SK Shipping Co Ltd *v* IOF Pte Ltd
[2012] SGHCR 14

Case Number : Suit No 440 of 2012 (Summons No 3808 of 2012)

Decision Date : 25 September 2012

Tribunal/Court : High Court

Coram : Justin Yeo AR

Counsel Name(s) : Mr Vincent Ong and Mr Winston Wong (Rajah & Tann LLP) for the plaintiff; Mr Haireez Jufferie - Instructed (Joseph Lopez & Co) for the defendant.

Parties : SK Shipping Co Ltd — IOF Pte Ltd

Civil Procedure

25 September 2012 Judgment reserved.

Justin Yeo AR:

1 This is an application by the defendant pursuant to, *inter alia*, O 24 r 11 read with O 24 r 10 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed), for the production and/or inspection of documents referred to in the Statement of Claim ("the Application").

Facts

2 This action commenced on 29 May 2012 when the plaintiff filed and served the Writ of Summons with an endorsement of the plaintiff's alleged claim. On 20 June 2012, the plaintiff issued the Statement of Claim. On 26 June 2012, the defendant made a request, by way of a letter, for the production of the documents referred to in the Statement of Claim. The defendant also requested that these documents be provided on an urgent basis, particularly in view of the impending deadline then for the filing and service of the Defence.

3 No response from the plaintiff was forthcoming. As a result, the defendant issued a chaser on 29 June 2012, requiring the plaintiff to revert by noon on 2 July 2012. The plaintiff finally responded to the defendant's request for documents on 4 July 2012, stating that quite apart from the issue of availability or existence of the documents requested, the plaintiff was of the view that the defendant was not entitled to discovery of documents at this stage of the proceedings. Accordingly, plaintiff was not agreeable to the defendant's request for an extension of time to file the Defence.

4 On 5 July 2012, the defendant issued a Notice to Produce in Form 40 ("the Notice to Produce") pursuant to O 24 r 10(1), requesting 17 categories of documents. O 24 r 10(2) stipulates that the party on whom notice is served under O 24 r 10(1) "*must*, within 4 days after service of the notice, serve on the party giving the notice a notice in Form 41 stating a time within 7 days after the service thereof at which the documents… may be inspected… and stating which (if any) of the documents he objects to produce and on what grounds" [emphasis added]. However, the plaintiff did not provide any reply in Form 41 within the stipulated time. At a pre-trial conference held on 24 July 2012, in response to the court's query as to why no response had been given to the Notice to Produce, counsel for the plaintiff explained that they were still taking their client's instructions on this point.

5 On 26 July 2012, the Application was taken out pursuant to *inter alia* O 24 r 11 read with O 24

r 10 of the Rules of Court for the production and/or inspection of documents referred to in the Statement of Claim. Annexed to the Application was a list of 16 categories of documents ("Annex A"). It suffices to note for now that the categories of documents stated in Annex A were not entirely identical to those requested in the Notice to Produce. The relevant portion of Annex A is reproduced here (for convenience, the abbreviations used in the following table will be adopted in the course of this judgment):

S/N	Document Description	Reference in Statement of Claim
1	The Time Charterpary dated 22 March 2012 for the MV "ANNA BARBARA" between the Plaintiff and Prime East Shipping Limited ("Prime East")	Paragraph 3
2	The "*Sub-Charterparty*" between Prime East and Precious Charm Ltd ("Precious")	Paragraph 4
3	The "*Sub-Sub-Charterparty*" between Precious and Isaphia (Singapore) Pte Ltd ("Isaphia")	Paragraph 4
4	The Fixture Re-cap dated 22 March 2012	Paragraph 6
5	The "*Previous charterparty*" dated 14 July 2009	Paragraph 6
6	The "Adopted C/P"	Paragraph 6
7	The Stevedore Damages Report issued on 28 April 2012	Paragraph 8(d)
8	Each of all documents evidencing the "*repeated reminders*" sent by the Plaintiffs to Prime East	Paragraph 8(e)
9	Each of all "*similar notices via email*" sent by the Plaintiffs to Precious and Isaphia	Paragraph 8(g)
10	Email dated 10 May	Paragraph 8(h) and again referred to at Paragraph 5 of the Reply
11	Email dated 11 May from Skuld Copenhagen	Paragraph 8(i)
12	Email dated 18 May from Skuld Copenhagen to Plaintiffs	Paragraph 8(j)
13	Email dated 18 May from Skuld Copenhagen to Plaintiffs	Paragraph 8(l)
14	Email dated 22 May from Skuld Copenhagen to Plaintiffs	Paragraph 8(m)
15	Email dated 23 May from Skuld Copenhagen to the Plaintiffs	Paragraph 8(n)
16	Copies of all "*finalized or consolidated claims*" and/or Statements of Account worked out to the sum of USD 469,386.04	Paragraph 8(p)

6 It should also be noted that in paragraphs 1(b) and 2(c) of the Defence, the defendant expressly stated that where an allegation made in the Statement of Claim was not admitted, it was *inter alia* because the defendant did not have copies of all the relevant documents. The defendant also expressly reserved the right to deny any allegations in due course.

