IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 127

Suit No 85 of 2017
(Registrar's Appeal No 338 of 2017)

Between

(1) International Financial Services (S) Pte Ltd
(2) Thomas Fewtrell

… Plaintiffs

And

(1) Old Mutual International Isle of Man Ltd Singapore Branch (formerly known as Royal Skandia Life Assurance Limited (Singapore Branch))
(2) AAM Advisory Pte Ltd (formerly known as PKF-AAM Fund Advisory Pte Ltd)

… Defendants

GROUNDS OF DECISION

[Tort] — [Confidence]
[Civil Procedure] — [Pleadings]

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International Financial Services (S) Pte Ltd and another
v
Old Mutual International Isle of Man Ltd Singapore Branch and another

[2018] SGHC 127

High Court — Suit No 85 of 2017 (Registrar's Appeal No 338 of 2017)
Valerie Thean J
15 February, 26 March 2018

28 May 2018

Valerie Thean J:

Introduction

1 The first plaintiff, International Financial Services (S) Pte Ltd ("IFS"), provides business and management consultancy and financial advisory services. The second plaintiff, Thomas Fewtrell ("Mr Fewtrell") is a director and shareholder of IFS. The first defendant, Old Mutual International Isle of Man Limited Singapore Branch ("OMI"), sells wealth management and life assurance financial products. The second defendant, AAM Advisory Pte Ltd ("AAM"), is wholly owned by Old Mutual International Holdings Limited, an affiliate of OMI. OMI sells its products through various companies that employ advisors to engage clients. Two such companies were IFS and AAM.

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2 The present suit was brought by the plaintiffs against the defendants for breach of confidence and conspiracy by unlawful means. Both heads of claim arose from the use of information obtained by the defendants in the context of three contracts. The first contract was a loan granted by OMI to Mr Fewtrell to secure the working capital of IFS. The other two were guarantees to OMI securing the loan: one from IFS and the other from Mr Fewtrell's wife, Ms Louise Joan Kidd. These contracts did not contain any express term as to confidentiality. The plaintiffs contended the defendants owed them an implied duty of confidentiality,

3 The defendants sought to strike out the action. Their application was first dismissed by an Assistant Registrar on 23 October 2017. The key question posed by the defendants' application was whether, within this contractual context, there could be implied a term that the following information would be protected by the law of confidence: the existence of a creditor-debtor relationship between parties; the default of IFS and Mr Fewtrell on the guarantee and loan; and that OMI were in the process of recovering the loan. I answered this key question in the negative on 26 March, allowing the defendants' appeal with brief oral reasons. The plaintiffs have appealed and I now furnish my grounds of decision.

Background

4 On 28 July 2014, OMI, which is incorporated in the Isle of Man and registered in Singapore, entered into an agreement ("the Loan Agreement") to loan S$1,800,000 to Mr Fewtrell ("the Loan"). Mr Fewtrell is an 81% shareholder and one of two directors in IFS. The other is Mr Christopher Ivinson. The purpose of the Loan was to repay the outstanding capital and interest owing under two earlier loans taken by IFS on 23 October 2013 and 22

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May 2014 which remained unpaid, and to fund IFS' business needs. The Loan was secured by two guarantees, one from IFS ("the Guarantee") dated 25 July 2014, and another from Ms Kidd, dated 2 June 2014. English law governed the Loan and Guarantee, with the English courts having exclusive jurisdiction over any disputes arising.

5 The Loan was not repaid. On 27 September 2016, OMI's English solicitors wrote separately to Mr Fewtrell, IFS and Ms Kidd to demand payment of outstanding sums due and payable under the Loan, and to call on the two guarantees. No response to this letter was received from any of the three parties. Instead, on 10 November 2016, IFS' solicitors wrote to OMI and AAM contending that confidential information relating to the Loan and the Guarantee had been disclosed to employees of IFS; and that OMI and AAM had unlawfully interfered with the contracts between IFS and its employees, causing damage. On 22 November 2016, OMI's English solicitors responded to IFS' solicitors denying the allegations and requesting for particulars and information. IFS did not reply. The plaintiffs commenced this suit thereafter, on 1 February 2017. On 23 March 2017, OMI commenced action in the English courts against Mr Fewtrell, IFS and Ms Kidd to recover the Loan and to call on the two guarantees.

