IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 203

Originating Summons No 533 of 2017 (Summons No 1087 of 2019)

Between

ED&F Man Capital Markets Ltd

… *Plaintiff*

And

Straits (Singapore) Pte Ltd

… *Defendant*

GROUNDS OF DECISION

[Civil Procedure] — [Injunctions]
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Introduction

1 In this application, the defendant sought both an injunction against the use of documents and information disclosed in Originating Summons No 533 of 2017 ("OS 533") as well as an anti-suit injunction. The injunction against the use of the documents and information was granted as the plaintiff's use of these in English proceedings would be an abuse of process and breached the implied undertaking that was the *quid pro quo* for the order for disclosure. The anti-suit injunction was refused, even after further arguments were made.

2 The plaintiff appeals against my decision enjoining it from using in English proceedings documents and information disclosed by the defendants in Singapore. The defendant appeals in turn against my decision refusing an anti-suit injunction against the plaintiff.

Facts

3 The plaintiff is a company registered in England. It is a global brokerage and financial services business with headquarters in England and offices in Dubai, Hong Kong, Switzerland and the US.[1] It claimed that it was the victim of fraud committed by two Hong Kong companies, Come Harvest Holdings Ltd and Mega Wealth International Trading Ltd ("the Hong Kong Companies"). That fraud was supposed to have involved forged warehouse receipts issued by a Singapore warehouse company and delivered to the plaintiff under nickel repurchase agreements entered into between the plaintiff and the Hong Kong Companies. The warehouse receipts were endorsed by the defendant to the Hong Kong Companies.[2]

4 The plaintiff initially sought information and documents from the defendant on a consensual basis, but eventually made an application in OS 533 for pre-action discovery and interrogatories against the defendant pursuant to O 24 r 6 and O 26A r 1 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC").[3]

5 In respect of that application, Ms He Yuzhen Sherraine ("He"), the Senior Vice President of the defendant, filed an affidavit affirmed on 27 June 2017 ("He's 1st affidavit") deposing information and exhibiting documents concerning the dealings the defendant had with the Hong Kong Companies. A number of other proceedings were also commenced. Eventually, the application

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1 Nicholas James Patrick Riley's 2nd affidavit affirmed on 24 May 2017 ("Riley's 2nd affidavit") at paras 4, 5.

2 Plaintiff's submissions dated 23 May 2019 ("PS") at paras 6–10; see Riley's 2nd affidavit at paras 9–12, 17–19.

3 PS at paras 12–14; Riley's 2nd affidavit at paras 27–36.

for pre-action disclosure in OS 533 was dismissed by the Assistant Registrar. The plaintiff's appeal against the decision in Registrar's Appeal No 215 of 2018 ("RA 215") was withdrawn.

6 In the meantime, the plaintiff commenced an action in England in December 2017 against the Hong Kong Companies, on the basis of English governing law and an exclusive jurisdiction clause in their contracts.[4] The defence filed by the Hong Kong Companies on 28 June 2018 alleged that they believed that the warehouse receipts which they received from the defendant were genuine, and contradicted the allegations in He's 1st affidavit that only scanned copies of the warehouse receipts had been sent to the Hong Kong Companies.[5] In September 2018, the plaintiff joined various additional parties, including the defendant, to the English action, and brought claims of unlawful means conspiracy, liability to account as constructive trustee and knowing receipt against the defendant.[6]

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4 Wang Yufei's affidavit sworn on 1 March 2019 ("Wang's affidavit") at para 10 and pp 12–38.

5 Wang's affidavit at pp 345–364; para 13 at p 351; *cf* He's 1st affidavit at paras 26, 31.

6 Wang's affidavit at para 13 and pp 125, 155, 162.

The parties' cases

The defendant's case

7 The defendant applied for an injunction restraining the plaintiff from using the documents and information that it disclosed in OS 533 in any foreign proceedings commenced by the plaintiff against the defendant. It argued that the plaintiff had made two representations by its commencement and pursuit of the proceedings in OS 533: first, that it would commence substantive proceedings in this regard against the defendant in Singapore; second, that the defendant's disclosures in OS 533 would only be used in Singapore proceedings.[7]

8 In the alternative, the defendant submitted that its disclosures fell within the principle articulated in *Riddick v Thames Board Mills Ltd* [1977] QB 881 ("*Riddick*"), which protects disclosures of documents and information made under compulsion of court process from collateral use.[8]

9 The defendant also applied for interim and permanent anti-suit injunctions against the plaintiff to restrain it from continuing with the English proceedings against the defendant. The defendant submitted that the requirements for the grant of an anti-suit injunction were met. Singapore was the natural forum for the dispute between the parties.[9] The plaintiff's conduct in OS 533 had also misled the defendant and the court that the plaintiff intended to commence substantive proceedings in Singapore, and its conduct was

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7 Defendant's submissions dated 24 May 2019 ("DS") at paras 36, 38.

8 DS at paras 39–40.

9 DS at para 86.

vexatious and oppressive in its totality.[10] Finally, there had also been no undue delay on the defendant's part that precluded the grant of anti-suit relief.[11]

The plaintiff's case

10 The plaintiff submitted that the defendant had not shown that Singapore was the more appropriate forum[12] and had not addressed the significant factors connecting the parties' dispute to England, including the exclusive jurisdiction clauses in the plaintiff's contracts with the Hong Kong Companies.[13] Furthermore, its conduct had not been vexatious, oppressive or an abuse of the Singapore court process. It had not commenced OS 533 for a collateral purpose; it genuinely sought to investigate the circumstances of the fraud and maintained the provisional view that proceedings might be commenced in Singapore.[14] As regards any abuse of process arguments, it was the defendant that had unduly delayed seeking an anti-suit injunction.[15]

11 The plaintiff rejected the application of the *Riddick* principle in this case. The *Riddick* principle applies only to documents disclosed under compulsion, but the documents in question had been disclosed voluntarily by the defendant.[16] The *Riddick* principle also does not apply to documents used in open court, and the disclosed documents here had been used in open court and formed an

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10 DS at paras 92–101.

