

STUYVESANT-NORTH LIMITED APPELLANT;

1957
 Jan. 31
 Feb. 4

AND

THE MINISTER OF NATIONAL }
 REVENUE } RESPONDENT.

Practice—Examination for discovery—Witness ordered to answer questions that are pertinent to the issue.

Held: That the Court will order a witness on examination for discovery to answer questions asked him which are pertinent to the issue.

MOTION for an order that a witness on examination for discovery answer certain questions asked of him.

The motion was heard before the Honourable Mr. Justice Dumoulin in Chambers.

D. W. Mundell, Q.C. for the motion.

Wolfe D. Goodman contra.

DUMOULIN J.:—This is a motion by respondent requesting an order of this Court that one Alexander Gordon Fisher, examined for discovery as an officer of the appellant Company, be required to answer questions numbers 16, 17, 18, 73, 74, 75, 162, 163 and 166 set out in the transcript of the adjourned examination for discovery, and also four questions related in the agreement of counsel dated the 14th day of January 1957, which ought to be considered as asked and unanswered.

The matter at issue is briefly this.

The appellant Company, doing business as an underwriter of mining and oil securities at Toronto, made two loans to Donalda Mines Ltd. to an amount of \$125,000, obtaining, by way of bonus, 100,000 treasury shares at a valuation of 5¢ per share, the current market price of the latter then ranging between 50¢ and 55¢ per share.

The subsequent resale of the so-called bonus shares by appellant brought in a return of \$61,243.55 net. This amount was taxed by the Minister as an income profit, within the scope of the appellant's regular trading operations, a decision to which appellant takes exception, raising the point that the resale of the bonus shares was nothing but the realization of a capital asset outside the ordinary course of the Company's trade.

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Dumoulin J.

The questions which Mr. Alexander Gordon Fisher refused to answer, on advice of counsel, are as follows:

1. What was the source of the funds paid out by the Appellant in financing each of the transactions evidenced by the agreements set out below?
2. Were they paid out of capital of the Appellant?
3. Were they paid out of funds specifically borrowed by the Appellant for the purpose and, if so, from whom were they borrowed?
4. If neither paid out of capital nor out of funds specifically borrowed for the purpose how were the payments financed by the Appellant?

I am of opinion that the evidence sought by appellant bears a direct relation to the problem at issue and is consequent to appellant's stand in the matter.

Without prejudice to the merits of the case, I may say that a fair manner of ascertaining the legal correctness of the Company's contention, that the return derived from the bonus shares was enhancement of capital and not a business transaction, consists in probing the source of the loans made by Stuyvesant-North Ltd. whence the bonus shares accrued as additional inducement, and comparing their origin with the other trade transactions, appended to the agreement and admitted by appellant's counsel to be regular business transactions of the firm.

The case of *Cragg v. Minister of National Revenue* (1), mentioned in the course of argument, will undoubtedly prove of great help when deciding the merit of the case, but did not have to deal with a motion similar to the actual one.

I was also referred to Bray's treatise on Discovery p. 113. What I read there would rather lend weight to respondent's request, since I am of opinion that from replies to the moot questions the latter "would clearly derive material benefit", and I quote this author:

In *Sketchley v. Connolly*, 11 W.R. 573 (also cited *post*, Bk. II. Ch. III.) Blackburn, J. considered that it was not necessary that the answers should be strictly evidence, if the party *would clearly derive material benefit in the cause from the discovery*; and so Crompton, J. in reference to the particular discovery here required, namely, the name of the real defendant, (see *ante*, p. 89), considered that as the declarations of the real defendant would be evidence the answer disclosing his name would be the first step to obtaining it.

Interrogatories which do not relate to any matter in question in the cause or matter shall be deemed irrelevant notwithstanding that they might be admissible on the oral cross-examination of a witness, Ord. XXXI, r. 1 (see *ante*, p. 91). . . .

On page 114 I also found the following decision, which presents some degree of analogy to this motion:

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In a suit to set aside a sale from father to son as being made without consideration *the latter as defendant was compelled to discover his resources means of paying and how the money was provided for the* alleged consideration: *Newton v. Dimes*, 3 Jur. N.S. 583.

Dumoulin J.

For the motives and reasons above, I hold that the questions objected to are pertinent to the issue. The witness being examined on discovery, namely, Alexander Gordon Fisher, is in consequence ordered to answer questions 16, 17, 18, 73, 74, 75, 162, 163 and 166, set out in the transcript of the adjourned examination for discovery, and also the four questions set out in the agreement of counsel and quoted above, and such further and proper questions as may arise out of the answers thereto.

Motion granted, with costs to the Respondent in any event of the cause.

Judgment accordingly.