6 On 7 September 2017, after two sets of further and better particulars were served pursuant to requests dated 11 April 2017 and 31 May 2017, the defendants applied to strike out the Statement of Claim under O 18 r 19 of the Rules of Court (Cap 332, R 5, 2014 Rev Ed).[1]

[1] HC/SUM 4103/2017.

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Statement of Claim sought to be struck out

7 On 5 February 2018, after the Assistant Registrar had dismissed the defendant's application and the matter was pending appeal, the plaintiffs filed an application to amend their Statement of Claim. This application was still pending at the time of the hearing before me, although it was withdrawn after I delivered my decision.[2] At the hearing, arguments were premised upon the proposed amended pleading. Nothing turns upon the amendments, save in respect of a point on damages dealt with below, at [51]. Reference to the Statement of Claim in these grounds, save where indicated otherwise, is to the draft amended Statement of Claim proposed by the plaintiffs.

8 Paragraph 12 of the Statement of Claim listed the following information as confidential:

(a) The fact that IFS and International Financial Services (Qatar) LLC ("IFS Qatar") were in need of a loan of S$1,800,000 in order to support their business and working capital requirements.

(b) The fact that Mr Fewtrell had obtained a loan of S$1,800,000 from OMI pursuant to the Loan Agreement in order to provide IFS and/or IFS Qatar with loans to support their business and working capital requirements.

(c) The fact that IFS had entered into the Guarantee to guarantee and indemnify Mr Fewtrell's obligations to OMI under the Loan Agreement.

(d) Mr Fewtrell's financial circumstances and the fact that Mr Fewtrell had defaulted on his obligations under the Loan Agreement as

[2] AR's Minute Sheet dated 23 April 2018.

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he was unable to make repayments in accordance with the Loan Agreement.

(e) The fact that OMI had issued a demand to IFS under the Guarantee, by way of a letter dated 27 September 2016, purporting to notify Mr Fewtrell of events of default and requiring Mr Fewtrell to repay all alleged outstanding sums under the Loan Agreement.

9 The plaintiffs alleged at paragraph 13 of the Statement of Claim that under the Loan Agreement and the Guarantee, they had a reasonable expectation that such information would remain confidential given the nature of the lender-borrower and lender-guarantor relationship between the parties. In the circumstances, OMI was subject to an equitable obligation not to disclose the protected information.

10 Particulars of the breach of duty were listed at paragraph 14 of the Statement of Claim. It was alleged that on 10 August 2016 and again on 27 August 2016, two AAM employees communicated the following to two IFS employees:

(a) OMI had lent monies to Mr Fewtrell;

(b) IFS had guaranteed this loan from OMI to Mr Fewtrell;

(c) Mr Fewtrell and IFS were in default; and

(d) OMI was in the process of recovering the monies owing from Mr Fewtrell and IFS.

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11 The plaintiffs asserted that the information was not in the public domain: apart from some of OMI's employees, they were only known to a select few individuals related to IFS who had been directly involved in the Loan Agreement and/or the Guarantee. Because none of the latter group from IFS was responsible, the AAM employees must have learnt the same from OMI. The plaintiff further pleaded that an 8 September 2016 email sent by OMI's International Sales Director Mr Marcel Bradshaw ("Mr Bradshaw"), in response to an email from Mr Ivinson, amounted to an "acknowledgement" that OMI had revealed the information.

12 Subsequent to the disclosures, employees expressed concern about their future at IFS and IFS' viability. To address these concerns, Mr Fewtrell and Mr Ivinson entered into separate agreements to award three key IFS employees 81,115 phantom shares each in IFS ("the Shares Agreement"). These phantom shares were initially valued at S$2.88 each, and thereafter had a value equal to the book value of IFS' shares. Under the terms of the Shares Agreement, Mr Fewtrell and Mr Ivinson committed to award each of the three individuals further phantom shares (up to a limit of 81,924 phantom shares), depending on their performance at work. The purpose of the Shares Agreement was to incentivise these individuals so that they would stay as employees. The plaintiffs therefore claimed as loss the value of the phantom shares committed to the employees, the diversion of management time to deal with the defendants' actions, the impact on IFS' business, and legal costs.

13 The plaintiffs also claimed, further and/or in the alternative, that OMI and AAM had conspired to injure the plaintiffs by unlawful means. They stated that OMI shared the information with AAM, which then revealed the same to IFS staff, in the hope IFS staff would doubt IFS' financial standing and question

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whether they should remain in IFS. The loss caused to the plaintiffs by this alleged act of conspiracy mirrors the loss stated in the preceding paragraph.