11 DS at paras 103, 104.

12 PS at paras 54, 55.

13 PS at para 56.

14 PS at paras 59–60.

15 PS at para 85.

16 PS at para 107.

integral part of the Assistant Registrar's decision in OS 533.[17]

My decision

12 The injunction against the use of information and documents disclosed by the defendant in OS 533 was granted to prevent their use in proceedings outside Singapore. Any orders that might have been made in the OS 533 application for pre-action discovery and interrogatories (both constituting what I will refer to as "pre-action disclosure") and the disclosures made in those proceedings were meant for use only in Singapore proceedings. This conclusion applied both on a statutory analysis and under the *Riddick* principle. While an exception to the *Riddick* principle would arise where documents were disclosed voluntarily, I did not find that that was the case here: the "voluntary" disclosure that the plaintiff relied upon referred to the defendant's disclosure of documents and information in its attempt to resist pre-action disclosure. That could not amount to voluntary use notwithstanding the defendant's own statements that it had volunteered these documents;[18] such statements must be taken against the context of the OS 533 application.

13 The plaintiff also invoked the open court use of the documents, citing the open justice principle articulated in *Foo Jong Long Dennis v Ang Yee Lim and another* [2015] 2 SLR 578 ("*Dennis Foo*"). But that case needs to be read in its factual context: the documents in *Dennis Foo* had been used in a prior trial, and given such use and consideration of the documents at trial, it is not surprising that any implied undertaking was considered spent. Different considerations would apply in the present case since the documents and

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17 PS at para 117.

18 See PS at para 106.

information were referred to and considered only in the very application for pre-action disclosure, and expressed to be disclosed with express reservations.

14 The anti-suit injunction was declined as I was not persuaded by the defendant that Singapore was clearly the natural forum for the proceedings. There were factors relied upon by the defendant which pointed to Singapore being the natural forum; but other factors pointed instead to England. It suffices to note that given this close balance, the defendant did not make out the first requirement for the issuing of an anti-suit injunction. None of the factors relied upon by the defendant were sufficient in any event to establish vexation and oppression of the degree that would justify the issuing of an anti-suit injunction. The mischief or conduct raised could be better and specifically targeted by the injunction against the use of the documents and information disclosed.

Issue 1: Injunction against the use of the documents

15 An injunction is a form of relief granted to protect the legal or equitable rights of the claimant or plaintiff: it is a discretionary remedy. While injunctions are often issued in specific circumstances, there is no closed list of the types of injunctions that can be ordered as long as the plaintiff can make out a right that is infringed, or a cause of action that is to be protected.

Law on the use of documents given in discovery

16 The defendant argued that the Singapore court only has jurisdiction to order pre-action disclosure in aid of Singapore proceedings: *Dorsey James Michael v World Sport Group Pte Ltd* [2014] 2 SLR 208 ("*Dorsey*") at [68] and [69]. The defendant argued that it follows that any application for pre-action disclosure for any purpose other than to aid proceedings in Singapore would be without basis, and would be liable to be dismissed. Any applicant seeking pre-

action disclosure should be regarded as representing or undertaking to the court and the respondent that any substantive proceedings following from such disclosure would be commenced in Singapore, and that it would only use the documents obtained in such proceedings. At the very least, the applicant should be taken to have represented that it had a genuine provisional intention to commence proceedings in Singapore.[19] The plaintiff had previously given indications that it would indeed pursue proceedings in Singapore. Had it been otherwise, its application would have been dismissed out of hand.[20]

17 The plaintiff responded that there is no undertaking in an application for pre-action disclosure that proceedings would be commenced in Singapore. All that is required is that the applicant adduce "credible evidence of a Singapore nexus": see *Dorsey* at [69]; *Intas Pharmaceuticals Ltd v DealStreetAsia Pte Ltd* [2017] 4 SLR 684 at [52].[21]

18 I accepted the parties' argument that pre-action disclosure in Singapore is governed by statute, namely, the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA").[22] I also accepted the defendant's argument that as the language of the statute points to the courts being empowered to order pre-action disclosure for the purpose of Singapore proceedings, any use outside that purpose would amount to a disregard of a statutory objective and for that reason would amount to an abuse of the court process.[23] An injunction should be

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19 DS at paras 34–36.

20 DS at paras 37–38.

21 PS at paras 78–81.

22 See PS at para 77; DS at para 34.

23 See DS at para 35.

granted to the defendant in these circumstances to prevent such abuse from continuing.

19 For reference, I reproduce the relevant provisions below. Section 18(2) of the SCJA provides that the High Court shall have the powers set out in the First Schedule. The Singapore High Court's jurisdiction to order pre-action discovery and interrogatories is set out at para 12 of the First Schedule:

> **Discovery and interrogatories**
>
> 12. Power before or after any proceedings are commenced to order discovery of facts or documents by any party to the proceedings or by any other person in such manner as may be prescribed by Rules of Court or Family Justice Rules.

