Credit Suisse v Lim Soon Fang Bryan
[2007] SGHC 52

Case Number : Suit 822/2005, RA 297/2006

Decision Date : 12 April 2007

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Muthu Arusu and Ramesh Selvaraj (Allen & Gledhill) for the plaintiff; Kenneth Tan SC (Kenneth Tan Partnership) and Bhaskaran Sivasamy (M & A Law Corporation) for the defendant

Parties : Credit Suisse — Lim Soon Fang Bryan

Civil Procedure – Witnesses – Order for issue of letter of request to foreign judicial authorities for examining witnesses in foreign jurisdiction – Applicable principles – Whether order "necessary for the purposes of justice" – Order 39 rr 1, 2 Rules of Court (Cap 322, R 5, 2006 Rev Ed)

Evidence – Admissibility of evidence – Depositions taken overseas – Whether requirements of s 33 of Evidence Act satisfied – Whether phrase "cross-examine" in proviso (b) to s 33 of Evidence Act covering "cross-interrogatories" in O 39 r 3 of Rules of Court – Section 33 Evidence Act (Cap 97, 1997 Rev Ed) – Order 39 r 3 Rules of Court (Cap 322, R 5, 2006 Rev Ed)

12 April 2007

Belinda Ang Saw Ean J:

1 This was an appeal by the defendant, Bryan Lim Soon Fang, to set aside an order made by the Assistant Registrar, Ms Dorcas Quek, on 11 October 2006 pursuant to O 39 rr 1 and 2 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) for a letter of request to issue from the High Court of Singapore to the judicial authorities in the Republic of China (Taiwan) for the examination of two witnesses, namely Richard Chen Jung-Yuan ("CJY") and Elen Chen Chuan-Hung ("CCH"). The proposed witnesses are Taiwanese nationals and presently residing in Taiwan. I affirmed the Assistant Registrar's decision on 15 November 2006. The defendant has appealed against my decision.

Background Facts

2 The background to the present proceedings is as follows. Credit Suisse ("the bank") is the plaintiff in these proceedings. At all material times, CJY and his wife, Lin Yi-Jing, were the customers of the bank. On or about 13 March 2000, the couple established a USD joint account with the bank. The joint account bearing no 0005476 ("the Account") was operated by CCH pursuant to a power of attorney granted to her by CJY and his wife. The couple maintained the Account with the bank until it was closed on 13 June 2001. The defendant was employed by the bank as a relationship manager, and in that capacity, he was the officer-in-charge of the Account in question. In September 2000, the defendant resigned from the bank. Shortly thereafter, CJY, his wife and CCH, through Messrs Drew & Napier, made various claims against the bank in connection with operation and management of the Account by the defendant. Between March 2000 and July 2000, the defendant was said to have:

(i) made various fraudulent misrepresentations to the account holders and CCH which induced them to enter into various transactions;

(ii) wrongfully converted the account holders' monies to his own use or to the use of a third

party; and

(iii) traded on the Account without authority.

The details of the unauthorised transactions are particularised in the Statement of Claim.

3 The bank upon receipt of the complaints conducted an internal investigation. According to the bank, the defendant did not properly cooperate with the investigators (see para 45 of the Statement of Claim). Nonetheless, the outcome of the internal investigation was that the defendant had failed to comply with the bank's practices and procedures. The bank eventually settled with CJY and his wife and paid the sum of EUR 400,000 in November 2002 in full and final settlement of all the claims against the bank. I noted that Messrs Drew & Napier had earlier provided the bank with a tape recording of a telephone conversation between CCH and the defendant. In that conversation, the defendant admitted to CCH that, without authorisation, he converted a sum of US$100,000 into Singapore dollars (*ie* S$173,000) which he then used to pay to one Lim Kai Hiang. Separately, CJY had confirmed to the bank that the signature on the payment authorisation slip to one Lim Kai Hiang was not his. The bank has sued the defendant to recover, *inter alia*, the settlement sum of EUR 400,000. It was alleged that the defendant breached his employment contract with the bank in failing to discharge his duty of good faith and fidelity to the bank. The bank has also claimed damages for breach of fiduciary duties owed by the defendant to the bank. In his defence, the defendant contended that in respect of the transaction involving the sum of US$100,000, CJY had approved the payment authorisation slip and the signature on the document was not a forgery. The defendant's version of this particular transaction was markedly different from the tape-recorded conversation. As for the other transactions, the defendant in his defence had put the bank to strict proof of the allegations involving the Account.

