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

[2023] SGHCR 17

Originating Claim No 365 of 2022 (Summonses Nos 2993 and 2994 of 2023)

Between

(1) Eng's Wantan Noodle Pte Ltd
(2) Thomas Hong

… *Claimants*

And

Eng's Char Siew Wantan Mee Pte Ltd

… *Defendant*

JUDGMENT

[Civil Procedure] — [Production of Documents]
[Civil Procedure] — [Costs] — [Security]

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Eng's Wantan Noodle Pte Ltd and another
v
Eng's Char Siew Wantan Mee Pte Ltd

[2023] SGHCR 17

General Division of the High Court — Originating Claim No 365 of 2022
(Summonses Nos 2993 and 2994 of 2023)
AR Navin Anand
19 October 2023

26 October 2023 Judgment reserved.

AR Navin Anand:

Introduction

1 HC/OC 365/2022 ("OC 365") is the latest chapter in the continuing dispute over the right to use the "Eng's" name in businesses selling wanton noodles.

2 The origins of the "Eng's" name can be traced to a successful hawker stall at Dunman Food Centre ran by Mr Ng Ba Eng ("Mr Ng") that sold wanton noodles known for its noodle texture, handmade wanton dumplings, and spicy hot chilli sauce. A joint venture to expand Mr Ng's business found success but ended abruptly in 2018 amidst souring relations between the business partners. From this sprang rival wanton noodle businesses by the first claimant and the

defendant.

3 In OC 365, the parties seek a determination on claims of passing off and trademark infringement (or the absence of it). The case is fixed for trial early next year, and parties have exchanged and filed their Affidavits of Evidence-in-Chief ("AEICs"). Pursuant to O 9 r 9 of the Rules of Court 2021 ("ROC 2021"), the claimants and the defendant have each filed a Single Application Pending Trial ("SAPT") to seek orders against the other on matters that they deem necessary for the case to proceed expeditiously. In their SAPT, the claimants seek the production of documents and the provision of security for costs for the defendant's counterclaim. The defendant, on the other hand, only pursues the production of documents in its SAPT.

4 After considering the parties' submissions and the relevant documents, I have decided to dismiss both the claimants' and the defendant's SAPTs. I set out my full grounds below.

Background facts

5 The background to this dispute has been canvassed in some detail in three earlier judgments: *New Ping Ping Pauline v Eng's Noodles House Pte Ltd and others* [2021] 4 SLR 1317 ("*Eng's (HC)*"), *New Ping Ping Pauline and others v Eng's Noodles House Pte Ltd* [2021] SGHC(A) 4 ("*Eng's (AD)*"), and *Pauline New Ping Ping v Eng's Char Siew Wantan Mee Pte Ltd* [2022] SGIPOS 10 ("*Eng's (IPOS)*"). Where necessary, I will refer to these judgments to highlight the facts which are relevant to my decision.

6 It should be noted that the parties also relied on matters covered in the AEICs, in addition to the supporting and reply affidavits filed for the SAPTs. At the hearing before me, counsel agreed that I could consider the AEICs in

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arriving at my decision, and I will refer to them where appropriate as well.

The parties

7 The first claimant, Eng's Wantan Noodle Pte Ltd operates a restaurant selling wanton noodles at 287 Tanjong Katong Road.[1] The first claimant was incorporated on 28 February 2018, and is part of the Lao Huo Tang Group of companies ("LHT Group").[2] The first claimant has no association with Mr Ng's family. The second claimant, Mr Thomas Hong, is the CEO of the LHT Group.[3]

8 The defendant, Eng's Char Siew Wantan Mee Pte Ltd, operated a restaurant selling wanton noodles at 248/250 Tanjong Katong Road between May 2018 and November 2022.[4] The defendant was incorporated on 5 March 2018, and its directors and shareholders are Mr Ng's daughters, Ms Ng Mui Hong ("Mui Hong") and Ms Ng Mei Ling ("Mei Ling").[5] The defendant's business is very much a family affair. Mui Hong's and Mei Ling's brother, Mr Ng Weng San ("Desmond"), is a *de facto* employee of the defendant,[6] while their mother, Mdm Loh Ngit Goo ("Mdm Loh"), assisted in the business as well.[7] The defendant presently does not operate any business selling wanton noodles, but the Ng family (*ie*, Mui Hong, Mei Ling, Desmond and Mdm Loh)

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1 Statement of Claim at para 1.

2 Affidavit of Evidence-in-Chief of Thomas Hong @ Hong Meng San dated 7 August 2023 ("TH AEIC") at para 11.

3 *Ibid* at para 12.