20 Within the SCJA, the reference to "proceedings" must, in the absence of any other words, be taken to refer to proceedings in Singapore: see *Dorsey* at [69]. This is supported by the language of O 24 r 6(3)(*a*) and O 26A r 1(3)(*a*) of the ROC, which require that the originating summons for pre-action discovery and interrogatories must state:

> … the grounds for the application, the material facts pertaining to the intended proceedings and whether the person against whom the order is sought is likely to be party to subsequent proceedings in Court; …

The ROC does not define "court" under O 1 r 4. However, O 1 r 3 provides that the Interpretation Act (Cap 1, 2002 Rev Ed) shall apply for the interpretation of the ROC, and s 2 of the said Act defines "court" to refer to "any court of competent jurisdiction in Singapore". I also observed that the Court of Appeal held in *Dorsey* at [69] that the courts' powers under para 12 of the First Schedule to the SCJA do not extend to the ordering of pre-action interrogatories in aid of proceedings beyond Singapore. The same principles would underlie applications for pre-action discovery: see *Dorsey* at [25].

21 Finally, I did not accept the plaintiff's argument that accepting this position would mean that an applicant for pre-action disclosure is required to commit to commencing proceedings only in Singapore and nowhere else. The plaintiff argued against such a requirement on the basis that an applicant could not have known at the point of the pre-action disclosure application where proceedings would be commenced.[24] But the statutory framework imposes no such positive obligation and requires no such thing: what it does require is that documents or information disclosed pre-action would only be used in Singapore proceedings. It remains open to the claimant to commence proceedings elsewhere, as long as the claimant does so without the use of the documents disclosed in Singapore pre-action proceedings. This limitation is reasonable: an intrusive, compulsive process is used to require disclosure or to summon a respondent to appear in court at the pre-action stage. The legislature has chosen to temper the compulsion used to obtain these materials with their limited and restricted use.

The principle in Riddick

22 An alternative basis for the restriction on the plaintiff's use of the documents relied on the *Riddick* principle. A product of the common law, the *Riddick* principle constrains the use of documents given on discovery to temper the compulsive effect of an order for discovery. It has been referred to in a number of local authorities: *Hong Lam Marine Pte Ltd and another v Koh Chye Heng* [1998] 3 SLR(R) 526 ("*Hong Lam Marine*") at [14]; *Pertamina Energy Trading Ltd v Karaha Bodas Co LLC and others* [2007] 2 SLR(R) 518 at [36]; *BNX v BOE and another appeal* [2018] 2 SLR 215 ("*BNX*") at [64].

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[24] See PS at paras 81–82.

23 In *Riddick*, the English Court of Appeal held that the plaintiff could not use an internal memorandum disclosed in an earlier suit as the basis for a subsequent action of defamation. Lord Denning MR explained at 895–896:

> The reason for compelling discovery of documents in this way lies in the public interest in discovering the truth so that justice may be done between the parties. That public interest is to be put into the scales against the public interest in preserving privacy and preserving confidential information. …
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> … On the one hand discovery has been had in the first action. It enabled that action to be disposed of. The public interest there has served its purpose. Should it go further so as to enable the memorandum … to be used for this libel action? I think not. The memorandum was obtained by compulsion. Compulsion is an invasion of a private right to keep one's documents to oneself. The public interest in privacy and confidence demands that this compulsion should not be pressed further than the course of justice requires. The courts should, therefore, not allow the other party — or anyone else — to use the documents for any ulterior or alien purpose. Otherwise the courts themselves would be doing injustice. … In order to encourage openness and fairness, the public interest requires that documents disclosed on discovery are not to be made use of except for the purposes of the action in which they are disclosed. … The principle was stated in … Bray J, *Bray on Discovery*, 1st ed (1885), p 238:
>
> > 'A party who has obtained access to his adversary's documents under an order for production has no right to make their contents public or communicate them to any stranger to the suit: … nor to use them or copies of them for any collateral object … If necessary an undertaking to that effect will be made a condition of granting an order: …'
>
> Since that time such an undertaking has always been implied, … A party who seeks discovery of documents gets it on condition that he will make use of them only for the purposes of that action, and no other purpose. …

24 In *BNX* at [64], the Court of Appeal cited *Beckkett Pte Ltd v Deutsche Bank AG* [2005] 3 SLR(R) 555 at [14] to explain the *Riddick* principle in the following terms:

> … where a party to litigation has been ordered to give discovery, the discovering party may not use the discovered documents, and the information obtained therefrom, for a purpose other than pursuing the action in respect of which discovery is obtained. Public interest requires that in relation to an action, there should be full and complete disclosure in the interest of justice. On the other hand, it cannot be denied that discovery on compulsion is an intrusion of privacy. The *Riddick* principle seeks to strike a balance between these two interests. …

25 The *Riddick* principle has been described as an implied undertaking not to use documents obtained on compulsion of court process for other purposes which is owed to the court: see *Hong Lam Marine* at [19] and [21]; *BNX* at [65]. I am not sure that the reasoning put forward as justifying the *Riddick* principle, namely, that disclosure is made in return for an undertaking not to use the documents for an ulterior purpose, reflects the actual basis for the restriction on the use of the documents. Given that the *Riddick* principle is meant to balance between the public interest in "discovering the truth so that justice may be done between the parties" and the public interest in protecting the privacy and confidentiality of the respondent (see *Riddick* at 895, reproduced above at [23]), it may be better to confront potential abuses of the court process directly and to characterise the restriction as imposed by the court to protect against the misuse of the process of discovery for purposes other than the fair and efficient disposal of the matter before the court. This avoids the artificiality of having to characterise the parties as having given an implied undertaking through their mere participation in the court process. Hobhouse J similarly observed in *Prudential Assurance Co Ltd v Fountain Page Ltd and another* [1991] 1 WLR 756 ("*Prudential Assurance*") at 764:

> … The expression of the obligation as an implied undertaking given to the court derives from the historical origin of the principle. It is now in reality a legal obligation which arises by operation of law by virtue of the circumstances under which the relevant person obtained the documents or information. …

Nevertheless, Hobhouse J noted that treating the obligation as having the character of an implied undertaking served a useful purpose (at 764–765):

> … [I]t confirms that the obligation is one which is owed to the court for the benefit of the parties, not one which is owed simply to the parties; likewise, it is an obligation which the court has the right to control and can modify or release a party from. It is an obligation which arises from legal process … Treating the duty as one which is owed to the court and breach of which is contempt of court also involves the principle that such contempts of court can be restrained by injunction …

Despite my reservations, I accept that our courts have endorsed the formulation of the *Riddick* principle as an undertaking imposed by court (see, *eg*, *Microsoft Corp and others v SM Summit Holdings Ltd and another and other appeals* [1999] 3 SLR(R) 465 at [23]–[24]), and I utilise the same formulation in my grounds of decision.

