

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. 86 of 2007

BETWEEN : **THE FANTASY COMPANY OF FIJI LIMITED** a limited liability company having its registered office at Lot 16 SO 3956, Fantasy Subdivision, Wailoaloa, Nadi.

Plaintiff

AND : **CREDIT CORPORATION (FIJI) LIMITED** a limited liability company having its registered office at Credit House, 4 Gordon Street, Suva.

Defendant

Appearances : M/S Suresh Maharaj & Associates - Lautoka for the Plaintiff
M/S S.B. Patel & Company – Lautoka for the Defendant

R U L I N G

INTRODUCTION

1. The Plaintiff seeks leave to serve interrogatories on the Defendant under Order 26 Rule 1¹.
2. An affidavit sworn by Abbas Ali on 29 October 2008 supports the application. Ali says that the Defendant had discovered some documents following some discovery Orders in May and July 2008. His solicitors had then written to the Defendant's solicitors in late July 2008 seeking answers to some specific questions. The Defendant's solicitors replied vide a **letter of 05 August 2008**. However, the answers given were evasive.

¹ Order 26 Rule 1.

1(1) A party to any cause or matter may apply to the Court for an order –
(a) giving him leave to serve on any other party interrogatories relating to any matter in question between the applicant and the other party in the cause or matter, and
(b) requiring that the other party to answer the interrogatories on affidavit within such period as may be specify in the order.
(2) A copy of the proposed interrogatories must be served with the Summons, or the notice under Order 25, Rule 7, by which application for such leave made.

3. Ali further deposes there appears to be some elements of *'under hand'* dealing in respect to disposal of the chattels at undervalued prices.
4. The Defendant opposes the application on the ground of relevance, necessity and also that the interrogatories are not necessary for disposing fairly or saving costs or relate to the evidence the Plaintiff intends to adduce.

DISCRETION

5. Whether or not interrogatories will be allowed is purely a matter of discretion for the courts. An application made before discoveries are completed or have not been attended to² is premature and is likely to be refused.
6. The four main objects of interrogatories are: (1) to obtain admissions to facts which will support the interrogating party's case (2) to obtain admissions which will destroy or damage the case of the party interrogated (3) to obtain further and better particulars (4) to obtain accounts from a party occupying a fiduciary position³.
7. Interrogatories which, if answered, would either save costs or promote the fair and efficient conduct of the action, will be allowed. Generally, an interrogatory seeking a disclosure of the names of witnesses will not be permissible because the names of witnesses is normally regarded as not forming part of the material facts⁴.
8. It is also generally not permissible to seek evidence of facts in dispute⁵.
9. The party being interrogated must attempt to answer every interrogatory as accurately as possible. There is a view that complete precision is impossible and therefore, not necessary⁶. However, the contrasting view is that both interrogatories and their answers must be expressed in language of the most

² see Mohammed Alam v Colonial National Bank, Queensland Insurance (Fiji) Ltd, Registrar of Titles and Mohammed Shameem Airud Khan (unreported) Civil Action No. HBC 02 of 2006 delivered on 22nd June 2007 as per Master Udit.

³ (see Lockhart J in WA Pines Pty Ltd v Bannerman [1980] FCA 79; (1980) 30 ALR 550 and 574)

⁴ (see Day Break Pacific Limited & Anr v Donaldson and Ors HC AK CIV 2005-404-765 [2006] NZHC 957, Associate Judge Faire; Lord Esher MR in Marriott v Chamberlain (1886) 17 QBD 154 (CA) at 163).

⁵ (as per Lord Esher MR in Marriott v Chamberlain)

⁶ (Henwood v Radio New Zealand Ltd (1993) 7PRNZ 160 at 163); Douglas v Morning Post (1923) 39 TLR 402).

rigorous precision and in strict adherence to the letter of the words used⁷. It is safe to say that there is no place for reading between the lines. What is required is the expression of the clear meaning that the words bear on their face.

10. Where the interrogatory is directed to an act done by a servant or agent, it should expressly require the answering party to enquire of the servant or agent⁸.
11. An interrogatory that calls for an opinion from the person interrogated⁹.
12. Notably also, an interrogatory seeking information as to the content of documents is not permissible¹⁰ or to the interpretation of discoverable documents¹¹.
13. Interrogatories relating solely to credit are not permitted¹².
14. Ordinarily, interrogatories which are questions of law and/or mixed questions of law and fact are, not allowed¹³.
15. Apart from the above, nearly anything that is material may now be asked. The right to interrogate extends to any facts, the existence or non-existence of which is relevant to the existence or non-existence of the facts directly in issue.