7 I heard parties on 22 August 2012 ("the first hearing") and 31 August 2012 ("the second hearing"). At the second hearing, I directed the plaintiff to file an affidavit detailing all the attempts made to obtain the documents in categories 2 and 3 from the relevant third parties (*viz*, Prime East, Precious and Isaphia – hereinafter, "the Third Parties").

Parties' Arguments

8 The defendant was of the view that it was entitled to all the documents requested in Annex A. The plaintiff, however, raised specific objections to the various categories of documents requested, as follows:

(a) With regard to the documents in categories 2, 3, 8, 14, 15 and 16, the plaintiff asserted that these documents were *not* referred to in the Statement of Claim, and therefore, that O 24 r 10 was inapplicable. Specifically with regard to the documents in categories 2 and 3, the plaintiff argued that *even if* there was a reference to these documents, these documents were clearly not in the possession, custody or power of the plaintiff as these were documents in a contractual chain to which the plaintiff was not a party.

(b) With regard to the documents in categories 5 and 6, the plaintiff did not deny that these documents were referred to in the Statement of Claim. However, the plaintiff alleged that these categories were different from those sought in the Notice to Produce. The plaintiff also asserted that categories 5 and 6 referred to the same document.

(c) More generally, the plaintiff attempted to resist production of *all* the documents, on the premise that the disclosure of these documents was not necessary at the present stage of the proceedings.

9 Before turning to set out the issues that arise for determination in the present case, I note that with regard to the objection *vis-à-vis* categories 5 and 6 (see [8(b)] above), the plaintiff did not elaborate on how this was an objection to an order for production. Presumably, the plaintiff was asserting that no order could be made under O 24 r 11(1) given that these categories were not requested for in the Notice to Produce.

10 However, on perusal of the Notice to Produce, it appears that the documents in categories 5 and 6 were referred to in paragraph 5 of the Notice to Produce. While I accept that paragraph 5 of the Notice to Produce could have been better worded, in any case, it clearly referred to the documents in categories 4, 5 and/or 6. Given that the plaintiff has not denied that category 4 was referred to in the Notice to Produce, and that it has in fact further asserted that categories 5 and 6 referred to the same document, I do not see how the lack of clarity in paragraph 5 of the Notice to Produce prejudiced the plaintiff in any way. As such, I do not see a need to further consider this particular ground of objection with regard to documents in categories 5 and 6.

Issues

11 The issues that arise for determination are as follows:

(a) First, whether, for the purposes of O 24 r 10(1), reference was made in the Statement of Claim to the documents in categories 2, 3, 8, 14, 15 and 16 ("Issue 1");

(b) Second, whether an order for production of the documents in categories 2 and 3 should be made, in view that these documents are allegedly not in the possession, custody or power of the

plaintiff ("Issue 2"); and

(c) Third, whether the production of documents requested in Annex A was "necessary" for the purposes of O 24 r 13(1) ("Issue 3").

12 The issues will be addressed *in seriatim*.

Issue 1 – Whether reference was made to the documents in categories 2, 3, 8, 14, 15 and 16

13 As mentioned in [8(a)] above, the plaintiff asserted that the documents in categories 2, 3, 8, 14, 15 and 16 were *not* referred to in the Statement of Claim, and therefore, that O 24 r 10 was inapplicable. The issue is therefore whether, for the purposes of O 24 r 10(1), reference was made in the Statement of Claim to the documents in categories 2, 3, 8, 14, 15 and 16.

The Law

14 O 24 r 10 provides for the inspection of documents referred to in pleadings and affidavits. It states:

10. Inspection of documents referred to in pleadings and affidavits (O. 24, r. 10)

(1) Any party to a cause or matter *shall be entitled* at any time to serve a notice in Form 40 on any other party *in whose pleadings or affidavits reference is made to any document* requiring him to *produce that document* for the inspection of the party giving the notice and to permit him to take copies thereof.

(2) The party on whom a notice is served under paragraph (1) must, within 4 days after service of the notice, serve on the party giving the notice a notice in Form 41 stating a time within 7 days after the service thereof at which the documents, or such of them as he does not object to produce, may be inspected at a place specified in the notice, and stating which (if any) of the documents he objects to produce and on what grounds.

[emphasis added]

15 It should be noted that O 24 r 10 of the Rules of Court is *in pari materia* with O 24 r 10 of the Rules of the Supreme Court (UK) ("RSC") (for convenience, both provisions will be referred to simply as "O 24 r 10"). As such, English case law is of persuasive value in the interpretation and application of O 24 r 10.

