HCA 2352/2012

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

ACTION NO 2352 OF 2012

BETWEEN

BRUCE JAMES STINSON Plaintiff

and

GU MING GAO (顧鳴高) Defendant

Before: Hon Au-Yeung J in Chambers

Date of Hearing: 19 October 2015

Date of Decision: 26 February 2016

D E C I S I O N

INTRODUCTION

1. This is the Plaintiff's appeal against the Registrar's decision refusing to order non-party discovery. The issues in the appeal are necessity and relevance of the discovery.

BACKGROUND

2. The Plaintiff and the Defendant (a statistics professor), have formed a partnership ("**the Partnership**") since 2004 to establish a horse racing betting operation using a **Mathematical Model** which provided accurate probability estimates for Hong Kong horse races.

3. Under the Partnership Agreement, the Defendant was responsible for a modelling team that provided, developed and maintained the Mathematical Model. The Defendant and the Modelling Team at all material times had sole control of and access to the Mathematical Model as developed from time to time. The Defendant and one Leung Man Kit ("**Leung**") were part of the Modelling Team. The Plaintiff did not have access to the Mathematical Model.

4. Under the Partnership Agreement, the Mathematical Model constituted the property of the Partnership. Both parties agreed that they would not deal with, sell or share the Mathematical Model with others.

5. Since around the 2007 racing season, the Mathematical Model had been able to produce accurate estimates and to generate consistent profits for the Partnership Business.

6. It then came to the attention of the Plaintiff that the Defendant had, allegedly in breach of the Partnership Agreement and the Defendant's obligations as a partner, been making private bets using the Mathematical Model. It also became apparent that the Defendant's private betting had gone on to a much grander scale around the 2010/2011 racing season.

7. By an email dated 27 July 2012, the Defendant gave notice to terminate the Partnership Business.

8. The Plaintiff proposed that each party should walk away with a working copy of the Mathematical Model, and requested the Defendant to deliver up a copy of the same; but the Defendant refused.

9. The Plaintiff issued the Writ on 19 December 2012, seeking the delivery up of the Mathematical Model, damages for breach of the Partnership Agreement and account of profits made by the Defendant from private betting using the Mathematical Model on his own account.

10. The Defendant does not deny private betting. The issue is whether he had (on the Plaintiff's case) used the Mathematical Model (based on a logit model), or (on his own case) the probit model.

11. On 27 November 2013, upon the Plaintiff's application and after a contested hearing, Master De Souza ordered the discovery of the betting records of the Defendant and/or his nominees or agents on his behalf (including but not limited to Leung, Lam Yuk Fai and Xiong Liying Ivan). The discovery was to cover the period from the start of the 2004/2005 racing season to the end of 2011/2012 (ie 8 racing seasons).

12. The Defendant's appeal was dismissed by L Chan J on 2 April 2014. However, the

learned judge limited the discovery period to the time of delivery up of the Mathematical Model.

13. By summons dated 4 April 2014 ("**Defendant's Variation Summons**"), the Defendant sought to vary or correct the Order of L Chan J. The draft order attached to that Summons expressly provided, in §1 thereof, that the Defendant should provide discovery of the Defendant's betting records including those of "his nominees or agents on his behalf, if any, …"

14. The Defendant's Variation Summons was dismissed by L Chan J on 15 April 2014 as unmeritorious.

15. On 19 June 2014, upon the Defendant's application, Deputy High Court Judge Seagroatt ordered discovery against the Plaintiff of all statements and records of all accounts maintained with the Hong Kong Jockey Club ("**HKJC**") from 27 January 2004 to 27 July 2012 in respect of horse betting activities "undertaken by individuals on behalf of the Partnership Business."

16. Meanwhile, the Defendant only disclosed about 3 years of his own records between 13 April 2011 and 18 December 2013 in purported compliance with the Order of L Chan J. His excuse was that that was what the HKJC had supplied to him. The Defendant, denying private betting through nominees/agents (collectively "**agents**"), did not disclose any betting records of the alleged agents.