26 As regards the scope of the *Riddick* principle, it has no application to documents voluntarily disclosed in the course of legal proceedings: *BNX* at [66]. It also no longer applies once a document has been used in open court: *Dennis Foo* at [54]. I will discuss the application of these two exceptions to the *Riddick* principle in turn, first addressing whether the defendant's disclosures in OS 533 were voluntary, and next if the disclosed documents and information were used in open court.

The exception for voluntary disclosures

27 The Court of Appeal in *Hong Lam Marine* explained at [21] that the *Riddick* principle applies only to documents disclosed under compulsion of court process, "whether by virtue of the enforcement of the rules of the court or by a specific court order". The basis of the voluntariness exception was

articulated as follows, citing *Derby & Co Ltd v Weldon (No 2)* The Times (20 October 1988):

> The voluntary disclosure of documents in the course of interlocutory proceedings by a party does not come within the rationale which is the basis of the implied undertaking relating to documents disclosed on discovery. In relation to documents voluntarily disclosed the court has not invaded the privacy of the party. The party has, for his own purposes in defending a case, decided himself to use the documents rather than maintain his privacy. It is the party who has destroyed the privacy of the document, not the plaintiff or the court … it is an unavoidable consequence of all litigation that a party who chooses to put in evidence, necessarily risks that such evidence becomes available to others. In my judgment the special protection given to documents disclosed under compulsion of discovery procedures does not apply to any wider class of documents.

28 The Court in *Hong Lam Marine* at [24] also endorsed Hobhouse J's observations in *Prudential Assurance* that as parties are at liberty to decide what material they wished to adduce in evidence, there was no *prima facie* restriction on the use of documents and information acquired in the course of litigation (*Prudential Assurance* at 769):

> … The compulsion exception is confined to documents and information which a party is compelled, without any choice, to disclose. Where a party has a right to choose the extent to which he will adduce evidence or deploy other material, then there is no compulsion even though a consequence of such choice is that he will have to disclose material to other parties. …

I observed also that Hobhouse J at 765 dismissed the argument that a party acts under compulsion whenever it is subjected to orders or rules of procedure which require him to do various things or take various steps in the action. Where a party is subject to a rule to deliver pleadings, for instance, the primary sanction that the court imposes for failure to do so is to strike out the claim or the defence, such that the other party's claims or defences will prevail. Hobhouse J did not accept that the principle of compulsion applies in these scenarios, and

distinguished orders, the breach of which is a contempt of court and those orders which "merely" give rise to a default. It was only in the former scenario that a party acts under such compulsion which brings the implied undertaking into force.

29 In *BNX*, the Court of Appeal considered the element of voluntariness. [BNX] sought to adduce certain documents (the "May 2013 Documents") as further evidence in an appeal. The May 2013 Documents had been obtained through disclosure ordered in separate proceedings, Suit No 585 of 2017 ("Suit 585"), against [A], an architectural firm hired by [BOE]. The Court of Appeal held that the *Riddick* principle applied to the May 2013 Documents (at [69]) as the documents could not be said to have been disclosed voluntarily:

(a) First, the May 2013 Documents had been disclosed by [A] pursuant to an order for production made against [A] in Suit 585. [BNX] owed an implied undertaking to [A] and the court in Suit 585 not to use the May 2013 Documents and had not applied to be released from this undertaking (at [67], [69] and [71]).

(b) Second, although [BOE] included the May 2013 Documents as exhibits in its affidavits filed in connection with [BNX]'s summons to adduce further evidence, [BOE] was not party to Suit 585 and could not have consented to the release from the undertaking that [BNX] was subject to in that action. In any case, [BOE] had included the documents as exhibits to resist [BNX]'s application for these documents to be adduced as further evidence, and had expressly reserved its rights in relation to the documents (at [68]).

30 Both parties accepted that an exception exists to the *Riddick* principle in respect of disclosures made voluntarily. The difference between their positions lay in whether the defendant's disclosures in OS 533 were indeed voluntary. The defendant relied on *BNX* to argue that its disclosures in OS 533 were not voluntary. As with [BOE] in *BNX*, the defendant had disclosed the documents and information to resist the plaintiff's application for pre-action disclosure of the same documents and information. The OS 533 disclosures had also been subject to the following reservation at para 5 of He's 1st affidavit, which was filed to resist the application for pre-action disclosure:[25]

> In this affidavit, I will begin by providing some background information on the warehouse receipts … Such information is provided to assist the Honourable Court and to demonstrate why the Application should be dismissed. The disclosure is without prejudice to the Defendant's position that the Plaintiff is not entitled to any of the information and/or documents sought in the Application, for reasons I will elaborate on below. [emphasis in original]

31 The plaintiff contended that the disclosures in OS 533 had been voluntarily made and that the balance between competing interests is appropriately struck by limiting the *Riddick* principle to documents disclosed by compulsion of court.[26] The plaintiff argued that the defendant had voluntarily chosen to provide some information in OS 533, just as it had chosen not to disclose its contracts with the Hong Kong Companies. The defendant had also described its disclosures as voluntary on 14 occasions, including in its submissions before the Assistant Registrar in OS 533.[27]

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25 DS at para 46.