14 In the circumstances, the plaintiffs sought damages, and an injunction restraining OMI from communicating any information relating to the Loan Agreement to any party without the prior written consent of IFS and any information relating to the Guarantee to any party without the prior written consent of Mr Fewtrell.

Parties' arguments

15 The defendants' application was premised principally on their argument that the information said to be confidential (*supra* [8]) was not protected by a duty of confidence. Such facts as pleaded in paragraph 12 of the Statement of Claim were not information of a confidential nature, and a duty of confidentiality could not be implied by contract or in equity in relation to the information pleaded. The plaintiffs also correctly pointed out that the information pleaded to have been shared (*supra* [10]) was not the same as the information sought to be protected. The differences were minor and nothing turned upon the former being a smaller subset of the latter. For clarity, I would mention that within these grounds of decision, the emphasis is on the information which was pleaded as shared with others, being paragraph 14 of the Statement of Claim, for the reason that it forms the focus of any breach of the duty of confidence. If a duty confidence exists, for the plaintiffs to make out their case, it must, at the lowest, cover the shared information, the purported subject matter of the breach of that duty.

16 The second strand of the defendants' case was a general failure of the plaintiffs to plead their case with sufficient precision. In particular, the plaintiffs

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did not specify how OMI had breached any duty of confidence. There was no contention that OMI shared the information with AAM, nor was there any properly pleaded damage. Furthermore, as the claim in unlawful conspiracy hinged on that for breach of confidence, the former claim necessarily failed as well.

17 The plaintiffs' position was that their pleadings were sufficient, maintaining that they were not required to set out the evidence on which they would rely to prove their claims. They submitted that whether the requirements in *Coco v A N Clark (Engineers) Limited* [1969] RPC 41 ("*Coco v Clark*") (in relation to equitable beach of confidence) and *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 ("*Sembcorp Marine*") (for implication of terms in fact) were made out are matters for determination at trial. Furthermore, the plaintiffs pointed out that the class of persons and/or relationships which give rise to a duty of confidentiality are not closed, and there is in any event no authority which states that a duty of confidence cannot exist in the present circumstances.

18 At first instance, the Assistant Registrar agreed with the plaintiffs, holding that the issues in respect of the implied term required adjudication in a trial setting, with full consideration of the broader context of the facts and circumstances. He reiterated, and this point was not disputed on appeal, that the threshold for striking out, in line with *Low Tuck Kwong v Sukamto Sia* [2010] SGHC 159 and *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582, is a high one, with a need to show with clarity and certainty that the claim was plainly unsustainable.

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Issues

19 The following issues, therefore, arose for consideration:

(a) Did the defendants owe the plaintiffs a duty of confidence in respect of the shared information?

(b) If such a duty existed, were the pleadings sufficient in respect of its breach and the damage suffered?

(c) If (a) was answered in the negative, could the claim for the tort of conspiracy be sustained?

20 I answered questions (a) and (c) in the negative on 26 March 2018. Arising from the answer in (a), the claim in breach of confidence was no longer sustainable. Dealing with (b) was not necessary and I did not deal with the issue at the time. For reasons which I explain below, I also answer (b) in the negative. I turn now to elaborate.

Breach of confidence

The information sought to be protected

21 Fundamental to any implied breach of confidence must the confidential nature of the information which forms the subject matter of the breach. Information which does not have the necessary quality of confidence cannot be the subject of an action for breach of confidence: see John Hull, *Commercial Secrecy: Law and Practice* (Sweet & Maxwell, 1998) at para 3.02. Here, the information which was alleged to have been shared in breach of the duty of confidence, *supra* [10] and [15], comprised: (i) the fact and relationship of

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creditor and debtor; (ii) the fact of default and breach; and (iii) the fact of the lender's demand to repay.

Source of the duty of confidence

22 It was common ground that there was no express term of contract which placed a duty of confidence upon the defendants in relation to the information sought to be protected. Neither the Loan Agreement nor the Guarantee contained a confidentiality clause. Any breach of a duty of confidence had to be implied, either by contract or in equity.

Whether implied in law out of parties' relationship

23 A first consideration was whether the duty could be implied into the contracts in law, simply by virtue of their lender-borrower or lender-guarantor relationships. This formed the basis of paragraph 13 of the Statement of Claim.

