IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 279

Originating Summons No 1106 of 2017 (Summons 3934 of 2019)

Between

(1) Cosco Nantong Shipyard Co Ltd

… *Plaintiff*

And

(1) Logitel Offshore Rig II Pte Ltd
(2) Logitel Offshore Pte Ltd

… *Defendants*

EX TEMPORE JUDGMENT

[Civil Procedure] — [Appeals] — [Leave]
[Civil Procedure] — [Production of documents] — [Notice to produce]

Cosco Nantong Shipyard Co Ltd
v
Logitel Offshore Rig II Pte Ltd and another

[2019] SGHC 279

High Court — Originating Summons No 1106 of 2017 (Summons 3934 of 2019)
Belinda Ang Saw Ean J
5, 12 September 2019; 26 November 2019

29 November 2019 *Ex Tempore* Judgment

Belinda Ang Saw Ean J:

1 Originating Summons No 1106 of 2017 ("OS 1106") was brought by Cosco Nantong Shipyard Co Ltd, the plaintiff, on 29 September 2017 for pre-action discovery against Logitel Offshore Rig II Pte Ltd and Logitel Offshore Pte Ltd, the first and second defendants respectively. The defendants' director, Mr Matthew Blake, filed an affidavit to oppose OS 1106 ("Blake's 2nd Affidavit") on 28 November 2017. Certain financing documents (hereafter called the "Financing Agreements") were mentioned in paragraph 57 of Blake's 2nd Affidavit. The Financing Agreements became the subject matter of the plaintiff's Notice to Produce dated 18 December 2017, issued pursuant to O 24 r 10 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC").

2 The plaintiff filed Summons No 632 of 2018 ("SUM 632") after the defendants objected to the production of the Financing Agreements for inspection. The Assistant Registrar who heard SUM 632 ordered production of two categories of documents to the plaintiff for inspection (*ie*, the Financing Agreements). Registrar's Appeal No 64 of 2018 ("RA 64") is the defendants' appeal against the decision of the Assistant Registrar. I affirmed the decision of the Assistant Registrar on 25 July 2019 and the defendants, being dissatisfied with my decision in RA 64, filed Summons No 3934 of 2019 for leave to appeal ("SUM 3934").

3 Having read the written submissions and heard the parties' oral arguments, I would dismiss SUM 3934 for the reasons explained below.

4 An appropriate starting point is the abuse of process argument that is central to the defendants' application in SUM 3934. Counsel for the defendants, Mr Davinder Singh SC ("Mr Singh"), explained that although no specific authority was cited during the hearing of RA 64 to make good the abuse of process argument, there is in fact authority for the proposition. He referred to *Tyco Australia Pty Limited v Leighton Contractors Pty Limited* [2005] FCAFC 115 ("*Tyco*") (the "*Tyco* principle") in support of the abuse of process argument. I would reference the abuse of process argument with the plaintiff's contention that abuse of process was only raised in RA 64 in the limited context of O 24 r 13(1) of the ROC, namely whether the production of the Financing Agreements for inspection is necessary for either disposing fairly of the cause or matter or for saving costs. Having compared the parties' written submissions and oral arguments before the Assistant Registrar and in RA 64, I accept the plaintiff's contention as it is substantiated by the material before me.

5 Before going into the defendants' written submissions in RA 64, a quick narration of the relevant procedural history would be helpful. After the plaintiff filed its Notice to Produce which sought the production of thirteen categories of documents, the defendants filed their Notice Where Documents May Be Inspected on 12 January 2018 ("the defendants' Notice") agreeing only to the production of three out of the thirteen categories of documents. In particular, the defendants objected to the production of the Financing Agreements on the sole ground that they were not in their possession, custody or power.[1] It is evident that the abuse of process argument was not contemplated in the defendants' Notice.

6 As a consequence, the plaintiff filed SUM 632 on 2 February 2018 seeking production of the remaining ten categories of documents including the Financing Agreements.

7 In the defendants' reply affidavit for SUM 632 filed by Mr Blake on 12 February 2018, the following grounds of objection were raised in relation to the Financing Agreements:

> *(1) The financing agreements are confidential*
>
> …
>
> *(2) The financing agreements are not in the PCP of the Defendants*
>
> …
>
> *(3) The request for inspection for the financing documents is a transparent attempt of the Defendants to circumvent the rules of pre-action discovery and obtain documents in relation to its Proposed Claims, which is an abuse of process of this Honourable Court.*

[1] Third affidavit of Mr Blake dated 12 February 2018, p 82.

