

**THE HIGH COURT
COMMERCIAL**

[2021] IEHC 373
**Record Nos: 2020/3566P
2020 No. 62COM**

BETWEEN:

YUZHU KANG

PLAINTIFF

-AND-

XIU XIANG KELLY

TUO DU

XIU LAN HOLDINGS LIMITED

LAN SIDERIVER INVESTMENT HOLDINGS LIMITED

ALLIED EXPRESS INTERNATIONAL DEVELOPMENT LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Tony Hunt delivered on 19 May 2021

1. The issue at the heart of this case may be simply stated. Between 2010 and 2013, the plaintiff alleges that he invested significant sums of money in property interests in Ireland. These investments are said to include the Fota Island resort and hotel and the Kingsley Hotel in Cork. These hotels are owned by the third defendant.
2. The plaintiff claims that he is the victim of a serious and substantial fraud in respect of his ownership of the shares in the third and fourth defendants ("Holdings" and "Sideriver"), perpetrated by the first and second defendants with the assistance of the third to fifth defendants. He claims that this scheme involves the dilution and transfer of his shareholding in the third defendant to the fifth defendant ("Allied"). The principal mechanism of the alleged fraud is through the improper use of a power of attorney granted to the first defendant by the plaintiff in 2013 in connection with his Irish business affairs and interests.
3. The defendants' counter-claim for declarations that Ms Kelly is the beneficial owner of Holdings, and that Mr Du is the ultimate beneficial owner of Sideriver, and of further properties at Little Island, County Cork, Finglas, Dublin 11 and Clifden, County Galway.
4. The essence of the defence case is that the first defendant effected the purchase of the Fota property using her money and that she was and is the beneficial owner of that property. It is further claimed that she was and is the beneficial owner of the shares in Holdings, and that the second defendant has at all material times been the beneficial owner of the shares in Sideriver. It is also claimed that an allotment of a 99.9% shareholding in Sideriver to Allied was, in effect, a debt for equity swap. As it is asserted that Ms Kelly was at all material times the sole ultimate beneficial owner of the shares in Allied, her transfer of those shares to Empower Growth Limited (a Seychelles company) was proper and lawful. The defendants deny that the plaintiff was the beneficial owner of the loans assigned to Allied.
5. Whereas the resolution of this matter will undoubtedly be complex, it seems that the ultimate task of the trial judge in this case will be to identify the funding for, and

consequent ownership of, the various assets the subject-matter of the proceedings. At this stage, I am simply and solely concerned with resolution of the various procedural applications brought by both sides of the case. Each side applied for discovery and for answers to interrogatories by the other, and the defendants applied to compel a reply to a notice for particulars by the plaintiff. Declan McGrath SC (of the Inner Bar) represented the plaintiff and Lyndon McCann SC (also of the Inner Bar) represented the defendants.

6. This judgment concerns the applications regarding interrogatories and particulars only, as the issues relating to discovery have been resolved. The plaintiff's discovery application was ultimately reduced down to one disputed category, which was resolved in the course of the hearing on 26 February 2021. The defendants' application for discovery against the plaintiff was dealt with by way of an ex tempore ruling shortly after that hearing.

Interrogatories

7. The plaintiff's application is for an order directing the first defendant to answer on oath interrogatories numbers 1 to 4 inclusive of the 8 identified in the Second Schedule to the notice of motion dated 14 December 2020, and that the second defendant answer the interrogatories numbered 1 to 5 inclusive, out of the 17 identified in the Third Schedule. Mr. McGrath indicated that the balance of the interrogatories were not pursued because those issues were now covered by the discovery process. The interrogatories in issue are as follows:

First defendant

- (1) What is the first defendant's legal name?
- (2) Did the first defendant tell the plaintiff that his 100% shareholding in Sideriver had been transferred away from him? If so, when?
- (3) When was the stock transfer form transferring the plaintiff's 99.01% shareholding in holdings to Allied executed?
- (4) Did the first defendant purchase any Irish assets or make any other Irish investment for the purposes of assisting the plaintiff in obtaining an Irish visa? If so, which?

Second defendant

- (1) What business activities does the second defendant conduct?
- (2) When the second defendant start conducting those activities?
- (3) Does the second defendant use any corporate entity/entities to conduct his business activities, if so, which?
- (4) Did the second defendant ever use any corporate entity/entities to conduct his business activities? If so, which?

