Trek Technology (Singapore) Pte Ltd v Ritronics Components (S'pore) Pte Ltd [2006] SGHC 215

Case Number : Suit 672/2002, RA 275/2006

Decision Date : 12 December 2006

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Jason Chan and Wong Tsung Wei (Amica Law LLC) for the plaintiff; Wendy Low Wei Ling (Hee Theng Fong & Co) for the defendant

Parties : Trek Technology (Singapore) Pte Ltd — Ritronics Components (S'pore) Pte Ltd

Civil Procedure – Interrogatories – Whether to order withdrawal of interrogatories issued after trial of main action and during proceedings for assessment of damages – Scope for use of interrogatories under O 26 r 1 Rules of Court – Order 26 r 1 Rules of Court (Cap 322, R 5, 2006 Rev Ed)

12 December 2006 *Judgment reserved.*

Choo Han Teck J:

1 This was an appeal against the Assistant Registrar's order of 15 September 2006 directing that the interrogatories issued by the plaintiff on 11 August 2006 be withdrawn. These interrogatories arose in the context of proceedings to assess damages ("the AD proceedings") after a trial in which Lai Kew Chai J ("Lai J") decided the question of liability in the plaintiff's favour ("the liability proceedings"): see *Trek Technology (Singapore) Pte Ltd v F E Global Electronics Pte Ltd and others and other suits (No 2)* [2005] 3 SLR 389. The decision of Lai J was affirmed on 11 November 2005 by the Court of Appeal (see *F E Global Electronics Pte Ltd and others v Trek Technology (Singapore) Pte Ltd and another appeal* [2006] 1 SLR 874). Shortly thereafter, on 20 December 2005, the plaintiff applied for directions to commence the AD proceedings.

2 The plaintiff's allegation that the defendant breached its patent by producing and selling thumb drives under the names "SlimDisk" and "BioSlimDisk" was the principal issue in this action. To set matters in their appropriate context, I should first point out that the present set of interrogatories was filed after discovery had already been completed in the AD proceedings. The affidavit verifying the defendant's list of documents in discovery was filed on 6 February 2006 ("the first affidavit"). Pursuant to an application by the plaintiff, the defendant's managing director filed another affidavit on 17 April 2006 ("the second affidavit"). In both these affidavits, the relevant personnel of the defendant had affirmed that it had disclosed all its documents for the purposes of assessing its liability to pay damages. The second affidavit unequivocally denied that the defendant had any manufacturing facility or production in Singapore or had made or manufactured any of the infringing products in Singapore. It also maintained that the defendant did not have possession of any correspondence with suppliers of the components of the infringing products, or of any documents relating to the manufacture of these products. The affidavit expressly stated that all relevant commercial documents had been disclosed. The plaintiff, not being satisfied with these denials and the position taken by the defendant that there was nothing more to disclose, consequently served the present list of interrogatories on the defendant.

3 There were a total of 36 interrogatories but they were variations of two broad themes. The first general category of questions related to the defendant's acts of infringement in making, selling or distributing the infringing products, whilst the second concerned the existence and location of documents arising from or connected with the making, testing, selling, and distribution of the said

products. The factual basis for the plaintiff's application was Lai J's judgment in the liability proceedings, as well as the admission that the defendant had taken 100 pieces of the products to an international exhibition, CeBit; although 70 of these 100 pieces were brought back to Singapore, there was no documentary evidence as to what had happened to the rest. The plaintiff's counsel, Mr Jason Chan, also relied on unconfirmed newspaper reports wherein the defendant's managing director had announced that it planned to sell "100,000 BioSlimDisk worldwide" by the end of 2002. Mr Chan thus submitted that it could not be true that no documents connected with such grand designs could be found. Furthermore, he pointed out that the defendant had claimed to have invested more than $1,000,000 in the research and manufacture of its products. He submitted that it would be incredible that no documentary proof existed in relation to these activities. Mr Chan submitted that the interrogatories were necessary in the AD proceedings because first, they would tend to show the extent of the defendant's infringing dealings and the market demand for its products. Secondly, they would indicate the extent of the defendant's commercial activity regarding the making and distribution of the products, and thirdly, they would be helpful to the plaintiff's expert in his assessment of the damages arising from the defendant's use or sale of its products.