4 The bank applied on 26 September 2006 for a letter of request to be issued to the Taiwanese judicial authorities for the evidence of CJY and CCH to be taken in Taiwan. The application was supported by the affidavit of Charles Lim Sing Song ("Charles Lim"). The defendant did not file any affidavit to oppose the application.

The Registrar's Appeal

5 It is convenient to set out the relevant provisions of the O 38 and O 39. The relevant rules of O 38 read as follows:

1. Subject to these Rules and the Evidence Act (Chapter 97), and any other written law relating to evidence, any fact required to be proved at the trial of any action begun by writ by the evidence of witnesses shall be proved by the examination of the witnesses in open Court.

…

9. (1) No deposition taken in any cause or matter shall be received in evidence at the trial of the cause or matter unless –

(a) the deposition was taken in pursuance of an order under Order 39, Rule 1; and

(b) either the party against whom the evidence is offered consents or it is proved to the satisfaction of the Court that the deponent is dead, or beyond the jurisdiction of the Court or unable from sickness or other infirmity to attend the trial.

(2) A party intending to use any deposition in evidence at the trial of a cause or matter must, at a reasonable time before the trial, give notice of his intention to do so to the other party.

…

6 The relevant rules of O 39 read as follows:

1. (1) The Court may, in any cause or matter where it appears necessary for the purposes of justice, make an order in Form 73 for the examination on oath before a Judge or the Registrar or some other person, at any place, of any person.

(2) An order under paragraph (1) may be made on such terms (including, in particular, terms as to the giving of discovery before the examination takes place) as the Court thinks fit.

2. (1) Where the person in relation to whom an order under Rule 1 is required is out of the jurisdiction, an application may be made –

(a) for an order in Form 74 under that Rule for the issue of a letter of request to the judicial authorities of the country in which that person is to take, or cause to be taken, the evidence of that person;

…

3. (1) Where an order is made under Rule 2 for the issue of a letter of request to the judicial authorities of a country to take, or cause to be taken, the evidence of any person in that country, paragraphs (2) to (6) shall apply.

…

(3) If the evidence of the person to be examined is to be obtained by means of written questions, there must be filed with the letter of request a copy of the interrogatories and cross-interrogatories to be put to him on examination.

7 In proceedings in Singapore, evidence is normally taken orally from witnesses who attend the hearing for that purpose (see O 38 r 1). This remains the case even though nowadays the witness's evidence-in-chief often consists of little more than confirming the truth of his affidavit of evidence-in-chief (see O 38 r 2). The court has for a long time had the power to make an order for a witness to be examined before a person nominated by the court in order to enable the party seeking the order to obtain evidence from the witness prior to the trial for use at the trial proper. That power is contained in O 39 r 1. If the person is outside the jurisdiction, the court is asked, like in this case, to issue a letter of request seeking the assistance of the foreign judicial authorities in relation to the matters which it referred. The procedure is set out in O 39 rr 2 and 3. An application under O 39 r 2 is likely to be made in respect of a reluctant witness and so, when a court orders a witness to be examined, it is for the purposes of making his oral evidence available in the form of a deposition rather than in person. Order 38 r 9 deals with the deposition being received in evidence in the absence of the witness at the trial. I shall come to the issue of admissibility of the deposition as evidence of the facts stated therein later on. A party making an application under O 39 r 2 for an order for the examination of a witness should normally put before the court evidence sufficient to satisfy the court that it is appropriate to make the order. This should normally include an explanation of the nature of

the proceedings, identification of the issues to which they give rise and the grounds for thinking that the person to be examined can give relevant evidence which justifies requiring his attendance for that purpose (see *Singapore Civil Procedure 2003* (Sweet & Maxwell, 2003) para 39/l/8 at 660).

8 It was clear from Charles Lim's affidavit that CJY and CCH, having settled with the bank, were not interested at all in assisting the bank in its recovery action against the defendant. They were plainly unwilling to attend in Singapore. Undoubtedly, as Taiwanese residents, they were beyond the effective jurisdiction of this court. It was also reasonable to expect CJY and CCH to have relevant evidence to give on the matters in issue at the trial. Their importance as witnesses was to be found in their past association with the defendant. The application for a letter of request was unarguably concerned with obtaining material evidence for use at the trial from witnesses who were capable of giving that evidence and the defendant had not suggested anything to the contrary.

9 Counsel for the bank, Mr Muthu Arusu, submitted that having regard to the circumstances described in [8] above, the interests of justice clearly warranted the making of an order for examination of CCH and CJY and, in support of the exercise of discretion in similar circumstances, Mr Arusu referred me to the commentary in *Halsbury's Laws of Australia* vol 20 (Butterworths, 1995) at para 325-8195:

> If the witness is a material witness whose evidence is essential in order that a matter be proved, and if the witness is not in the jurisdiction and cannot be induced to come within the jurisdiction, an order for examination will normally be made almost as a matter of course. The weight to be given to such evidence will be a matter for the court or jury.

