PARTIES:	YAMAMORI (HONG KONG) LIMITED v CTG PTY LTD & ORS
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NOS:	No. 111 of 1989
DELIVERED:	Darwin 13 January 1995
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JUDGMENT OF:	Kearney J

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PROCEDURE - Supreme Court procedure - Trial dates - Setting down

Mulley v Manifold (1959) 103 CLR 341, referred to

REPRESENTATION:

Counsel:

Plaintiff	Mr Stewart
Defendants	Mr Henwood
Third Party	Mr Moore

Judgment category classification: C

Judgment ID Number: kea

Number of pages: 11

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 111 of 1989

BETWEEN:

YAMAMORI (HONG KONG) LIMITED
Plaintiff

AND:

CTG PTY LIMITED
First Defendant

AND:

GEOFFREY ROBERT CLARK and
MICHAEL JAMES GILLOOLY
Second Defendants

AND:

DATUK HARRIS BIN MOHD SALLEH
Third Party

CORAM: KEARNEY J

REASONS FOR RULING

(Delivered 13 January 1995)

I rule today on several matters which arose out of directions hearings on 10 and 12 January 1995. Essentially, they relate to the date for trial, and matters relevant thereto. This action is currently tentatively listed for trial 6-31 March 1995, although Mr Henwood for the Defendants asked that it commence on 13 March, on the basis that the trial will take no more than 3 weeks - a matter on which all parties now agree.

The background to the matters presently in issue

The most significant event of recent days in the preparation of this action for trial was a further and better discovery of documents by the Defendants on 28 December 1994. The list of documents comprised some 26 pages. Of these, some 4 pages listed documents claimed to be privileged from production. The remainder of the discovered documents, comprising some 269 items, are now available for inspection. They include cash book journals, receipts, letters (some with annexures), telexes, a trust ledger, a bank statement, notes and minutes of meetings, trust deeds, file notes, time sheets, copy accounts, statements of receipts and disbursements, various memoranda, notes, directors' reports and statements, an auditor's report, a tax return, balance sheets and financial statements, several miscellaneous bundles of documents, and so on.

The Plaintiff's solicitor, Mr Stewart, and the Third Party's solicitor, Mr Moore, are now clearly faced with the very considerable task of inspecting and assessing these documents.

The history of this further discovery of 28 December by the Defendants is relevant, for present purposes. Case-flow management of this action, classified as Category "C" for purposes of r48.02(2), commenced on 8 August 1994 at a

directions hearing. At that time Mr Stewart raised, inter alia, the question of discovery by the Defendants; this had been proceeding by arrangement between the parties. Mr Stewart's concern was that it was taking a long time. Mr Henwood, for the Defendants, said that it entailed examination of some 200 boxes each containing some 7 or 8 files each full of papers - the "Burgundy Royale" files. He had already spent some 3 days on this task; he considered that he was "nearly there". At that stage he had "not found anything that's relevant"; and while saying that "I hope to complete [the search] tomorrow", he added that, if not, it might "take a couple more weeks before I have the time to get back to it". He agreed that this question of discovery would be resolved "within a matter of 2 weeks or thereabouts". Mr Stewart was prepared to wait for that length of time. I ruled that "we'll set that aside for 2 weeks".

The parties agreed on 8 August that the action would not be ready for trial in 1994. I stated that to be ready for trial in February or March 1995 was "really as good as could be done"; Mr Stewart agreed. He stressed that:-

> "Our program really is ... to gain access to the documents [to be discovered]. If any relevant documents are within those files, ... we'll reconsider our position with a view to getting the matter ready for trial."

There were other matters in issue between the parties but, as Mr Henwood stated, "everything really awaits the wading through the documents, in one sense". He considered that nevertheless the action "isn't that far away ... from being ready for trial".

I fixed 6 March 1995 as an "indicative" date for trial, setting aside the 5 weeks to 7 April. I said that by the next callover on 13 September 1994 I expected "Mr Henwood to have gone through his boxes" and to have discovered his documents, or "to have indicated to the other parties what discovery, if any, he is able to make".

On 25 August 1994, in the course of hearing argument on the question of whether CTG Pty Ltd should be re-joined as a defendant, I noted that the trial was currently "tentatively" fixed for March 1995.

