IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC 105

Originating Summons No 1079 of 2021

Between

CSR

… *Applicant*

And

CSS

… *Respondent*

GROUNDS OF DECISION

[Civil Procedure — Discovery of Documents]

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CSR
v
CSS

[2022] SGHC 105

General Division of the High Court — Originating Summons No 1079 of 2021
Lee Seiu Kin J
18 January 2022

10 May 2022

Lee Seiu Kin J:

Introduction

1 In the days of old, to bring an action, care had to be taken to choose the proper writ, given that each writ was specific to a particular form of action, and carried with it, a different set of procedures. Legislative reform, however, put an end to this – actions were subsequently commenced by the same writ, and parties simply had to state their claim and cause of action: see Sir John Baker, *An Introduction to English Legal History* (Oxford University Press, 5th Edn, 2019) at pp 75 – 76. However, for both the litigant in the 1700s, and in the modern day, the one constant is that there must be sufficient information to enable one to properly frame one's cause of action. This is where pre-action discovery serves its purpose, by allowing litigants access to information which would enable them to assess whether they have a viable cause of action: see

Jeffrey Pinsler, "The Early Development of the Discovery Process in Civil Actions in Singapore" [1997] Singapore Journal of Legal Studies 396 at p 397.

Background

2 In August 2017, at the behest of a few individuals who were in the Respondent's employ, the Applicant joined the Respondent firm together with eight of his subordinates. Within a short span of 13 months, the Applicant was demoted twice, and his subordinates were reassigned. The Applicant's appointment was eventually terminated by the Respondent in May 2020. Given the circumstances in which he was demoted, and his employment terminated, the Applicant suspected foul play on the part of those individuals. The Applicant had filed a complaint with the Respondent, who, after completing its own internal investigations, asked two of those individuals to resign.

3 There was, however, as the Applicant argued, insufficient evidence for him to conclude that there was a viable cause of action against these individuals and/or the Respondent in either the tort of deceit and/or the tort of conspiracy by unlawful means. The Applicant, having obtained legal aid from the Legal Aid Bureau, filed the present application, seeking the following prayers:

(a) That the Respondent disclose any Investigation Materials.

(b) That the Respondent disclose any specific documents referred to in the Investigation Materials upon a written request being made by the Applicant for the same.

(c) That the Respondent, its directors and employees shall not communicate in any mode, any information relating to, or in connection

with the present proceedings, except for the purposes of obtaining legal advice, and until further Order of this Court.

(d) That the Applicant be at liberty to use any information and/or documents obtained pursuant to or as a result of this Order in support of further actions, whether civil or criminal.

(e) That the Court's file and/or record of these proceedings be sealed.

(f) That no order of costs be made, pursuant to s 12(4)(*c*) of the Legal Aid and Advice Act (Cap 160, 2014 Rev Ed) ("Legal Aid and Advice Act"), given that the Applicant is legally aided.

(g) That there be liberty to apply.

4 I heard parties on 18 January 2022 and allowed the application. As the Applicant was legally aided, which raised an interesting point in relation to the application for pre-action discovery, I set out below the reasons for my decision.

Whether the application for pre-action discovery should be granted

5 Pre-action discovery is for an applicant "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": *Toyota Tsusho (Malaysia) Sdn Bhd v United Overseas Bank Ltd & another* [2016] SGHC 74 at [12]. To assess whether an applicant possesses sufficient knowledge about the viability of its claim, the court must consider the applicant's intended cause of action to determine if the applicant has sufficient facts to plead its claim: *Haywood Management Ltd v Eagle Aero Technology Pte Ltd* [2014] 4 SLR 478 at [45]. This is, of course,

subject to the overriding test of necessity in O 24 r 7 of the Rules of Court (Cap 322 R 5, 2014 Rev Ed) which states:

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

6 In the present case, the Applicant claimed that, based on the limited information currently available, his intended causes of action are the torts of fraudulent misrepresentation and/or conspiracy to defraud,[1] and that in order to mount viable claims, particulars disclosing fraudulent intention on the part of the potential defendants must be pleaded, failing which, the claims could be struck out.