THE CLAIM

16. There was an Asset Purchase Agreement between a company called G Kay Construction and Credit Corporation (Fiji) Ltd whereby the latter had financed the purchase by the former of a number of heavy machineries. These

⁷ (Kupresak v Clifton Bricks (Canberra) Pty Ltd [1985] 75 FLR 172 at 174).

⁸ (Rasbotham v Shrosphire Union Railways & Canal Co (1883) 24 Ch D 110 at 113)

⁹ (Re Securitibank Ltd (No 32) (1984) 1 PRNZ 523 at 526) is normally not permissible

¹⁰ (Herschfeld v Clarke [1856] Eng R 167; (1856) 11 Exch 712)

¹¹ (see Mohammed Alam v Colonial National Bank)

¹² (as per Shameem J in Huang Tzung – Hao v A Team Corporation Ltd [1999] FJHC 160; see also Order 26 Rule 1(4))

¹³ (AG – Wang New Zealand Ltd [1990] 3 NZLR 148, at 151; Nash v Layton (1911) 2 Ch 71; Looker –v- Murphy (1889) 15 VLR 348, 351, McBride v Dandland (1917) SALR 249, 259; Mohammed Alam v Colonial National Bank)

machineries are itemized in paragraph 3 of the Statement of Claim. The statement of claim then goes on to plead at paragraph 3 that the Plaintiff company then took over the burden of indebtedness of G Kay by an Asset Purchase Agreement dated 06 January 1999. The sum owing to CCFL at that time was \$262,416-00. The arrangement, as pleaded in paragraph 5 of the Statement of Claim, was that the heavy machineries would remain in the possession of G Kay Construction while the Plaintiff pays off the debt which it has assumed – after an initial deposit of \$25,000.

17. The Plaintiff pleads at paragraph 6 that, by the end of November 2001, the Defendant's Statement of Account showed that the balance had reduced considerably from \$262,416-00 to \$764,745.39. However, it is alleged that the Defendant, without Notice, would go on to repossess all the heavy machinery and would go on to sell these at a gross undervalue to a third party. The claim is for negligence and breach of contract.

THE INTERROGATORIES

18. My ruling on each interrogatory sought are as follows.

Interrogatory	Allowed/Not Allowed?
A. CONTRACT OF ASSET PURCHASE	
1. What was the total amount shown on the contract to be the sum owed to Credit Corporation for chattels described in the contract?	Not Allowed. Too Vague. Which contract? Sum owing as of which date?
2. Who were the persons who signed the contract as guarantors for and on behalf of the Company?	Not allowed. Which Contract? Which company?
B. SEIZURE OF CHATTELS	
3. On what date were the chattels subject to Asset Purchase Agreement dated 6th January, 1999 seized?	Allowed.
4. Under what clause of the contract was the seizure effected?	Allowed.
5. What was the nature of the breach of the contract that warranted such action? Quote the clause if it is other than the 4 above?	Allowed.

6. Who was your Bailiff who seized the chattels?	(i) Names of witnesses do not form part of the material facts.
7. How many items were seized?	Allowed.
8. Where did you keep the chattels after seizure?	Allowed.
9. When did you advertise for the auction of the chattels as advised through letter from your solicitor dated 5th August, 2008?	Allowed
10. Did you advise the plaintiff and the guarantor in writing that you had seized the chattel and if so when and how, and if so what documentary evidence you have to prove the same, provide the same in your Affidavit?	Allowed save for the part where the interrogatory requires documentary evidence.
C. SALE OF CHATTELS	
11. What was the amount in arrears at the time of the seizure?	Allowed.
12. What consideration or reasonable opportunity was given to the Plaintiff and the guarantors to clear the arrears?	Allowed.
13. How did you advertise for the auction of the chattels – provide copies of advertisement?	Allowed .
14. What was the reserved price that resulted in no bid being received in the 1st auction as advised by your solicitors in letter dated 5/08/2008?	Allowed.
15. When was the 2nd Auction held as you have said that there was no bidder for the 1st Auction?	Allowed.
16. Was the 2nd Auction advertised, if so, how and when and provide documentary evidence of the same when answering the question?	Allowed save for the part seeking documentary evidence.
17. Provide name of your auctioneer and the names of all parties/person who attended the 2nd auction.	Not permissible to ask for the names of witnesses
18. Were the plaintiff and the guarantors informed of the Second Auction and the subsequent tender?	Allowed.
19. Why was the tender of Construction Equipment Hire Limited dated 31st August, 2001 accepted when the same was submitted after the closing date of 5/08/01?	Allowed.
20. How was the alleged deposit sum of \$30,000.00 paid by Construction Equipment Hire Limited and provide evidence of the same attached to the Affidavit?	Allowed except for the part where the interrogator is seeking evidence.
21. Did you carry out and obtain any valuation report for all chattels from a reputable dealers.	Allowed.
22. If the Answer to Question 13 above is yes, then where are the copies of the valuation reports and in answering this question, the valuation reports must	Normally a matter for discovery. But will allow it save for the part seeking a copy of