4 Affidavit of Evidence-in-Chief of Ng Mui Hong dated 31 July 2023 ("NMH AEIC") at para 18; TH AEIC at para 20.

5 NMH AEIC at paras 16-17.

6 Affidavit of Evidence-in-Chief of Ng Weng San dated 31 July 2023 ("NWS AEIC") at para 1.

7 Affidavit of Evidence-in-Chief of Loh Ngit Goo dated 31 July 2023 ("LNG AEIC") at para 1.

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intend to restart the business in due course.[8]

The failed joint venture

9 To understand the claims made in this action, it is necessary to first set out the failed joint venture which led to the incorporation of the first claimant and the defendant.

10 From the 1980s until early 2012, Mr Ng operated his business from a hawker stall at Dunman Food Centre that bore a signboard with the English words "Eng's Char Siew Wan Ton Mee" and the Mandarin characters "榮高叉燒雲吞麵" (see *Eng's (HC)* at [11]). The "Eng's" name was derived from Mr Ng's name (*ie*, Ng Ba Eng) (see *Eng's (IPOS)* at [5]). The Mandarin characters "榮" and "高" mean "glory" and "high", while the remaining characters mean "char siew wanton noodles" (see *Eng's (IPOS)* at [6]). Business was brisk, and the stall won many accolades, including the title of "hawker master" by *The Straits Times* and *Lianhe Zaobao* newspapers (see *Eng's (HC)* at [12]). From 2009, Desmond joined Mr Ng in operating the hawker stall, with the rest of the Ng family playing other supporting roles (see *Eng's (HC)* at [13]).

11 In early 2012, Mr Jason Sim ("Jason"), a businessman, approached Mr Ng and proposed a collaboration to expand Mr Ng's hawker business (see *Eng's (HC)* at [14]). Mr Ng agreed, and Eng's Noodles House Pte Ltd ("Eng's Noodles") was incorporated on 27 February 2012 with Desmond and Jason's wife, Ms Pauline New ("Pauline"), as the sole shareholders and directors (see

[8] Affidavit of Ng Mui Hong dated 12 October 2023 ("NMH Reply Affidavit") at para 6.

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Eng's (AD) at [3]).

12 Mr Ng and Desmond commenced business from Eng's Noodles' premises at 287 Tanjong Katong Road, and from 27 February 2012 to 28 February 2018, the business enjoyed considerable success, even after Mr Ng passed away in 2013 (see *Eng's (IPOS)* at [10], [14]-[15]). Despite this success, the relationship between Desmond and Pauline started deteriorating from 2015 onwards, and Eng's Noodles ceased business on 28 February 2018 after it failed to obtain a renewal of the lease of its premises (see *Eng's (HC)* at [27]-[30]; *Eng's (AD)* at [12]). As it turned out, Jason had helped the second claimant secure the lease of 287 Tanjong Katong Road for the first claimant (see *Eng's (AD)* at [12]-[13]).

13 Sometime in March 2018, the first claimant started business from 287 Tanjong Katong Road.[9] Around the same time, Mui Hong and Mei Ling set up the defendant as their way of asserting the original and authentic "Eng's brand", and "to fight, to get back our 'Eng's' and *rong gao*" (see *Eng's (HC)* at [101]–[102]). The defendant commenced operations at 248/250 Tanjong Katong Road (*ie*, across the road from the first claimant) in May 2018 (see *Eng's (AD)* at [6]).

The common law derivative action

14 In 2019, Pauline commenced a common law derivative action in HC/S 20/2019 ("S 20") and brought claims for: (a) unlawful means conspiracy against Desmond, Teng Chai Hai ("Bill") who is a 5% shareholder and a director of Eng's Noodles, Mui Hong, Mei Ling, and the defendant; and (b) breach of fiduciary duties owed to Eng's Noodles by Desmond and Bill. In response, Mui Hong, Mei Ling and the defendant counterclaimed against Pauline in the tort of

9 TH AEIC at para 71.

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passing off ("S 20 Counterclaim").

15 Pauline's claims were dismissed by Valerie Thean J on 22 December 2020, and Pauline's appeal against Thean J's decision was dismissed by the Appellate Division of the High Court on 19 July 2021 (see *Eng's (HC)* and *Eng's (AD)*).

16 Thean J also dismissed the S 20 Counterclaim, finding that Mui Hong, Mei Ling and the defendant could not prove the element of goodwill necessary to maintain an action in passing off. Her Honour's reasoning was as follows.

(a) Thean J accepted that there existed goodwill in wanton noodles associated with Mr Ng's recipe and method of preparation (see *Eng's (HC)* at [124]):

> In the present case, the good being sold was *wanton mee*. It is associated with a particular source, namely the business using the late Mr Ng's recipe and method of preparation. In particular, the *wanton mee* is known for its "springy noodles" and accompanied by a "gunpowder" chilli paste. It is this association that formed the attractive force that brought in the custom.

(b) During the years when Mr Ng operated the hawker stall at Dunman Food Centre (see [10] above), the goodwill was owned by Mr Ng and attached to the hawker business (see *Eng's (HC)* at [126]). When Mr Ng operated through Eng's Noodles, the goodwill continued to be owned by Mr Ng but attached to Eng's Noodles instead (see *Eng's (HC)* at [127]).