16 It is well established that the underlying purpose of O 24 r 10 is to confer on the requesting party "the same advantage as if the documents referred to had been fully set out in the pleadings" (*Rafidain Bank v Agom Universal Sugar Trading Co Ltd and another* [1987] WLR 1606 ("*Rafidain Bank*") at 1610H and *Dubai Bank Ltd v Galadari and others (No 2)* [1989] 1 WLR 731 ("*Dubai Bank*") at 737G, both citing *Quilter v Heatly* (1883) 23 Ch D 42 ("*Quilter*") at 50).

17 In the event that there is no dispute that references were in fact being made to the documents in the pleadings or affidavits, courts are strongly inclined to order production of those documents because the reference to those documents, in and of itself, is construed as a form of "disclosure" by that party (*Rubin v Expandable Ltd* [2008] 1 WLR 1099 ("*Rubin*") at 1108C *per* Rix LJ). As Rix LJ observed, although the document in question has not been "disclosed by list, or at any rate not yet", it has been disclosed by mention in pleadings or affidavits which are, "for the purposes of litigation, …

another important and formal category of documents" (*ibid*). As such, the party referencing such a document should be prepared to be required to permit the inspection of the same, and the other party should be "*entitled* to it" [emphasis added] (*ibid*) . In a situation where reference to the document has been made in the pleadings or affidavits, the party referencing the document in question must show "good cause" to oppose the production of such a document (*Rafidain Bank* at 1613D-E, citing *Quilter* at 51).

18 Following from the above, one of the key issues in cases involving O 24 r 10(1) is whether an assertion in a pleading or affidavit involves a "reference … to any document" within the meaning of O 24 r 10(1). Problems arise where, although the assertion made in the affidavit or pleading does not specifically mention a document or class of documents, it gives the reader strong grounds for supposing that a document must exist (*Dubai Bank* at 738D-E). This, indeed, is a key issue in the present Application, with regard to the documents in categories 2, 3, 8, 14, 15 and 16.

19 It is clear that a document need not be expressly mentioned in the pleadings in order to invoke O 24 r 10 (*Singapore Civil Procedure 2007* (GP Selvam gen ed) (Sweet & Maxwell Asia, 2007) ("*Singapore Civil Procedure*") at para 24/10/1). However, there seems to be a paucity of Singapore case law with regard to the precise test to be applied in determining the issue mentioned in [18] above. Indeed, the only decision by Singapore courts drawn to my attention was that of *Woodcliff Assets Ltd v Reflexology and Holistic Health Academy and Others* [2009] SGHC 162 ("*Woodcliff*"). In *Woodcliff*, Senior Assistant Registrar ("SAR") Yeong Zee Kin noted at [39] that an order for production of documents for inspection under O 24 r 13 may be made for documents explicitly referred to in pleadings or affidavits, but not for documents which were referred to by inference. In that case, SAR Yeong held that the document in question was not explicitly referred to in the affidavits, and therefore did not order production of the document (*ibid*).

20 Reference to English case law is highly instructive, especially given the dearth of Singapore case law as well as the identical procedural rules in question. In *Dubai Bank* (which was cited in *Woodcliff* at [39], but without elaboration), the English Court of Appeal held that where a document is not explicitly referred to in pleadings or affidavits, the court's task is to ascertain whether, on a fair meaning of the words in their context, there is a "*direct allusion*" [emphasis in original] to the document; it is insufficient for the reference to be made by inference (*Dubai Bank* at 739A-B). Other than the fact that, in *principle*, "reference" does not, in its natural and ordinary meaning, include "reference by inference", in *practice*, permitting "reference by inference" would effectively necessitate the parties (and subsequently, the court) entering into a process of inference and speculation to determine whether the document or class of documents exist (or ever existed) (*ibid*).

21 Indeed, the learned Law Lords in *Dubai Bank* emphasised that in cases of "reference by inference" it may be more appropriate for the requesting party to apply for an order of discovery of a specific document or a class of documents under O 24 r 7 of the RSC (*ibid*). After all, the absence of a direct allusion to the document will merely mean that the applicant is not entitled to seek production and inspection under O 24 r 10; it does not preclude him from seeking discovery pursuant to other discovery rules (*ibid*).

