1964

Sept. 14

Sept. 22

BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN:

McKEEN & WILSON LTD. ....PLAINTIFF;

AND

GULF OF GEORGIA TOWING CO. LTD. and RAYMOND McCULLOUGH .... } DEFENDANTS.

Shipping—Discovery—Oral examination of officer of corporation—British Columbia Supreme Court Rules, Order XXXIA, Marginal Rule 370cc—Whether officer bound to inform himself of matters not within his personal knowledge.

In an action for negligence causing damage to a barge an officer of plaintiff corporation was examined for discovery under Order XXXIA

of the British Columbia Supreme Court Rules. He declined to answer certain questions on the ground that the matters were not within his personal knowledge. The defendant moved for an order to compel him to answer the questions.

Held: Since the 1960 amendment to the applicable Rule (Marginal Rule 370cc) an officer of a corporation on examination for discovery may be required to inform himself of the matters in question from the corporation's records and from other officers and servants of the corporation. (*Brydone-Jack v. Vancouver Printing and Publishing Co. Ltd.*, (1911) 16 B.C.R. 55, explained.)

APPLICATION by defendant company for fuller discovery by officer of plaintiff.

The application was heard by the Honourable Mr. Justice Norris, District Judge in Admiralty for the British Columbia Admiralty District, at Vancouver.

Robert J. Harvey for plaintiff.

C. C. I. Merritt, Q.C. for defendant Gulf of Georgia Towing Co. Ltd.

V. R. Hill for defendant Raymond McCullough.

The facts and questions of law raised are stated in the reasons for judgment.

NORRIS D.J.A. now (September 22, 1964) delivered the following judgment:

This is a motion on behalf of the Defendant Gulf of Georgia Towing Co. Ltd. for an order "that Robert P. Husband, an officer of the Plaintiff Company, search the documents in the Plaintiff Companys' possession and power relating to the matters in question in this action and inform himself so as to be able to answer the questions put to him; and to so answer the questions put to him on this issue numbered 49, 50, 57, 92, 96, 98, 100, 101, 103, 104, 106, 107, 109, 126, 127, 128, 129, 131, 138, 159, 160, 163, 164, 181, 197, 200, 202, 203, 204, 205, 206, 211, 212, 213, 214, 216, 223, 224, 229, 236, 237, 238, 239, 250, 252, 253, 254 and 291, in the Examination for Discovery of Robert P. Husband, and failing this and in the event that he still refuses to do so, the Writ and Statement of Claim be struck out and the action dismissed." The motion is supported by counsel for the defendant McCullough.

Counsel for the defendants submit that the officer of the plaintiff company, Husband, was tendered for examination

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on discovery as being the sole person representing the plaintiff company capable of giving adequate discovery, that this is not a case of the examination of a witness with limited knowledge of the company's affairs and whose lack of knowledge on examination could be remedied by the examination of another officer on order of the Judge and that as all questions are relevant to issues which appear on the pleadings, all the questions should be answered. Counsel for the defendant Gulf of Georgia Towing Co. Ltd. further agreed that if this Court ordered that questions 92, 96, 98, 100, 101, 103, 106, 107, 109, 128 and 129 be answered, Husband informing himself as to the matters referred to therein, then the said defendant would withdraw the application to the extent that it asked for an order in respect of questions 236, 237, 238 and 239.

Counsel for the plaintiff in his argument divided the questions into seven groups. It will be convenient to deal with the application following such grouping.

1. GROUP ONE: Q. 49-50, 163-164:

Counsel for the plaintiff argues that the question as to whether the defendants knew or should have known that Barge No. 43 was owned by McKeen & Wilson Ltd. is irrelevant.

In paragraph (1) of the Statement of Claim the plaintiff alleges that it was the owner of Barge 43 which it was alleged was damaged by the negligence of the defendants. In another action by the Straits Towing Ltd. against the same defendants the same barge is referred to as the barge of the plaintiff in that action. These actions have now been consolidated for the purpose of trial.