(c) After Mr Ng's passing in 2013, the ownership of the goodwill became unclear. Thean J held that the goodwill was not owned by Mui Hong, Mei Ling and the defendant (see *Eng's (HC)* at [143]). In particular, Thean J observed that there was no evidence that the public

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attributed the goodwill to other members of the Ng family aside from Mr Ng or "at most, Desmond" (see *Eng's (HC)* at [143]). Desmond was not a plaintiff in the S 20 Counterclaim, nor was there any assertion that he was the owner of the goodwill (see *Eng's (HC)* at [143]).

(d) Further, even if the ownership of the goodwill was established, the entity responsible for the misrepresentation to the public would be the first claimant, and not Pauline (see *Eng's (HC)* at [144]).

17 The dismissal of the S 20 Counterclaim was not appealed against. Following Thean J's decision, the members of the Ng family entered into a deed of an assignment dated 3 September 2021 ("Deed of Assignment") to assign their residual and personal goodwill to the "Eng's" name to the defendant.[10]

Registration of trade marks

18 As the claims in S 20 were making their way through the court system, a parallel fight was brewing on the trade mark front.

19 On 8 June 2018 and 31 July 2018, the defendant applied to register three trade marks with the Intellectual Property Office of Singapore ("IPOS"): (a) first, Trade Mark No. 40201811254U ("1st Name Mark); (b) second, Trade Mark No 40201814979U ("2nd Name Mark); and (c) third, Trade Mark No 40201814978P ("3rd Name Mark") (see *Eng's (IPOS)* at [24]). For ease of reference, I refer to these three marks collectively as the "Name Marks". The Name Marks were registered under Class 43 and covered "*Take away food services; Serving food and drinks; Providing food and drink; Providing of food and drink; Provision of food and drink; Preparation of food and drink;*

[10] NWS AEIC at para 44; Defendant's Bundle of Documents ("DB") at pp228-232.

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Restaurants; Restaurant services; Restaurant reservation services".[11]

(1st Name Mark)

(2nd Name Mark)

(3rd Name Mark)

Figure 1: The Name Marks

20 On 6 August 2018, Mui Hong, who had registered Trade Mark No 40201719310S ("Chilli Mark") on 3 October 2017 under a sole proprietorship, applied to have it transferred to the defendant (see *Eng's (HC)* at [28] and [40]). The Chilli Mark was registered under Class 30 and covered "Noodles".[12]

Figure 2: The Chilli Mark

21 Pauline opposed the application of the Name Marks, and on 27 June 2022, the IP Adjudicator issued his decision, allowing the registration of the Name Marks (see *Eng's (IPOS)*). On 25 July 2022, Pauline appealed against the IP Adjudicator's decision *vide* HC/TA 7/2022 ("TA 7").[13]

22 In addition to her opposition to the Name Marks, Pauline filed an application in the IPOS to invalidate the registration of the Chilli Mark. The

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11 NMH AEIC at para 37.

12 *Ibid* at para 36.

13 *Ibid* at para 42.

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Registrar of Trade Marks referred this invalidation action to the General Division of the High Court in HC/OA 558/2022 ("OA 558").[14]

23 On 24 March 2023, Thean J heard and dismissed both TA 7 and OA 558.[15] Thereafter, Pauline filed AD/OA 23/2023 ("OA 23") to seek permission to appeal against the decision in TA 7 and OA 558.[16] OA 23 was dismissed by the Appellate Division of the High Court on 2 August 2023. Consequently, on 15 August 2023, IPOS issued the certificates of registration for the Name Marks,[17] thus ending the 4-year contest over their registration.

24 The trade marks currently registered under the defendant are set out in the table below. For completeness, I should add that the first claimant and companies under the LHT Group had filed applications to register trade marks containing the "Eng's" name.[18] Based on the materials before me, it appears that these applications have since been withdrawn.[19]

Trade Mark	**Class**	**Date of Registration**
Chilli Mark	30	3 October 2017
1st Name Mark	43	8 June 2018
2nd Name Mark	43	31 July 2018
3rd Name Mark	43	31 July 2018

14 *Ibid* at para 43.

15 *Ibid* at para 44.

16 *Ibid* at para 45.

17 Defence and Counterclaim (Amendment No. 1) at para 15.

18 NWS AEIC at para 53.

19 *Ibid*.

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Threats of proceedings and the Poster

25 During the course of the protracted litigation over the registration of the Name Marks, the defendant had, through its solicitors, issued letters to various persons and threatened proceedings for trade mark infringement and passing off.[20] The recipients of such letters included the claimants, companies in the LHT Group, and the landlord of the premises at 287 Tanjong Katong Road.