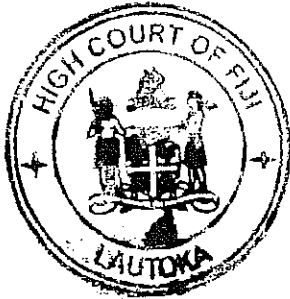
be attached to the Affidavit?	the Valuation Report as this will be seeking evidence.
23.If the answer to Question 13 above is No, then provide detail explanation why no valuations were carried out for the seized chattels?	Allowed.
24.What are the straight answers to the following question put forward in the letter dated 31/7/08 from the plaintiff's solicitors to your solicitors?	
1. Why your client accepted tender from Construction Equipment Hire Limited dated 31/08/01 when the tender had closed on 05/08/01 as per your tender advertisement?	Allowed
2. How was the tender of Construction Equipment Hire Limited accepted?	Allowed
3. Why the Chattels were sold to Construction Equipment Hire Limited when there was no valuation report done?	Allowed
4. Provide copies of account in respect to how the Sale proceeds were used by your client Company.	Allowed
5. Has Construction Equipment Hire Limited fully paid for the chattels and if so how was the same paid, please provide all documentary evidence?	Not Allowed
6. On what date the chattels were released to Construction Equipment Hire Limited and Fairdeal Earthmoving Company? Please provide documentary proof?	Allowed save for the part seeking all documentary evidence.
7. What part did Uday play in respect to the Sale of the Chattels to Construction Equipment Hire Limited and Fairdeal Earthmoving Company?	Allowed save for the part seeking documentary proof
25.Who had authorized for the Sale of the Chattels to Construction Equipment Hire Limited and Fairdeal Earthmoving Company, provide copies of all records kept by you?	Names of witnesses do not form part of the material facts.
26.Why wasn't acceptance of tender issued to Construction Equipment Hire Limited and Fairdeal Earthmoving Company?	Allowed.
27.What was the total sale proceed from sale of all chattels?	Allowed.
28.Why were the chattels sold at a lower price when in fact the value of the chattels were over \$500,000.00.	Allowed.
29.What were the terms and conditions of the tender regarding the payment offered by Construction Equipment Hire Limited?	If a copy of any document containing these terms and conditions are discoverable, then the document should be discovered. Otherwise, allowed so long as no interpretation of

	these terms and conditions is attempted.
30. Was there any variation in the mode of payment between Construction Equipment Hire Limited & Fantasy Company Fiji Limited?	Allowed.
31. Was Construction Equipment Hire Limited punctual in its monthly payment and provide detail statement of account of Construction Equipment Hire Limited.	Allowed.
32. Who authorized to accept payment from Fairdeal Earthmoving Company on installment?	Names of witnesses do not form part of the material facts. Accordingly, it is not permissible to ask for the names of witnesses (see Day Break Pacific Limited & Anr v Donaldson and Ors HC AK CIV 2005-404-765 [2006] NZHC 957, Associate Judge Faire; Lord Esher MR in Marriott v Chamberlain (1886) 17 QBD 154 (CA) at 163).
33. Was there an agreement signed with Fairdeal Earthmoving Company and if so provide copies of the same with your Affidavit Answering the question?	Allowed.
34. What are the actual dates when the chattels were released to Construction Hire Limited and Fairdeal Earthmoving Company?	Allowed.
35. Do you also accept that by the end of September, 2001, you had released chattels to Construction Equipment Hire Limited and Fairdeal Earthmoving Limited?	Allowed.
36. Do you also agree that on 6th September, 2001 and 15th November, 2007, Fairdeal Earthmoving Company had paid you the sum of \$10,000.00 and \$56000.00 respectively for the roller?	Allowed.
37. The statement of account dated 31/12/2001 shows the date of sale of Roller as 31/12/01. Can it be explained why was the debit of \$5000.00 each made in December when the actual sale was made in September and November, 2001?	Allowed.
D. QUESTIONS RELATING TO PLAINTIFF	
38. Did you by way of a letter dated 26/03/01 state that the balance of debt was \$97,410.67 and you further stated that this amount should be paid in full if the dispute among shareholders is not resolved.	If the letter is discoverable, then it should be discovered. Otherwise, allowed.
39. Did you not demand for a payment of \$13,732.51 by your letter dated 8/5/01 being arrears and payment	If the letter is discoverable, then it should be discovered.