24 The plaintiffs relied upon s 47 (read with s 40A) of the Banking Act (Cap 19, 2008 Rev Ed), which obliges banks (with limited exceptions) to maintain confidentiality of any information or particulars relating to a loan account. The defendants are not entities within the purview of the Banking Act, however, a point conceded by the plaintiffs; and the need for Parliament to intervene could itself suggest that the common law does not impose upon a lender a duty of confidentiality vis-a-vis his relationship with the borrower. The plaintiffs sought nevertheless to imply such a duty into lender and borrower contracts.

25 In general, the court should be slow to imply a term in law, as it would then apply to all contracts of the same class. Of relevance is Vinodh

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Coomaraswamy J's summary of the relevant principles in *CAA Technologies Pte Ltd v Newcon Builders Pte Ltd* [2016] SGHC 246 ("*CAA Technologies*") at [110], citing *Chua Choon Cheng and others v Allgreen Properties Ltd and another appeal* [2009] 3 SLR(R) 724, as follows:

> (a) Implying a term in law lays down that term as a default provision in all contracts of a definable class, subject of course to contrary agreement.
>
> (b) When implying a term in law, the court is concerned with considerations of fairness and policy in a defined class of contracts rather than with ascertaining objectively and advancing the intentions of the parties in the specific contract under consideration.
>
> (c) A court should ordinarily exercise considerable restraint in holding a particular term to be one implied in law, given that that term will then be an implied term of all contracts of that class.
>
> (d) All terms which are implied in law must be reasonable, but a term will not be implied in law simply because it is reasonable.

26 In *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 ("*Tournier*"), the English Court of Appeal held that it is an implied term of the contract between a banker and his customer that entitled the customer to a qualified duty of confidentiality, where the banker will not divulge to third persons, without the consent of the customer, either the state of the customer's account or any of his transactions with the bank, or any information relating to the customer acquired through the keeping of his account, save in limited exceptional circumstances (pp 472-3). Banks LJ nevertheless considered the

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confidentiality between the banker and his customer to be acquired through the *keeping of the latter's account*. In *Bodnar v Townsend* [2003] TASSC 148 ("*Bodnar*") the Supreme Court of Tasmania extended this duty to credit unions because they performed a similar function to banks where deposits were taken. Thus, Blow J held that the contract between the credit union and its depositor/customer carried a like implied term to that set out in *Tournier*.

27 A court "will recognise and enforce confidentiality only to the extent that it is reasonable to do so": see *AAY and others v AAZ* [2011] 1 SLR 1093, at [57]. The onus was on the plaintiffs to show that it would be reasonable to imply a duty of confidentiality between lender and borrower, and neither *Tournier* nor *Bodnar* assisted in this regard. Where an entity is tasked as an agent with keeping deposits, that duty creates a fiduciary relationship in the context of the management of the account. To say, in that context, that financial information relating to the account is confidential, is entirely reasonable. The relationship is wholly different between an entity lending money and its customer. It is also important to bear in mind that the matters sought to be kept confidential here are not matters of financial information revealed to secure the loan, but the fact of the debtor-lender relationship, the debtors' default in payment and the lender's determination to take further action. In my view, it would not be reasonable to regard this information as confidential, for two reasons. First, the risk of such information becoming public knowledge is a risk which borrowers in the market commonly bear, and one which incentivises commercial actors to borrow and spend prudently. Secondly, non-payment raises an expectation that a creditor would exercise his rights through any legitimate commercial means. To do so, disclosure must inevitably follow, first with advice from professionals, and then later, to the world at large, in the pursuit of any remedy.

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The fact of the relationship and the fact of default are commercial facts which cannot be said to be of a confidential nature unless expressly provided for.

28 Support for this conclusion may be found in an established line of American authority. In *Graney Development Corp v Taksen* 400 NYS2d 717 ("*Graney*"), a bank customer sued the bank for statements made by the bank to officers of another bank in relation to a loan. The Supreme Court of Monroe County distinguished between instances where the bank dealt with a customer in relation to deposits, received in its capacity as agent for the depositor, and instances where the relationship between the bank and the plaintiff was solely that of creditor and debtor. The court there held (at 720) that where the relation between the bank and the debtor was only that of creditor and debtor, the information which the bank obtains, as a party to a loan agreement, cannot be expected to be kept confidential. Furthermore, the court held that "[o]ne who defaults on his debts owed to a merchant cannot expect that his default will be kept a secret."