At the second directions hearing on 13 September 1994, Mr Henwood stated that he had now completed his search of the 200 boxes and had:-

> "... extracted from it a number of folders and boxes which I'm currently going through in greater detail."

He said that he was -

> "... happy for your Honour to direct that the list of documents be filed and served on both parties within, say, 21 days, with the expectation it will be done well before that."

An order to that effect was then made by consent. Accordingly, discovery should have been made by the Defendants by 4 October; it was in fact not made until 28 December, some

12 weeks after that date. That fact has proved to be crucial, for present purposes.

On 2 December 1994 Mr Stewart formally applied by Summons for discovery by the Defendants, as the order of 13 September had not been complied with.

At the third directions hearing on 8 December 1994, Mr Henwood stated that:-

> "... I haven't completed the task of going through the documents which were extracted from the 200 boxes, but I am in the process of doing that and it will take a little time yet, probably a couple of weeks."

With the need thereafter for the list of documents to be typed, Mr Henwood sought a date for discovery early in January 1995. In response, Mr Stewart stated:-

> "I'm very fearful, your Honour, that the Plaintiff, who's going to have the carriage of this case, is going to be jammed by the prospect of getting ready for a trial when at this stage the documentation hasn't been identified, and we don't even know who the parties are."

The last-mentioned concern was a reference to the fact that I had not ruled at that time on the Plaintiff's application to have CTG Pty Ltd re-joined as a defendant.

He sought that a period of 14 days be fixed for discovery to be made by the Defendants.

Mr Henwood observed:-

> "... It may be, in hindsight, that consenting to an order in those terms on the last occasion [that is, to an order that discovery be made by 4 October] was a little rash,

> because of this: it is still not clear whether ... any of the documents that I have extracted are in fact relevant or discoverable.
>
> ...
>
> I have located some [documents] which are relevant, but it is my understanding that they are copies of things that have already been discovered, and I haven't yet cross-checked that.
>
> ...
>
> And so if that is right then so far, on what I've found, there is nothing that is discoverable, and that's my difficulty [as regards an order for discovery being made]."

I proceeded to "cut the Gordian knot" and extended to 23 December the time for compliance with the consent order for discovery of 13 September.

The matters raised in January 1995

Against that background I turn to the matters raised at the fourth and fifth directions hearings, on 10 and 12 January.

On 10 January I noted that since the last directions hearing on 8 December 1994 I had ruled on 14 December that CTG Pty Ltd be joined as a Defendant in the action, with retrospective effect; and that the Defendants had made an extensive discovery of documents on 28 December. Mr Southwood of counsel for the Plaintiff submitted that the action was now unlikely to be ready for trial on 6 March, some 8 1/2 weeks away; he sought a trial date early in May. Mr Henwood considered that the action would be ready for trial in March though:-

> "... probably [it] wouldn't be as well prepared as perhaps it could be, given the relatively short time ..."

He asked that the trial commence on 13 March, to suit the convenience of one of the Defendants. Mr Moore for the Third Party considered:-

> "... it's possible that [the action] could be ready [for trial in March] ... with a great amount of difficulty.
>
> If the Plaintiff is bringing in other issues [a reference to Mr Southwood's foreshadowing (see below) of proposed amendments to the Statement of Claim] ... that may cause major difficulties that could make it absolutely not ready [for trial] in March."

I informed the parties that it would be possible to set the action down for trial in October this year.

Mr Southwood said that he had recently reconsidered the pleadings, and had advised the Plaintiff to plead that Messrs Clark and Gillooly were trustees "rather than simply being persons who are bound to indemnify [CTG]". Further, the Plaintiff should claim in negligence against them, and possibly should also plead a common money count (a matter Angel J had noted, at p16 of his interlocutory decision of 11 September 1992). There was also the need for the Plaintiff's solicitors to inspect the documents discovered by the Defendants on 28 December and, following consideration of their contents, to interrogate the Defendants. He considered that the trial should not take more than 3 weeks.