26 On 25 July 2022, an article was carried in *The Straits Times* to report on the outcome of the *Eng's (IPOS)* decision ("ST Article").[21] The ST Article also mentioned a statement provided by the Ng family on their intention to pursue the second claimant and Pauline for infringement of the Eng's name. The relevant portion of the ST Article reads as follows:[22]

> In a statement provided through one of their lawyers Leo Cheng Suan, the Ng family said that the Eng's brand was left to them by their father and rightfully belongs to them.
>
> "We will be pursuing the matter with Mr Thomas Hong and Ms Pauline New for their infringement of the Eng's name," they added.

27 The defendant reproduced the ST Article as a poster and displayed it outside its shop ("Poster").[23] The Poster juxtaposed two separate images of the shopfronts of the first claimant and the defendant, and had the word "Counterfeit" placed across the former and the words "REAL and only" over the latter.[24] The left column of the Poster read as follows:

> Our family's Eng's Trade Marks have been misappropriated.

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20 TH AEIC at paras 106-120.

21 *Ibid* at pp165-167.

22 *Ibid* at p166.

23 *Ibid* at para 173.

24 *Ibid* at p169.

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> Sadly the public has been deceived and some even suffered food poisoning at the counterfeiter's shops. We were bullied but we persevered and are grateful for the High Court, the Court of Appeal and IPOS's decisions in our favour.
>
> The Eng's brand was left to us by our late father and rightfully belongs to our family. Our Family stands united to do him proud as the true Hawker Master for wantan mee.
>
> We will be pursuing the matter with Mr Thomas Hong and Ms Pauline New for their infringement of the Eng's name.

28 The Poster was described by the second claimant to be the "last straw",[25] and on 31 October 2022, the claimants commenced OC 365 against the defendant.

Present action in OC 365

29 In OC 365, the claimants claim against the defendant in defamation, for groundless threats of infringement proceedings with respect to the Chilli Mark, and seek negative declarations in the form of:

(a) a declaration that the defendant has no cause of action against the claimants for infringement of the Name Marks and the Chilli Mark; and

(b) a declaration that the defendant has no cause of action against the claimants for the tort of passing off.[26]

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25 *Ibid* at para 186.

26 Statement of Claim at paras 24-34.

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30 The defendant's defence to these claims is as follows.

(a) It has valid causes of action against the first claimant for infringement of the Name Marks and the Chilli Mark, and in passing off.[27]

(b) The second claimant is a shadow or *de facto* director of the first claimant.[28] He is the alter ego and directing mind of the first claimant, and the corporate veil ought to be lifted for him to be personally liable for authorising, directing, and procuring the acts of the first claimant.[29]

(c) The words alleged to be defamatory were true in substance and fact.[30]

31 The defendant also brings a counterclaim against the claimants for trade mark infringement, passing off, and for well known trade marks.[31]

32 At a Registrar's Case Conference on 10 February 2023, SAR Cheng Pei Feng recorded a consent order for OC 365 to proceed on a bifurcated basis with liability to be determined first, prior to the trial for the assessment of damages or an account of profits (if applicable) ("Bifurcation Order").[32] It was expressly stated in the Bifurcation Order that "[t]he bifurcation will likewise apply to the

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27 Defence and Counterclaim (Amendment No. 1) at paras 15-21 and 23.

28 *Ibid* at paras 6 and 22.

29 *Ibid* at para 6.

30 *Ibid* at paras 24-26.

31 *Ibid* at paras 31-66.

32 Certified Transcript (10 February 2023), p4, lines 15-22.

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process of production of documents and/or AEICs".[33]

33 On 4 July 2023, the trial on liability was fixed for 8.5 days in January and February 2024. On 7 August 2023, the parties exchanged and filed their AEICs.

The SAPTs

34 On 28 September 2023, the claimants filed their SAPT *vide* HC/SUM 2993/2023 ("SUM 2993"), and the defendant filed its SAPT *vide* HC/SUM 2994/2023 ("SUM 2994").

35 In SUM 2993, the claimants seek the production of documents and the provision of security for costs from the defendant. I elaborate.

(a) The claimants initially sought the production of 5 categories of documents, but only proceeded with 4 categories at the hearing after the defendant agreed to a limited form of production for 1 category. The 4 categories of documents proceeded with are:

(i) Category 1: Documents pertaining to the operation and cessation of the defendant's business at 248/250 Tanjong Katong Road, in particular, documents showing the rental costs, the renovation and outfitting costs, the number of staff and the salaries of the staff, the monthly turnover and profit, and the date of cessation ("Branch Operation Documents").

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[33] *Ibid.*

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(ii) Categories 2 and 3: The complete accounts of Eng's Noodles from 2012 to present, and of the defendant from 2018 to present ("Accounts Documents").

(iii) Category 4: The dividends, salaries, bonuses, and director's fees (where applicable) paid to Desmond, Desmond's wife, Mui Hong, Mei Ling and Mdm Loh ("Remuneration Documents").