17. HKJC had confirmed that it was possible to provide betting records up to 7 years from the date of the order. The Plaintiff drew this to the Defendant's attention. The Plaintiff himself had in fact disclosed 7 years of HKJC betting records to the Defendant pursuant to the order of Deputy High Court Judge Seagroatt. Despite these, the Defendant has not produced further betting records.

THE PRESENT SUMMONS

18. The Plaintiff took out the present summons seeking discovery against HKJC ("**the HKJC summons**") of:

(1) all documents showing details of all betting made by and/or on behalf of the Defendant for each race from the commencement of the racing season in 2004 to the present ("**class 1 documents**");

(2) statements and records of all betting accounts of the Defendant relating to the betting under (1) above ("**class 2 documents**");

(3) statements and records of all betting accounts for each race from the commencement of the racing season in 2004 to the present under the name Leung Man Kit ("**class 3 documents**");

(4) statements and records of all other betting accounts relating to betting made on behalf of the Defendant under (1) above ("**class 4 documents**").

19. Both before the Registrar and this court, HKJC took a neutral stance. It does not object to production of the betting records of the Defendant and Leung for 7 years from the date of the order of the court.

20. The Defendant vigorously opposed the HKJC summons despite the prior order of L Chan J. It is the Defendant's case that his private bets did not involve using (a) the Mathematical Model; and (b) agents.

21. The Registrar dismissed the HKJC summons.

22. In this appeal against the Registrar's decision, the scope of discovery sought has been greatly narrowed. The Plaintiff only seeks discovery of betting records of the Defendant and Leung but not other agents. The bone of contention is relevance and necessity.

23. Ms Tam SC has framed 2 issues:

(1) Further discovery of the Defendant's records is unnecessary;

(2) Discovery of agent's records is irrelevant and unnecessary.

24. Since the filing of the appeal, the Plaintiff had entered into further correspondence with HKJC. HKJC took the stance that it could only preserve records (dating back for longer than 3 years) if the Defendant and Leung did not object to the same. The Defendant did not object to the preservation of those records, but he did not consent to disclosure of the same.

25. After the hearing, I have ordered HKJC to preserve the documents sought pending handing down of this decision.

26. Before I analyze the case further, I wish to deal with a point on evidence. The Plaintiff has purportedly put in the affirmation evidence (in relation to another summons dated 27 November 2014), which was filed after the evidence in this HKJC summons was closed.

27. To adduce evidence in such manner reflects a lack of discipline. It is not open to the Plaintiff to submit that the affirmations were filed only after this appeal was launched and

hence fell within Order 58, rule 1(5). I shall not rely on the evidence in relation to the other summons, except Professor Fan's affirmation not objected to by Ms Tam SC.

LEGAL PRINCIPLES ON NON-PARTY DISCOVERY

28. Under s.42 of the High Court Ordinance, Cap 4, the Court has a discretion to order disclosure of documents by a non-party. It is for the applicant to show that the documents sought are in existence, in the possession of the respondent and are relevant to the issues, and that discovery is necessary for fairly disposing of the cause or matter.

29. The test of relevance in an application under s.42 and O.24 r.7A is the same test as that which is applied for other types of discovery under O.24, namely documents which may contain information which may enable a party either to advance his own case or to damage that of his adversary. These include documents which may fairly lead a party to a train of enquiry which may have either of those consequences: *Peruvian Guano case* (1882) 11 QBD 55; *Tullett Prebon (Hong Kong) Limited v Chan Yeung Fong Nick & ors* (unrep, HCA 2197/2009, 9 June 2011) at §74 per To J; *Chan Tam Sze v Hip Hing Construction Co. Ltd,* (unrep, HCA 1931/1988, 17 October 1989) per Bokhary J at p.5.

30. Even if the court is satisfied with the above requirements, it must still exercise its discretion bearing in mind that disclosure orders against third parties are exceptional. It should not be used as a fishing exercise for documents nor be speculative. It should not be oppressive to witnesses: *Tullett Prebon v Chan* at §77 and *Re Estate of Ng Chan Wah* HCAP 5/2003 at §16 per Chu J (as she then was).