22 The English cases have also helpfully alluded to several fine but crucial distinctions in ascertaining whether there is a "*direct allusion*" [emphasis in original] to a document in pleadings or affidavits:

(a) First, a document is directly alluded to if reference is made to the *contents* of the document as opposed to merely the *effect* of a document (*Dubai Bank* at 739H; affirmed in *Rubin* at 1107A): only the former would come within the meaning of "reference … to any document" in

O 24 r 10(1). It is important to note that in *Dubai Bank*, Slade LJ suggested that although the phrase "the property Blackacre was conveyed by A to B" may suggest that "one can be more or less certain that a document effecting the conveyance exists" (*Dubai Bank* at 738E-F), this did not suffice for the purposes of O 24 r 10. As Slade LJ emphasised, a mere opinion that on the *balance of probabilities*, a transaction referred to in a pleading or affidavit *must have been effected by a document*, *does not give the court jurisdiction* to make an order under O 24 r 10 (*ibid* at 739H).

(b) Second, a document is directly alluded to if the words used, on their fair meaning, convey the *act of making the document itself* as opposed to a mere *reference to a transaction* (*Rubin* at 1108E): only the former would come within the meaning of "reference … to any document" in O 24 r 10(1). In *Rubin*, the expression which the court had to consider was "he wrote to me". The court found that "he wrote" is not a mere *reference to a transaction* otherwise to be inferred as effected by a document (*contra*, *eg*, "he conveyed"), but rather, a *direct allusion* to the *act of making the document itself* (*ibid*). The court also suggested that "I recorded and transcribed our telephone call that day" and "written up the interview" were examples of direct allusions to documents that would amount to a "reference" for the purposes of O 24 r 10(1) (*ibid* at 1108F-G).

23 Having set out the principles governing O 24 r 10(1), I turn now to consider whether the documents in categories 2, 3, 8, 14, 15 and 16 were "referred to" in the Statement of Claim.

Application to the facts

Categories 2 and 3

24 Categories 2 and 3 are alleged references to charterparties involving the Third Parties. It is undisputed that the charterparties are specifically mentioned in the Statement of Claim. Further, counsel for the plaintiff appeared willing to concede at the first hearing that the charterparties mentioned were, on the *balance of probabilities*, contained in documents. However, citing *Dubai Bank* at 739H (see [22(a)] above), he contended that this was insufficient to find any "direct allusion" to the existence of documents. He further submitted that the references to these charterparties were not references to any specific documents, and that they "merely illustrate the nature of the contractual relationship between the various parties down the charterparty chain". He also argued that *even if* the word "charterparty" was to be construed as a reference to the contract itself, such a contract may well have been an *oral* one.

25 Counsel for the defendant referred to several paragraphs of the Statement of Claim to substantiate his argument that the charterparties had been referred to for the purposes of O 24 r 10(1). He emphasised that: (1) in paragraph 4 of the Statement of Claim, the plaintiff had pleaded that the vessel was sub-chartered by Prime East to Precious "by way of *a* time charterparty" [emphasis added]; and (2) the plaintiff had pleaded at paragraph 8 of the Statement of Claim that "there is a corresponding lien *clause in the* Sub-Charterparty and a further corresponding lien *clause in the* Sub-Sub Charterparty" [emphasis added].

26 Having considered the above arguments, I am of the view that the plaintiff's arguments are overly technical. While it may be argued that neither "charterpart[ies]" nor "clause[s]" *necessarily* takes on documentary form, the guiding principle is to construe the pleadings in view of a "fair meaning of the words in their context" (see [20] above). In this connexion, the words "charterpart[ies]" and "clause[s]" appear, on a fair meaning of those words in their context, to be direct allusions to documents. For instance, the reference to lien clauses being "*in the* Sub-

Charterparty and … *in the* Sub-Sub Charterparty" [emphasis added] appears to be a reference to the *contents* of documents rather than the *effect* of the same. I also note that the plaintiff did not explain how the reference to "charterpart[ies]" in the present case was different from the assertion "by virtue of a mandate from the account holders" in *Dubai Bank* which the learned Law Lords opined (at 740G) to be a reference to a "document by way of mandate". As such, I find that the references to "charterpart[ies]" are, for the purposes of O 24 r 10(1), references to *documents* which contained the contractual terms governing the relationships between the said parties.

Categories 8, 14, 15 and 16

27 Categories 8, 14, 15 and 16 can be dealt with together.

(a) With regard to category 8, the plaintiff asserted there was no reference to any documents in relation to the "repeated reminders" in paragraph 8(e) of the Statement of Claim, which reads as follows:

> Despite repeated reminders by the Plaintiffs, Prime East had refused and/or failed to pay to the Plaintiffs the outstanding hire as well as the estimated repair costs for the damage caused to the Vessel.

(a) The defendant responded that in the context of the pleaded facts, and particularly in view of the fact that the plaintiff was a company incorporated in the Republic of Korea whereas Prime East was a company incorporated in the British Virgin Islands, "repeated reminders" were clear references to documents which the plaintiff had forwarded to Prime East. The defendant added that in a commercial transaction, one would expect to see reminders in written form, especially where the parties were in different countries and the reminders concerned a demand for a significant sum of money.