29 *Graney* was cited with approval by the Appellate Division of the New York Supreme Court in *Norkin v Hoey* 586 NYS2d 926, in which the court held at 931: "[w]e must agree with the court in *Graney*, that whatever expectations of confidentiality may inhere in the traditional relationship between bank and depositor, such expectations are wholly lacking in the context of the debtor-creditor loan relationship". In the same vein are the following decisions: *Boccardo v Citibank NA* 579 NYS2d 836 at 838 (Supreme Court, New York County, New York), *Hopewell Enterprises Inc v Trustmark National Bank* 680 So2d 812 at 817—818 (Supreme Court of Mississippi) and *Schoneweis v Dando* 435 NW2d 666 at 673 (Supreme Court of Nebraska). Although these decisions

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are not binding on me, they nonetheless suggest that there is no reasonable expectation that such information would be confidential.

30 The plaintiffs cited, in response, the decision of the Federal Court of Australia in *Winterton Constructions Pty Ltd v Hambros Australia Ltd* (1992) 111 ALR 649 ("*Winterton*"), where Hill J stated at 667:

> Even in the case of a financier not being a bank, a borrower is entitled to expect (even if it is not an implied term of the contractual arrangement) that his financier will keep confidential matters concerning the borrower's financial affairs …

That statement, however, must be read in context. In that case, the respondent, a merchant bank, and a property developer formalised a facility which enabled the developer to draw funds to finance a building development. The developer then contracted with the applicant, a builder, to erect the proposed building. However, the developer's position deteriorated and the respondent refused to release further funds to the developer. The applicant submitted that the respondent encouraged the developer to continue to allow the applicant to proceed with the building despite the respondent's knowledge that the developer was insolvent. The question before the court was whether the respondent had an obligation to inform the applicant of the developer's financial affairs, and it was in that context that the above comment was made. Immediately after the above extract, Hill J further held:

> … To impose upon a lender such an obligation to communicate to a person whom it knows to be under contractual obligations with the borrower, would impose an intolerable burden upon the financier and could be most damaging to its borrowers. This is so whether or not the financier itself might tend to benefit from the failure to disclose. It is hard to see, for example, how the financier would be protected from an action of defamation should it turn out that the information conveyed by it to a contracting party turned out to be in some way incorrect. The

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> communication of that information could further work, in many cases, quite contrary to the interests of the financier.

31 It is clear that the court was not dealing with secrecy between lenders and borrowers in general, but whether financiers could be expected to bear the risk of disclosing damaging information about its borrowers to third parties. The plaintiffs' reliance on *Winterton* was therefore of no assistance to them.

Whether implied in fact within the terms of contract

32 Having decided that such a duty could not be imposed by the relationship, the query which followed was whether it could be implied upon the specific terms of the parties' contracts, specifically, the Loan Agreement and the Guarantee.

33 The Court of Appeal in *Sembcorp Marine* (at [94]) stated that there are at least three ways in which a gap in a contract could arise: (a) the parties did not contemplate the issue at all; (b) the parties contemplated the issue but chose not to provide for it because they mistakenly thought that the express terms of the contract adequately addressed it; or (c) the parties contemplated the issue but chose not to provide any term for it because they could not agree on a solution. The court stated at [95] that the only instance where it is appropriate for the court to consider if it will imply a term into a contract is where the parties did not contemplate the issue at all, and so left a gap.

34 In my view, disclosure of the matters pleaded as protected must have been contemplated. When entering into any contract of loan or guarantee, the fact of default, and the consequences thereafter, must be significant points that lender and creditor would ordinarily consider. There could not therefore be any unintended gap in omitting a provision on confidentiality.

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35 A consideration of the documents suggests that parties contemplated and provided for the scenario at hand. This is because an implied term such as that suggested by the plaintiffs would contradict express terms of the contracts. In particular, Clause 11 of the Guarantee and Clause 19 of the Loan Agreement allow disposal and assignation of lender rights, which would necessitate disclosure of the Loan and its default if any. At the same time, in advancing an implied term that did not allow such disclosure and in praying for an injunction which prohibited any disclosure without their consent, the plaintiffs must have taken the view in the Statement of Claim that any duty of confidence would be absolute: the defendants would not be able to divulge the information to anyone.

36 The plaintiffs attempted to argue at the hearing that there was no contradiction: an implied confidentiality clause could be interpreted such that OMI was permitted to share the information with any party to whom it transferred or assigned its rights to, and that party would then similarly be bound by the obligation of confidentiality. In other words, the plaintiffs recognised that the only way to read these express terms harmoniously with the one sought to be implied is to limit disclosure of such information to parties to whom the lender or guarantor wishes to assign to or to whom it wishes to dispose of its interest.