> …
>
> 48. I am advised and verily believe that it is wholly inappropriate on an interlocutory application such as this for the Plaintiff to use the application as a vehicle to seek disclosure of documentation that is the very subject-matter of its substantive application in OS 1106. Further, allowing inspection of the financing documents would be tantamount to allowing the Plaintiff to circumvent the rules of pre-action discovery to obtain documents in relation to its Proposed Claims and to obtain the identities of the prospective defendants. This appears to be an abuse of process of this Honourable Court. It will be recalled that the power and/or jurisdiction of this Honourable Court to determine the substantive application in OS 1106 is being challenged by the Defendants.
>
> *(4) It is not necessary for inspection of the financing documents to be granted for the saving of costs or for the fair disposal of the matter*
>
> [emphasis in original]

8 The position taken before the Assistant Registrar who heard SUM 632 can be summarised as such. Four main grounds were raised by the defendants: (a) confidentiality; (b) lack of possession, custody or power; (c) abuse of process; and (d) lack of necessity. In particular, abuse of process as a ground, if successful, would serve to "knock out", so to speak, SUM 632 without the need to go into the other three grounds. Before the Assistant Registrar, the point on abuse of process in the form of the plaintiff's purported circumvention of the requirements of pre-action discovery was ventilated but it was conflated with the point about the use of discovered documents to commence litigation outside Singapore (*ie*, the *Riddick* principle).[2]

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[2] Transcript for SUM 632, 5 March 2018, pages 18 to 19.

9 For present purposes, I set out the material part of the Assistant Registrar's decision on 12 March 2018 concerning abuse of process:

> I do not accept the argument that the request for these documents is an attempt to circumvent the rules of pre-action discovery and is an abuse of process. Given that reference was made to these documents in the Defendants' affidavit, the Plaintiff is entitled to proceed under O 24 r 11 of the Rules of Court. I note too that the Plaintiff's counsel has indicated that the Plaintiff will subject themselves to any implied undertaking restricting the use of the documents until the hearing of the Originating Summons itself, so the Defendants' concern that the Plaintiff can use the documents to commence proceedings in other jurisdictions is unfounded.

10 The submissions in RA 64 before me, however, took on a different shape. This is most apparent from the defendants' submissions in RA 64, which I turn to now. The material portions of the defendants' written submissions dated 2 July 2018 state:

> **IV. MAIN ISSUES – RA 64**
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> …
>
> **(1) The Financing Agreements are not "necessary" and their production would amount to an abuse of process**
>
> …
>
> 46. A further relevant question for the Court to consider in determining whether it is 'necessary' to order production of the Financing Agreements is whether the Defendants place any reliance on, or attribute any probative value to, the Financing Agreements in their evidence filed in OS 1106. Putting it another way, as the Court in *SK Shipping* … asked at [38], are the documents "indisputably critical documents… [which] form an integral part of the [Defendants'] case"? It is only where the documents are important, and reliance is placed on their existence and content by the party that refers to them in evidence, that fairness dictates that the court should order their production for the benefit of the other party. It is only in such circumstances that it can be said that the other party is, or may be, at a disadvantage by reason of the non-production of the documents.

> 47. The position here is that the Financing Agreements are clearly not "critical documents" that form an "integral part" of the Defendants' case. In fact, the converse is true: it is the Plaintiff's case to which the Financing Agreements are said to be critical. Indeed, they are at the heart of the main OS 1106 application for pre-action discovery, and it follows that the Plaintiff ought to be required to make its case good in that main application (to which a different and more stringent test applies) before it is entitled to an order for production of these documents.
>
> 48. ***In this context***, **the Plaintiff's attempts to obtain production of these documents and (in doing so) thereby circumvent any requirement to make good their case for pre-action discovery in OS 1106, are nothing short of an abuse of process.** This is because the Plaintiff does not need inspection of the Financing Documents to file a reply affidavit in OS 1106. The Defendant also does not rely on the Financing Documents to establish its case in OS 1106. The Plaintiff's argument essentially boils down to this: it seeks production of the Financing Documents requested in OS 1106 (via the Production Application) in order to determine whether it is entitled to the relief sought in OS 1106. Yet the relief sought in OS 1106 is the production of those self-same Financing Documents. The argument is circular.
>
> [emphasis added]

