to answer the interrogatories it would have the effect of compelling them to make binding admissions before they had anything like a full picture of the case, and of enabling the plaintiffs to shape their case in accordance with the manner in which the appellants had bound themselves by their answers. The respondents should not be given this advantage.

Ms Yuen urged upon us the approach of the commercial court in England which strongly discouraged interrogatories. She placed particular reliance upon the criteria referred to by Colman J at 537 of *Det Danske Hedeselskabet v. KDM International plc* [1994]2 Lloyd's Rep. 534:

"There are, however, some very specific yardsticks which it is worth bearing in mind:

First, unless the answers are essential for the preparation of the requesting party's case for trial and cannot reasonably be expected to emerge from requests for further and better particulars and further discovery or witness statements, interrogatories will not normally be ordered. For this reason the service of interrogatories before witness statements have been exchanged will almost always be premature.

Secondly, information which is relevant to matters in issue only in the sense that it may lead to further inquiry or that questions about it could be asked in cross-examination at the trial will not be essential information for the purposes of the first consideration.

Thirdly, requests for information which although it may be relevant to matters in issue, can be provided only by means of detailed research or investigation which the party interrogated would not otherwise carry out for the purpose of preparing for trial will hardly ever qualify as being necessary either for disposing fairly of the cause or matter or for saving costs."

The problem with this approach is that it overlooks the fact that Findlay J appears to have given his consideration to all of these matters.

In deciding whether or not to order that the interrogatories be withdrawn he was exercising his judicial discretion. As such we should only be disposed to interfere with this exercise of discretion if it can be demonstrated either that the judge was plainly wrong or that he erred in principle.

After weighing all of the relevant considerations Findlay J summarised the position at p4 of his judgment in these terms:

"It seems to me that the interrogatories are necessary for disposing fairly of the matter. The plaintiff cannot properly prepare for trial unless it knows what evidence it needs to establish the facts that are crucial to its case. If it does not have answers to these interrogatories, the plaintiff must be cautious and assume that it needs every possible piece of evidence that will help to establish its case. A large

part of the costs of doing this will be saved if, as I suspect the second and third defendants will be able to do with difficulty, they give these details relating to the plaintiff's claim."

Before us Ms Yuen conceded that she could no longer place reliance upon submissions to the effect that the interrogatories contained irrelevant material.

In addition to this after hearing an objection from Mr Kerr for the respondent we accepted that it was not open to Ms Yuen to contend that it would be oppressive for her clients to be required to answer the interrogatories as this had not been argued before Findlay J.

The judge came to the conclusion that the role of the 1st defendant and the duty of the 2nd and 3rd defendants was clear and that the interrogatories were straightforward. There was no appeal against these findings and no evidence was adduced to dissuade us from accepting them as conclusive. The judge exercised his discretion in a wholly uninvolved application.

Ms Yuen's scope for arguing that the judge had not exercised his discretion properly was severely circumscribed. She has not been able to demonstrate that the judge was either plainly wrong or that he erred in principle when he came to the conclusion that the interrogatories were both necessary to dispose of the matter fairly and that in all probability costs would be saved if the answers were provided to the respondents.

In our view this appeal should be dismissed. However before leaving this appeal it is necessary to state that judges hearing applications for interrogatories should bear in mind the criteria of Colman J earlier referred to in this judgment and that it is indeed unusual for interrogatories to be ordered in a case which is listed in the commercial list.

We make an order nisi that the respondents will have the costs of this appeal.

(G.P. Nazareth)

Vice President

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