

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FSD CAUSE NO. 125 of 2012

BETWEEN

TEMPO GROUP LIMITED

and others

plaintiffs



And

FORTUNA DEVELOPMENT CORPORATION

and others

defendants

**Mr. M. Green, QC instructed by
Mr. M. Imrie and Ms. L. Kuehl
of Maples & Calder for the Plaintiffs**

**Mr. R. Hacker, QC & Mr. R. Fisher instructed by
Mr. P. McMaster, QC and Ms. A. Gilbert
of Appleby for the Defendants**

Henderson, J.

Hearing: September 1, 2014

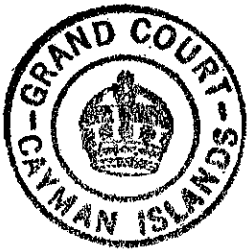
Ruling: September 10, 2014

RULING ON ADMISSIBILITY

1. The plaintiffs object to the admissibility in evidence of two witness statements by Mr. Albert Hsu tendered by the defendants. There are two objections. First, the reason given by the witness for his failure to attend at trial for cross-examination is not that he is beyond the seas but, put simply, that he does not wish to be involved further in the dispute. Second, the hearsay notice was not served simultaneously with the witness statements themselves.
2. Mr Hsu's first witness statement is dated March 12, 2014. In it he gives evidence of potential importance to my assessment of the credibility of Dr Chen. That is an issue of fundamental significance in this trial.
3. Mr Hsu is 82 years old and resides in Taiwan. In a letter to counsel dated July 28, 2014 which the parties agree I may consider, Mr Hsu says:

First, I have many business interests and commitments, and I do not believe that I will be able to devote the time necessary to prepare for giving evidence and to go before the court.

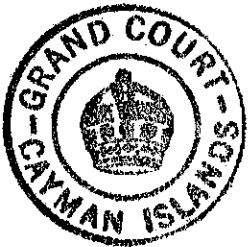
Moreover, I have had friendships with each of the late Mr Ting Shan Li, the late Mr Tsien Peng Lun and Dr Chen Ching Chih spanning several decades. I wish to retain relations with the parties on both sides of the litigation which are unaffected by the difficulties of this dispute. Though I regret the fact that this litigation has cast a long shadow over the significant achievements of Fortuna (in which I hold a small shareholding), I consider it to be a private matter between the other shareholders, which is unrelated to me and in which I do not wish to be entangled.



4. Having learned of his refusal to attend the trial, counsel delivered to the plaintiffs a hearsay notice dated August 4, 2014. This was about one month before the start of the trial and well after the date upon which the witness statements were delivered. The plaintiffs objected and delivered a counter notice.

5. The general power to admit evidence in the form of a witness statement is found in sections 44 and 45(1) of the *Evidence Law (2011 Revision)* ("the Law"). Evidence is admitted in this manner as part or all of the evidence-in-chief of the witness. The witness must be presented to the court for cross-examination unless there is an agreement to dispense with that. If the witness is not available to be cross-examined, then the content of his witness statement is mere hearsay.

6. The Chief Justice is given a power in section 56 of the Law to make rules of court imposing preconditions, including notice to other parties, to the admissibility of such statements. Those rules are found in Order 38 of the *Grand Court Rules*. Part III of Order 38 permits the admission in evidence of hearsay evidence in certain circumstances which are set out in Order 38, rule 25, one of which is that the witness is "beyond the seas", i.e., not within the Cayman Islands. Where a party wishes to enter in evidence a witness statement without tendering the witness for cross-examination, rules 21 and 22 impose a requirement to serve a hearsay notice specifying the reason the witness cannot attend.



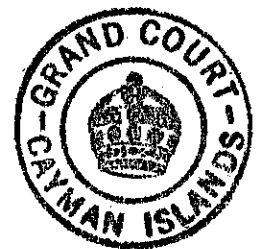
7. The circumstance given in the hearsay notice relevant to Mr Hsu is that he is beyond the seas. That is the defendants' reason for being unable to call the witness, although not Mr Hsu's motive for refusing to appear. It is the former which must be set out in a hearsay notice, not the latter. The witness may have any number of motives for refusing to attend which he may or may not have revealed. His motive does not matter. From the perspective of the party seeking to adduce his evidence, he cannot be compelled to give evidence because he is beyond the seas and beyond the jurisdiction of this court.