7 The Applicant further stated, in written submissions, that only the following information was available:[2]

> (a) On 28 March 2017, the Applicant reached out to [A] on the possibility of joining the Respondent together with his team. On 31 March 2017, [A] introduced [B], a Senior Financial Services Director, to the Applicant when the latter had specifically asked to speak to a recruitment director.

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1 Applicant Subs para 31.

2 Applicant Subs para 37.

(b) In the same meeting, [A], [B] and the Applicant agreed for [B] to be the "introducer" and to split the referral fee three-ways.

(c) Between April and August 2017, the Applicant met with [C], a Senior Manpower Development Manager under the Respondent's employ. Terms of recruitment for the Applicant and his team were agreed upon and formalised by August 2017. However, around 29 August 2017, [C] abruptly included a clause, stipulating that the Applicant had to recruit eight direct financial consultants and achieve $330,000 in Cumulative Awards and Incentives Performance Indicator, failing which his appointment as Financial Services Director would be reviewed ("the Clause"), in the Applicant's terms of recruitment. [C], however, assured the Applicant that it would not be enforced.[3]

(d) Around 13 April 2018, the Applicant asked [B] about the referral fee. This provoked an angry reaction from [B]. [B] also forwarded some messages from [D] who apparently knew about the agreement between [A], [B] and the Applicant to split the referral fee. The messages from [D] merely stated that the Respondent had not decided whether the referral fee could be paid out.

(e) A few days later, [C] and [A] informed the Applicant that the Clause would in fact be enforced and that he would be demoted. [C] also told the Applicant that he would be further demoted if he failed to recruit six financial consultants by December 2018.

(f) On 11 September 2018, the Applicant was suddenly informed that he would be further demoted to the rank of Financial Consultant in

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[3] Applicant Subs para 8.

a week's time even though he was on track to recruit seven consultants by December 2018.

(g) Thereafter, the Applicant heard from his subordinate, one [E], that [B] would absorb his team of financial advisors and that she did not wish to be under [B].

(h) To the best of the Applicant's knowledge, [C], [A] and [D] were employees of the Respondent, while [B] was an appointed agent with the Respondent.

(i) Subsequently, the Applicant made a formal complaint to the Respondent regarding the conduct of its employee(s) and/or appointed agent(s). After internal investigations concluded, the Respondent informed him that [C] and [A] had been invited to resign.

8 Based on the above facts, the Applicant's suspicion that there was fraudulent misrepresentation and/or a conspiracy to defraud was largely based on circumstantial and hearsay evidence. The Applicant submitted that there were the following critical gaps in his knowledge:[4]

(a) While [B], [A], [C] and [D] appeared to have relationships with each other, it was unclear whether there were discussions and/or an agreement between them to induce the Applicant to join the Respondent by promising a share of the referral fee and that the Clause would not be enforced, and a conspiracy between them to render the Applicant's continued appointment with the Respondent untenable and absorb the Applicant's team of financial advisors thereafter.

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4 Applicant Subs at para 38.

(b) While [C] was the one who made the representation to the Applicant that the Clause would not be enforced by the Respondent, [C] did not seem to gain from this whole episode. Although the Applicant suspected that there could be a conspiracy, it was unclear whether there were discussions and/or an agreement between [B], [A], [C] and/or [D] to induce the Applicant to agree to the Clause by representing that the Respondent would not enforce it.

(c) The Applicant had no knowledge as to whether [B], [A] and/or [D] knew that [C] had made the Representation, or that it was false. Further, the Applicant did not know whether [C] knew that the Representation was false or that he made the Representation with the intent to defraud since he did not seem to stand to gain from doing so.

(d) The Applicant did not know how [A], [C] and/or [D] benefitted or stood to gain from the alleged conspiracy when [B] appeared to be the primary beneficiary in absorbing the Applicant's team.

(e) While it appeared that some form of misconduct had taken place given that [A] and [C] were asked to resign, the Applicant did not know the exact reasons as to why they were asked to resign or why [B] and [D] were not.