There is no doubt in my mind that the questions objected to may raise matters which are relevant to issues raised on the pleadings. This is all that the defendants are required to show. As to whether or not they are relevant and admissible at the trial is a matter for the learned trial Judge.

See *Tisman v. Rae*[1] Bird J.A. at p. 81; *Lawryshyn v. Aquacraft Products Ltd.*[2] and cases cited by Aikins J. at pps. 343-4.

[1] [1946] 4 D.L.R. 78.

[2] (1963) 42 W.W.R. (N.S.) 340.

2. Group Two: Q. 57, 92 and 96, 98, 100, 101
103-4, 106-7, 109, 129-131
138, 211-213, 216, 229.

Counsel for the plaintiff submits that under the authority of the majority judgment of the Court of Appeal of British Columbia in *Brydone-Jack v. Vancouver Printing and Publishing Company, Limited*[1]. Husband being an officer of the plaintiff company being examined under Order XXXIA of the Rules of the Supreme Court of British Columbia, might not be ordered to inform himself of matters not within his personal knowledge. He also relied on *Dudley v. C.P.R.*[2]; *Haswell v. Burns & Jackson Logging Co. Ltd.*[3]; *In re Electric Power Act*[4]. He alleged that the judgment of Whittaker J. in *Dallas v. Dallas*[5] was distinguishable.

The judgments in the first three of these cases were based on the majority judgment in the *Brydone-Jack* case. In *Dallas v. Dallas,* Whittaker J. said at p. 324 of the Report:

> Counsel for the defendant, however, relies upon a decision of the court of appeal of this province, *Brydone-Jack v. Vancouver Printing and Publishing Co Ltd.,* (1911) 16 WLR 262, 16 B.C.R. at 55. In that case Macdonald, C.J A. with whom Galliher, J A. agreed, held that a witness, an officer of a company, being examined for discovery, may not be ordered to inform himself of the knowledge of his fellow-officers touching the issues in the action. Irving, J A. delivered a dissenting judgment. The court held that, following the English practice, the witness could be so ordered if the discovery were by way of interrogatories. No doubt this decision, unless and until reviewed by the court of appeal, would bind this court where the witness is being examined as an officer of a corporation. Any remarks of the learned Chief Justice which may be construed as applying to discovery generally were not necessary for the decision and with the greatest respect, should, I think, in view of the great volume of authority to the contrary, be regarded as *obiter.*
>
> The defendant in this case carries on his business through the agency of Bradley Oils Corpn. Ltd, a company which he controls. The company is defendant's servant or agent.
>
> If relevant information is not with a party's personal knowledge but is within the knowledge of his servant or agent, derived in the course of the employment, the party must make reasonable efforts to obtain the information: *Bolchow v Fisher* (1882) 10 QBD 161, 52 LJQB 12; *Horton v. MacLean* (1911) 2 OWN 804, and 1493; *Vanhorn v. Verral* (1911) 3 OWN 439; *Bondar v. Usinovitch* (1918) 1 WWR 557, 11 Sask LR 64; *Burns v. Henderson* (1918) 1 WWR 885; *Culver v. Lloydminster (Town) and Flint & Stephenson* (1928) 1 WWR 406, 22 Sask LR 314.

[1] (1911) 16 B C.R. 55.
[2] (1963) 42 W.W.R. 60.
[3] [1947] 2 W.W.R 394 at 397.
[4] [1949] 1 W.W R. 75 at 78.
[5] (1961) 34 W.W.R. 322.

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I make no reference to the cases in which it has been held that a person under examination as an officer of a company must obtain from his fellow-officers relevant information not within his own personal knowledge.