The defendant's first objection

10 Mr Kenneth Tan SC appeared on behalf of the defendant at the appeal. He opposed the bank's application on the ground that an examination of the proposed witnesses in Taiwan would cause injustice to the defendant as the evidence taken in Taiwan could not be tested by cross-examination in the ordinary way. The dispute between the parties was contentious and evidence on the issues in this dispute depended on the credibility of the witnesses and the accuracy of their recollection of the facts. An examination of the proposed witnesses out of jurisdiction would deprive the trial judge of an opportunity to assess their demeanour. The trial judge would not have the benefit of hearing and seeing the proposed witnesses. The argument was that in determining whether it was in the interests of justice that such an order be made, the disadvantage of the trial judge not seeing and hearing the proposed witnesses weighed more heavily in the balance against making the order where (a) the credibility of a witness was material, and (b) the application was made by the party who had chosen the forum (see *Napier v Anthony & Co* [1932] SSLR 82). In contrast, in the case of *Walt Disney Productions v H John Edwards Publishing Co Pty Ltd* [1952] 69 WN 281 at [282], the evidence that was sought to be taken in Canada and the United States of America were such that they could be described as formal in nature and was, thus, not dependent on the credibility of witnesses.

11 Mr Tan cited *In re Boyse; Crofton v Crofton* [1882] 20 Ch 760 and *H Stacey v Diamond Metal Products Co Ltd* [1935] 4 MLJ 249 for the proposition that no order would be made for evidence to be taken abroad if it appeared that the procedure in the foreign country would not permit justice to be done in that it did not afford the opposing party an opportunity to cross-examine the witness in the ordinary way. In *Hardie Rubber Company Pty Limited v The General Tire & Rubber Company* [1971-1973] 129 CLR 521, the argument there was that it would be unjust to the appellant for the court to exercise its discretion to issue a letter of request as there was a limitation placed upon the right to cross-examine under Japanese procedure. As there was a difference between the procedures in Japan from that which would be observed in Australia, the evidence could not be properly tested in

Japan. Gibbs J, however, concluded that on an examination conducted in Japan the rights of the parties would not be that much different from those under the laws of Australia so as to provide a reason not to allow the letter of request to be issued.

12 On this point, I respectfully disagreed with Mr Tan that there was such a general rule applicable in all cases. It is a matter of judicial discretion as to when an order for evidence to be taken abroad will be granted. The important principle the court must apply when deciding how to exercise its discretion is one of justice. The circumstances of each case must be considered and the overarching question is whether the order is "necessary for the purposes of justice" as was successfully demonstrated in the bank's application. Some of the cases cited by the defendant were simply examples where discretion was not exercised in favour of an application for evidence to be taken abroad. On the other side of the same line are cases like *Williams v Mutual Life Associate of Australasia* [1904] 4 SR (NSW) 677 at 680 and *Willis v Trequair* [1906] 3 CLR 912 where discretion was exercised and the order was made in instances where the non-compellability of the proposed witness outweighed the disadvantages attendant upon the taking of evidence abroad instead of *viva voce* examination before the trial judge deciding the substantive issues.

13 In *H Stacey v Diamond Metal Products Co Ltd*, the affidavit of the witness in question was signed before any action had started. It was prepared when there was no pending cause or action which was a necessary requirement. After threat of action, but before the writ, Hunter, on the request of the defendants made, in England, an affidavit as to certain matters in issue in the action of which no other person could give evidence for the defendants. Hunter died before the writ was filed. Terrell J held that the affidavit should not be used as evidence under O 35 r 1(2) of the Civil Procedure Rules, 1934 as it was not made in a pending cause or matter and was, therefore, inadmissible as an affidavit. The affidavit was also not admissible because the plaintiff, who was not in the picture at the time the affidavit was made, would not have had the opportunity of cross-examining Hunter on his affidavit.