26 PS at para 101.

27 PS at paras 105–107, 116.

32 To my mind, the reasoning adopted by the Singaporean and English courts in the cases referred to above did not apply with full force to the present case. The respondent to a pre-action disclosure application should be treated differently: such a respondent does not "merely" face the risk of default if it chooses not to respond; failing to resist the application may lead to a serious intrusion into the privacy of a non-party. I return to the balancing exercise undergirding the court's adoption of the *Riddick* principle. The procedural tools allowing for pre-action disclosure serve the public interest by allowing the court to order the discovery of documents or the administration of interrogatories "with a view to identifying possible parties to proceedings" in Singapore: see O 24 r 6(5) and O 26A r 1(5) of the ROC; *Dorsey* at [32] and [69]. But given the intrusive nature of such tools and the potential for their abuse, the public interest in protecting the respondent's privacy and confidentiality features more heavily in such applications.

33 Accordingly, I was not persuaded that the defendant's disclosures in OS 533 amounted to voluntary use: the documents and information were exhibited and deposed in order to resist the pre-action disclosure application. It can be an intricate issue to decide whether or not it is wise to include the very documents and information sought in an application, or a sample of such documents and information, in resisting disclosure. In some cases, much time and energy can be saved by including these documents and information; the court is able to see for itself what is being sought and may make its determination accordingly. Alternative mechanisms can be thought of, including holding back such documents but offering to show them only to the court if asked. Which may be preferred or thought preferable may depend on the perceptions of the lawyers concerned. But it would be unfortunate for counsel to be constrained in choosing the best course of action out of a fear that

by doing so they would open the door to the unintended use of these documents thereafter.

34 As for the defendant's avowal on a number of occasions that the disclosures were voluntary, it was clear that the defendant's references to its volunteering such documents and information were in the context of demonstrating its cooperation and compliance; it did not show that it was giving up the documents and information for all purposes and use, especially in light of the express reservation in He's 1st affidavit (reproduced above at [30]).

35 Even if I were wrong on the application of the *Riddick* principle, I was satisfied that an obligation analogous to that under the *Riddick* principle could apply if, on a true construction of the rules of court under which He's 1st affidavit had been made, any rights of confidentiality or privilege in the documents and information had been reserved.

36 In this regard, I considered the reasoning in *Prudential Assurance*, which concerned witness statements and experts' reports that the plaintiffs had been required to serve on the defendants under O 38 r 2A and O 38 rr 36 and 37 of the Rules of the Supreme Court (UK) respectively. These documents were served pursuant to the provisions of O 38 or directions given thereunder. As parties were at liberty to decide what materials they wished to adduce in evidence in these materials, they had not been served under compulsion and the *Riddick* principle did not apply (at 769). Hobhouse J accepted, however, the argument that the use of such documents may still be restricted (at 770):

> … [I]f the … plaintiffs are to succeed on this line of argument it must be by the demonstration of a duty owed to the court, analogous to that owed under the implied undertaking, which derives from the circumstances of the case and in particular as a matter of implication from the relevant rules of court. … [S]uch restrictions are capable of existing and where they do

> they derive from rules of procedure or principles of law recognised by the courts as being incidents of such procedure.

37 In relation to the expert reports, the relevant rules expressly stated in unqualified terms that the recipient of an expert report is entitled to use it. Hobhouse J drew the inference that the use of the experts' reports was not subject to any restriction as to their use (at 772–773). As for the witness statements, Hobhouse J referred to the purpose of O 38 r 2A (at 774):

> … Its purpose is stated in sub-rule (2) to be 'disposing fairly and expeditiously of the cause or matter and saving costs'. It is related to the instant litigation alone. … A secondary purpose must also be to encourage and facilitate the making of admissions and settlements. … this exchange of information may enable disputes to be resolved in a manner that is exactly parallel to that which often occurs in without prejudice negotiations. Costs are saved if trials are rendered unnecessary or appropriate admissions are made. … Accordingly there are good reasons of policy arising from the rule that reinforce the analogy with the treatment of documents obtained on discovery and communications without prejudice. Likewise, there are good policy reasons for imposing similar restrictions. There is therefore no basis for declining to give effect to the inference to be drawn from the rule itself.

Hobhouse J therefore held that witness statements served pursuant to a direction given under O 38 r 2A remain privileged in the same way as a without prejudice communication remains privileged, where the witness to whose evidence that statement relates is never called to give evidence (at 774).

38 In the present case, the rules allowing for pre-action disclosure serve the policy goals of saving unnecessary costs and avoiding needless claims in relation to actual or anticipated proceedings in Singapore (see *Dorsey* at [32]). But just as how an applicant cannot be "on a fishing expedition" and cannot use pre-action discovery to uncover further causes of action (see *Dorsey* at [35] and [36], citing *Bayerische Hypo- und Vereinsbank AG v Asia Pacific Breweries (Singapore) Pte* [2004] 4 SLR(R) 39 at [4] and *Ng Giok Oh v Sajjad Akhtar*

[2003] 1 SLR(R) 375 at [7]), it follows that the use of information disclosed both under an order for pre-action disclosure and to resist such disclosure should also be restricted to their use in instant proceedings in Singapore, and not in proceedings brought anywhere else.

The exception in Dennis Foo

39 The High Court in *Dennis Foo* introduced an exception to the *Riddick* principle, holding that the principle ceased to apply to a document disclosed during discovery in a prior suit once it has been used in open court (at [54]).

