

Defendants in the case being tried before him in the Court below. We allowed both appeals and set aside orders of the learned Judge allowing discovery in the midst of the trial which had already begun when the applications were made. We now state our reasons for so deciding.

Background

2. The 1st and 3rd Appellants instituted the K.L. High Court Civil Suit No. D4-22-34-1995 (the D4 Action) against the 1st Respondent claiming various reliefs for alleged defamation, malicious prosecution and unlawful interference with their trade and business as responsible dealers of a particular brand of a Chinese medicinal wine (the said Chinese wine). Some two years later the Respondents filed K.L. Civil Suit No. D1-22-400-1997 (the D1 Action) against all the Appellants for alleged passing off and infringement of the Respondents' proprietary rights by distributing and selling counterfeit said Chinese wine.

3. On 5.8.1997 the D1 Action was ordered to be tried together with the D4 Action. However on 6.12.1999 the parties agreed to the mode of trial in which the parties in the D1 Action would proceed with their respective claim and counter-claim and that the parties in the D4 Action would be bound by the decision in the D1 Action as well as any order as to costs made therein. (See terms of the recorded agreement at page 271 AR 541).

4. The trial commenced on 19.6.2000 through 22.6.2000 and was adjourned for continued hearing for 3 days in November 2000. Before the resumption of trial however the Respondents on 14.9.2000 filed

Summons in Chambers Enc. 40 in the D1 Action (Enc. 40) under Order 24 rule 11 of the Rules of the High Court 1980 (RHC) requiring the Appellants to produce for their inspection various documents evidencing the purchase and/or import of 1500 cartons of counterfeit said Chinese wine (the said documents) alleged to be in the Appellants' possession. The application was grounded on the fact that the witness statement of the Appellants' Ngan Meow Yiap (Ngan) acknowledged the existence and/or made reference to the purchase/import of 1500 cartons of counterfeit said Chinese wine, that the Appellants had failed to comply with the Notice to Produce the said documents dated 13.7.2000 and that the said documents are essential and relate to the issue in the action and are material to the Respondents' claim. Enc. 40 was twice adjourned at the instance of the Respondents' solicitors.

5. The Respondents then on 9.2.2001 filed Summons in Chambers Enc. 61 in the D4 Action (Enc. 61) also under Order 24 r 11 RHC seeking for an order to produce for inspection of the Respondents the Appellants' purchase/import documents dated after April 1994 (the import documents) relating to the same brand of the Chinese wine referred to in Ngan's affidavit affirmed on 8.2.1995. The application was not supported by any affidavit. On the next hearing date of Enc. 40 the learned Judge acceded to Respondent counsel's request for Enc. 61 and another SIC for discovery to be heard together with Enc. 40 and determined as they were said to be related. He directed that written submissions be lodged by both parties. His Lordship subsequently on 23.4.2001 allowed all 3 applications with costs, hence these appeals before us against his decision on Enc. 40 and Enc. 61.

Finding of the High Court

6. The learned trial Judge gave identical grounds of decision which are short and simple. He states that the Respondents' cause of action against the Appellants raises the main issue of whether the subject matter of the slander was counterfeit. Therefore the discovery and production of the documents sought for are relevant to the issues in the case. He also holds that the production of the documents would enable the case to be disposed of fairly particularly so when the existence of those documents in the Appellants' possession, custody and power was admitted and confirmed by the Appellants in the witness statements and the affidavits filed.

The Appeals

7. Separate appeals were filed by the Appellants – the first appeal No. W-02-541-2001 in respect of the order made on Enc. 40 while the second appeal No. W-02-542-2001 is in respect of Enc. 61. Several grounds of appeal were put up in the Memoranda of Appeal filed but before us only one issue said to be common to both appeals was canvassed. And that is that the learned trial Judge erred in law and fact in holding that the Appellants had admitted having in their possession, custody and power documents relating to the alleged importation of the counterfeit said Chinese wine from Kwong Ming Trading Co. of Hong Kong.

The Law

8. Both Enc. 40 and Enc. 61 are made under Order 24 rule 11 of the RHC. The applicable rules are rules 10, 11 and 13 which relevant provisions are reproduced for convenience of reference.

“10 **Inspection of documents referred to in pleadings and affidavits (O 24 r 10)**

(1) Any party to a cause or matter shall be entitled at any time to serve a notice in Form 43 on any other party in whose pleadings or affidavits reference is made to any document requiring him to produce that document for the inspection of the party giving the notice and to permit him to take copies thereof.