(b) With regard to category 14, the plaintiff contended that there was no reference to any document or, in particular, an email from Skuld Copenhagen to the plaintiff on 22 May 2012 in paragraph 8(m) of the Statement of Claim, which reads as follows:

> On 22 May 2012, Skuld Copenhagen responded on behalf of Isaphia and refused to provide the requested information/documents on the ground that the Plaintiffs had no contractual relationship with Isaphia.

(b) The defendant counter-argued that because the response issued by Skuld Copenhagen was a response to another letter, the natural reading of the word "responded" in paragraph 8(m) of the Statement of Claim was that a *document* was being referred to. The defendant also added that, in the context, the word "responded" conveyed an act of *making* a document.

(c) With regard to category 15, the plaintiff argued there was no reference to any email from Skuld Copenhagen to the plaintiff on 23 May 2012 in paragraph 8(n) of the Statement of Claim, which reads as follows:

> On 23 May 2012, the Defendants, through their representatives, Skuld (Far East) Ltd, replied to the effect that the Defendants had no contractual relationship with the Plaintiffs and could not assert any rights against the charterers down the chain. The Defendants refused to provide the requested information or documents.

(c) The defendant did not make any specific response to category 15. Indeed, the defendant

had informed the plaintiff before the hearing that it would no longer be pursuing a production order over this category of documents.

(d) With regard to category 16, the plaintiff asserted that there was no reference to any "finalised or consolidated claims and/or Statements of Account" in paragraph 8(p) of the Statement of Claim, which reads as follows:

> As at 11 June 2012, the Plaintiffs have finalised or consolidated their claim for unpaid hire as against Prime East which works out to the sum of US$469,386.04. As such, the total outstanding amount due and owing from Prime East to the Plaintiffs is in the sum of US$719,386.04 (the total of US$469,386.04 and US$250,000.00) for which the Plaintiffs assert a lien over the freight payable by the Defendants to Isaphia.

(d) On this point, the defendant submitted that the phrase "finalised or consolidated" necessarily referred to an act of *making* documents which consolidated the plaintiff's alleged claim for unpaid hire and/or the act of reducing the quantum of the alleged claim into documentary form. The defendant also submitted that the figures quoted in paragraph 8(p) of the Statement of Claim reflected the *contents* of a document.

28 I do not agree that a "fair meaning of the words in their context" would support the arguments that the defendant made (as summarised in the preceding sub-paragraphs). It should be emphasised that *even if* I were to be convinced on the balance of probabilities that the "repeated reminders", "response[s]", "replie[s]" and/or "finalised or consolidated… claim" were done by way of documents, this would be insufficient for the purposes of O 24 r 10 (see *Dubai Bank* at 739H, and [22(a)] above). I accordingly find that no reference has been made to the documents in categories 8, 14, 15 and 16. As such, no order for production will be made for these documents.

Issue 2 – Whether order for production should be made for documents allegedly not in plaintiff's possession, custody or power

29 Specifically with regard to the documents in categories 2 and 3, which I have found to have been referred to in the Statement of Claim (see [26] above), the plaintiff argued that an order for production should not be made because these were documents in a contractual chain to which the plaintiff was not a party (and accordingly were allegedly not in the plaintiff's possession, custody or power). The issue is therefore whether an order for production of the documents in categories 2 and 3 should be made in view that these documents are allegedly not in the possession, custody or power of the plaintiff.

The law

30 The Application was made under O 24 r 11(1)(a) because the plaintiff failed to serve a notice in Form 41 as required by O 24 r 10(2).

31 It is important to note that O 24 r 11(1) differs from O 24 r 11(2) in one material aspect. Under O 24 r 11(2), the court may only permit the applicant to inspect documents which are in the "possession, custody or power" of the responding party. Such a requirement is not stated under O 24 r 11(1). O 24 r 11 provides as follows:

> **11. Order for production for inspection (O. 24, r. 11)**
>
> (1) If a party who is required by Rule 9 to serve such a notice as is therein mentioned or who is

served with a notice under Rule 10 (1) —

(a) fails to serve a notice under Rule 9 or, as the case may be, Rule 10 (2);

(b) objects to produce any document for inspection; or

(c) offers inspection at a time or place such that, in the opinion of the Court, it is unreasonable to offer inspection then or, as the case may be, there,

then, subject to Rule 13 (1), the Court may, on the application of the party entitled to inspection, make an order in Form 42 for the production of the documents in question for inspection at such time and place, and in such manner, as it thinks fit.

(2) Without prejudice to paragraph (1), but subject to Rule 13 (1), the Court may, on the application of any party to a cause or matter, order any other party to permit the party applying to inspect any documents *in the possession, custody or power of that other party* in respect of which discovery has been given under any Rule in this Order or in pursuance of any order made thereunder.