14 The decision of *In re Boyse* is distinguishable as a case where the witness sought to be examined was the "plaintiff" in the action in that he was the person who was really making the claim. The court had also sensed that the claim was being made under suspicious circumstances. On the matter of cross-examination under Japanese procedure and its limitation as compared to the position under Australian law, the High Court of Australia in *Hardie Rubber Company Pty Limited v The General Tire & Rubber Company* upheld the decision of Gibbs J on that aspect as it was a matter that was essentially of a discretionary character (see p 561 of the report) and the aforesaid limitation did not count as a reason to refuse to make the order. Walsh J explained at 562:

> Furthermore, the difficulties will probably be reduced, although not entirely removed, by the inclusion in the letter of request of particular provisions designed to obtain improved facilities for the conduct on behalf of the appellant of the cross-examination of the witnesses. The provisions having this object, which are contained in the documents upon which the parties had agreed, will probably be of considerable assistance to the appellant. If the parties had not so agreed, it would have been proper, in my opinion, for the Court to include such provisions of this kind as seemed to it to be appropriate. But, *in my opinion, it would not have been right to treat the existence of the difficulties to which the appellant referred as requiring the Court to refuse to make any order at all*.
>
> [Emphasis added]

The decision of the High Court of Australia was in line with the italicised statement above. It affirmed *Willis v Trequair* and applied the general principle that an applicant for a letter of request must satisfy

the court that he cannot procure the attendance of material witnesses within the jurisdiction.

15 Mr Arusu referred me to *Copps v Time International of Canada Ltd* (1964) 1 Ontario Reports 229, a decision of the Senior Master of the Supreme Court of Ontario, for the proposition that where the conditions to be satisfied were met, namely, (a) the application was made in good faith, (b) the evidence of the witness would be material to the issue, and (c) there was good reason why the witness could not be examined within the jurisdiction, the order should be granted even though the opposite party might be prejudiced by being unable to cross-examine the witness in open court before the judge or jury. That case concerned a defamation action which was to be tried by jury. The Senior Master, Mr Marriott, distinguished *Lawson v Vacuum Brake Co* (1884) 27 Ch 137. In *Lawson v Vacuum*, an order for the examination of a witness was refused on the ground that the witness appeared to be an accomplice in the fraud alleged by the plaintiff and the court was not satisfied that he could not be brought within the jurisdiction for the trial. Cotton LJ at 143 of report stated, generally, if it could be shown that a plaintiff could not bring the witness to be examined at the trial, it would be right to give leave to examine the witness abroad and it would be for the court or jury at the trial to determine how far the weight of his evidence was affected by their not having seen or heard him. The burden was on the party who wished to examine the witness abroad to show clearly that the witness could not be reasonably expected to come here and on that point the plaintiff there failed.

16 The decision of the Senior Master also illustrated the thinking that it was wrong to refuse examination abroad simply because the evidence was controversial for to do so would "come close to a *reductio ad absurdum* and to defeat the true purpose of the relevant rules" (see p 231 of the report quoting per Stewart J in *Niewiadomski v Langdon* [1956] O.W.N 762). Mr Marriott at p 231 said:

> Here the witness' evidence will be taken in the neighbouring State of New York and there is no doubt that plaintiff's counsel can conveniently attend and will have the right to cross-examine. *Admittedly there is a possibility that cross-examination may not be satisfactory as if it took place here and in open Court, but the alternative is to deny altogether the defendants' right to adduce evidence of this witness, which as already mentioned I feel is most material.* So that I believe that the prejudice to the defendants if the order were refused outweighs the possible prejudice to the plaintiff by reason of the evidence being taken *de bene esse* and out of the jurisdiction.
>
> [Emphasis added]

17 As for the case of *Walt Disney Productions v John Edwards Publishing Co Pty Ltd*, Mr Arusu commented that the observations of McLelland J at 282 of the report were made in passing and did not stand for any immutable proposition. In my view, McLelland J's views recognised a general undesirability of evidence abroad being taken *de bene esse* where, for instance, questions of identity and credibility were the main issues, but at the end of the day, it was a matter for the court hearing the application to weigh all the circumstances of the case in determining whether or not an order appears necessary for the purposes of justice.

18 I should point out that I was not persuaded that the credibility of the witness was likely to be a real issue in this case. Identity was not an issue here. I was mindful that the conversation between the defendant and CCH was recorded on a tape recorder. Presumably, the tape-recorded conversation was intended to be relied upon as corroborative evidence of the conversation between CCH and the defendant. In the case of tape-recorded evidence, the party relying on it must prove by competent witness, the time, place and accuracy of the tape recording in question. If anything, the

evidence that was sought was formal in nature and was not dependent on the credibility of CCH.

19 The order made by the Assistant Registrar to examine the proposed witnesses abroad was, in my judgment, necessary for the purposes of justice. I was satisfied that the bank would not be able to procure the attendance of material witnesses within the jurisdiction. In balancing the interests of the parties based on the circumstances to which I have referred, justice would be better served if I upheld the decision of the Assistant Registrar. The bank ran a real risk that it would not be able to call the relevant evidence if I did not make an order. This was one case where the bulk of the significant evidence depended on CCH and CJY which was a very strong factor in favour of granting the order.