On 12 January Mr Southwood put forward for consideration a time-table for the Plaintiff's inspection of the documents discovered on 28 December, amending its Statement of Claim, any corresponding amendments to the Defences, the serving of interrogatories, and the answer to those interrogatories; if adhered to, these pre-trial essentials would be completed by 31 March. He stressed that the Plaintiff could not be ready

for trial by 13 March, in light of the Defendants' voluminous discovery of 28 December and the consequent need for inspection and interrogation. He sought that the trial commence on 2 May. He stressed that the Plaintiff had now been put in the position of seeking a later trial date, by the extent and lateness of the Defendants' discovery of 28 December.

Mr Henwood confirmed that the Defendants were ready to proceed to trial in March. Although he agreed the documents discovered on 28 December were voluminous, he said that they had been discovered:-

> "... because they may conceivably lead to a line of inquiry ... [but] in substance there's very little there that's likely to be seen to be significant [to the issues in the case]."

He considered that leave to interrogate the Defendants should not be given to the Plaintiff, if leave were required, as interrogatories were "generally ... not of great utility" in a commercial case such as this, and "in many jurisdictions now, interrogatories are the exception rather than the rule". He conceded that such leave may not be required, in light of r30.02(3) and the fact that, (bearing in mind r30.02(2)) the Master had not issued a certificate that the action was ready for trial.

I observe that to have made discovery on the basis that the documents discovered might reasonably lead to a "train of inquiry" was very proper; see *Mulley v Manifold* (1959) 103 CLR 341 at p345. It is true that discovery as an element in civil procedure has been criticised in recent times but it is well established generally, and automatic in this jurisdiction under O.29. It cannot be accepted a priori that the documents

discovered on 28 December are of little significance. Similarly, as regards the process of interrogatories; their utility in fact is often greatest in commercial cases. In terms of r30.02, in relation to the facts of this case, it seems that leave to serve interrogatories is required; I consider that such leave should be given, and I rule accordingly.

Mr Henwood further asked that if the Plaintiff were permitted to interrogate, the Defendants should not be required to answer its interrogatories unless the Court was first satisfied that the interrogatories served were proper and should be answered. I consider that that matter can only be addressed, if it arises, after the interrogatories have been served.

I do not consider that it is appropriate, as Mr Henwood submitted, that I should first be satisfied as to "which topics ... the Plaintiff wants to interrogate on". For the purpose of the serving of interrogatories, a wide view of relevance should be taken: see "Discovery and Interrogatories" by Simpson, Bailey and Evans (1984), pp.76-7. It is important in this regard that the pleadings be completed so that the issues between the parties are clear.

Mr Henwood opposed the application to have the trial in May, on the basis that counsel he had briefed for the March trial would not be available in May.

Mr Moore had no instructions on these matters.

Conclusions and orders

In light of the history of this action to date, as outlined above, and of its present state of unreadiness for trial, it is clear to me that it cannot be made ready for trial in March. The dates tentatively set for trial, 6-31 March, are therefore vacated.

Further, it is clear to me that the parties will not be ready for trial by 2 May, the alternative date sought by Mr Southwood. The draft time-table he has outlined for matters preliminary to trial is impossibly tight and, I think, very over-optimistic. The next available date for trial, in October, is far more realistic. Even so, it will require the closest attention by the parties to preparation of the case, if it is to be ready for trial by then; there will also have to be regular directions hearings.

In the light of these considerations, I now make the following orders:-

1. This action is set down for trial to commence on Monday, 9 October 1995. The 3-week period 9-27 October 1995 is set aside for that purpose.

2. The Plaintiff will complete by 7 February 1995 its inspection of the Defendants' documents discovered on 28 December 1994.

3. The Plaintiff will file and serve any interrogatories arising from that inspection, on the Defendants by 7 March 1995.

4. The Defendants will answer those interrogatories on affidavit, by 11 April 1995.

5. The Plaintiff has leave to further amend its Statement of Claim in accordance with the approach indicated by Mr Southwood on 12 January 1995 (see pp6-7), and will file and serve that further amended Statement of Claim on the other parties by 30 January 1995.

6. The Defendants have leave to further amend their further amended Defences, in response to the further amended Statement of Claim in paragraph 5 above; they will file and serve any such further amended Defences by 13 March 1995.

7. The Plaintiff has leave to file and serve a further reply to any further amended Defences in paragraph 6 above, by 3 April 1995.

8. All parties are at liberty to apply, on 2 days' prior notice.

9. The next directions hearing will be held on Tuesday, 14 February 1995 at 9:30 a.m.