(3) An application for an order under paragraph (2) must be supported by an affidavit specifying or describing the documents of which inspection is sought and stating the belief of the deponent that they are *in the possession, custody or power of the other party* and that discovery has been given of them under any Rule in this Order or in pursuance of any order made thereunder.

[emphasis added]

32 While no Singapore cases were cited to me on this point, the English case of *Rafidain Bank* is instructive. In *Rafidain Bank*, it was held that the omission of the requirement of "possession, custody or power" from the equivalent RSC provision was, as a matter of construction and common sense, a "deliberate" one (*Rafidain Bank* at 1610H). This is because the party who refers to the documents in his pleadings or affidavits does so *by choice*, and usually because these documents were either essential to his cause of action (or defence), or of significant probative value to him (*ibid*). These do not presuppose that the said documents would be in that party's possession, custody or power (*ibid*).

33 The court in *Rafidain Bank* further emphasised that there was no reason why the broad scope of O 24 rr 10 and 11(1) should be restricted such that an order may only be made pursuant thereto if the documents sought are in the possession, custody or power of the party to whom the order if made is directed (*ibid* at 1613E). This should be contrasted with O 24 r 11(2), which contains the "exceptional restriction" that the making of an order pursuant thereto is dependent on whether the documents sought to be inspected are in the possession, custody or power of the party to whom the order if made is directed (*ibid*).

34 However, given that the court has discretion *vis-à-vis* whether or not to grant an order for production under O 24 r 11(1), the absence of possession, custody or power may be a *factor* taken into consideration in the exercise of such discretion. The absence of possession, custody or power will "sometimes amount to a good cause" not to order production of such documents, but not "invariably" so (*Rafidain Bank* at 1611B). The court in *Rafidain Bank* gave, as an example, the case of a "technical" absence of possession, custody or power where there is evidence that the third party who had possession of the document would very likely make it available if only he was asked to do so. The court was of the view that in such a situation, there was no reason that the court should be

powerless to make an order for production, despite the respondent's lack of possession, custody or power.

35 I invited further submissions on what "good cause", as referred to in *Rafidain Bank*, meant or entailed. Counsel for the plaintiff argued that *Rafidain Bank* established that the court should be inclined to make an order for production where it is *likely* that a third party in possession of the documents would provide the documents upon being asked to do so. He further asserted that the converse was also true, *viz*, that the court should *not* order production where it is *unlikely* that a third party in possession of the documents would provide the documents upon being asked to do so. In his view, a third party being unlikely to provide the documents when asked to do so would constitute "good cause" not to order production.

36 I am not convinced by the plaintiff's arguments. First, it should be emphasised that in *Rafidain Bank*, the "technical" lack of possession, custody or power was cited as an *example* (and by no means an *exhaustive* one) in which courts will order production where a party asserts that it lacks possession, custody or power over the documents in question. There is therefore scant basis for the plaintiff's assertion that the converse argument he propounded is supported by the case.

37 Second, in *Zida Technologies Limited v Tiga Technologies v Tiga Technologies Limited and others* HCA 5617/2000 ("*Zida*"), the High Court of the Hong Kong Special Administrative Region had occasion to consider *Rafidain Bank*, *Dubai Bank* and *Quilter* in the context of the court's exercise of discretion under the equivalent provision in Hong Kong. In that case, the applicant sought the production of documents referred to in an affidavit, under a provision equivalent to O 24 r 11. The respondents asserted that they did not and have never had those documents in their possession. Master Jones ordered the respondents to produce the documents for inspection. In the course of appealing against Master Jones' order, the respondents filed an affirmation setting out the attempts to obtain the documents. In that affirmation, it was claimed that the 3rd respondent tried to approach the third parties (who were allegedly in possession of the documents) in or about December 2000 to obtain the documents. The request was rejected because neither of the third parties wished to be embroiled in the litigation. The 2nd respondent also affirmed that it sent two letters in May 2001 to request for the documents to be provided, but there was no response forthcoming from the third parties by the time of the appeal hearing. On appeal, the court ruled that (at [58]-[59]):

> The timing of the 3 May letters shows that an attempt to comply with Master Jones' Order was made only on the penultimate day for compliance. It all has the look of a set-piece. There are *no chaser letters* in evidence. There is *no file note exhibited of any telephone or other communication* from the solicitors. There is no evidence from the [respondents] that they have or have not communicated with the third parties about the Order since it was made. Indeed since this prospect was first contemplated, when the [applicant] asked for inspection in December 2000, there is no evidence from the [respondents] themselves (as opposed to their solicitors) as to whether this issue has been discussed before or since the 3rd [respondent] spoke to the third parties, "in or about December 2000".
>
> In my judgment, the [respondents] certainly *have not been robust* about meeting the obligation of [Master Jones'] Order and have been adroit in *demonstrating only the lamest efforts* in this regard from the start. This is a relevant consideration in the exercise of any discretion.
>
> [emphasis added]

38 It is clear from *Zida* that it is insufficient for the party refusing discovery to demonstrate "only

the lamest efforts" in requesting the necessary documents from the relevant third party (*Zida* at [59]). Where the efforts to obtain the necessary documents are "undistinguished by zeal" (*Zida* at [55]), the fact that the relevant third party refuses to cooperate is *per se* insufficient for the party refusing discovery to discharge its onus of showing "good cause" (see *Zida* at [51]-[59]).