20 Before I deal with Mr Tan's second objection, I should say something about the contention advanced by Mr Tan that the courts had shown a disinclination as a matter of practice not to issue letters of request for the examination of witnesses abroad where fraud was being alleged. According to Mr Tan, the rationale was that it was for the claimant to choose the forum and for him to prove fraud (see *Napier v Anthony & Co* (1932) SSLR 82). Where fraud is alleged, the court may consider the presence of the witness at the trial is necessary, especially, where the issues in dispute are highly contentious (see *Singapore Court Practice 2006* (LexisNexis, 2006) at para 39/2-3/2). Therefore, CCH and CJY should be present at the trial to give their evidence. In *Napier v Anthony & Co*, the plaintiff there traded in England and entered sale contracts in Penang through his representative, L D Napier. The plaintiff sued the defendants for the price of the goods sold and delivered to them. The defendants raised fraud on the part of L D Napier and suggested that the plaintiff through his representative had been guilty of similar frauds in the past. The plaintiff applied for an order directing letters of request to issue for the examination of L D Napier and other witnesses in London. The Court of Appeal reversed the decision of Sproule Ag. CJ and held that the order should be made having regard to the expense of bringing the proposed witness to Penang to attend the trial which would be disproportionate to the size of the claim. In that case, it was the defendant that was setting up the fraud against the plaintiff and that was different from a fraud that was alleged by the plaintiff. The observations of the Court of Appeal were made in the context of a plaintiff who had alleged fraud in the action and the application was for the plaintiff himself to be examined abroad after having chosen his own forum. In my view, there was nothing much in the choice of forum point where, as was the case here, the bank and defendant were both within the jurisdiction. This was not the case of a plaintiff wishing to be examined as a witness on his own behalf but of two material witnesses whose attendance could not be procured. It was also not as if the proposed witnesses were participants in the fraud. As stated, the bank's claim stemmed from the alleged fraud of the defendant perpetrated on the account holders and their attorney, CCH.

The defendant's second objection

21 I now turn to Mr Tan's second objection which was grounded on the admissibility of the deposition taken overseas and the requirements of s 33 of the Evidence Act (Cap 97, Rev Ed 1997). By O 38 r 1, evidence in every action is to be given by witnesses examined *viva voce* in open Court save for exceptions provided in the Rules of Court, the Evidence Act and any other written law. Hence, the Evidence Act would apply to depositions of witnesses examined here and abroad. Mr Tan submitted that no order to examine witnesses abroad ought to be made as the depositions could not be admissible in evidence under s 33 of the Evidence Act. In particular, the depositions obtained in Taiwan would not satisfy proviso (b) to s 33 of the Evidence Act as the procedure in Taiwan for the examination of the witness did not allow for cross-examination. In order for the depositions to be admissible in evidence, the defendant must have had the right and opportunity to cross-examine the witness. Examination of a witness, as laid down in s 139 of the Evidence Act, means his examination-in-chief, his cross-examination and his re-examination. The provision that a witness should be

examined meant that he should not only be examined- in-chief, he should be permitted to be cross-examined and re-examined. No examination of a witness could be complete if the adverse party was refused permission to cross-examine him. Examination of a witness by means of cross-interrogatories was not the same as cross-examination in the ordinary way. Besides, cross-interrogatories put to the witness by the Taiwanese judicial authorities were not comparable with cross-examination in the ordinary way. The case here fell squarely within the purview of s 33 of the Evidence Act. As such the defendant's opposition to the application was on a stronger ground. In support of Mr Tan's contention that a deposition was admissible in evidence only if s 33 of the Evidence Act was satisfied, I was referred to para 39/1/2 of *Singapore Court Practice 2006*. Mr Tan submitted that O 38 r 9 had to be read subject to s 33 of the Evidence Act as the former was a subsidiary legislation.

22 I should at this juncture set out the provisions of s 33 of the Evidence Act:

> Evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which under the circumstances of the case the court considers unreasonable subject to the following provisions:
>
> (a) the proceeding was between the same parties or their representatives in interest;
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> (b) the adverse party in the first proceeding had the right and opportunity to cross-examine; and
>
> (c) the questions in issue were substantially the same in the first as in the second proceeding.