(b) The claimants further seek an order that the defendant provide security for costs for its counterclaim in the sum of $150,000. The claimants contend that the defendant is impecunious, and the figure of $150,000 is based on the estimates of $50,000 for pre-trial costs, $72,000 to $90,000 for trial, and $20,000 for post-trial work.[34]

36 In SUM 2994, the defendant initially sought the production of 3 categories of documents from the claimants. Two categories were not proceeded with, after the claimants' counsel agreed to file an affidavit by a representative of the first claimant to confirm that there are no documents in the first claimant's possession or control. Thus, the only contested category was the production of all correspondence and documents with the Singapore Food Agency and customers relating to the food poisoning incident at the first claimant's restaurant and franchised outlets, including any police reports made by Ms Tiffany Hong, the 2nd claimant's daughter ("Food Poisoning Documents").

Issues

37 The SAPTs in SUM 2993 and SUM 2994 can be analysed in two parts.

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[34] Claimants' Written Submissions ("CWS") at paras 17 and 41.

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I will deal first with the prayers for the production of documents in both SAPTs, before considering whether to order security for costs against the defendant in SUM 2993.

Part 1: Production of documents

38 Under the ROC 2021, the term "production" is now used in place of what was traditionally referred to as "discovery" in the revoked Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC 2014")). In the present case, the parties seek the production of requested documents (also known as specific discovery in the ROC 2014) pursuant to O 11 r 3(1) of the ROC 2021. The provision reads as follows:

> **Production of requested documents (O. 11, r. 3)**
>
> **3.**– (1) The Court may order any party to produce the original or a copy of a specified document or class of documents (called the requested documents) in the party's possession or control, if the requesting party –
>
> (*a*) properly identifies the requested documents; and
>
> (*b*) shows that the requested documents are material to the issues in the case.

39 To the best of my knowledge, the disclosure regime for originating claims under O 11 of the ROC 2021 has hitherto not yet been considered in any decision. Accordingly, I will first analyse the disclosure regime under the ROC 2021, before setting out my views on the test for production under O 11 r 3 of the ROC 2021 and whether this test is satisfied on the present facts.

Disclosure regime under the ROC 2021

40 Discovery is a fundamental rule in our system of litigation to ensure that litigation is conducted "cards face up on the table" and is disposed of in a just and efficient manner: see *Teo Wai Cheong v Crédit Industriel et Commercial*

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and another appeal [2013] 3 SLR 573 ("*Teo Wai Cheong*") at [41]. As explained by the Court of Appeal in *Teo Wai Cheong* (at [41]– [42]):

> … The just and efficient disposal of litigation can only be achieved by ensuring that parties disclose the relevant evidence before any hearing of the matter, thus allowing counsel and the parties to evaluate the strength of their respective cases, clarify the issues between them, reduce surprises at the trial and encourage settlement …
>
> … the principle that litigation is to be conducted with "cards face up on the table" helps ensure that "real justice between opposing parties" is done. Unless the court has before it *all* the relevant information, such an object cannot be achieved. …
>
> [emphasis in original]

41 However, there exists a perennial tension in balancing the needs of justice and efficiency in the discovery process, as both objectives may not always pull in the same direction. In the words of Lee Sieu Kin J in *Breezeway Overseas Ltd and another v UBS AG and others* [2012] 4 SLR 1035 (at [20]):

> The perennial tension in the law of civil procedure, *viz*, the attempt to achieve both justice and efficiency, comes to the forefront in the discovery process. *On the one hand, it is ex hypothesi in the interest of justice that all relevant material is discovered, while on the other, there is a pressing need to ensure efficiency lest injustice be occasioned through the well-meaning but disproportionate attempt to ensure that all relevant material is disclosed.* As Jacobs LJ succinctly observed in *Nichia Corp v Argos Ltd* [2007] EWCA Civ 741 at [50]-[51]:
>
> > 50. … 'Perfect justice' in one sense involves a tribunal examining every conceivable aspect of a dispute. All relevant witness and all relevant documents need to be considered. And each party must be given a full opportunity of considering everything and challenging anything it wishes. No stone, however small, should remain unturned. …
> >
> > 51. But a system which sought such 'perfect justice' in every case would actually defeat justice. The cost and time involved would make it impossible to decide all but the most vastly funded cases. The cost of nearly every

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> case would be greater than what it is about. Life is too short to investigate everything in that way. So a compromise is made: one makes do with a lesser procedure even though it may result in the justice being rougher. Putting it another way, better justice is achieved by risking a little bit of injustice.
>
> [emphasis added]

42 Striking the right balance between justice and efficiency in the discovery process is increasingly challenging in light of technological advancements and the proliferation of data, which have increased the *volume* of potentially discoverable material. In his extra-judicial address at the Goff Lecture in 2021, Chief Justice Sundaresh Menon explained the phenomenon as follows (see Sundaresh Menon CJ, "The Complexification of Disputes in the Digital Age", Goff Lecture 2021 (9 November 2021) at paras 17-19):