31. The following factors should be considered on an application for third party record:

> "First, how important is the information to the issues? Second, has the applicant taken appropriate steps to obtain the information within the proceedings before seeking disclosure from the third party? Third, would it be sufficient for the court simply to draw adverse inferences on the basis that the party from whom the information was sought within the proceedings has failed to supply their information? Fourth, what is the nature of the relationship, if any, between the parties to the proceedings and the third party? Fifth, if disclosure is necessary and proportionate wheel [sic] the editing of documents protect private information?" (*Tullett Prebon v Chan* (*supra*) at §85 per To J, citing a decision of Hartmann JA, as he then was).

32. There is no dispute that the documents sought (dating back 7 years) are in existence and that HKJC is in possession, custody or power of the subject records of both the Defendant and Leung.

ISSUE 1 – FURTHER DISCOVERY OF THE DEFENDANT'S RECORDS

Relevance

33. In his decision dated 2 April 2014 (§28), L Chan J decided that the Defendant's

betting records were relevant and that the Plaintiff needed these records for examination by an expert to find out whether they showed a pattern that was related to the output of the Mathematical Model. I agree with the learned judge's views.

Necessity to fairly dispose of the cause or matter

34. Ms Tam SC, however, contends that relevance is not by itself sufficient. Her submissions fall under 3 limbs:

(i) It is the Plaintiff's own case that he already has sufficient evidence to prove the central issue on the Defendant's betting;

(ii) The full 7 years' betting records only go to quantum and are unnecessary at the present stage;

(iii) Discovery of the full 7 years' betting records will be a disproportionate burden to the HKJC, the Defendant and the court.

That it is the Plaintiff's own case that he already has sufficient evidence to prove the central issue on the Defendant's betting

35. Ms Tam SC submits that the Defendant has already produced 3 years' HKJC records amounting to 1,931 pages. On those materials, each party's expert agreed that it was sufficient with the present discovery to prepare an opinion.

36. Ms Tam SC pointed out that Professor Fan (Defendant's expert)[1] said that the statistical data from one racing season was "*more than enough statistically*" to draw his conclusion.

37. On the other hand, she points out that Mr Ziemba, the Plaintiff's expert, was able to come to a confident, unqualified opinion that the Defendant's private betting was done using the Mathematical Model.

> "Even for the 2011/2012 season alone, there is a lot of data to be analysed in [the Defendant's] Betting Records and the Partnership Betting Records and that data alone is sufficiently large and sufficient for me to reach the conclusions that [D's] bets were made with the Model and that he must have placed bets other than those shown in [the Defendant's] Betting Records through other accounts such as that of [Leung]."

Such opinion was repeated in various places in his report.

stated that further disclosure of the Defendant's betting records was necessary to arrive at a more accurate opinion, so Ms Tam SC submits.

39. With respect to Ms Tam SC, Mr Ziemba was responding to the Defendant's contention that no matter how much study and comparison was made between the

Defendant's and the Partnership's betting records, the opinion that the Defendant's private betting was done using the Mathematical Model was inconclusive. There clearly was a dispute in opinion between the experts.

40. Further, Mr Ziemba has made it clear that what he had said in his affirmation was not intended to be a detailed analysis and comparison but that such detailed analysis and comparison would be done in the expert report which he would be preparing.

41. It is not for the court to decide on which expert's approach or conclusion is correct at this stage. Mr Ziemba has not stated that he did not require 7 years of the Defendant's betting records. It was justified for him to study as many of those records as possible to identify the Defendant's betting pattern, to prove the Plaintiff's case. It was not a fishing expedition.

42. Besides, the Defendant should not be allowed to circumvent L Chan J's order through a back door by purportedly relying on disputed expert's views. I reject the first limb of Ms Tam SC's argument under Issue 1.