- (5) Did the second defendant purchase any other Irish assets or make any other Irish investment for the purpose of assisting the plaintiff in obtaining an Irish visa? If so, which?
8. Mr. McCann's response on this issue was as follows:
- a) With respect to the interrogatories to the first defendant, he conceded that numbers 1 to 3 lent themselves to a narrow specific answer. The first part of number 4 could be answered either yes or no, but the second part required a narrative, and it was impermissible to use interrogatories in that way.
 - b) Whilst it was permissible to use interrogatories without leave to cut down on the ambit of discovery, the Rules of Court nonetheless continue to envisage the provision of a "yes" or "no" answer. In this regard, he relied on Appendix X to the Rules of the Commercial Court, Form 1, where the questions are structured so as to lend themselves solely to a "yes" or "no" answer. There was no authority to support the proposition that interrogatories could go beyond questions lending themselves to a highly specific answer.
 - c) Any movement away from the "yes/no" approach would have to be cautious, and the questions would have to be drafted in a way that lent themselves to clear and specific answers. Insofar as the judgment of Simons J in *NAHJ Company for Services -v- Royal College of Surgeons in Ireland [2020] IEHC 539* was relied upon as an authority for a broader approach, this was not a commercial case and the observation relied upon by the plaintiff was *obiter dictum*.
 - d) Insofar as the interrogatories directed to the second defendant were concerned, these went beyond permissible limits, because if answered in the affirmative they would then require a narrative by way of explanation of that answer. It was conceded that this objection was less strong in the case of interrogatory number 5.
9. The defendants' notice of motion dated 14 December 2020 seeks an order directing the plaintiff to reply to interrogatories 1 to 32 (inclusive), 47 to 49 (inclusive), 50 to 56 (inclusive), 59, 68, 81 and 97 to 100 (inclusive) as delivered on 20 October 2020. For reasons of space, I do not propose to replicate these interrogatories here. The plaintiff replied to 201 of the interrogatories originally delivered by the defendants, but the defendants were not satisfied with the answers to the interrogatories listed in the notice of motion, as listed above.
10. The plaintiff declined to answer interrogatories 1 to 32, 50 to 56, 59, 68 and 81 on the basis of lack of relevance, and interrogatories 47 to 49 and 97 to 100 on the basis that they were vague and unclear. The defendants dispute the plaintiff's various characterisations of these interrogatories, arguing that they are clear, relevant and all capable of a "yes" or "no" answer.

Mr. McCann submitted that a clear litigious purpose was served by delivery of these interrogatories, on the basis that they related to facts alleged by the defendants and not admitted in the pleadings, and that the costs of proving those facts would be saved, if they were admitted by the plaintiff.

11. In reply for the plaintiff, Mr. McGrath submitted that:

- a) There was an overlap in the plaintiff's applications for discovery, answers to interrogatories and replies to particulars, and that this amounted to oppression.
- b) The information sought had only the most tenuous connection with the issues in the proceedings, and that the information was sought and intended to be deployed for an abusive purpose.
- c) Interrogatories must seek information about the issues in the case.
- d) Interrogatories must relate to issues in the pleadings and not to the evidence which a party wishes to adduce to prove their case.
- e) The right to interrogate is not confined to facts directly in issue but extends to facts the existence or non-existence of which is relevant to the existence or non-existence of the facts directly in issue.
- f) The entitlement to raise interrogatories should assist in the efficient determination of the matter under consideration and should not be abused for any collateral purpose, and that a collateral purpose existed in this case.
- g) In relation interrogatories 5 to 8, the plaintiffs had agreed to make discovery of documents concerning those matters and, in those circumstances, the defendants should not be permitted to impose additional costs upon the plaintiff by compelling answers to interrogatories which may have obviated the requirement for discovery. In effect, the defendants were seeking to "double up" procedurally in relation to the same factual issue.
- h) It was not permissible to interrogate in relation to mixed questions of fact and law such as, for example, the question as to whether the plaintiff continued to be ordinarily resident in China.

Decision on interrogatories

12. One of the issues debated at the hearing was the extent to which interrogatories must be formulated so as to admit only of a simple "yes" or "no" answer. This supposed requirement dates back to the judgment of Walsh J in *J.&L.S. Goodbody Ltd -v- Clyde Shipping Co. Ltd, Supreme Court, 9 May 1967*. I am satisfied that a rigid requirement that interrogatories be drafted in this manner is no longer applicable, if it ever was. As noted by Kelly J (as he then was) in *Anglo Irish Bank Corporation Limited -v- Browne [2011] IEHC 140*, in cases where interrogatories may be sought without leave, such as in the Commercial List, their use provides a more cost-effective and less time-consuming

method of obtaining information which might otherwise require an order for discovery, and in many respects interrogatories are superior to discovery. They asked a direct question which must be answered under oath and once answered, they may be utilised as evidence in the trial thereby avoiding the necessity to call witnesses. Kelly J (then speaking as a member of the Court of Appeal) added in *McCabe -v- Irish Life* [2015] 1 IR 346 that robust questions may be posed on a much wider basis than is generally appreciated, and the procedure should not be ignored where the case permits the delivery of interrogatories.