(f) Further, while the Applicant knew that [B], [A], [C] and [D] were either employees or appointed agents of the Respondent, the Applicant did not know whether there was sufficient connection between [B], [A], [C] and [D]'s conduct and their relationship with the Respondent that would render the Respondent vicariously liable to the Applicant.

9 Flowing from this, the Applicant argued that disclosure of the Investigation Materials would allow gaps in his knowledge to be filled, and allow him to not only assess the viability of his claim in either the tort of deceit and/or the tort of conspiracy by lawful/unlawful means,[5] but also identify persons who are potentially liable to him.

10 In response, the Respondent submitted that the Applicant was not entitled to pre-action discovery of the Investigation Materials as disclosure was not necessary for the following reasons. First, the present application was an abuse of court process as the Applicant's purpose in applying for pre-action discovery was not to commence civil proceedings, but to use the information obtained to get regulatory bodies to investigate and punish [B], [A], [C] and/or [D].[6] Second, the Applicant did not require the Investigation Materials to identify the potential defendants and plead all the facts necessary for his case in fraudulent misrepresentation.[7] Third, the Applicant's purported claim for conspiracy to defraud him was wholly speculative in nature.[8] Fourth, the Applicant ought to first seek pre-action discovery or interrogatories from the potential defendants instead of the Respondent who was merely a third party.[9]

11 I deal with the Respondent's objections in turn, starting first, with the contention that the Applicant was using the pre-discovery process improperly. The Respondent pointed to several letters which the Applicant had sent in which he made no mention of bringing a civil suit against the potential defendants, but

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5 Applicant Subs at para 57.

6 Respondent Subs at para 67.

7 Respondent Subs at para 85.

8 Respondent Subs at para 98.

9 Respondent Subs at para 106.

rather, stated his intention to report the matter to the police and/or regulatory bodies, as his basis for asserting that the Applicant had no intention of bringing civil proceedings against the potential defendants.

12 In my view, it was not fatal to the Applicant's case that he made no mention, in his letters to the Respondent, of his intention to commence civil proceedings. There is no onus on a party to lay out all his cards on the table, especially where litigation is being contemplated. Further, the Applicant's statements that he was going to file complaints with the police and regulatory bodies in his correspondence with the Respondent, to my mind, merely showed a man who was at his wits end given that he found himself in, what appeared to him to be a grossly unfair situation.

13 Similarly, I was not convinced by the argument that there was an abuse of process simply because the Applicant sought an order that he be allowed to use documents obtained to support any criminal action against the potential defendants. While there is an implied undertaking that the party who is entitled to pre-action discovery of documents to use the documents only for the conduct of the case and not for any other purpose, it is always open to that party to apply to court for leave to use the documents for purposes extraneous to the civil proceedings: *Lim Suk Ling Priscilla and another v Amber Compounding Pharmacy Pte Ltd and another and another appeal and another matter* [2020] 2 SLR 912 ("*Lim Suk Ling Priscilla*") at [1]. In that light, it would appear that the Applicant was simply seeking leave to use the documents to file a criminal report if the application for pre-action discovery was granted.

14 I turn now to the Respondent's second contention, that the Applicant did not require the Investigation Materials to identify the potential defendants and plead all the facts necessary for his case in fraudulent misrepresentation.

Generally, where the tort of deceit is concerned, the following elements must be established: *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 at [14]. First, there must be a representation of fact made by words or conduct. Second, the representation must be made with knowledge that it is false; it must be wilfully false, or at least made in the absence of any genuine belief that it is true. Third, the representation must be made with the intention that it should be acted upon by the plaintiff, or by a class of persons which includes the plaintiff. Fourth, the plaintiff must have acted upon the false statement and suffered damage in so doing.

15 It was clear to me that in the present case, the missing piece of the puzzle from the Applicant's point of view lay in the fact that he did not know whether [C] had made the representation, knowing that it was false. On the available facts before me, there was nothing which shed light on the state of [C]'s knowledge at the time when he made those representations to the Applicant.