The full 7 years' betting records only go to quantum and are unnecessary at the present stage

43. Discovery relating to damages or profits will not be ordered until all issues of liability have been determined and the Plaintiff has elected whether to claim damages or an account of profits. Such discovery will be "premature, must impose trouble and annoyance upon the Defendant to no purpose if the verdict be in his favour on the question of liability, and ought not to be granted". See *Auto-Treasure Ltd t/a Albert Jewelry Creation v Noble Diamond Ltd t/a Noble Jewellery & anor* [1992] 1 HKC 117, at 119D-G and 120E-F, per Godfrey J (as he then was).

44. In an action between partners, there will be no award for damages and the Plaintiff's only remedy is the taking of partnership accounts: *Yau Wah Hing & anor v Yuen Kay Ming* (unrep, CACV46/2012, 19 March 2013) per Lam JA at §§62-63; *Leung Wing Yiu v Siu King Yuen & ors* [2003] 2 HKLRD 21 per DHCJ Lam (as he then was) at 28 29.

45. Accordingly, there will inevitably be a separate trial of liability and taking of partnership accounts in the present case. Ms Tam SC submits that the full 7 years' betting records are relevant only to quantum and so discovery of them is pre-mature.

46. With respect, I disagree. At the trial, the court has to find whether the Defendant had breached the Partnership Agreement and when it was breached. These are issues on liability. If, during the subsequent stage of account and inquiry, the Defendant says that

he had not used the Mathematical Model for the rest of the 4 years, the Master will have no finding to assist him or her. The Master may not be able to order further discovery as to when the breach had occurred.

47. I am not satisfied that the undisclosed HKJC records are only relevant to the issue of quantum.

48. In any case, even if the documents are not necessary at this stage, it is necessary to order HKJC to preserve those documents, otherwise it would erase them in accordance with its internal policy.

Discovery of the full 7 years' betting records will be a disproportionate burden to the HKJC, the Defendant and the court

49. Ms Tam SC points out that according to HKJC, providing the Defendant's betting records up to 7 years would require significant administrative effort. The Defendant has already disclosed 1,931 pages of betting records for a 3-year period. The parties, their lawyers and their experts have already incurred significant time and costs analyzing those records. Adding another 4 years of records will add significantly to that burden and is unacceptable in light of the underlying objectives in Order 1A of the RHC.

50. Now that the scope of discovery has been narrowed, HKJC has not suggested in this appeal that the administrative effort would be too onerous for it. In fact, it has produced 7 years of the Plaintiff's records. Given my finding that the 7 years of betting records are relevant to the issue of liability, any administrative "burden" and costs cannot override the need to do justice.

51. In summary, the Defendant has not established any of the grounds in opposition in respect of Issue 1. His discovery under L Chan J's order was inadequate. It is necessary and fair to order HKJC to make discovery of the Defendant's betting records for 7 years to cure the inadequacy.

ISSUE 2 – DISCOVERY OF AGENT'S RECORDS

52. It is the Plaintiff's case that the Defendant had been betting through agents of which Leung was one. The bases are as follows:

(a) The strategy which the Defendant had devised for the Partnership Business using the Mathematical Model was to place bets on 4 betting options, namely Win, Place, Quinella and Quinella Place. It proved to be highly successful. It was inconceivable that the Defendant only bet on Place and Quninella in his private betting, especially since his private betting was about 3 times more than

the Partnership Business' bets. Based on the opinion of Mr Ziemba, the Plaintiff contends that the Defendant must have been placing bets on Win and Quinella Place through other HKJC accounts of his nominees.

(b) The Plaintiff's witnesses made statements to the effect that the Plaintiff and his staff were aware of the alleged private betting conducted by Leung purportedly on behalf of the Defendant from 2004 to 2012. Leung was also seen logging into his betting account which showed extraordinarily high balances (from HK$1.3 million to HK$1.7 million) for someone of his income.

(c) Despite earning a modest salary before resignation from the Partnership in July 2012, Leung and his family members have in recent years been able to purchase 7 properties with substantial amounts of money.