installment for May, 2001 which the Plaintiff made on 20/05/08?	Otherwise, allowed.
40. Do you agree that after the above payment of \$13,732.51 was made the total balance of debt was \$83,678.16.	Allowed.
41. Do you agree that the figure of \$13,732.51 also included installment of \$5467.00 for the month of May, 2001.	Allowed.
42. Did you repossess all the chattels on 10th July, 2001?	Allowed.
43. What was the due date of payment of monthly installments then at the time of the actual seizure?	Allowed.
44. At the time of the repossession, were the repayments behind and by how long?	Allowed.
45. What was the term of the loan payment in the Contract?	Allowed.
46. Did you send a reminder notice to the Plaintiff or the guarantors to demand payment for the month of June, 2001 before repossessions if that was in arrears?	Allowed.
47. Did you at any time inform the Plaintiff or the guarantors that the chattels have been seized and are being sold?	Allowed.
48. Did you at any time after the seizure of the chattels, demand for payment of the balance sum from the Plaintiff Company?	Allowed.
49. What was the balance sum owing by the Plaintiff when the chattels were seized and when was the same demanded from it.	Allowed.
50. Do you agree that at the time of the repossession all chattels were in good working condition and were being used on various jobs?	Allowed.
51. Do you agree that the chattels were worth more than the actual price that you sold for since at the time of signing the contract 19 months before, the same was valued at \$212,437.90?	Allowed.
52. Do you agree that the total debt owing under the Asset Purchase Agreement was \$262,416.00?	Allowed.
53. Do you agree that you had on or about 10th July, 2001 seized the chattels?	Allowed.
54. Do you agree that the Plaintiff had made a payment of \$5647.00 on 16th November, 2001?	Allowed.
55. Do you agree that a statement was sent to the Plaintiff dated 30/11/01 for the sum of \$9,141.39 of which \$3,674.39 was for overdue account that was paid on 11/1/02.	Allowed.
56. Do you agree that on 27/11/01 you wrote a letter to the Plaintiff requesting for all overdue payments and	Allowed.

installments for year ending 2001.	
57. Did you advise the Plaintiff to continue with the payment of installment after the seizure? Why?	Allowed.
58. Do you also agree that you accepted payment from the Plaintiff after the seizure of the chattels?	Allowed.
59. Do you agree that you sold various chattels between 10th July, 2001 and 31st August, 2002 for the purpose of offsetting the debt?	Allowed.
60. Did you have any arrangement with the Plaintiff to allow you to sell the Chattels to recover the debt?	Allowed.
61. Did you offer 48 months in the contract for the Plaintiff to pay off the total amount as stated in the contract?	Allowed.
62. Did you on 13/02/06 write to Messrs Suresh Maharaj & Associates and in which letter you stated that there was a breach of agreement by the Plaintiff? Can you specify the actual breach as stipulated in the Contract?	Allowed.
63. You further said in the same letter that the Plaintiff was given reasonable opportunity to clear off the arrears. Can you specify what was the actual amount that was in arrears and for what period and what reasonable opportunity was offered?	Allowed.
64. You also said in the same letter that the Plaintiff had issues relating to its financial position. Can you explain what did you actually mean by that. What did you know about the Plaintiff's financial position?	Allowed.
65. In the same letter you have admitted that all chattels were sold by auction. Can you explain why then a tender was accepted from Construction High and Fair Deal.	Allowed.
66. Was interest in the amount of \$74, 978.10 added to the principal sum of \$212,437.90 and that was for full 48 months? Why 48 months was not given?	Allowed.
67. What was the total amount received from Sale of all Chattels?	Allowed.
68. If you agree and as stated in your letter dated 26/03/01 that the balance of debt was \$83,678.16 which was prior to the seizure, does your above figure tally with sum received from Sale. Did it exceed the figure shown as debt and by how much? (Refer to Question 41)	Allowed.
69. Why was it necessary to dispose of all chattels when you had already recovered the debt from previous sales?	Allowed.

19. The Defendant is to answer the above interrogatories within 21 days in an affidavit. Case adjourned to 04 July 2018 for mention.



A handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the end, positioned above a dotted line.

Anare Tuilevuka
JUDGE
31 May 2018