16 I similarly found no merit in the Respondent's third contention, that the application for pre-action discovery should be denied as the Applicant's purported claim for conspiracy to defraud him appeared wholly speculative in nature. To establish a claim in the tort of conspiracy, whether by lawful or unlawful means, two key elements must be shown. First, that there is some concerted action between two or more persons to injure the applicant: Gary Chan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) ("*The Law of Torts in Singapore*") at [15.054] and [15.062]. Second, the defendants must have intended to injure the applicant: *The Law of Torts in Singapore* at [15.057] and [15.064].

17 In the present case, the Applicant did not know whether [C], who made the representation to him that the Clause would not be enforced, knew that that

representation was false, and whether [B], [A] and/or [D] knew of the same. The Applicant also did not know whether there was indeed a conspiracy between [B], [A], [C] and [D] to cause him loss. While there was no smoking gun, the Applicant's purported claim for conspiracy does not seem speculative. Circumstantial evidence suggests that there might be a conspiracy between [B], [A], [C] and [D]. After all, the four of them were involved in the events that led up to the Applicant's dismissal and appeared to either be friends or close acquaintances of one another.

18 As for the Respondent's final contention, that the Applicant ought to have sought pre-action discovery or interrogatories from the potential defendants instead of the Respondent who is merely a third party, I was not persuaded that this was a good reason for denying pre-action discovery in the present case. There was, after all, a possibility that the documents would disclose that the Applicant had a possible cause of action against the Respondent.

Is Disclosure necessary in the present case?

19 As mentioned above at [5], pre-action discovery can only be made if the court is satisfied that it is necessary. Further, the court can decline to order pre-action discovery if it is not in the public interest to do so: *Singapore Civil Procedure 2021* vol 1 (Cavinder Bull S.C. gen ed) (Sweet & Maxwell, 2021) ("White Book") at para 24/6/6/. In the present case, I found that pre-action discovery was indeed necessary to allow the Applicant to ascertain whether he had a viable cause of action either in the tort of deceit or the tort of conspiracy. The Respondent had conducted its own internal investigations into the matter and produced a report which would shed light as to whether [B], [A], [C] and [D] were acting in concert, and whether they had made certain representations

to the Applicant with the intention of deceiving him. This was the information the Applicant needed to assess whether he had viable causes of action in tort and deceit, and the parties against which he could possibly bring a claim.

20 While I have found that pre-action discovery was necessary in the present case, the fact that there was public interest in allowing the application, given that the Plaintiff was legally aided was an additional reason in favour of allowing pre-action discovery.

21 That there is public interest in allowing pre-action discovery where the applicant is legally aided is usefully illustrated by the case of *Shaw v Vauxhall Motors Ltd*[1974] 1 WLR 1035. In that case, the plaintiff, as a result of an allegedly faulty braking system of the truck that he was driving, was crushed against a wall of a factory. The plaintiff sought legal aid which was granted so that he could get an opinion on his case. To that end, the plaintiff's counsel asked to see the maintenance records of the braking system. When the defendant refused to disclose those records, the plaintiff applied under s 31 of the Administration of Justice Act 1970 (c 31) (UK) to have those documents disclosed on the basis that if the records showed that the braking system was well maintained, the action might not proceed. In allowing the appeal and ordering discovery, Buckley LJ made the following observations (at p 1040G – 1041B):

> … But there is an important aspect of the matter which I think it is right for any court before whom such an application comes to bear in mind. That is the public interest where the plaintiff is qualified for legal aid. Where the plaintiff is qualified for legal aid, his advisers are under a duty to inform the legal aid committee of their view of his prospects of succeeding in the action and to keep the committee informed from time to time throughout the progress of the proceedings of any change in that respect: it is undesirable that proceedings should be brought or continued with legal aid beyond the point at which

> it is reasonably clear that the plaintiff has got no substantial prospect of success; and therefore there is a special ground for saying that it is desirable that the advisers of legally aided parties should have as early information as possible on matters which may affect that aspect of a legally aided party's position in the litigation. In the present case, it has now been made clear by Mr Russell that the plaintiff's case rests wholly upon the allegation that the truck which the proposed plaintiff was driving when the accident occurred is said to have been defective; and Mr Russell concedes that if disclosure of the documents which are sought to be disclosed shows that in fact the machine was not defective, the plaintiff could not succeed in the action; and the disclosure of the documents may therefore result in the action being abandoned before it is even commenced, the dispute never reaching the stage of litigation at all. This seems to me to make this case clearly one in which it is right for the court to exercise its discretion in favour of ordering early disclosure–pre-proceedings disclosure–of the documents in question, and on that ground I agree that the appeal should be allowed.