23 Initially, Mr Arusu contended that s 33 of the Evidence Act was inapplicable. His position appeared to have changed in his letter opposing the defendant's request for further arguments. Whilst Mr Arusu accepted that even if there was no *viva voce* cross-examination of the proposed witnesses in Taiwan, nonetheless, O 39 r 3(3) allowed for examination by means of interrogatories and cross-interrogatories. Examination by means of cross-interrogatories, which would be conducted by the Taiwanese court, was a form of cross-examination within the meaning of proviso (b) to s 33 of the Evidence Act. At the end of the day, it was up to the trial judge to evaluate the weight of the evidence bearing in mind the distinction between its admissibility and its weight.

24 In my view, the defendant's second objection to the application for depositions to be taken in Taiwan was without merit. First, the objection was completely premature. Second, the defendant's interpretation of proviso (b) to s 33 of the Evidence Act was too narrow. I shall now elaborate on the reasons.

(i) The objection was premature

25 It is useful to start with the purpose of an examination of an overseas witness *de bene esse*. It is to obtain from the witness evidence that will be offered at trial. Whilst that may be the purpose, it is recognised that a deposition taken pursuant to an order of court under O 39 does not automatically qualify it as evidence in the case (see *Fisher v CHT* [1965] 1 WLR 1093). I shall come to the issue of the admissibility of the deposition as evidence of the facts stated therein later on. O 39 r 1 refers to an "examination on oath". This includes cross-examination by the other side. An examination pursuant

to a letter of request may be made either by means of oral questioning or written questions (*ie* interrogatories and cross-interrogatories). Applying the concept of interrogatories and cross-interrogatories to a request so far as the giving of evidence for a trial is concerned, there is little distinction between oral examination, oral cross-examination, written examination (*ie* administering interrogatories and cross-interrogatories) by the judge of the foreign court to which the request was sent. There is a helpful paragraph in *Atkin's Encyclopaedia of Court Forms in Civil Proceedings*, vol 18, (Butterworths, 1996 issue) at 398 that explains the process of the request for evidence to be taken abroad:

> If the court to which the request is to be sent is familiar with the common law procedure for the examination and cross-examination of witnesses, it will be sufficient to indicate in the Letter of Request the issues upon which the witness is to be examined. If, however, the court is one which itself examines the witness, it will be necessary to attach to the Letter of Request the interrogatories to be put to the witness. The parties may either prepare joint interrogatories to bring out what they respectively want from the witness or one party may prepare his interrogatories and submit them to the other side, who will prepare cross-interrogatories.

In short, the defendant could, if he so desires, include in his cross-interrogatories matters not touched on in the interrogatories. If the defendant wishes to question the witness further as he has supplemental questions, he can, in principle, apply for a separate letter of request to be issued.

26 I have already touched on the general mode of adducing evidence at the trial (see [7] above). Depositions of witnesses obtained abroad pursuant to O 39 r 1 could be used at the trial provided the non-attendance of the witnesses at the trial was for one of the reasons stated in O 38 r 9. By consent, parties may agree to the depositions being read in court. Without consent, the question that arises is how the non-attendance of the witness is to be proved. There is no express reference to this but as the application is for an order in Form 74, O 39 r 2 (1)(a) is to be read with Form 74. Paragraph 2 of the Assistant Registrar's order is the same as Form 74. It provides that office copies of the depositions may be read and given in evidence on the trial of this action, saving all just exceptions, without any further proof of the absence of the said witness than the affidavit of the solicitor of the party using the same. This part of the order provides that at the trial "proof of the absence of the witness may be given by an affidavit of information and belief of the solicitor of the party who wishes to use the same or his agent" (see *Atkin's Encyclopaedia of Court Forms in Civil Proceedings* at 392). The meaning of "saving all just exceptions" is defined in Mallal's Supreme Court Practice, vol 1, (1961 Ed) at 467 and the meaning given there is still apposite in today's context:

> These words preserve any objections to the relevancy, or otherwise as to the admissibility of the matter sought to be proved by means of this rule. The object of the rule is to save expense where possible, but it does not in any way extend or modify the provisions of the Evidence Ordinance.

27 In my view, O 38 r 9 read together with O 39 r 2(1)(a) and Form 74 deal with the question as to when depositions made pursuant to O 39 r 1 are permitted to be used in the absence of the witnesses and the procedure for proving the absence of the witness as distinct from the question of admissibility in evidence of the deposition taken abroad which is governed by s 33 of the Evidence Act (see *Singapore Court Procedure 2006*, para 39/10/1 at 982).