Application to the facts

39 In the present case, the documents in categories 2 and 3 are indisputably critical documents as they form an integral part of the plaintiff's case. The plaintiff's claim is for freight allegedly owed to them due to an alleged exercise of a lien pursuant to a clause in the plaintiff's charterparty. As such, even for a *prima facie* case to be made out in the plaintiff's favour, the plaintiff's claim is dependent on the exercise of an unbroken line of corresponding lien clauses in all the charterparties in the contractual chain (the plaintiff itself asserts this in paragraph 8 of the Statement of Claim).

40 Counsel for the plaintiff informed me at the first hearing that the plaintiff had requested for these documents from the Third Parties, but that no response from the Third Parties has been forthcoming. At the second hearing, I ordered the plaintiff to file an affidavit detailing all the efforts made to obtain these documents from the Third Parties. In the resultant affidavit, it was deposed that the plaintiffs had previously on 22 May 2012 requested for copies of the documents from the Third Parties. None of the Third Parties provided the Plaintiffs with the documents – Isaphia asserted that the plaintiffs had no right to demand disclosure of the documents, while Prime East and Precious did not respond to the plaintiffs' requests. The affidavit stated that subsequent to the second hearing, the plaintiff had further attempted to obtain copies of the documents through its chartering brokers, but to no avail.

41 Against this backdrop, counsel for the plaintiff asserted that this was not a case where there was a "technical" lack of possession, custody or power, and that the Third Parties were very unlikely to provide the Plaintiffs with the documents. As such, relying on the argument detailed at [35] above, the plaintiff contended that it had shown "good cause" why production of the documents in categories 2 and 3 should not be ordered.

42 I am not convinced by the plaintiff's arguments. Like the respondents in *Zida* who only tried to obtain the documents on one occasion before making another last-minute "set-piece" attempt (*Zida* at [58]), here the plaintiff did not make any further requests for the documents from the Third Parties after having its 22 May 2012 request rejected by Isaphia and ignored by Prime East and Precious. It was only subsequent to my direction at the second hearing (for the plaintiff to file an affidavit detailing all the attempts made to obtain the documents from the third parties) that the plaintiff's solicitors attempted to obtain the documents through the plaintiff's chartering brokers. Even then, no details were provided on what these alleged attempts were or how they were carried out. Furthermore, and especially with regard to the plaintiff's assertion that there was no response from Prime East and Precious, instead of attempting to solicit a response from them, the plaintiffs opted not to send any "chaser letters" or to follow up on its requests in any form. The plaintiff's efforts in obtaining the documents are, to borrow a phrase used in *Zida*, "undistinguished by zeal".

43 For the avoidance of doubt, I am aware that the facts of present case are different from those in *Zida*. In *Zida*, the respondents had a "close business relationship" with the third parties, and one of the third parties appeared to be "nothing less than the customs agent for the [respondents]" (*Zida* at [47]). In contrast, there is no evidence of similar relationships between the plaintiff and the Third Parties here. Be that as it may, in my view, the plaintiff has not been robust in its attempts to obtain the documents from the Third Parties. Notably, the plaintiff's 22 May 2012 request was made *prior* to the Application being taken out, and even *after* the Application had been taken out, the plaintiff did

not attempt to step up its efforts to obtain the relevant documents from the Third Parties. It is also notable that when resisting the production of the documents, the plaintiff merely claimed that the documents were not in its possession, custody or power; no attempts were made to show "good cause" why the production of documents in categories 2 and 3 should not be ordered.

44 As such, in view of the criticality of the documents in categories 2 and 3 to the plaintiff's case, as well as the lack of effort on the plaintiff's part in attempting to obtain the relevant documents from the Third Parties, the plaintiff has not shown "good cause" why an order for production should not be made for the documents in categories 2 and 3.

Issue 3 – Whether production of documents "necessary"

45 As a general contention, the plaintiff contended that the production of documents requested in Annex A was not necessary at the present stage of the proceedings, because (a) the defendant has filed a substantive Defence, without the need for reference to the aforesaid documents; and (b) there are no interlocutory applications or applications for summary determination of the matter in the proceedings at present which warrant discovery of these documents at this stage for the fair disposition of the same or for saving costs.