22 The observations of Buckley LJ are, in my view, relevant to the present case. The Applicant has applied for legal aid in respect of his suit against the potential defendants. As set out in s 8(2)(*b*) of the Legal Aid and Advice Act, the Legal Aid Bureau must be convinced that the plaintiff has reasonable grounds for "taking, defending, continuing or being a party" to the proceedings before granting legal aid. The rationale for this is simple. As Minister Edwin Tong, in the Second Reading of the Legal Aid and Advice (Amendment) Bill put it: "legal aid is targeted and given only to those with limited means, as it has to be, because we have limited resources and we need to be prudent about how we allocate them": *Singapore Parliamentary Debates, Official Report* (19 November 2018), vol 94. It was therefore clear to me that the public interest considerations when it came to the disbursement of legal aid was a relevant consideration that should be taken into account in considering whether pre-action discovery should be ordered.

Whether leave to use the documents in support of other proceedings should be granted

23 It is a fundamental principle of discovery that a party which is entitled to pre-action discovery of documents has an implied undertaking to only use the disclosed documents for the conduct of the case, and not for any other purpose ("the Riddick undertaking"): *Lim Suk Ling Priscilla* at [1], White Book at para 24/6/7. The Applicant therefore sought an order to use documents obtained in pre-action discovery for any further proceedings, both civil and criminal.

24 The Respondent objected to this on the following grounds:

(a) The Applicant had provided no basis, let alone any special or exceptional circumstances to warrant his release from the implied undertaking.[10]

(b) Any assessment by the Court of whether the circumstances warrant the Applicant's release from the implied undertaking necessarily requires the Court to first know what exactly the Applicant intends to do and the details thereof which would necessitate his release from the undertaking as opposed to a blanket general right of release.[11]

25 In *Lim Suk Ling Priscilla*, the Court of Appeal held (at [45]), that in determining whether a party ought to be released from its Riddick undertaking, a balancing of interests tests is to be adopted. Leave would be granted if, in all the circumstances of the case, the interests advanced for the extraneous use of the disclosed documents outweighed the interests that were protected by the

10 Respondent Subs at para 133.

11 Respondent Subs at para 134.

Riddick undertaking (at [46]). Some factors which weighed in favour of lifting the Riddick undertaking include (at [71]):

(a) Countervailing legislative policy;

(b) Support of related proceedings;

(c) Investigation and prosecution of criminal offence(s);

(d) Public safety concerns; and

(e) International comity.

26 On the other hand, factors weighing against the granting of leave include (at [72]):

(a) Public interest in encouraging full disclosure and the disclosing party's privacy interests;

(b) Injustice or prejudice to the disclosing party;

(c) Improper purpose for which leave was sought;

(d) Timeous assertion of the privilege against self-incrimination by the disclosing party.

27 In the present case, I took the view that leave should be granted to allow the Applicant to use the documents obtained for further civil, but not criminal proceedings. There was nothing on the facts which suggested that a criminal offence had been committed. However, if the documents obtained disclosed any form of criminal conduct, it would be open to the Applicant to apply to court for leave to disclose the documents to the relevant authorities.

Whether the non-disclosure and sealing orders should be granted

28 I turn now to deal with the final orders which the Applicant sought: a) the Respondent be restrained from communicating any information about the present proceedings to its employees (the "Non-Disclosure order"), and b) that the court's file be sealed (the "Sealing order"). The Applicant says that such orders are necessary given that the matter is still at a preliminary stage, and given the allegations of fraud, the Applicant has a legitimate interest in ensuring that the alleged fraudsters or co-conspirators in the fraud are not tipped off in respect of intended court proceedings as they might seek to undermine any future claim against them.[12] The Applicant further asserted that because the matter is still at an early stage, it is unnecessary for the maintenance of open justice to allow third parties access to the affidavits filed in these proceedings.[13] Finally, the Applicant argued that the Respondent had no good reason to object to the orders sought given that it would be in their interest to keep proceedings confidential, considering the serious nature of the allegations made against itself and/or its employees.[14]