11 On an objective reading of the two paragraphs set out above, the abuse of process averred to in the defendants' written submissions is *not* quite the same point raised by Mr Singh in the leave to appeal application (*ie*, SUM 3934). In brief, Mr Singh submits that the *Tyco* principle takes on two hues: (a) a Notice to Produce calling for the production of the very documents that are the subject of an underlying pre-action discovery application is *prima facie* an abuse of process (per Hely J); and (b) the same production *may or may not* constitute abuse of process depending on the facts and circumstances (per Hill J). While the language in the written submissions for RA 64 above may be reminiscent of that employed in *Tyco*, the two points are arguably distinct.

12 My attention was also drawn to two other paragraphs in the defendants' written submissions:

> **IV. MAIN ISSUES – RA 64**
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> …
>
> 34. The Defendants' position, on the other hand, can be summarized as follows:
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> …
>
> (b) The Financing Agreements are therefore **not necessary** for the Plaintiff to respond to paragraphs 57 and 58 of Mr Blake's 2nd Affidavit, in order to determine OS 1106. In fact, ordering such production would amount to an abuse of process.
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> …
>
> **V. RA 63**
>
> …
>
> 85. The Court should not sanction the Plaintiff's attempt to circumvent due process and obtain the Financing Agreements by the back-door. The Court should be vigilant to prevent such abuse of its processes. This is especially important in the present case where the Defendants have a threshold objection to the Court's jurisdiction in the OS 1106 proceedings; namely that the Court cannot grant the pre-action discovery sought by way of the Principal Disclosure Requests, in circumstances where the substantive action contemplated in light of such disclosure will not be in Singapore.

13 Neither of these two paragraphs assist the defendants' present leave to appeal application. For the same reasons stated earlier, paragraph 34(b) of the defendants' written submissions clearly makes a different point from *Tyco*. As for paragraph 85, it should be highlighted that the defendants' above submissions dated 2 July 2018 were tendered for both Registrar's Appeal No 63 of 2018 ("RA 63"), being the defendants' application to amend Mr Blake's affidavits, RA 64 as well as Summons 2186 of 2018 ("SUM 2186"), being the

defendants' application to adduce further evidence for RA 64. It is evident that the reference to abuse of process therein was made in the context of RA 63. At the hearing that followed on 4 – 5 July 2018, the then counsel for defendants, Mr Bazul Ashhab ("Mr Bazul"), made no other submission (written or oral) relating to abuse of process, save for the reference to the same paragraph 85. In my view, that reference to abuse of process is plainly a generic one, in contradistinction to the *Tyco* principle now raised by the defendants. It suffices to note that on 5 July 2018 I dismissed RA 63 and adjourned the hearing of RA 64 and SUM 2186 to a date to be fixed.

14 Not unlike the defendants' aforementioned written submissions, there was no reference to abuse of process in the *Tyco* sense (or any sense for that matter) in the defendants' further written submissions for RA 64 dated 22 July 2019. It is apparent that the further written submissions centred on the issue of whether the Financing Agreements could be said to be in the possession, custody or power of the defendants, as had been first stated in the defendants' Notice. Tellingly, the transcript of the proceedings for RA 64 from 24 – 25 July 2019 also do not touch on abuse of process, whether in the *Tyco* sense or otherwise. Therefore, to this extent, I agree with counsel for the plaintiff, Mr Toh Kian Sing SC ("Mr Toh"), that the defendants' circumvention point had not been explicitly canvassed before me in RA 64 in the manner suggested by Mr Singh and hence it is a new point.

15 Be that as it may, even taking the defendants' case at its highest – that the abuse of process argument had been raised in RA 64 and is thus *not* a new point – I find that the test laid out in *Lee Kuan Yew v Tang Liang Hong* [1997] 2 SLR(R) 862 ("*Lee Kuan Yew*") for granting leave to appeal against my decision in RA 64 has *not* been satisfied.