40 The parties in *Dennis Foo* were shareholders of Raffles Town Club Pte Ltd ("RTC"). In 2006, RTC instituted a suit against the plaintiff, the defendants and a third party ("the Year 2006 Suit"). Pursuant to discovery obligations in the Year 2006 Suit, the defendants furnished certain meeting minutes. These meeting minutes were used during the trial of the Year 2006 Suit, which ended with a dismissal of the claim and counterclaims. The plaintiff subsequently relied on the minutes as the main piece of evidence to commence the suit in *Dennis Foo*, claiming damages for, *inter alia*, deceit and misrepresentation.

41 In *Dennis Foo*, Chan Seng Onn J surveyed the positions taken in various common law jurisdictions and concluded that the *Riddick* principle ceased to apply to documents used in open court. Chan J accordingly held that the *Riddick* principle did not apply to the meeting minutes and ordered the trial to continue. Three reasons were given for recognising this exception to the *Riddick* principle:

> (a) First, doing so gave proper deference and recognition to the principle of open justice (at [60]). The open justice principle is given statutory recognition in s 8(1) of the SCJA, which provides that (at [59]):

> **8.**—(1) The place in which any court is held for the purpose of trying any cause or matter, civil or criminal, shall be deemed an open and public court to which the public generally may have access.

The principle was also discussed in *Tan Chi Min v The Royal Bank of Scotland plc* [2013] 4 SLR 529, where Lee Seiu Kin J observed (at [14]):

> In sum, the principle of open justice requires that decisions by judges (and Registrars) in court proceedings be amenable to scrutiny by members of the public through the inspection of documents filed in court that were considered in the decision-making process. This serves to promote public confidence in the administration of justice. …

Concerns that this exception would deter parties from being forthcoming during discovery were misplaced, given that parties are compelled by the consequences of non-compliance to give discovery (at [57]). Parties may also apply to court for the implied undertaking to continue (at [58]).

(b) Second, this exception avoided difficulties with the alternative position endorsed by the majority in *Harman v Secretary of State for the Home Department* [1983] 1 AC 280 ("*Harman*"). The majority in *Harman* held that the *Riddick* principle continued to apply to documents used in open court but not to transcripts of court proceedings that might capture the documents in question (*Dennis Foo* at [32]). Chan J observed that this distinction was unjustifiable (at [61]).

(c) Finally, the recognition of an exception for documents used in open court would bring Singapore in line with the positions taken in other common law jurisdictions (at [65]).

42 The term "open court" is open to different interpretations: it could refer to proceedings open to the public or to recorded proceedings, which would

include chambers hearings. Which alternative it is matters: if the exception to the *Riddick* principle arises through the use of documents in proceedings open to the public, as is suggested by Chan J's invocation of s 8(1) of the SCJA in *Dennis Foo* at [59], that would seem to show that its rationale is that any restriction on use is lost because the documents are essentially available to the public. On the other hand, if the exception arises when the documents are adopted and referred to in proceedings on the record, the rationale would appear to be that the restriction is lifted because of the use of the documents alone.

43 Neither rationale appears, with respect, to be sufficient to overcome the basis for the *Riddick* principle in the first place: that is, to mitigate the compulsion that is exercised against the respondent through the court process. As I observed above, this degree of compulsion is increased in respect of respondents who are not yet the subject to any claim: pre-action disclosure is a significant intrusion on a respondent. While the *Riddick* principle balances between the public interest in the "administration of justice" and that in protecting the privacy and confidentiality of the documents and information disclosed, I was concerned that the High Court in *Dennis Foo* interpreted the former consideration too broadly. I read the English Court of Appeal in *Riddick* to be focussed on the administration of justice as between the parties to the action and in discovering the truth such that justice may be done between them. The open court principle as invoked in *Dennis Foo*, however, engages different considerations that relate to the need for judicial decisions to be open to public scrutiny and therefore freely reported and accessible. These considerations ought properly to be weighed in a different matrix.

44 I therefore had doubts about the operation of the exception in *Dennis Foo*. Be that as it may, it was sufficient in the present case to find that the defendant's disclosure fell within what I perceived to be a limited exception to

the *Dennis Foo* exception to the *Riddick* principle. My reasoning above at [32] to [34] applies here as well, albeit with a slightly different tenor. The focus here was not so much on whether the disclosure was "voluntary"; rather, in so far as the basis for the *Dennis Foo* exception to the *Riddick* principle strives to strike the right balance in the balancing exercise (see *Dennis Foo* at [55] and [56]), applying the *Dennis Foo* exception in these circumstances would be unjust, as it would unduly hamper the respondent's ability to resist an intrusion into its privacy and confidentiality prior to the commencement of the action.

Issue 2: Anti-suit injunction

Law on anti-suit injunctions

45 The Court of Appeal's guidance on the specific factors relevant to the determination of whether to grant an anti-suit injunction was laid down in *John Reginald Stott Kirkham and others v Trane US Inc and others* [2009] 4 SLR (R) 428 ("*Kirkham*") at [28]–[29]:

> (a) whether the defendants are amenable to the jurisdiction of the Singapore court;
>
> (b) the natural forum for resolution of the dispute between the parties;
>
> (c) the alleged vexation or oppression to the plaintiffs if the foreign proceedings are to continue;
>
> (d) the alleged injustice to the defendants as an injunction would deprive the defendants of the advantages sought in the foreign proceedings; and

(e) whether the institution of the foreign proceedings is in breach of any agreement between the parties.