He directed that the defendant inform himself. It is to be noted that in *Brydone-Jack v. Vancouver Printing and Publishing Company Limited, supra,* Macdonald, C.J.A. said at p. 57:

I have no doubt that the English practice should prevail here, where discovery is sought by means of interrogatories under our rule in that behalf. On the other hand, I do not think that that practice is applicable on the point here involved, where discovery is sought by oral examination under Order XXXIA. Even if we had not the English rule of practice in addition to that in the above mentioned order, I should hesitate to follow the Ontario practice. The oral examination is expressly declared to be subject to the rules of examination applied to a witness, and I do not think that a witness may be ordered off the witness stand to inform himself concerning the knowledge of his fellow servants or agents, so that he may return and give evidence based on the information so obtained.

In his dissenting judgment Irving J.A. made it clear that the decision turned on the wording of Marginal Rule 370C as it then was. At p. 58 and 59 he said:

The difficulty is raised by the use of the expression in Rule 370c. (1) "He shall testify in the same manner and upon the same terms, and subject to the same rules of examination as a witness"—and it is said that a witness is not required to go away and ascertain a lot of facts of which he knows nothing—but I think that full effect may be given to those words by regarding them as laying down directions for the conduct of the examination itself, and not to the preparation for it, nor as to the principle which should govern the scope of it.

That the issue turned on the words as quoted by Irving J.A. is supported by the note of the argument of E. P. Davis K.C. contained on p. 56 of the Report as follows:

Davis, in reply: The system here is that the examination is to be the same as at a trial, therefore the witness could not be compelled to give hearsay evidence.

At the time of the *Brydone-Jack* decision the rule as to discovery by a corporation read as follows:

370c. In the case of a corporation, any officer or servant of such corporation may, without any special order, and anyone who has been one of the officers of such corporation may, by order of a Court or a Judge, be orally examined before the trial touching the matters in question by any party adverse in interest to the corporation, and may be compelled to attend and testify in the same manner and upon the same terms, and subject to the same rules of examination as a witness, save as hereinafter provided. Such examination may be used as evidence at the trial if the trial Judge so orders.

However, when the rules were amended in 1960 to become effective in 1961 the words quoted in the *Brydone-Jack* case

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and which were the foundation for that decision were deleted as affecting corporations. Marginal Rule 370cc, Order XXXIA(2) now reads:

> Where a corporation is a party to an action or issue, any person who is or has been an officer or servant of a corporation (other than the external auditor of the corporation) may, without order, and the external auditor of the corporation may, by order of a Judge, be orally examined before trial touching the matters in question by any party adverse in interest to the corporation.

It is fair to assume that the reason for the change was that it was realized that the result of the *Brydone-Jack* decision was not reasonable, as an officer of a corporation put forward for examination on discovery as representing the corporation, would often have no personal knowledge of matters in question in the action. Knowledge of these matters on the part of other officers or servants would be imputed to the corporation as the corporation as such could have no personal knowledge. The officer to be examined representing the corporation, could in such cases, have only such knowledge as he might gain from the company records or from other officers or servants and, therefore, should inform himself through such sources. Support is given for this assumption by the trend of decisions of this Court since the *Brydone-Jack* case, holding that hearsay evidence is permissible on discovery which would not be admitted on trial. See *Haswell v. Burns & Jackson Logging Co. Ltd.*[1], Robertson J.A. at 395-6; *Trans-Canada Forest Products Ltd. v. Heaps, Waterous Ltd.*[2], Bird, J.A. at 441-2. This last case was a case of interrogatories, but on this point the principle as enunciated by my brother Bird is the same.

Counsel before the Court on this application did not argue the important change in the Rule and with respect, it would appear that in the cases in the Supreme Court of this province since the 1961 amendment came into force viz.: *Dallas v. Dallas* and *Dudley v. C.P.R.* neither the change in the Supreme Court Rules nor the effect of the same on the authority of the judgments in *Brydone-Jack v. Vancouver Printing and Publishing Company Limited, supra,* were drawn to the attention of the learned Supreme Court Judges presiding. In *Dallas v. Dallas* the learned Judge was not required to deal with the question which arises on this motion.

[1] [1947] 2 W.W.R. 394. [2] [1950] 2 W.W.R. 433.