> … In 1999, the world generated as much as 1.5 billion gigabytes of data in a year; today, that same amount of data is produced about every 18 hours; and, by 2025, it is estimated that that quantity of data will be created approximately every 5 minutes. The popularity of email and instant messaging have resulted in the creation and archival of an almost exhaustive documentary record of written communication. Even video and audio calls can be recorded and saved. Added to this is the data that is constantly generated by all manner of 'smart' gadgets connected to the 'Internet of Things'. There is also the data about the data – or metadata – such as information as to the size of an electronic file, or when it was created. Today, nearly everything is recorded, almost nothing is deleted, and anything can be shared with anyone with a click or two.
>
> *The ease with which data can be electronically generated, stored and shared has meant that the volume of potential evidence available now is far beyond anything that existed in the 20th century, when records were predominantly created and stored on paper. …*
>
> *[This] has led to an unprecedented expansion in the scope of the available evidence that could be considered. Evidence may now be found everywhere, whether in the form of message logs, call logs, GPS location data, connections to wireless networks, and the like, so long as one knows where to look and is inclined to look hard enough.*

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> [emphasis added]

43 The other dimension to an ever-increasing amount of potentially discoverable material is time and costs. Put simply, parties and their counsel will invariably need more time and incur greater costs in reviewing and considering these material, and deciding whether they should be disclosed or pursued against other parties.

44 It is against this backdrop that O 11 of the ROC 2021 seeks to lay down a stricter regime for the disclosure of documents as compared to its predecessor provision (*ie,* O 24 of the ROC 2014). This impetus for this change was explained in the Civil Justice Commission's report in the following terms (see *Civil Justice Commission Report* (29 December 2017) (Chairperson: Justice Tay Yong Kwang) at p19):

> *The Rules impose a new regime* which works on the principle that a claimant is to sue and proceed on the strength of his case and not on the weakness of the defendant's case. *It aims to prevent parties from engaging in unnecessary requests and applications with the hope of uncovering a "smoking gun". While some cases may justify the current full discovery, the Rules seek to make them rare exceptions rather than the norm. Discovery is very expensive and time consuming. It is also labour intensive in some cases where documents are still stored in printed copy.* It is also highly intrusive into privacy and confidentiality (even if the browsing of a party's documents is done by that party's solicitors and their assistants). In today's context, it is even more so since discovery can encompass all the documents and messages stored in a person's mobile phone and other electronic devices. [emphasis added]

45 In broad terms, the disclosure of documents under O 11 of the ROC 2021 proceeds as follows.

(a) After an order for general production is made by the court, the parties are to exchange a list of, and a copy of, all documents in their

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possession or control, on which they rely on for their respective cases as well as "known adverse documents": see O 11 r 2(1)(*a*)-(*b*) of the ROC 2021. The term "known adverse documents" includes documents which a party ought reasonably to know are adverse to the party's case: see O 11 r 2(2) of the ROC 2021. In addition, a broader scope of discovery can take place if agreed between the parties or if ordered by the court: see O 11 r 2(1)(*c*) of the ROC 2021. Unlike the position under the ROC 2014, the parties do not need to file the list of documents and an affidavit verifying such a list.

(b) Thereafter, the parties may seek production of requested documents if they can properly identify these documents and show that such documents are material to the issues in the case: see O 11 r 3(1) of the ROC 2021.

(c) The court will not order production of any document that merely leads a party on a train of inquiry to other documents, except in a special case: see O 11 r 5(1) of the ROC 2021. Further, the court will not order the production of any document that is part of a party's private or internal correspondence, unless it is a special case or such correspondence are known adverse documents: see O 11 r 5(2) of the ROC 2021.

46 In applying O 11, one must also have regard to the Ideals enshrined in O 3 r 1 of the ROC 2021 ("Ideals"), which are "akin to constitutional principles by which the parties and the Court are guided in conducting civil proceedings" and advocate for fair access to justice, expeditious proceedings, costs effective work, the efficient use of court resources, and fair and practical results: see O

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11 r 1(2) of the ROC 2021; *Dai Yi Ting v Chuang Fu Yuan (Grabcycle (SG) Pte Ltd and another, third parties)* [2023] 3 SLR 1574 at [13]– [14].

Test for production under O 11 r 3 of the ROC 2021

47 In my view, the requesting party applying for production of requested documents under O 11 r 3 of the ROC 2021 must satisfy three conditions.

48 First, the requesting party must properly identify the requested documents: see O 11 r 3(1)(*a*) of the ROC 2021. This means that the requested documents must be described with *sufficient particularity* to enable the producing party to know what documents are being requested and to ascertain whether the documents are in that party's possession or control: see *Singapore Civil Procedure 2022* vol 1 (Cavinder Bull gen ed) (Sweet & Maxwell, 12th Ed, 2022) (*"Singapore Civil Procedure*") at para 11/3/2.

49 Second, the requesting party must show that the requested documents are *material* to the issues in the case: see O 11 r 3(1)(*b*) of the ROC 2021. This can be approached in two parts.