13. To these observations I would add that it seems to me that the use of interrogatories ought to be encouraged and somewhat expanded, because their usefulness does not come at the cost of the significant logistical and cost considerations that often attach to the discovery process. The *obiter dictum* of Simons J in the *NAHJ* case referred to above appears to me to reflect a more expansive trend in this area. He observed that interrogatories usually, but not always, admitted of a “yes” or “no” answer.
14. I believe that the interrogatory procedure should also apply to facts which can be admitted by way of a simple statement which does not require narrative, opinion or conditionality. It can also apply to the listing of facts that can be clearly ascertained by means of interrogation. For example, a question asking whether a party is currently a company director admits of a straightforward answer. In those circumstances, I would also consider it permissible to request the interrogated party to list such directorships in the event of an affirmative basic answer.
15. This is not to say that this procedure is now available without limits. Simons J also set out a useful list of general principles governing the use of interrogatories. These are as follows:
 - a) Interrogatories may be served not only in relation to facts *directly in issue*, but also in respect of facts the existence or non-existence of which is relevant to the existence or non-existence of facts directly in issue.
 - b) The right to serve interrogatories is not confined to facts which are in the peculiar knowledge of the *other* party, but they may also be used for the purpose of obtaining an admission from the other side.
 - c) Interrogatories will not be allowed where what is sought is not an answer in respect of a factual matter but relates to the *interpretation* of the contents of a document.
16. I have considered the disputed interrogatories on each side of this case in the light of these observations and principles. Insofar as the plaintiff’s interrogatories to the defendants are concerned, I consider that the first defendant should answer interrogatories numbers 1 to 4, on the basis that these questions are capable of being answered without narrative or elaboration. On same basis, the second defendant should answer interrogatories numbers 5 to 8. I am satisfied that the questions are directed to

the establishment of a fact or series of facts that are capable of being relevant to the issues raised by the pleadings, and do not require narrative answers.

17. Insofar as the defendants' interrogatories to the plaintiffs are concerned, the defendants argue that the interrogatories at issue relate to matters surrounding the plaintiff's departure from China and travel to Ireland. This is said to be relevant because the defendants have pleaded that the plaintiff left China in September 2019 to escape both the Chinese authorities and numerous creditors and that, as a result, the plaintiff is involved in various legal proceedings there, and has been subject to numerous judgements and freezing orders. It is claimed that the plaintiff was involved in pyramid schemes dressed up as peer-to-peer lending. The defendants claim that these difficulties support their contention that the plaintiff has falsely laid claim to the defendant's assets by providing him with a motive for making such false claims.
18. At this point, I should refer back to my *ex tempore* decision on the defendants' application for discovery in relation to these issues. I refused this on the basis that the circumstances of or reasons for the plaintiff's departure from China in 2019 is not a factual issue which, if resolved, would result in any relief claimed being either ordered or refused at trial. This was for the reason that the assets the subject-matter of the claim and counterclaim in these proceedings were acquired between 2011 and 2014 at latest, and the question of beneficial ownership of these assets was fixed as a matter of fact long before the plaintiff departed from China in 2019. Consequently, even if the situation is as the defendants allege, and there is some information that is capable of substantiating this case, I fail to see sufficient relevance in the establishment of these facts to the issue of ownership of the disputed assets to require that the plaintiff answer questions on oath relating to these issues at this stage. The defendants appear to possess ample information to enable significant cross-examination of the plaintiff as to credit on these matters at the trial of the action. This disposes of the issue concerning the defendants' interrogatories 3 to 32, 50 to 56, 59, 68 and 81.
19. So far as interrogatories 47 to 49 are concerned, these relate to the preparation of a "Share Transfer Form" in September 2019. The questions are based on an assertion that the plaintiff requested that the second defendant prepare this form, and this form was brought to China by the second defendant, where the plaintiff refused to sign it. The questions do not contain details of what shares this form is said to relate to, and in the absence of such detail, I uphold the objection relating to vagueness and lack of clarity. I also note the timing of the alleged events in terms of potential relevance. This request can be re-formulated in more detail if it is capable of referring to a fact in issue in the proceedings.
20. On the other hand, I am satisfied that the facts interrogated by numbers 1, 2 and 97 to 100 (the plaintiff's residency and requests for accounts from the second defendant to the plaintiff relating to Fota) are clearly capable of being relevant to the facts directly in issue in the case and are not vague and unclear. If these are facts, they are capable of being

admitted in clear and short terms. I will therefore make an order that the plaintiff provide answers on oath to these interrogatories.