46 As the Privy Council noted in the landmark case of *Société Nationale Industrielle AeroSpatiale v Lee Kui Jak and another* [1987] 1 AC 871 at 893, the notions of vexation and oppression should not be restricted by definition. Citing *Peruvian Guano Co v Bockwoldt* (1883) 23 Ch D 225 at 330, the Privy Council raised two examples of vexatious proceedings (at 893–894): where the proceedings are so utterly absurd that they cannot possibly succeed, and where the plaintiff, thinking he can gain some fanciful advantage, sues the defendant in two courts at the same time under the same jurisdiction. The Court of Appeal in *Kirkham* at [47] observed that the courts have held that there is vexation or oppression in situations such as the following:

> … where a party is subjected to oppressive procedures in the foreign court; bad faith in the institution of the foreign proceedings; commencing the foreign proceedings for no good reason; commencing proceedings that are bound to fail; and extreme inconvenience caused by the foreign proceedings (*Dicey on The Conflict of Laws* ([27] *supra*) at para 12-073). These situations can also be suitably described by the word *unconscionable*. … [emphasis in original]

47 Even though anti-suit injunctions operate *in personam*, they interfere with foreign proceedings. As such, comity considerations are relevant where there is delay in bringing an application for anti-suit relief. Comity requires, where possible, "the avoidance of wastage of judicial time and costs that would inevitably be occasioned by the abandonment of proceedings or when a party is precluded from relying on the judgment of the rival court": *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 ("*Sun Travels*") at [69] and [78]. As the Court of Appeal observed in *Sun Travels* at [83], the longer the delay and the more advanced the foreign court

proceedings become, the stronger the considerations of comity: see also *Beckkett Pte Ltd v Deutsche Bank AG* [2011] 2 SLR 96 at [24].

48 In the present case, the areas of dispute were: whether Singapore was the natural forum for the dispute; whether vexation and oppression were made out; and whether the defendant's delay in seeking an anti-suit injunction precluded the grant of an anti-suit injunction.

Whether Singapore was the natural forum

49 The natural forum is "that with which the action has the most real and substantial connection": *Eng Liat Kiang v Eng Bak Hern* [1995] 2 SLR(R) 851 at [19]. The defendant submitted that Singapore was the natural forum for the plaintiff's claims against the defendant, given the following:[28]

(a) the defendant is a Singapore incorporated company operating out of Singapore;

(b) the documents and possible key witnesses were in Singapore;

(c) the warehouse company that issued the warehouse receipts was also incorporated and based in Singapore;

(d) the claims against the defendant would be governed by Singapore law as Singapore was the *lex loci delicti*, *ie*, the place of the alleged tort (see *Rickshaw Investments Ltd and another v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 ("*Rickshaw Investments*") at [53]);

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28 DS at para 86.

(e) the defendant's disclosures in the OS 533 proceedings had been given under Singapore law;

(f) the plaintiff represented that the proceedings would be in Singapore;

(g) Singapore's judicial resources had been invested to hear the parties in OS 533; and

(h) the defendant invested time, costs and expense in instructing Singapore counsel.

50 The plaintiff argued that the factors did not show that Singapore was clearly the natural forum:[29]

(a) While proceedings were commenced and conducted in Singapore, incurring expense and the investment of time, both sides had instructed counsel in England, and the English court had invested time and judicial resources to hear the parties.

(b) The presence of witnesses in Singapore was not a determining factor: see *Kirkham* at [38]. In any event, the dispute between the parties involved the Hong Kong Companies and seven other defendants, all of whom had submitted to the jurisdiction of the English courts. If anything, this pointed to England being the more appropriate forum.

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[29] PS at para 55.

(c) The OS 533 disclosures made in Singapore were only limited; there remained the possibility that disclosure ordered in England would be more wide-ranging.

51 The plaintiff highlighted other significant factors connecting the parties' dispute to England:[30]

(a) the contracts between the plaintiff and the Hong Kong Companies were subject to exclusive English jurisdiction;

(b) the related disputes with the other defendants would involve overlapping issues and common witnesses, and there was a risk of inconsistent findings if a separate trial was held in respect of the defendant; and

(c) the defendant had conceded, within the context of para 3.1(3) of Practice Direction 6B supplementing Section IV of Part 6 of the Civil Procedure Rules (UK) (the "English CPR"), that the plaintiff had a good arguable case and that the defendant was a "necessary and proper party" to the plaintiff's claims in the English proceedings.[31]

52 I concluded that the factors that the defendant relied upon were largely neutral, and it was not shown that Singapore was clearly the natural forum.

53 First, the location of witnesses and evidence was not a significant factor pointing to Singapore as being the natural forum. As the Court of Appeal observed in *Kirkham* at [38], the location of witnesses is only really significant

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30 PS at para 56.

31 See Wang's affidavit at pp 449–450.

in relation to third-party witnesses who are not in the employ of the parties as it could give rise to issues of compellability. The key witnesses that the defendant alluded to were its own employees, *ie*, He and Mr Ang Peng Leong Jeremy, the defendant's Chief Executive Officer.[32] While I did not have the benefit of hearing expert evidence on English law, it did not appear that the defendant would face issues in producing its own employees as witnesses. These witnesses may testify abroad given the prevalence of video-linked evidence (see *Kirkham* at [39]); documentary evidence may be readily presented abroad as well (see *Kirkham* at [40]).

54 Second, on the facts of the present case, the registration of either the defendant or the warehouse operator in Singapore did not appear to have any real impact on the determination of the natural forum. The plaintiff is an English registered company with no presence in Singapore. The Hong Kong Companies involved in the alleged fraud are based in Hong Kong. All things considered, the place of registration of the parties was a neutral factor (see *Kirkham* at [37]).

55 Third, even if English conflict of law rules prescribe that Singapore law governs the alleged torts or equitable wrongs, the English court would presumably hear expert evidence on Singapore law, and would be in as ready a position to make a determination as the Singapore courts would be when dealing with English law issues in our courts.

56 Fourth, the fact that proceedings in OS 533 were previously pursued in Singapore would have to be weighed against the current state of proceedings in England. The investment of time and preparation in the Singapore proceedings

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[32] See DS at para 86(b); He's 1st affidavit at para 47.

did not appear so significant that the balance tilted in favour of Singapore being the natural forum. Matters had not proceeded to such an advanced stage that it would be more efficient and just to require parties to proceed in Singapore instead of England.