(2) The party on whom a notice is served under paragraph (1) must, within 4 days after service of the notice, serve on the party giving the notice a notice in Form 44 stating a time within 7 days after the service thereof at which the documents, or such of them as he does not object to produce, may be inspected at a place specified in the notice, and stating which (if any) of the documents he objects to produce and on what grounds.

11. **Order for production for inspection (O 24 r 11)**

(1) If a party who is required by rule 9 to serve such a notice as is therein mentioned or who is served with a notice under rule 10(1) –

(a) fails to serve a notice under rule 9 or, as the case may be, rule 10(2); or

.....
.....

then, subject to rule 13(1), the Court may, on the application of the party entitled to inspection, make an order in Form 45 for production of the documents in question for inspection at such time and place, and in such manner, as it thinks fit.

(2) Without prejudice to paragraph (1), but subject to rule 13(1) the Court may, on the application of any party to a cause or matter, order any other party to permit the party applying to

inspect any documents in the possession, custody or power of that other party relating to any matter in question in the cause or matter.

(3) An application for an order under paragraph (2) must be supported by an affidavit specifying or describing the documents of which inspection is sought and stating the belief of the deponent that they are in the possession, custody or power of the other party and that they relate to a matter in question in the cause or matter.

13 **Production to be ordered only if necessary, etc (O 24 r 13)**

(1) No order for the production of any documents for inspection or to the Court shall be made under any of the foregoing rules unless the Court is of opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.”

9. In **Dubai Bank Ltd. v. Galadari & Ors. (No 2) (1990)** 2 All ER 738, 744 the English Court of Appeal held that, the natural and ordinary meaning of the phrase “reference to” imports the making of a direct allusion to a document or documents. The absence of a direct allusion to the document in the affidavit will mean that the other party will not have the right to such production and inspection under Order 24 rule 10 (which is in pari materia with our Order 24 rule 10 RHC). The court rejected the submission that “reference” includes a “reference by inference”, that is, where an assertion made in an affidavit or pleading gives rise to an inference that the document must or might exist.

10. In considering the equipollent English provision of rule 11 the Court of Appeal in **Rafidain Bank v. Agom Universal Sugar Trading**

Co. (1987) 3 All ER 859 held that the court has jurisdiction to order discovery of documents referred to in a party's pleadings and affidavits notwithstanding that the documents were not in the custody, possession or power of that party, but the absence of custody, possession or power could well amount to a good cause for the court to refuse to exercise its discretion. In that case Watkins LJ also made the following observation.

"I see no reason whatsoever why the broad scope of rr 10 and 11 should be restricted in any way subject of course to the exercise of the court's discretion. It is plain to me that the additional power given to the court in rule 11(2) contains an exceptional restriction, namely that the making of an order is *dependant on whether the documents sought are in the possession, custody or power of the party* to whom the order if made is directed."

(emphasis added).

11. Under rule 13(1) an order for the production of documents for inspection is not to be made unless the court is of opinion that such order is necessary either for disposing fairly of the case or matter or for saving costs. It is for the party seeking production to satisfy the court that such production is necessary for the purpose specified in rule 13(1) – per Parker LJ in **Dolling-Baker v. Marrett & Ors** (1991) 2 All ER 890 and **Ventouris v. Mountain** (1991) 1 WLR 607.

12. And in considering the application the court should bear in mind the words of Sir Thomas Bingham MR in **Taylor v. Anderton** (1995) 1 WLR 447, 462 that "the purpose of the rule is to ensure that one party does not enjoy an advantage or suffer an unfair disadvantage in the litigation as the result of a document not being produced for inspection."

13. Finally the court would dismiss a plaintiff's application for discovery if it is of the view that the plaintiff was "merely fishing for evidence to prop up his case" and to allow him discovery would be unduly oppressive to the party giving discovery – see **Leslie S Holmes v. Engineering Service Inc.** (1993) 1 AMR 27, 36.