28 Order 39 r 2(1)(a) envisages a separate and different application from the one brought under O 38 r 9 which arises only when a party desires to use the deposition at the trial in the absence of the witness and gives notice of his intention to do so. There is plainly a two-stage process to the use of deposition evidence at the trial (see *Hong Kong Kam Lan Koon Ltd v Realray Investments Ltd*

[2004] 4 HKC 349). The first stage of the process is to obtain an order under O 39 r 2 for the taking of the evidence, and the second stage comes about if, for example, the party who has obtained the deposition decides to make use of it in the absence of the witness at the trial. In this way, the defendant's submission is demonstrably premature. The defendant's submission not only conflated the provisions of O 39 r 2 and O 38 r 9, they also ignored the bank's right to decide at a later date whether or not to make use of the deposition. It is clear that a party who has obtained the deposition of a witness overseas need not make use of the deposition at the trial if he decides not to do so. If the opposing party chooses to make use of the deposition, he can ask for the deposition to be admitted in evidence (see *Hong Kong Kam Lan Koon Ltd v Realray Investments Ltd* at [12]). This existence of the two-stage process is consistent with the decision of the English Court in *Fisher v CHT* (see [25] above). In the circumstances, the proper and sensible time to deal with the admissibility issue is after notice is given under O 38 r 9(2) to use the deposition at the trial. By then, the degree to which the foreign procedure permits adequate testing of a witness's evidence will be capable of objective assessment.

(ii) Interpretation of proviso (b) to s 33 of the Evidence Act

29 I now come to the interplay between s 33 of the Evidence Act and O 38 r 9. The real issue here concerned the interpretation of proviso (b) to s 33 of the Evidence Act. It is obvious from my earlier analysis (see [28] above) that there is no conflict between O 38 r 9 and s 33 of the Evidence Act as it is possible to reconcile both provisions. Order 38 r 9 deals with the use of depositions taken in any cause or matter pursuant to O 39 r 1 in the absence of the witness for the reasons stated in O 38 r 9 (1)(b) and proof of absence must be to the "satisfaction of the Court". The words "proved to the satisfaction of the Court" mean that the judge considers evidence given to him which is sufficient to satisfy his mind that the absence of the witness was due to one of the prescribed reasons. As stated, by Form 74, proof of absence of a witness is by means of an affidavit of information and belief of the solicitor of the party who wishes to use the same. Objection can still be taken by the opposite side as to the admissibility of the deposition on grounds that proviso (b) to s 33 of the Evidence Act is not satisfied. That is to say, he has had no opportunity to cross-examine the witness on his deposition. From this perspective, there is no conflict between O 38 r 9 and s 33 of the Evidence Act. There is no question of O 38 r 9 modifying or overriding s 33 of the Evidence Act. Section 33 only makes the deposition of such a witness admissible in evidence. It is always open to the person against whom the deposition is produced to thereafter show at the trial proper that it should not be believed for reasons given by him.

30 Section 33 of the Evidence Act provides that evidence given by a witness in a judicial proceeding or before any person authorised by law to take it, is relevant for the purpose of proving in a subsequent proceeding or in the later stage of the same proceeding the truth of the facts which it states, when the presence of the witness cannot be obtained without an amount of delay which the Court considers unreasonable under the circumstances of the case provided, *inter alia*, that " the adverse party in the first proceeding had the right and opportunity to cross-examine the witness" (see proviso (b)). The word "right" used in the section means a right conferred by a statutory provision such as that contained in s 140 of the Evidence Act and not a right accruing from mere permission granted by the Court (see *Banwari Lal v The State* AIR 1956 All. 385 at 391). Proviso (b) to s 33 requires a right and opportunity to cross-examine.

31 The question here is whether cross-interrogatories referred to in O 39 r 3 mean the same thing as "cross-examine" in proviso (b) to s 33 of the Evidence Act so as to render the evidence taken by means of interrogatories and cross-interrogatories admissible. In *R v Ramchandra* (1895) ILR 19 Bom 749, the accused there was charged for misappropriating specific sums of money. During the course of a preliminary inquiry, the committing Magistrate issued a commission under the Criminal Procedure

Code for the examination of Mr Rao Bahadur K C Bedarkar who had been the judge of the Court of Small Causes at Poona at the time when the offences were alleged to have been committed. The witness was examined by means of interrogatories and cross-interrogatories. At the trial before the Sessions Court, the deposition of Mr Bedarkar was tendered in evidence by the prosecution. The accused objected to its admissibility. The Sessions Judge overruled the objection, holding that the deposition was admissible under s 33 of the Indian Evidence Act as the attendance of the witness could not be procured without reasonable delay and expense. One related question which arose was whether the opportunity to administer cross-interrogatories under a commission was an "opportunity to cross-examine" within the meaning of the proviso to s 33 of the Indian Evidence Act which was *pari materia* to our s 33 of the Evidence Act. Fulton J did not put any interpretation upon proviso (b) to s 33. However, Jardine J made some obiter pronouncements which I find are much in point and I adopt them. I should explain that the appellate court found the deposition inadmissible for reasons outside of s 33, but Jardine J, nonetheless, went on to discuss the question whether proviso (b) had been satisfied.