4 Under O 26 r 1(1) of the Rules of Court Cap 322, (R5, 2006 Rev Ed) ("the Rules"), the parties to any cause or matter may serve each other with interrogatories "relating to any matter in question" between them which are necessary either for "disposing fairly of the cause or matter" or "for saving costs". Although the heading of a rule is generally not conclusive as to its proper interpretation, the heading of O 26 r 1, namely, "discovery by interrogatories", is a helpful reminder of the nature of interrogatories. Interrogatories are one of the ways in which parties to a cause may be compelled to make disclosures of documents and facts not otherwise known or available to the other parties. Although the Rules do not expressly prohibit the service of interrogatories after the trial has commenced, it must be implicit that this must be so. Once the trial has started, expediency and fairness would have to be decided by the judge according to the rules of procedure at trial. Any question that could previously have been asked by way of interrogatory will have to be asked by way of cross-examination or by applying for leave for further cross-examination as the case may be. I do not think that interrogatories continue to be a viable means of saving of costs and achieving fairness once the trial has started. It would be anachronistic to use interlocutory procedures at the trial because interlocutory proceedings end when the trial begins.

5 By its very nature, a long cross-examination will invariably protract a trial. Lengthy or protracted trials are costly and may on occasion be used by more affluent parties as a means of oppression. Against this context, the discovery (including interrogatory) process, judiciously administered, can help to shorten the trial by abbreviating the cross-examination process. It is not uncommon to hear counsel asking seemingly mundane or aimless questions in cross-examination with the hope that the answers might lead to a more damaging set of questions. Interrogatories reduce the incidence of this scenario by usefully directing both parties' attention to the central issues in contention at an early stage, thereby reducing the need to focus counsel's time and effort on peripheral and uncontested matters. The utility of interrogatories in avoiding prohibitive litigation costs was recognised in *A-G v Gaskill* (1882) 20 Ch Div 519 ("*Gaskill*"), where Sir George Jessel MR stated at 527 that "one of the great objects of interrogatories" was to "to save [the interrogating party] the expense of proving a part of the case" since answers to interrogatories may make it unnecessary to call some witnesses.

6 In contrast to the approach in *Gaskill* ([5] *supra*), counsel for the defendant, Miss Low, adopted a more restrictive approach to the role of interrogatories and submitted that questions that can properly be asked in cross-examination cannot form the subject of interrogatories unless it can be shown that the interrogating party may be irremediably prejudiced if these questions are left to be answered at trial. A similar view was expressed by Colman J in *Det Danske Hedeselskabet v KDM*

International PLC [1924] 2 Lloyds Rep 534 ("*Det Danske*") at 537. The inconsistency between the approaches in *Det Danske* and *Gaskill* become particularly apparent when one refers to Lindley LJ's dictum in *Gaskill* (at 530) that "it is *no reason* for declining to answer the interrogatories to say that the same information may be got by cross-examination at the trial" (emphasis added). In my view, the equilibrium should lie midway between these two approaches. Whilst the possibility of a reduction in expense, however trifling, cannot *ipso facto* be sufficient ground to grant an interrogatory, to require evidence of "irremediable prejudice" as a necessary prerequisite in every case would reduce the effectiveness of O 26 r 1(1)(b), which expressly recognises the utility of interrogatories in saving costs. In my view, the threat of irremediable prejudice would, in most cases, fall within the "fair disposal" ground under O 26 r 1(1)(a), leaving other considerations to imbue the application of O 26 r 1(1)(b). Whilst it is difficult to make precise distinctions since the nature and complexities of trials will necessarily differ from case to case, I am of the view that the general approach should be to use interrogatories when they have a direct bearing on the issues and when they will ease the subsequent passage of cross-examination by delineating the precise matters in contention. Using interrogatories to clarify peripheral issues would controvert the object of reducing expenses under r 1(1)(b); greater costs would invariably be incurred if a party was required to put on oath at a preliminary stage answers that could quite easily be furnished at trial without affecting the general conduct of the other party's case.