Enc. 40

14. It was submitted on behalf of the Appellants on the authority of Rafidain's case (supra) that there was no reference to the said documents in Ngan's purported witness statement para 74 – 78 on grounds that the said statement is not a pleading or affidavit within the meaning of rule 10(1) and the alleged reference on the authority of the **Dubai Bank's** case (supra) is not a direct allusion to the said documents, hence there is no evidence that the Appellants have or had at any time custody, possession or power over them and the Respondents' are on a fishing expedition. On the Respondents behalf it was contended that Enc. 40 is made pursuant to rule 11(2) and not rule 10 of Order 24 and that there is tacit acknowledgement by Ngan of the existence of the 1500 cartons of alleged counterfeit said Chinese wine.

15. We found no basis to equate an unsigned subject to approval draft witness statement (therefore not yet a court document) with a pleading or affidavit filed in court. For the purpose of discovery, reference in such draft statement to any document cannot possibly give any right to the other party to production for inspection of the document so referred to therein. Only rule 10 of Order 24 gives the court jurisdiction to order production for inspection of documents referred in court documents. And even in the case of a pleading or affidavit the

reference to any document therein must be by way of direct allusion to a document or class of documents sought for discovery and not if the reference arises merely by inference. The court is not clothed with jurisdiction to allow discovery if the reference is merely to a transaction which on the balance of probabilities must have been effected by a document – see Slade LJ in the **Dubai Banks** case (supra).

16. Let us look at Ngan’s draft witness statement – para 74 – 78 to see whether it contain any acknowledgement of the existence or any reference to the documents sought to be produced. It is reproduced for convenience:

“74. Now, turn to p. 292 BOD, what is the document?

R : It is a letter from Wuhan Medicines & Health Products Import & Export Corporation to the Embassy of China.

75. What is the content of the said letter?

R : “On 24/12/94, our goodself has written to us to know about the export of 1500 cartons counterfeited Special Quality Lingzhi wine to Hong Kong’s Kwong Ming Trading Co. For your information, the formula of the wine is the formula given by Changyu Pioneer Wine Co’s formulation guideline.”

76. Please read the first sentence of paragraph 3 of the said letter.

R : “Referring to the invoice no. 0000849 covering 500 cartons of Special Quality Lingzhi wine, we are reaffirming that they are purchased from Changyu Pioneer Wine Co. ...”

77. What do you gather from the said letter?

R : That Kwong Ming is telling the truth, that the Zhan Qiao Pai Lingzhi liquor that it is selling are all genuine products and all originated from Changyu Pioneer Wine Corp. including the 1500 disputed cartons.

78. Do you think there is any basis at all to the Defendant’s (D4 suit) action that you are selling imitation Zhan Qiao Pai lingzhi liquor?

R : No, there is no basis at all. ”

17. As can be seen mention of the 1500 cartons of the alleged counterfeit said Chinese wine is only in the content of the letter tendered in court by the Respondents and marked P1 in the supporting affidavit of Respondents which Ngan reads in response to question 75. Responding to question 77 Ngan merely states his understanding of the content of the said letter. Ngan's witness statement makes no mention or reference at all directly or otherwise to any document or transaction relating to the said documents to even suggest that the Appellants were aware of their existence. There is therefore no basis for the Respondents' belief that the Appellants have or had at any time the said documents in their possession, custody or power.

18. The exercise of the learned Judge's discretion was obviously based on the wrong premise that the Appellants admitted having the said documents in their possession, custody and power. There is not a shred of evidence adduced to support that. On the contrary, that fact is clearly in dispute as evidenced by the Appellants' denial in para 3 of their solicitor's response to the Respondent's Notice to produce (see page 379 AR 541) and confirmed by Thye Yan Mee's affidavit of 27.10.2000. Para 3 is reproduced hereunder :

"3. Our clients do not have any knowledge nor are privy to the alleged transaction relating to the 1,500 cartons referred to in your Notice To Produce dated 13.7.2000 and your letter dated July 12, 2000. The reference to the said alleged transaction in the said draft Witness Statement is in response to and with reference to the document at page 292 of the Agreed Bundle of Documents, Vol. 1."

Appellate intervention is accordingly justified and the order made must be and was set aside.

Enc. 61

19. Being an application under rule 11(1), Enc 61 basically rests on the issue of whether the import documents are referred to in the Appellants' affidavit of Ngan affirmed 5½ years earlier on 8.2.1995. The Appellants' response to Enc. 61 was that they have furnished all the documents pertaining to the importation of the said Chinese wine from 1992 to 1995 in the Bundle of Documents Vol. 2 (BOD 2) and that Ngan's affidavit affirmed on 8.2.1995 did not make reference to any specific documents or dates relating to the import of the said Chinese wine, hence no reference is made to the import documents relating to the alleged counterfeit said Chinese wine which the Appellants had neither knowledge nor admitted their existence.