46 The defendant argued that disclosure of the documents requested in Annex A was necessary because (a) the disclosure of the documents would put the defendant in a better position to ascertain whether it is expedient and/or justified to resort to summary processes and/or other interlocutory applications; and (b) as alluded to in [6] above, it was apparent on the face of the Defence that it was filed with an unambiguous and express reservation of rights to amend the Defence because the plaintiff had pleaded matters which the defendant was either unaware of and/or not privy to.

47 The issue is therefore whether the production of documents requested in Annex A is "necessary" for the purposes of O 24 r 13(1).

The law

48 Before an order for production will be made under O 24 r 13(1), the court must opine that the order is *necessary* either for *disposing fairly of the cause or matter* or for *saving costs*. Order 24 r 13(1) provides:

> **13. Production to be ordered only if necessary, etc. (O. 24, r. 13)**
>
> (1) No order for the production of any documents for inspection or to the Court shall be made under any of the foregoing Rules unless the Court is of the opinion that the order is *necessary* either for *disposing fairly of the cause or matter* or for *saving costs*. …
>
> [emphasis added]

49 The plaintiff argued that the discovery of the documents in Annex A at the at the present stage of the proceedings would not assist either in the fair disposal of the matter or save costs. This argument was similar to the one raised by the defendants in *Woodcliff*. In *Woodcliff*, the court recognised that for discovery applications under O 24 rr 1, 5 and 6, it was possible to defer discovery of a document on the basis that disclosure *at that stage of the proceedings* is not necessary, leaving it open for a subsequent discovery request to be made at a later stage of the proceedings (*Woodcliff* at [36]). This is because O 24 r 7 (to which O 24 rr 1, 5 and 6 are subject) provides:

7. Discovery to be ordered only if necessary (O. 24, r. 7)

On the hearing of an application for an order under Rule 1, 5 or 6, the Court may, if satisfied that discovery is not necessary, or *not necessary at that stage of the cause or matter*, dismiss or, as the case may be, adjourn the application and shall in any case refuse to make such an order if and so far as it is of opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs.

[emphasis added]

50 In contrast, there is *no temporal dimension to the test of necessity* under O 24 r 13 (*Woodcliff* at [37]). Accordingly, under O 24 r 13, if production is necessary either for disposing fairly of the cause or matter or for saving costs, the document "*has to be* produced for inspection" [emphasis added]. Indeed, the court went so far as to emphasise that O 24 r 13 *did not* give the court the flexibility to defer an order for production to a later stage of the proceedings once it is found that such production was *necessary* (*ibid*).

Application to the facts

51 Counsel for the plaintiff attempted to distinguish *Woodcliff* by arguing that the court was there concerned with O 24 r 13, whereas the present application was one made under O 24 r 11. This argument gains no traction whatsoever, given that O 24 r 11(1) itself states that it is "subject to Rule 13(1)", and O 24 r 13(1) explicitly stipulates that it relates to the "foregoing Rules" (which would include O 24 r 11). Counsel for the plaintiff provided no further reason to distinguish *Woodcliff*, and I see no reason why the reasoning in *Woodcliff* should not apply to the present case.

52 I find that the production of the documents in Annex A is necessary either for disposing fairly of the cause or matter or for saving costs. First, and crucially, the plaintiff did not argue that the documents requested are unnecessary for disposing fairly of the cause or matter or for saving costs. Rather, the contentions raised by the plaintiff were *limited* to arguing that the production of documents is not necessary *at the present stage of the proceedings*. This, as mentioned in [50] above, is not a relevant argument insofar as O 24 r 13(1) is concerned. Second, I agree with the reasons cited by the defendant in [46] above *vis-à-vis* the necessity of the documents for disposing fairly of the cause or matter or for saving costs.

53 As such, I find that the test of necessity in O 24 r 13(1) is satisfied, and exercise my discretion under O 24 r 11(1) in the defendant's favour. This does not apply, however, to the documents in categories 8, 14, 15 and 16 as I have found that no reference was made to these documents in the plaintiff's pleadings (see [28] above).

Conclusion

54 In view of the foregoing, I order that the plaintiff does, within seven (7) days of the date of this order, file and serve on the defendant a list of documents and an affidavit verifying the same, stating whether it has or has had at any time in its possession, custody or power documents in categories 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12 and 13 of Annex A, and if the documents have been but are now not in its possession, custody or power, stating when it parted with the documents and what has become of the documents. No order is made for the documents in categories 8, 14, 15 and 16.

55 I additionally order that there be inspection of all documents specified in the list of documents filed and served pursuant to [54] above, within seven (7) days of service of the said list. The

defendant is at liberty to take copies of the said documents.

56 I will now hear parties on costs.

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