29 The Respondent argued that the Non-Disclosure and Sealing orders should not be granted for the following reasons:

(a) The Applicant's assertion that any future claims against the potential defendants may be undermined if the orders were not granted

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12 Applicant Supplementary Submissions ("ASS") at paras 9 and 12

13 ASS at para 15.

14 ASS at para 18.

is entirely speculative and without reasonable basis as there is no evidence to suggest that this would be the case.[15]

(b) The principle of open justice is sacrosanct and also applies to the early stages of proceedings.[16]

(c) The Respondent has not asserted any interest in keeping these proceedings confidential.[17]

30 As I previously observed in *BBW v BBX and others* [2016] 5 SLR 755 at [26] – [27] and [30], the court has the inherent power to grant a sealing order. The court's inherent power is reflected in O 92 r 4 of the Rules of Court which states:

> **Inherent powers of Court (O. 92, r. 4)**
>
> 4. For the avoidance of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

31 In the same vein, I would hold that the court can, in the exercise of its inherent powers, make an order for non-disclosure. Arguably, both a sealing and non-disclosure order, depending on how they are worded, can have the same broad aim, that is to maintain the confidentiality of information used in proceedings, and to maintain the status quo until a decision on the issue is reached: *Sembcorp Marine Ltd v Aurol Anthony Sabastian* [2013] 1 SLR 245 at [38]. Further, the court also looks at the purpose for which the order was granted

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15 Respondent Supplementary Written Submissions ("RSWS") Subs at para 7(a).

16 RSWS 7(b).

17 RSWS at para 7(d).

to determine the true effect of that order in determining whether there has been a breach of said order for the purposes of contempt proceedings: *Aurol Anthony Sabastian v Sembcorp Marine Ltd* [2013] 2 SLR 246 ("*Sembcorp Marine Ltd (CA)*") at [99]. It may have been sufficient to make the Sealing Order in the present case, given that the purpose of doing so was to prevent the potential defendants from finding out that the Applicant had requested for pre-action discovery and was contemplating civil action against them. That said, there is a difference between a sealing and a non-disclosure order. The former prevents the inspection of documents in the court file whereas the latter prohibits the disclosure of information. In the present case, the purpose of having the case files sealed would arguably be defeated if there was no corresponding order for non-disclosure, which would prohibit the Respondent from disclosing information about the present proceedings to the potential defendants.

32 Considering the circumstances of the case, I was of the view that it would be appropriate, erring on the side of caution, to grant the Non-Disclosure and Sealing orders. After all, if the potential defendants did catch wind that the Applicant was contemplating litigation against them, it was entirely possible that they would take steps, such as destroying evidence, which could undermine the subsequent litigation. This could occasion injustice on the Applicant.

Conclusion

33 In the circumstances, I allowed the application for pre-action discovery as well as the Non-Disclosure and Sealing orders, and granted leave for the Applicant to use the documents obtained in further civil, but not criminal proceedings.

34 As for costs, the general principle is that the person against whom an order for pre-action discovery is sought is entitled to his costs of the application,

and of complying with any order made thereon on an indemnity basis unless the court orders otherwise: White Book at para 24/6/14. However, the present case warranted a departure from the general rule as the Applicant was legally aided. Section 12(4)(*c*) of the Legal Aid and Advice Act states that:

> (4) Where any Grant of Aid is so filed, the aided person —
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> …
>
> (*c*) is not, except where express provision is made in this Act, liable for costs to any other party in any proceedings to which the Grant of Aid relates …

35 I therefore made no order as to costs.

36 Finally, it remains for me to thank counsel for both parties for their clear and cogent submissions which greatly assisted me.

Lee Seiu Kin
Judge of the High Court

Istyana Putri Ibrahim and Kho Qin Yao (Legal Aid Bureau) for the applicant.
Seah Yong Quan Terence and Chong Xiu Bing Denise (Virtus Law LLP) for the respondent.