(d) It is the Plaintiff's contention that Leung has been working with the Defendant in placing bets using the Mathematical Model, and was rewarded handsomely by the Defendant. Such incomplete records of the Defendant's betting account which have been disclosed by the Defendant showed that the Defendant had made over HK$56 million of profits through betting with his own betting account alone. It is the Plaintiff's case that the Defendant must also have made more profits through other betting accounts including Leung's.

(e) The Plaintiff invites the court to draw adverse inferences from Leung's alleged evasion of service.

53. Despite the Defendant's denial, those bases do disclose a case that Leung has been an agent of the Defendant.

54. However , it is Ms Tam SC's case that:

(i) Betting through agents has not been pleaded;

(ii) Discovery of betting records of agents is not necessary for the fair trial of the action as the Plaintiff claims to have sufficient evidence even without third party discovery;

(iii) The issue of Leung betting on behalf of the Defendant is peripheral to the central issue concerning the Defendant's use of the Mathematical Model in his private betting;

(iv) This case requires strong case management to prevent proliferation of non-essential issues.

Lack of plea of agency

55. Relevance is one of the 3 pre-requisites to the court's jurisdiction to order discovery. In the context of relevance, the issue must be one identified in the pleadings. See *Paul's Model Art GMBH & Co KG v UT Ltd & ors* [2006] 1 HKC 238 at §§24(1)(b) and 25 per Cheung JA.

56. I will add that a matter does not become an issue simply because it is hotly contested in affirmations in interlocutory proceedings, witness statements or expert reports.

57. Agency must be expressly pleaded. Discovery of documents relating to whether an alleged agent had taken secret profits was refused on grounds of relevance where the party seeking discovery did not plead agency: *Vastfame Camera Limited v International Freight Express (HK) Limited & ors* (unrep, HCCL8/2003, 29 April 2004), per DHCJ Muttrie at §§6-9.

58. The importance of proper pleading has been emphasized by the Court of Final Appeal in *Kwok Chin Wing v 21 Holdings Limited (formerly known as GFT Holdings Limited, Capital Prosper Limited and Rockapetta Holdings Limited) & anor* [2013] HKCU 2272 at §21:

> "21. … The basic objective is fairly and precisely to inform the other party or parties in the litigation of the stance of the pleading party (in other words, that party's case) so that proper preparation is made possible, and to ensure that time and effort are not expended unnecessarily on other issues:- *Wing Hang Bank Limited v Crystal Jet International Limited*. It is the pleadings that will define the issues in a trial and dictate the course of proceedings both before and at trial. Where witnesses are involved, it will be the pleaded issues that define the scope of the evidence, and not the other way round. (emphasis added) In other words, it will not be acceptable for unpleaded issues to be raised out of the evidence which is to be or has been adduced. As the Court of Appeal remarked in *Wing Hang Bank Limited v Crystal Jet International Limited*:-
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> "(2) In a trial, particularly where evidence is given by witnesses, it becomes extremely important that each side knows exactly what are the live issues. Where issues are sought to be introduced that have not been adequately or properly pleaded, amendments must be sought unless the consent of the other party or parties has been obtained. It will simply not do for unpleaded issues to be 'slipped in' when evidence is being given in the hope that the other side is not sufficiently alert to object." " (emphasis added)

59. The lack of earlier challenge against relevance does not confer on the court a jurisdiction that it does not have.

60. In the present case, there cannot be any dispute that the agency issue was never expressly pleaded but it was hotly contested in the witness statements and expert reports.

61. Mr Yan SC relies on paragraph 7 and its particulars of the statement of claim which pleads that the Defendant has converted the Mathematical Model to his own use and made private profits by utilizing the Mathematical Model to place bets "on his own

account and not for the Partnership Business". Mr Yan SC submits that those pleas mean that the Defendant had bet for his own benefit instead of for the Partnership's.