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In my respectful opinion, in view of the amendment of 1960 as it appears from the 1961 Rules, the *Brydone-Jack* case is no longer a binding authority on the question as to the right to require that an officer of a corporation presented for examination under Marginal Rule 370cc of the Supreme Court Rules, inform himself on the matters in question in the action.

In addition to the foregoing it is to be noted that if the submission of the plaintiff were sound, British Columbia would be the only Province in Canada which on the matter of examinations for discovery, did not follow the English practice in the case of interrogatories and the Ontario practice as to examinations for discovery. In these circumstances I may say with the greatest respect, that as District Judge in Admiralty, I would not follow the judgment of Macdonald C.J.A. in the *Brydone-Jack* case. I find the dissenting judgment of Irving J.A. in that case convincing.

3. GROUP THREE: Q. 159-160, 197-206:

Counsel for the plaintiff submits that it is not relevant to ascertain whether the plaintiff knew or should have known the contractual terms between the tugboat owner and the scow charterer, as an answer in the affirmative would not affect the liability of the defendants in the action.

The remarks made as to the objection to answer the questions in Group One apply equally here. I draw attention particularly to the judgment of Hunter C.J. in *Hopper v. Dunsmuir.*[1]

4. GROUP FOUR: Q. 126, 127, 180-181, 291:

Counsel for the plaintiff submits that the examining solicitor cannot conduct a discovery of documents on the examination, and he refers to the fact that there is no applicable Admiralty Rule and relies on Rule 307J. of the Supreme Court Rules.

This objection is, in my opinion, a trifling one and, in any event, the questions would appear to be proper ones in an effort to obtain the admission referred to in Marginal Rule 370J. The questions are such as may raise matters which are

[1] (1903) 10 B.C.R. 23 at 28

relevant to issues raised on the pleadings within the terms of the judgments in *Hopper v. Dunsmuir (No. 2)* and *Tisman v. Rae, supra.*

5. GROUP FIVE: Q. 223-224 incl.

Counsel for the plaintiff submits that these questions deal with damages, that it does not lie in the mouth of the witness to assess damages, that the witness is not a legal man and not qualified or required to assess the damages and that the examining solicitor should merely ask questions which will enable him to have the damages assessed.

This again is a trifling objection. There is no doubt that the questions were quite clear and proper. They did not tend to confuse or mislead the witness and such is not the objection.

6. GROUP SIX: Q. 236-239 incl.:

Upon answers being given to questions 92, 96, 98, 100, 101, 103, 104, 106, 107, 109, 128 and 129, there will be no order as to these four questions.

7. GROUP SEVEN: Q. 250, 252-254 incl.:

Counsel for the plaintiff submits that the questions asked are as to the opinion of the plaintiff and cannot be asked on discovery even although they might be asked on trial. He submits that the questions are tantamount to saying, "In what respect do you say that we were negligent", and that such is the function of pleadings and particulars. He cites an unreported judgment of Maclean J. in the Supreme Court of British Columbia in *British Columbia Forest Products Ltd. v. Yarrows Ltd.* delivered on April 27th, 1964 and the judgment of Coady J. in *Ball et al v. British Columbia Electric Company Limited.*[1] In both these cases the questions asked were pure questions of opinion, and with respect, were properly excluded. In the present case, as counsel for the plaintiff submits, what is being asked is, "In what respect do you say we were negligent". Matters covered by questions such as this are undoubtedly referred to in the pleadings and particulars, but this does not render the questions objectionable. The case is rather the reverse. The questions are not as to the opinion of the witness as an expert, but as representing the corporation and as to its claim in the action.

[1] (1951-52) 4 W.W R. 478.

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The witness Husband must inform himself on the matters referred to in all the questions set out in the motion paper save the questions in Group Six, and will attend at his own expense before the Registrar, on appointment given by him, and will answer such questions.

The defendants will have their costs of the motion and of the further examination in any event of the cause.