16 Before I turn to the test set out in *Lee Kuan Yew*, I make the following points. The defendants' characterisation of the plaintiff's Notice to Produce under O 24 r 10 as a circumvention of the requirements of pre-action discovery and hence an abuse of process, is a distraction. The truth of the matter is that there is no procedural bar to the plaintiff serving a Notice to Produce under O 24 r 10 in the context of an application for pre-action discovery under O 24 r 6 of the ROC. In fact, O 24 r 6(8) extends O 24 r 10 and O 24 r 11 to applications for pre-action discovery. This is the position held by Professor Jeffrey Pinsler – that "a party seeking discovery under [O 24 r 6] may avail himself of the provisions in rr 10 and 11, if he needs to do so" (*Singapore Court Practice 2018* (Jeffrey Pinsler SC, gen ed) (LexisNexis, 2018) at para 24/6/12).[3]

17 It follows that the serving of the Notice to Produce (including SUM 632) is not for a collateral purpose and, as such, there is no reason to view it as an abuse of process. What transpired is that the defendants here, by means of Mr Blake's 2nd Affidavit, unwittingly created an opportunity that the plaintiff spotted and it seized that opportunity by seeking production of the Financing Agreements referred to therein. There is nothing untoward in and about what the plaintiff did invoking O 24 r 10 to gain a litigation advantage. Any decent counsel presented with the same opportunity would have done the same thing.

18 I now turn to the three limbs of the test in *Lee Kuan Yew*.

19 First, there is no *prima facie* error of law in the decision in RA 64. In my view, the line of cases beginning with *Tyco* in Australia does not assist the defendants' case. Regardless of the precise contours of the *Tyco* principle, I do

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[3] Plaintiff's further written submissions in SUM 3934, paragraph 18.

not consider it applicable in Singapore. The relevant ROC regime in Singapore is unambiguous. The linchpin of the plaintiff's application for the Financing Agreements is O 24 r 6(8) of the ROC. O 24 r 6 enshrines the pre-action discovery regime. Rule 6(8) when read with rr 10 and 11 *deems* any application for inspection and production of documents referred to in an affidavit for the pre-action discovery, a "cause or matter". Put differently, the ROC clearly contemplates and connects the provisions of O 24 r 10 and orders for production of documents for inspection in O 24 r 11 to O 24 r 6 pre-action discovery applications. That is the very import of O 24 r 6(8).

20 Moreover, the procedural regime in Singapore offers safeguards in at least two ways: (a) the requirement of possession, custody or power of the party asked to produce the documents (per O 24 r 11(2)); and (b) the test of necessity for disposing fairly of the cause or matter or for saving costs (per O 24 r 13(1)). It is not a case of *carte blanche* for the plaintiff. Seen in this light, the defendants' assertions that the plaintiff's Notice to Produce and SUM 632 are attempts to circumvent the more stringent requirements of pre-action discovery are ill-founded. I have already dealt with rr 11 and 13 in RA 64, both of which are in any case, findings of fact that do not fall within this ground of error of law.

21 I now turn to the second limb. I do not consider there to be a question of general principle to be decided for the first time. According to counsel for both parties, there has been no published decision in Singapore on the application of O 24 rr 10 and 11 in the context of O 24 r 6 of the ROC. While that appears to be true, I find it unnecessary for a decision to be made on this because the answer to the question is already clearly prescribed in O 24 r 6(8) as explained above.

22 For the same reasons, the third limb of the test in *Lee Kuan Yew* is not satisfied. I do not consider this case to involve a question of such importance that its determination by a higher tribunal would be advantageous to the public. In addition, given the fact-centric nature of the inquiry into issues of possession, custody or power, and necessity under O 24 rr 11 and 13, I find that the present case is not one that engages public interest considerations.

23 For the reasons stated, SUM 3934 is dismissed with costs to the plaintiff. Parties are to agree on costs. If parties are unable to come to an agreement, they are to exchange and tender to court their respective written submissions on quantum of costs plus disbursements limited to one page no later than 16 December 2019.

Belinda Ang Saw Ean
Judge

Toh Kian Sing SC, Davis Tan Yong Chuan and Lau Chuan Ying, Rebekah (Rajah & Tann Singapore LLP) for the plaintiff;
Davinder Singh SC, Jaikanth Shankar and Srruthi Ilankathir (Instructed Counsel) (Davinder Singh Chambers LLC), Bazul Ashhab bin Abdul Kader, Chan Cong Yen, Lionel, Ashvin Shanmugaraj Thevar (Oon & Bazul LLP) for the first and second defendants.