20. The onus is on the Respondents to proof that all the import documents were in the possession, custody or power of the Appellants. The Respondents contend that BOD 2 did not answer the application as the documents therein mentioned either refer to imports prior to 1994 or imports in November 1995 the latter not even existing when Ngan's affidavit was affirmed. The veracity of the Appellants' denial of possession of documents relating to such import must be tested against their previous admission that they did exist. Lack of bona fides was also alleged.

21. Reference to documents relating to the said Chinese wine at any time being in the Appellants' possession, custody or power is only found in para 15 of Ngan's affidavit which is reproduced below:

“15 I further state that the allegation in paragraphs 7, 9 and 10 of Tan's Second Affidavit is mischievous as the Defendant is seeking to procure the Plaintiffs to reveal the identity of the

exporters for a collateral purpose, namely, to put pressure upon and victimise the lawful exporters of the “Zhan Qiao Pai” Special Quality Lingzhi Wine in PRC and Hong Kong. The Plaintiffs will disclose their documents if the Defendant agrees to give an undertaking to this Honourable Court that it will not make use of any information or documents so disclosed for a collateral or improper purpose. The Plaintiffs will, as and when required by this Honourable Court, procure witnesses from PRC and Hong Kong to testify to this at the trial of this action.”

22. As can be seen no reference is made at all to any specific documents nor the dates of those documents. The law requires direct allusion to be made in the affidavit for the documents sought for production before the other party can have the right to discovery – see **Dubai Banks** case (supra). There is no reason for the Court to doubt the Appellants’ averment that they have furnished all the import document in their possession and custody in BOD2 because that is the extent of their admission. The admission in para 15 makes no reference to the import documents pertaining to the alleged counterfeit said Chinese wine because they are not directly alluded to.

23. The learned Judge therefore erred when he ordered discovery on the premise of acknowledgement that the Appellants had in their possession, custody and power the import documents other than those in BOD2. To grant the order would be oppressive to the Appellants. It would also cause prejudice as the task is impossible. Appellate intervention is therefore in order to set aside the order of the High Court.

Order 24 rule 13(1)

24. There is one other matter which we cannot ignore and leave unsaid because it is fatal to the decision of the learned Judge and vitiated the exercise of his discretion. It is this. He apparently misdirected himself in law when he misappreciated the issue before him. In his grounds of decision the learned Judge states that the issue for his determination was whether the discovery and production of the documents would fairly dispose of the case, save time of trial and cost of calling witnesses which be answered in the affirmative.

25. As stated earlier the real issue is compliance with rule 13(1) which stipulates that discovery may only be ordered if the court is of opinion that such order is necessary either for disposing fairly of the cause or matter or for saving costs. The test is necessity not fairness and it is for the applicant to satisfy the court – see **Dolling-Baker's** case (supra) and **Ventouris v. Mountain** (supra). Because of that erroneous premise the learned Judge appears to be more concerned with relevance and fairness and omitted to consider whether and why it was necessary for the order to be made. The Respondents also failed to provide any materials to satisfy the court of such necessity.

26. If necessity is not the prime concern of the court, allowing discovery would tantamount to allowing the Respondents to fish for evidence which defeats the propose of the rule by causing the Appellants to suffer unfair disadvantage if they fail to comply with an order which is oppressive and incapable of compliance – see **Taylor v. Anderton** (supra) and **Leslie S Holmes** (supra). To make matters even worse the learned Judge even had the Respondents' cause of

action against the Appellants wrong when he states that it is for defamation and slander which is the Appellants' counter claim and subject to their D4 Action. This error also renders his finding on relevancy questionable and untenable. Such failure to consider what the law requires him to consider and the misappreciation of fact must vitiate the exercise of the learned Judge's discretion and call for appellate intervention.

Conclusion

27. In all the circumstances and for reasons aforesaid we allowed both appeals and set aside the orders of the learned Judge with costs to follow the event. Deposits to be refunded.

28. The presiding Judge of these appeals has since retired. However when the decision was made to allow these appeals we were clear of the reasons. It was just a matter of reducing them in writing which we, the remaining Judges have done accordingly.

Dated : 5.6.2009

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