7 In this regard, the first instance court deciding whether or not to allow such interrogatories need not - and indeed should not - be put to great length when contemplating whether to grant the request for interrogatories. Once seized of the issues, the court may readily refuse questions of a more ancillary or specific nature that might more appropriately be asked in cross-examination. The system may regress to oppressiveness and time-wasting if every question is argued at length at the interlocutory stage. Counsel must realise that the severity of potential prejudice falls to be judged in light of the added opportunity to clarify these concerns that will, in any event, be available to him during the trial. At the interlocutory stage, the court needs only consider whether: (a) the prejudice would be real, substantial, and irremediable if the interrogatories were refused; and (b) the questions can be answered without difficulty and can potentially dispose of entire lines of questioning and perhaps even the need to call certain witnesses during the trial. In either case, the court would be justified in allowing the request. I would be slow to overrule an exercise of such discretion by the court below in the absence of any obvious error and there was none in the present case. Detailed and exceedingly nuanced enquiries into the merits of the court's exercise of discretion will unnecessarily protract the judicial process at unjustifiable costs in terms of time and money to all concerned. In an adversarial system of trial, the rules relating to discovery and interrogatory are intended to ensure a fair fight. They are the counterweight to the law regulating the burden of proof, that is to say, that the judicial process will soften the harshness of the process of proof. It is a fair proposition to require a person to prove what he had asserted, but no one would have a complete stock of the evidence and knowledge that his opponent possesses. A judicial process requiring a party to prove his assertions without compelling reasonable disclosure from the other side might result in laying too onerous a burden on that first party, but this should not be understood as giving licence to that party to serve lengthy or oppressive interrogatories. The interrogatory must be considered in the context of its role in the litigation process. It performs an important but less facilitative function than cross-examination – it is the bridesmaid; not the bride.

8 If, as in this case, a defendant is accused of infringing the plaintiff's patent rights to a "thumb drive" storage disk, then the plaintiff must prove that he had the patent rights and that the defendant had made thumb drives using the plaintiff's design. The existence of the latter event may seem to be incontrovertible in many cases since the defendant would generally derive no profit from his infringing activity unless and until he sells the impugned thumb drives in the open market. The plaintiff, however, may face insurmountable difficulties of proof since he may never know when the

defendant first started making the said product or when he started selling them, or where he sold them, and how many had been sold. Such questions would be relevant, and in fact central, to any attempt to assess the extent of damage suffered by the plaintiff. They would thus necessarily constitute issues during the trial, but to leave them only to be addressed during cross-examination may prove a long and painfully futile exercise because the cross-examination is one of the penultimate parts of the trial process, being the stage just before counsel's closing address to the court. The introduction of such central pieces of information at this late stage may often catch counsel unaware and create the need for adjournments and a flurry of interlocutory applications to allow counsel to address these new developments. In the present case, where the defendant has already crystallised its position by stating that it had brought 100 pieces of the infringing product to an exhibition overseas and brought back 70 (see above at [3]), the shipping documents will be relevant to show whether that was indeed so. A total absence of shipping documents might lead the court to conclude that none of the pieces were in fact brought back. The question why the shipping documents have not been produced would hence be a relevant one for interrogatory purposes. However, that was not the question the plaintiff here asked. Instead it asked a broader question, "In relation to the Defendant's SlimDisk product, please state whether any orders were received by the Defendant in Singapore for the manufacture, sale and/or supply of the Defendant's SlimDisk product during the period between 23 August 2001 and 12 May 2005, the date of the judgment in this suit." The defendant had already given some general answers to that question.

9 Furthermore, the question referred to in [8] above would have been relevant not only to the assessment of damages but also to the issue of liability and could have been asked in cross-examination at the trial. The omission might still be rectified by cross-examination during the assessment of damages but would not be appropriate as an interrogatory at this stage. Counsel were unable to tell me when the order for the bifurcation of the trial was made and I must therefore assume that it was made by the judge at trial because in the ordinary course of events, the trial would be for liability as well as damages. Once a trial has started, there is no reason to serve interrogatories. Hence, unless the plaintiff had obtained an order for bifurcation and reserved the right to serve interrogatories prior to the assessment but after trial on the question of liability, he should not be permitted to serve interrogatories. He must thus content himself with cross-examination. Mr Chan's reliance on the unreported case of *Corporacion del Nacional de Cobre de Chile v Metallgescellschaft Ltd AG* (The Times, 6 January 1999) was not directly relevant because it concerned the appropriateness of interrogatories for the purposes of a summary judgment application. In this case, I do not think that the questions he set out in the interrogatories could not be put by way of cross-examination. If, as counsel submitted, given the facts as found by the trial judge it would be incredulous that the defendant did not have any of the documents asked for, the appropriate conclusions fell to be drawn against the defendant's existing averments in its affidavits that it had no further relevant documents. A failure to obtain further confirmation from the defendant that it had no such documentation would not irremediably prejudice the plaintiff. To the contrary, it might actually assist it during the presentation of final submissions to the court. For these reasons, I am of the view that the decision below should be affirmed and the appeal dismissed. I shall hear the question of costs at a date to be fixed.

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