(a) The issues in the case will be determined by reference to the pleaded cases of the parties (see *Tan Chin Seng and others v Raffles Town Club Pte Ltd* [2002] 2 SLR(R) 465 at [18]), and there must be a demonstrable nexus between the requested documents and at least one of the issues (see *Dante Yap Go v Bank Austria Creditanstalt AG* [2007] SGHC 69 at [20]).

(b) In addition, the requested documents must satisfy the threshold of materiality. The academic commentaries are aligned that the test of materiality under O 11 of the ROC 2021 mandates a higher or stricter

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threshold than the relevance-necessity test under O 24 of the ROC 2014: see *Singapore Rules of Court: A Practice Guide 2023 Edition* (Chua Lee Ming editor-in-chief) (Academy Publishing, 2023) at para 11.012; Jeffrey Pinsler, *Singapore Court Practice* (LexisNexis, 2023) ("*Singapore Court Practice*") at para 11.3.3; *Singapore Civil Procedure* at para 11/3/6. Bearing in mind the impetus for the new disclosure regime in the ROC 2021 and the Ideals (see [44] and [46] above), I respectfully agree with these sentiments. In my view, the threshold of materiality requires the requested documents to have a significant bearing on an issue in a case, such that it could potentially affect the court's ultimate decision: see *Singapore Court Practice* at para 11.3.4.

50 Third, the requesting party must provide sufficient evidence that the requested documents are in the possession or control of the producing party: see *Singapore Civil Procedure* at para 11/3/5. I agree with the views expressed in *Singapore Court Practice* (at para 11.3.4) that this condition is based on common sense – the requesting party must have a reason or some basis for his belief that the documents are in the possession or control of the producing party. This condition is arguably not difficult to satisfy, as a deposition in the requesting party's supporting affidavit to the effect that the requested documents are in the possession or control of the producing party is usually sufficient to constitute "sufficient evidence" of the same: see *EQ Capital Investments Ltd v Sunbreeze Group Investments Ltd and others* [2017] SGHCR 15 at [46(b)].

My decision on production

51 With the above principles in mind, I now consider the categories where the parties have sought production.

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Branch Operation Documents and Accounts Documents

52 The Branch Operation Documents and the Accounts Documents can be dealt with together. In essence, these documents concern the loss or damage suffered by the defendant. The parties' positions on these documents are as follows:

(a) The claimants argue that the Branch Operation Documents are material to the issue of whether damage had been caused to the defendant by their acts, or "self-inflicted" through questionable commercial decisions by the Ng family.[35] The defendant's position is that it is willing to produce these documents, but only at the assessment of damages stage.[36]

(b) As for the Accounts Documents, the claimants contend that the financial statements disclosed make references to notes that form an "*integral part of these financial statements*", and assert that disclosure of the complete financial statements is "material to the issues in the case".[37] The defendant relies on the financial statements to show the fall in revenue after the business of Eng's Noodles ceased and the Ng family operated out of the defendant,[38] and is willing to produce the requested documents at the assessment of damages stage.[39]

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35 Affidavit of Thomas Hong @ Hong Meng San dated 28 September 2023 ("TH Supporting Affidavit") at para 40.

36 NMH Reply Affidavit at para 11.

37 CWS at para 57.

38 Affidavit of Evidence-in-Chief of Teng Chai Hai dated 31 July 2023 ("TCH AEIC") at paras 24 and 47.

39 NMH Reply Affidavit at para 11.

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53 There is a temporal element to the assessment of materiality, in that a court may dismiss an application while leaving it open to the applicant to apply for production at a subsequent stage where the requested documents have become material: see *Gillingham James Ian v Fearless Legends Pte Ltd and others* [2023] SGHCR 13 at [19]. A clear instance of this is where the proceedings are bifurcated – the documents sought are not material to the issues affecting liability and only become material after liability is established and the parties proceed to the assessment of damages: see *Bing Integrated Construction Pte Ltd v Eco Special Waste Management Pte Ltd (Chua Tiong Guan and Another, Third Parties) and Another Suit* [2008] SGHC 25 at [14].

54 In the present case, and pursuant to the Bifurcation Order, OC 365 has proceeded on a bifurcated basis with the issues concerning liability to be first determined at the upcoming trial (see [32] above). Proof of loss is not required for the defendant to establish liability for its counterclaim in passing off, trade mark infringement and well known trade marks.

(a) In an action for passing off, a claimant must show that the defendant's misrepresentation has caused, or is likely to cause, damage to the goodwill in his business: see Ng-Loy Wee Loon, *Law of Intellectual Property of Singapore* (Sweet & Maxwell, 3rd Ed, 2021) (*"Ng-Loy*") at para 19.1.1. The inquiry for *damage* to goodwill (required to sustain a claim in passing off) is different from the inquiry into *damages*: see *Ng-Loy* at para 19.1.4. In cases where proceedings are bifurcated (such as the present one), only the former will be dealt with at the trial on liability.