62. In my view, a fair reading of those pleas does not include betting through an agent. As the case of agency is based on inference from matters in paragraph 52, there is all the more reason to plead it before discovery.

63. Then Mr Yan SC submits that Master de Souza and L Chan J had regarded the betting records of Leung as relevant and necessary to the resolution of the issues of this case. No one raised the issue of lack of plea of agency in those 2 courts. However, I note that L Chan J's decision of 2 April 2014 did not explain the relevance of Leung's records.

64. Mr Yan SC relies on the Defendant's Variation Summons to show that the Defendant had not sought to remove the provision about discovery of betting records of his alleged agents. I do not consider that as relevant. The hearing before L Chan J had ended. The draft terms of variation was a desperate attempt to change the order and could not be taken as an admission by the Defendant that the alleged agents' records were relevant to the claim.

65. I find that the lack of agency plea is fatal to the application for Leung's records.

Other limbs of arguments under Issue 2

66. I deal with paragraphs 54(ii) to (iv) for completeness sake. If betting through Leung as an agent had been pleaded, discovery of Leung's betting records would clearly have been necessary for the same reasons given in respect of the Defendant's betting records. Betting through an agent would not be peripheral to the issue of which model the Defendant used in his private betting. It would be in itself an act of breach of the Partnership Agreement. In that case, it would not be a question of case management but that the discovery ought to be ordered for the fair trial of liability of the action. Leung has denied on oath that he had betting records of agents. That was conclusive on the issue of possession in the context of discovery but not the issue of agency. In respect of discovery, the Plaintiff would have been entitled to seek discovery from HKJC.

Lack of service on Leung

67. I deal with a procedural issue for completeness sake. Mr Yan SC confirms that the HKJC summons had not been served on Leung and there has not been an order for substituted service. I consider that it would not be fair to order HKJC to disclose Leung's records anyway without affording him the opportunity to address the court before an order is made.

CONCLUSION

68. I allow the appeal to the extent that HKJC should produce all documents showing details of all betting made by the Defendant for each race counting from the commencement of the racing season in 2004/2005 to the date of delivery up of the Mathematical Model as ordered by L Chan J. This is a modified version of classes 1 and 2 documents.

69. I dismiss the appeal in relation to classes 3 and 4.

70. Subject to these orders, the order of preservation of records which I have imposed on HKJC on the date of the hearing is discharged.

COSTS

71. I agree with Ms Tam SC that the scope of this appeal was much reduced from that of the HKJC summons. The Plaintiff is partly successful to the extent of the Defendant's betting records but not Leung's. The Defendant has unreasonably contested the part relating to his records despite L Chan J's order and HKJC's stance. I therefore make an order *nisi* that there be no order as to costs of this appeal.

72. On a *nisi* basis, HKJC shall be awarded costs of this appeal on indemnity basis: (a) such costs are summarily assessed and allowed at $180,000; (b) half is to be borne by the Defendant. The other half shall be borne by the Plaintiff in the first instance but the ultimate liability shall be reserved to the trial judge.

73. As regards the hearing before the Registrar, the Defendant should be awarded 50% of the costs. I make an order *nisi* setting aside the Registrar's order for party and party costs so that: (a) the Plaintiff do pay the Defendant costs of $250,000; (b) half of the costs awarded to HKJC in the sum of $160,000 shall be borne by the Plaintiff; (c) the other half in the sum of $160,000 shall be borne by the Plaintiff in the first instance but the ultimate liability shall be reserved to the trial judge.

74. I thank counsel for their assistance.

(Queeny Au-Yeung)
Judge of the Court of First Instance
High Court

Mr John Yan SC and Mr Dominic Pun, instructed by Lily Fenn & Partners, for the Plaintiff

Ms Winnie Tam SC and Mr Jason Yu, instructed by Baker & McKenzie, for the Defendant

Mr Nicholas David Hunsworth (solicitor advocate) of Mayer Brown JSM, for the Hong Kong Jockey Club

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[1] The use of this report was not opposed to by Ms Tam SC.