8. After receiving the hearsay notice, the plaintiffs filed a counter notice under rule 26(1) contending that Mr Hsu can or should be called as a witness. The effect of such a counter notice is that the defendants are obligated to call the witness unless any of the reasons specified in rule 25 apply. In other words, if it were to appear that Mr Hsu is not in fact beyond the seas but within this jurisdiction, his witness statements would not be admissible unless he attends and is subject to cross-examination. Since there is no suggestion that Mr Hsu is within the Cayman Islands at present, the counter notice provides no comfort to the plaintiffs.

9. As a consequence, the plaintiffs' first objection is not well founded.

10. Section 56(3) of the Law, which sets out the jurisdiction of the Chief Justice to make rules concerning the admissibility of hearsay pursuant to hearsay notices, reads:

(3) Rules of court made under subsection (1)-



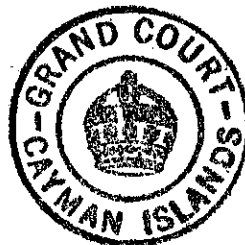
(a) *may confer on the court in any civil proceedings a discretion to allow a statement falling within section 45(1), 47(1) or 48(1) to be given in evidence, notwithstanding that any requirement of the rules affecting the admissibility of that statement has not been complied with, but except in pursuance of paragraph (b), shall not confer on the court a discretion to exclude such a statement where the requirements of the rules affecting its admissibility have been complied with. [underlining added]*

11. The subsection ends with these words:

... and any discretion conferred on the court by rules of court made as aforesaid may be either a general discretion or a discretion exercisable only in such circumstances as may be specified in the rules.

The balance of subsection 56(3) of the Law, including paragraph (b), is not material here.

12. Thus, there is a jurisdiction to admit hearsay evidence where there has not been strict compliance with the rules, but there is no jurisdiction to exclude it where the rules have been followed. The legislative intent is that in civil proceedings the court has no discretionary power to exclude hearsay. Unlike the case in criminal proceedings, a trial judge may not exclude a witness statement simply because he considers that the unavailability of the witness for cross-examination will prejudice the opposing party. The Legislative Assembly has accepted that hearsay, even on a central issue which cannot be tested by cross-examination, is nevertheless admissible in a civil proceeding if the proper notice is given and the other conditions of admissibility are met.



13. Rule 2A(9) provides that a hearsay notice "shall be served with" the witness statement. On its face, this rule is mandatory. However, Order 38, rule 2A(17) gives me a power to "vary or override" this particular provision on a discretionary basis.

14. A decision to vary or override rule 2A(9) must be based upon a consideration of whether the objecting party will suffer any significant prejudice. Where no such prejudice is apparent, the court's inclination will naturally be to admit the evidence and take the circumstances into account when deciding what weight to give it. The prejudice, if there is any, must arise from the breach of the rule and not from some other consideration. The fact that Mr Hsu's absence will deny the plaintiffs the opportunity to cross-examine him and will make my assessment of his credibility more difficult, while undeniably true, is not prejudice arising from the defendants' failure to serve the hearsay notice "with" the witness statements. The failure to serve the hearsay notice in March with the witness statements has not in and of itself caused prejudice to these plaintiffs.



15. The hearsay notice was served very soon after the defendants learned of the difficulty. It was not served at the appropriate time because the defendants expected Mr. Hsu to attend at the trial. There is no evidence that anyone associated with the defendants has encouraged Mr Hsu to refuse to attend. I proceed on the basis that the defendants have attempted in good faith to have Mr. Hsu attend for cross-examination but have failed to convince him to do so. If it were otherwise, I might exclude the witness statements on the ground that there has been an abuse

of the process of the court. In the present circumstances, I exercise my discretion to admit the witness statements of Mr. Hsu despite the failure to serve the hearsay notice at the proper time.

Henderson, J.

Henderson, J.