37 Nevertheless, such a limitation upon an express term may not be implied. *Irish Bank Resolution Corporation Ltd v Camden Market Holdings Corp & Ors* [2017] EWCA Civ 7 is a case on point. Camden Market Holdings Corp ("Camden") claimed a breach of contract against the Irish Bank Resolution Corporation Ltd ("IBRC") on the basis of an implied term in a facilities agreement for the development of properties at Camden Market ("the Camden

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Properties"). This facilities agreement expressly permitted IBRC to assign or transfer any of its rights under the agreement to another bank. There was no requirement on IBRC to obtain the consent of Camden for such disclosure of information. The liquidators began marketing the Camden loans as part of a package of loans containing distressed debt. Camden was concerned that prospective buyers of the Camden Properties would seek to obtain the properties at a discounted price by acquiring and enforcing the debt and contended that there was an implied term not to hinder Camden's ability to achieve the best price for the Camden Properties. The English Court of Appeal held (at [40]) that such a term could not be implied because it was a significant restriction of IBRC's power under the agreement and would "cut across IBRC's entitlement to provide information and would do so in a way which is redolent of uncertainty". Applying *Reda v Flag Ltd* [2002] UKPC 38 at [45], the court stated at [42] that an express power "cannot, as a matter of law, be circumscribed by an implied qualification."

38 I would add that, even if I were not correct that there is no gap in the contemplation of the parties, the Court of Appeal in *Sembcorp Marine* at [98] and [101] held that if a term is to be implied in a contract, three requirements are necessary: (i) parties did not contemplate the gap; (ii) the term is necessary for business efficacy; and (iii) the specific term to be implied must be so clear that parties would consider it plain and obvious. A term which is unclear would necessarily fail the officious bystander test. The implied term sought by the plaintiffs, especially on the plaintiff's approach of subjecting it to piecemeal exceptions, would neither be necessary for business efficacy nor would it be a plain and obvious term.

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Whether implied in equity

39 A last issue relates to whether there is any other manner to imply a duty in equity. It was common ground that the elements necessary are (*X Pte Ltd v CDE* [1992] 2 SLR(R) 575 at [27], citing *Coco v Clark*):

(a) the information was of a confidential nature;

(b) the information was communicated in circumstances importing an obligation of confidence; and

(c) there was an unauthorised use of the information.

40 The first two elements identified in *Coco v Clark* do not appear to be made out. First, I have decided that the information is not of a confidential nature. Secondly, there also appears to be no circumstances importing an obligation of confidence. Parties in this case have a commercial relationship governed by a contract. Paragraph 13 of the Statement of Claim appears to base the duty in equity upon the relationship of lender-borrower and lender-guarantor:

> Further and/or alternatively, IFS and Mr Fewtrell had a reasonable expectation that such information would remain confidential given the nature of the lender-borrower relationship between [OMI] and Mr Fewtrell and the lender-guarantor relationship between [OMI] and IFS. [OMI] was therefore subject to an equitable obligation not to disclose the above confidential information.

41 In my view, this did not make out a case for a duty of confidence to arise in equity.

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Breach of duty

42 I have explained that I was of the view that there was no duty of confidence in relation to the information said to be the subject matter of a breach of confidence. I deal here with the defendants' alternative argument regarding the pleading on the alleged breach of duty, in the event that this becomes relevant.

43 Paragraph 14 pleads the breach of the duty of confidence through the following steps:

> (a) AAM's Mr Matthias Hedstrom and AAM's Mr Kelso Beggs breached the duty of confidence by sharing the information sought to be protected with two employees of IFS. Mr Beggs also sought to meet with a third IFS employee: sub-paragraphs (a), (b) and (e).
>
> (b) Only some of OMI's employees and some individuals related to IFS knew about the information sought to be protected: sub-paragraph (c).
>
> (c) None of the individuals related to IFS revealed the information. Therefore, OMI's employees must have revealed the information to AAM: sub-para (d).

44 There are two substantial gaps in the logical flow set out above. First, there is no identification of OMI individuals responsible for sharing the information. Secondly, there is no identification of the communication between OMI and AAM employees which caused the breach.