Particulars

21. The defendants also seek an order compelling the plaintiff to reply to the particulars identified in Schedule 1 to the notice of motion dated 14 December 2020. The particulars in question are extensive, and I do not propose to replicate them here. The parties helpfully prepared a Table synchronising the relevant particulars, replies to particulars and pleadings. Many of the particulars sought concern the plaintiff's travels, especially concerning his arrival in Ireland from China in 2019. Mr. McCann submitted that queries relating to the relationship between the parties were clearly relevant to those issues. He made the same argument in relation to the specific transactions involving the parties. Mr. McCann relied particularly upon the justification of particulars extending beyond the question of discovery and applying generally to the preparation of the case, pointing out the complexity of the proceedings in that context.

22. The plaintiff responded that most of these requests are unnecessary and irrelevant to the issues in the case. Mr. McGrath submitted that the particulars requested in this case went beyond that which was necessary to establish the "broad outline" of the case of the opposing party. At a general level, Mr. McGrath outlined five objections to the particulars sought as follows:
 - a) They related to matters that are either irrelevant or extraneous to the matters in issue, especially in relation to the particulars relating to the plaintiff's departure from China, his travels in Europe and his phone numbers. They did not relate to the Statement of Claim, but to the Reply and Defence to Counter-claim and were not relevant to an understanding of the case that the plaintiff is making against the defendants.
 - b) They did not arise from the pleadings and amounted to of an attempt to obtain information not grounded in the pleadings.
 - c) Some related to matters that were already pleaded clearly in the Reply to Defence and Counter-claim.
 - d) Some seek information that is a matter for evidence, in the sense that sufficient information has already been provided to permit the defendants to understand the case that the plaintiff makes against them, and no additional particulars are required in that regard.
 - e) Similar particulars raised by the plaintiff had been met with the response that those particulars were matters for evidence.
 - f) There was an overlap between matters in respect of which particulars were sought and matters in respect of which discovery had also been sought, repeating the argument that the overlap was oppressive.

23. Broadly speaking, replies to particulars will only be ordered where they are required in order that the party seeking them understands in *broad outline* the case that they will have to meet and to avoid them being taken by surprise. The role of particulars is not to require a party to furnish details particulars of specific aspects of the case. Therefore, the applicable standards are "*adequate definition*" and "*broad outline*" of the case in question. The complexity or otherwise of the case will govern the level of detail required to achieve these standards.

Decision on particulars

24. Having applied these principles and standards to the plaintiff's claims in this case, I consider that the plaintiff should reply to the following particulars requested in the defendants' notice for particulars dated 20 October 2020, on the basis that they are required to adequately define the case pleaded by him that he is the beneficial owner of the assets in issue in these in these proceedings: paragraphs 1(j), 2(c), 3(a-c), 4(a-b), 4(d), 8, 9(b), 10(a-f), 12(d), 13(a-f), 14(a-f), 16(c), 17(b), 17(c), 17(d), 18(b) and 18(c).

Order

25. The plaintiff is ordered to reply to paragraphs 1(j), 2(c), 3(a-c), 4(a-b), 4(d), 8, 9(b), 10(a-f), 12(d), 13(a-f), 14(a-f), 16(c), 17(b), 17(c), 17(d), 18(b) and 18(c) of the defendants' notice for particulars dated 20 October 2020, and to answer on oath interrogatories numbers 1, 2 and 97 to 100 of the defendants' interrogatories to the plaintiff.
26. The first defendant is ordered to answer on oath interrogatories numbers 1 to 4 of the plaintiff's interrogatories to the first defendant.
27. The second defendant is ordered to answer on oath interrogatories numbers 1 to 5 of the plaintiff's interrogatories to the second defendant.
28. As previously agreed, the costs of all parties on both motions are costs in the cause. I suggest that 28 days should be the period for compliance with these steps.

Approved Judgment

No Redaction Required