57 On the other hand, some of the other points raised by the plaintiff such as the risk of inconsistent findings in concurrent proceedings and the concessions made by the defendant did not assist its case. While the risk of inconsistent findings could be relevant in some contexts, a finding one way in Singapore between the plaintiff and defendant would not necessarily implicate any determination between the plaintiff and the other defendants in the English proceedings. The concession made under the English CPR also did not bind the defendant one way or another.

Whether vexation and oppression was evidenced

58 The defendant argued that the plaintiff's commencement and continuation of the English proceedings were vexatious and oppressive. It was argued that the plaintiff consistently misled the defendant and the Singapore High Court that it intended to pursue proceedings in Singapore, by commencing the OS 533 proceedings without informing the court that it would pursue proceedings in England, and by maintaining its appeal in RA 215 even after filing the joinder application in England.[33] The defendant further argued that the plaintiff had used the pre-action disclosure application in OS 533 to test the receptivity of the Singapore courts to its claims against the defendant.[34] Finally,

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33 DS at para 94.

34 DS at paras 97–99.

the breach of the implied undertaking on the limited use of the disclosed documents and information also constituted vexation and oppression.[35]

59 The plaintiff disagreed that its conduct of the proceedings was vexatious or oppressive; it had commenced OS 533 to investigate the defendant's potential involvement in the alleged fraud against the plaintiff, with the provisional view that proceedings might be commenced in Singapore. There had also not been any "double claim" brought against the defendant in England and Singapore, as the Singapore proceedings had been terminated and the only substantive proceedings against the defendant were in England.[36]

60 In my judgment, some aspects of the plaintiff's conduct in the related proceedings came close to crossing the line on sharp practice. For instance, in OS 533, the plaintiff took the position that the fact of the English proceedings against the Hong Kong Companies did not have to be disclosed to the court, and the application for pre-action disclosure had been brought even though the plaintiff already knew the identities of the putative wrongdoers, *ie*, the Hong Kong Companies. On balance, however, I concluded that vexation and oppression were not made out. Any prejudice suffered by the defendant through the improper use of the documents and information was sufficiently and more appropriately addressed by the issuing of an injunction against the use of said documents and information. For the reasons given above, that injunction was issued; this remedy sufficiently addressed any harm that might be caused by the plaintiff. Putting to one side the improper use of the documents and information,

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35 DS at paras 100–101.

36 PS at paras 59, 60.

there was nothing else that pointed to any vexation or oppression suffered by the defendant.

Whether there was delay by the defendant

61 Since the defendant failed to establish that Singapore was the natural forum or that the plaintiff's conduct had been vexatious or oppressive, the plaintiff's allegations that there was undue delay on the defendant's part in applying for an anti-suit injunction did not strictly have to be considered. Nonetheless, I observed that the English proceedings against the defendant had not progressed to an advanced stage; the plaintiff submitted that the defendant's jurisdictional challenge in the English proceedings was scheduled to be heard in June 2019.[37] In these circumstances, I did not consider that there had been any undue delay on the defendant's part in applying for anti-suit relief as it did.

Issue 3: The impact of the further arguments

62 Further arguments were heard in which the defendant attempted to persuade this court to grant an interim anti-suit injunction or an order against the plaintiff to adjourn an upcoming hearing regarding the defendant's jurisdictional challenge to the English proceedings. The defendant argued that relief was required because of the plaintiff's non-compliance with the injunction against the use of the documents and information granted in Summons No 1087 of 2019 ("SUM 1087"), particularly through the plaintiff's insufficient expunging of the witness statements and pleadings in the English proceedings.[38] The defendant relied on the case of *Evergreen International SA v Volkswagen*

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37 See PS at para 91.

38 Defendant's Further Arguments dated 13 June 2019 at para 5.

Group Singapore Pte Ltd and others [2004] 2 SLR (R) 457 at [53] and [54] for the proposition that the court should grant an anti-suit injunction to protect its own jurisdiction and to give effect to its orders.

63 The plaintiff raised a preliminary jurisdictional objection as the defendant's request for further arguments pursuant to O 56 r 2 of the ROC read with s 28B of the SCJA had been made out of time: the request for further arguments was made after the order in SUM 1087 was extracted (see s 28B(1)(*a*) of the SCJA). The plaintiff also argued that there had been compliance with the order in SUM 1087. Any apparent reference to protected documents and information was actually gleaned from other sources and any incomplete compliance did not detract from the fact that there had been a genuine attempt at compliance. The plaintiff further argued that the defendant was simply trying to derail the English proceedings.

64 Even aside from the plaintiff's preliminary objection, I found that there were no grounds raised to revisit my original decision. Any incomplete compliance by the plaintiff with the order in SUM 1087 was not such as to lead to the conclusion that an interim anti-suit injunction should be issued or that the plaintiff should be ordered to apply to adjourn the English proceedings. Any non-compliance may attract a contempt action against the plaintiff or may affect any eventual recognition of an English judgment, but these were matters not before the court, and would need to be considered at the appropriate time.

Conclusion

65 For the reasons above, I granted an injunction against the plaintiff's use of the documents and information disclosed in OS 533 in proceedings outside of Singapore, but did not grant an anti-suit injunction to restrain the English

proceedings against the defendant. No order was made as to costs.

Aedit Abdullah
Judge

Prakash Pillai, Koh Junxiang, Charis Toh Si Ying (Clasis LLC) for the plaintiff;
Toh Kian Sing SC, Ting Yong Hong, Davis Tan Yong Chuan, Wang Yufei (Rajah & Tann Singapore LLP) for the defendant.