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45 Sub-paras (f)–(h) of paragraph 14 attempt to plug the lacuna by contending that an email sent from Mr Bradshaw dated 8 September 2016 amounted to acknowledgment that OMI had disclosed the information:

> [OMI] had a meeting with all internal stakeholders to stress the importance of Chinese Walls in Singapore and stressed the sensitivity of the relationship with [OMI 's] IFAs in Singapore in context of [OMI 's] ownership of [AAM].
>
> I have asked Willem Van Rooy, who is based in Singapore to discuss the seriousness of this matter with [AAM's] management.
>
> It is important that we keep the loan issue and this issue as separate issues…

46 This extract at sub-para (g), however, is prefaced by a paragraph to the following effect in the same email: [3]

> I can assure you that there is no orchestration from OMI's side. Having a multi-channel distribution business in Singapore is not only important to us, it is vital for our commercial success in Singapore. There is no benefit for us in the financial demise of IFS. We will lose one of our biggest supporters. We are also aware that any action to hurt IFS will put our relationships with our other independent advisors at risk. We all know how small the financial expat community is in Singapore.

Rather than being an admission, Mr Bradshaw's email was a denial and the facts mentioned in the later part of the email set out in the extract at paragraph 14(g) of the Statement of Claim were a reiteration of that denial.

47 Subsequently, the defendants requested for further and better particulars on how the information was communicated by OMI to AAM, including the identities of the defendants' employees who were involved in the alleged wrongdoing. The plaintiffs were unable to provide these details, replying only that:[4]

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[3] Rebecca Sowerby's affidavit dated 7 September 2017 at pp 82–83.

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> This is a matter that is within the [d]efendants' knowledge, and paragraph 14 and the sub paragraphs thereunder are the best particulars the [p]laintiffs are able to provide at this stage. The [p]laintiffs reserve the right to furnish further particulars, *pending discovery and/or interrogatories*.
>
> [emphasis added]

At the hearing, it was submitted that discovery of internal OMI and AAM emails relating to the Loan and Guarantee would be sought.

48 Pleadings must be sufficiently particularised so as "to inform the other side of the nature of the case that they have to meet as distinguished from the mode in which that case is to be proved", "to prevent the other side from being taken by surprise at the trial", and "to enable the other side to know with what evidence they ought to be prepared and to prepare for trial": Foo Chee Hock (gen ed), *Singapore Civil Procedure 2018* (Sweet & Maxwell, 2018) at para 18/12/2. The lack of particulars prejudices the defendants in the preparation of their defence. In this vein, the decision of Coomaraswamy J in *Chandra Winata Lie v Citibank NA* [2015] 1 SLR 875 ("*Chandra Winata Lie*") is instructive. The judge began by noting at [34] that a plaintiff has "the burden of pleading, particularising and proving every essential element of each cause of action which he chooses to pursue against the defendant in that suit". It would be an *abuse of process* for a plaintiff to commence suit when he is unable to particularise it, even if the plaintiff's inability arises because the essential elements are *knowable but were never within this knowledge*: *Chandra Winata Lie* at [45]. These rules exist for good reason:

> 78 First, the rule that a plaintiff must be in a position, at the time he commences suit, to plead, particularise and point to proof of his claim from his own knowledge *deters speculative*

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4 Particulars served by the plaintiff pursuant to the defendants' request dated 11 April 2017 at para 9.

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> *litigation and supresses litigiousness. A lawsuit is not a boundless and roving commission of inquiry into suspicions or broad allegations about a defendant's overall conduct.* It is a focused forensic process whose purpose it is to determine whether a plaintiff has established on the balance of probabilities a reasonably specific claim of a reasonably specific breach of duty which he asserts against a defendant…
>
> 79 Second, *the effect of these rules of pleading prevents a plaintiff from circumventing the allocation of the burden of proof* ***by pleading allegations which cannot be falsified***… These rules of pleading require the plaintiff to assert in his pleadings from the very outset of his suit the essential facts on which he relies. The court will then, at trial, test those assertions of fact one by one against the evidence and determine if the plaintiff has in fact discharged his burden of proof on each of them. The court cannot do that unless the plaintiff's assertions are falsifiable.
>
> [emphasis in italics and bold italics added]

49 Applying these principles, it is clear that the plaintiffs' pleadings were defective. First, the plaintiffs' claim was so lacking that critical parts of it could not be falsified. In particular, it would be extremely difficult for the defendants to rebut the assertions summarised at [43] above, with its gaps in logic and information listed at [44]. OMI would be required to investigate the actions of all of its employees at the material time in order to prove a negative, that none of them shared the information with AAM. Conversely if any lead came up they would need to trace each one to ascertain that there was no link to the two AAM employees alleged to have shared the information with IFS employees. The defendants were therefore severely prejudiced by the vague Statement of Claim.