32 In that case, it was argued by the prosecution that the deposition of Mr Bedarkar taken on commission was admissible under s 33 of the Indian Evidence Act. The accused had the opportunity of cross-examining the witness, and he availed himself of that opportunity by putting cross-interrogatories. The cross-interrogatories took the place of cross-examination within the meaning of s 33. Jardine J noted that the first part of s 33 applied to the deposition in question. The appellate court held that the words "opportunity to cross-examine" in proviso (b) to s 33 did not imply that the actual presence of the cross-examining party or his agent before the tribunal was necessary. Any such implication would put a strain on the words and lead to inconvenience. Jardine J at 758 said that if presence was necessary, the word would have been used. That holding of the appellate court favoured Jardine J's construction of the words "opportunity to cross-examine" as including the method of cross-interrogatories. Jardine J at 759 said:

> These considerations favour the construction of the words "opportunity to cross-examine" as including the method of cross-interrogatories which for many years was the chief mode of cross-examination in the Courts of Equity and the Admiralty Courts in England, and for which provision is made in the Common Law Procedure Acts. Where the whole examination was in writing – epistolary as Jeremy Bentham calls it – as distinguished from *viva voce* examination at the trial, the cross-examination was in writing too, and is so treated in the reports…. Though the point was not taken by Mr Kirkpatrick, we paused in order to consider whether counter-interrogatories, though described in these books as a form of cross-examination, were to be treated as such in interpreting our codes.

33 Jardine J was satisfied on the facts that the prisoner had an opportunity to cross-examine the witness by means of cross-interrogatories. As such he concluded that the evidence taken on commission complied with and was admissible under s 33 of the Evidence Act.

34 As to the "opportunity" to test the evidence, Jardine J at 757 said:

> …the record shows that the prisoner had questions, headed "cross-examination questions" and "supplemental cross-examination questions" put as counter-interrogatories, and also got notice of the day appointed for taking the evidence. Neither he nor his pleader attended. There may be circumstance where, although a prisoner has the right, he has not the opportunity, *e.g*. where the witness is at a great distance and the prisoner cannot go to the place and is too poor to employ a pleader or too unfamiliar with the ways of the place to get legal help there. When the want of opportunity is pleaded, the trying Court makes inquiry before admitting the evidence.

35 Similarly, in *Cazenove v Vaughan* 1 M.& S. 6, an examination *de bene esse* of a witness by means of cross-interrogatories was considered as a form of cross-examination. The plaintiff there obtained an order for the examination of a witness *de bene esse* to which the defendant did not oppose. Notice of the examination of the witness was duly given to the defendant, and of the interrogatories intended to be put to the witness at the examination. The witness left the jurisdiction thereafter and never returned whereupon the plaintiff obtained a further order to use the deposition of the witness and read in evidence at the trial. The court held that the deposition was admissible in evidence at the trial. The defendant had notice of the time of the examination and his non-participation was taken as his not wanting to cross-examine the witness by not filing his cross-interrogatories.

36 In the context of the issue before me, in the final analysis, the word "cross-examine" in proviso (b) to s 33 of the Evidence Act covers oral cross-examination including written cross-examination (*ie* cross-interrogatories as we know it today in O 39 r 3). It was plain from the two cases referred to in [31] and [35] above that cross-interrogatories was in the contemplation of the draftsman of s 33 of the Indian Evidence Act. There is no difficulty giving the same interpretation to proviso (b) to s 33 of our Act. Cross-interrogatories being a form of cross-examination, can serve to test the evidence and consequently answer the test of admissibility. In any case, I agreed with Mr Arusu that the test of admissibility was a matter for the trial judge rather than for the court making an order to issue a letter of request.

37 It is clear from the discussions above that it is for the defendant to show that he had not been afforded the opportunity to cross-examine. As to whether there was an opportunity to test the evidence at the time of examination or that the defendant chose to forego it, the question could only be answered later after the deposition abroad was obtained and a decision made to use the deposition so that the requisite notice under O 38 r 9(2) could be given. It is at this second stage of the process to use the deposition as evidence that the trial judge can determine for himself whether the deposition answers every condition of admissibility, the condition presently in dispute being proviso (b) to s 33 of the Evidence Act.

Result

38 For all these reasons, I dismissed the appeal with costs fixed at $3,500.