50 Second, the plaintiffs' submission that their claim ought not to be struck out because more particulars would be provided during discovery and through interrogatories is unsustainable, having regard to Coomaraswamy J's comments at [41] of *Chandra Winata Lie*, that it would be "wholly impermissible" for a

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plaintiff to "convert mere suspicion into conclusion" by "raiding the defendant's cupboards for evidence in discovery". On a related note, in *Toyota Tsusho (Malaysia) Sdn Bhd v United Overseas Bank Ltd & another* [2016] SGHC 74, Lai Siu Chiu SJ cited with approval academic commentary stating that "[p]re-action discovery is for the plaintiff who is unable to plead a case as he does not know whether he has a viable claim and requires the discovery to ascertain the gaps in his case." In any event, as Cooke J stated in *Nomura International PLC v Granada Group Limited* [2007] EWHC 642 at [37], "a claimant has no business to issue a Claim Form [*ie*, a Statement of Claim] at all 'in the hope that something may turn up'".

Damage suffered

51 The defendants moreover submitted that the plaintiffs had not properly pleaded their loss. Paragraphs 18–20 of the Statement of Claim detail how, after certain IFS employees found out about IFS' loan and its default, Mr Fewtrell and Mr Ivinson entered into the Shares Agreement to award three IFS employees phantom shares in IFS to address their concerns over IFS' viability. Through discovery of the document, the defendants realised that these three IFS employees were not party to the agreement stipulated. The Statement of Claim was not accurate prior to the 5 February amendments, as agreements *with* these three employees were pleaded. After the defendants raised the issue, the 5 February 2018 draft amendments (*supra* [7]) corrected these paragraphs to accurately reflect that Mr Fewtrell and Mr Ivinson had entered into these agreements with each other to incentivise the three employees. The plaintiffs were thereafter able to submit at the hearing that s 2 of the Contracts (Rights of Third Parties) Act (Cap 53B, 2002 Rev Ed) allows third party beneficiaries to enforce contracts to which they are not party.

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Conspiracy by unlawful means

52 The second limb of the Statement of Claim rests upon conspiracy by OMI and AAM to injure the plaintiffs by unlawful means.

53 The elements of this tort, as stated by the Court of Appeal in *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR 860 ("*EFT Holdings*") at [112], are:

(a) there was a combination of two or more persons to do certain acts;

(b) the alleged conspirators had the intention to cause damage or injury to the plaintiff by those acts;

(c) the acts were unlawful;

(d) the acts were performed in furtherance of the agreement; and

(e) the plaintiff suffered loss as a result of the conspiracy.

54 Regarding the combination of two or more persons, the defects in paragraph 14 of the Statement of Claim pointed out above apply with equal force to the conspiracy claim. There is no identification of OMI individuals who would be members of the conspiracy, nor of any communication between such individuals and the AAM employees named as part of their conspiracy.

55 More fundamentally, the third requirement is of an unlawful act. This refers to an actionable civil wrong: *EFT Holdings* at [91]–[93]. Paragraph 24 of the statement of claim premises the unlawful act upon the purported breach of confidence. It follows from my findings above that this limb would fail. Counsel

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for the plaintiffs suggested at the hearing that divulging commercially sensitive information would be sufficient. My findings above suggest that the fact of a loan, the debtor's default and the creditor's enforcement action are not commercially sensitive. The plaintiffs also did not articulate what information that was not confidential was still commercially sensitive, and further, how such commercially sensitive information, not being confidential, could ground any unlawful act.

56 In the circumstances, this head of claim was not sustainable either.

Conclusion

57 In the result, I allowed the appeal and ordered that the plaintiffs' claim be struck out. Costs of the appeal and the hearing below were awarded to the defendants and fixed at $18,000, including disbursements.

Valerie Thean
Judge

Siraj Omar, Premalatha Silwaraju (instructed), Nicolas Tang Tze Hao and Chloe Chong Wei Shan (Farallon Law Corporation) for the plaintiffs;
Moiz Haider Sithawalla and Derek Low Eng Ho (Tan Rajah & Cheah) for the defendants.

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