(b) Similarly, a claimant does not need to show loss or damage to obtain relief for trade mark infringement under s 27 of the Trade Marks

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Act 1998 (2020 Rev Ed) ("TMA") or well known trade marks under s 55 of the TMA.

55 Thus, the Branch Operation Documents and the Accounts Document are not material to the issues being adjudicated in the trial on liability, and I decline to order production of these documents at this stage.

Remuneration Documents

56 The claimants seek the Remuneration Documents to demonstrate whether the members of the Ng family are indeed "simple and poor folk".[40] According to the claimants, this arises because the members of the Ng family repeatedly assert in their AEICs that Jason and Pauline were handsomely remunerated by Eng's Noodles, and that they were manipulated by Jason.[41] Further, the defendant pleads that Jason viewed Eng's Noodles as a cash cow.[42]

57 In my view, whether the members of the Ng family are "simple and poor folk" is not an issue in this case. This issue does not arise out of the parties' pleaded cases. Even if this issue arises tangentially out of the pleadings, it is not material and will not affect the outcome at trial. Production should not be ordered on irrelevant allegations in pleadings, which, even if substantiated, could not affect the result of the action: see *Allington Investments Corp & Ors v First Pacific Bancshares Holdings Ltd & Anor* [1995] 2 HKC 139 at 142. As such, I dismiss the claimants' request for the production of the Remuneration Documents.

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40 CWS at para 61.

41 CWS at para 60; TH Supporting Affidavit at paras 32 and 48.

42 Defence and Counterclaim (Amendment No. 1) at para 12(c).

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Food Poisoning Documents

58 The claimants' case is that the defendant defamed them by maliciously citing the incident of food poisoning at the first claimant's restaurant to damage the first claimant's business, goodwill and custom.[43] In response, the defendant pleads the defence of justification, and contends that the alleged defamatory words are true in substance and fact.[44] The defendant therefore seeks production of the Food Poisoning Documents as they are material to whether the defendant was justified in making the alleged statements.[45]

59 As the basis of the defence of justification is truth, the state of mind of the publisher (and any malice on his part) is not relevant: see *Hady Hartanto v Yee Kit Hong and others* [2014] 2 SLR 1127 at [128]. Accordingly, the truth of the food poisoning incident will be a complete answer to the claimants' claim.

60 In the present case, the claimants admit in their Defence to Counterclaim that "… *there were instances of food poisoning at the 1st Claimant's restaurant at [287 Tanjong Katong Road] which was temporarily suspended from 18 May 2021 to 28 June 2021 …*".[46] In other words, the claimants admit that the food poisoning incident is true. While I question whether this aspect of the defamation claim should even be proceeding to trial, it does not alter the fact that the truth of the food poisoning incident is no longer a live issue in the case in light of the claimants' admission. I therefore dismiss the defendant's request for production of the Food Poisoning Documents.

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43 Statement of Claim at para 33.

44 Defence and Counterclaim (Amendment No. 1) at para 26.

45 Defendant's Written Submissions ("DWS") at para 39.

46 Defence to Counterclaim (Amendment No. 1) at para 59.

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Part 2: Security for costs

61 I now consider the claimants' prayer for an order that the defendant provide security for costs for its counterclaim. The claimants' application is made under s 388 of the Companies Act 1967 (2020 Rev Ed) ("Companies Act") read with O 9 r 12(2) of the ROC 2021.

62 The court will apply the following two-stage framework in considering whether to order security for costs (see *Cova Group Holdings Ltd v Advanced Submarine Networks Pte Ltd and another* [2023] SGHC 178 ("*Cova Group*") at [16]):

(a) first, whether the court's discretion to order security for costs under s 388 of the Companies Act has been enlivened; and

(b) second, whether it is just to order security for costs having regard to all the relevant circumstances.

Discretion to order security for costs

63 Section 388 of the Companies Act requires the claimants to show by credible testimony that there is reason to believe that the defendant will be unable to pay their costs if they succeed in their defence to the counterclaim.

64 The claimants point to the losses incurred by the defendant in 2021 and 2022, and the closure of the defendant's restaurant in November 2022, to argue that the defendant is impecunious.[47] In response, the defendant accepts that there is reason to believe that it will be unable to pay the claimants' costs, but submits

[47] CWS at paras 12-20.

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that the court should not exercise its discretion to order security for costs.[48]

65 As such, there is no question here of the jurisdiction to order security for costs; the issue is whether it is just to do so on the present facts.

Whether it is just to order security for costs

66 The court may consider the following non-exhaustive factors in deciding whether it is just to order security for costs for a counterclaim (see *SIC College of Business and Technology Pte Ltd v Yeo Poh Siah and others* [2016] 2 SLR 118 ("*SIC College*") at [76]– [77]):

(a) whether the counterclaim is *bona fide*;

(b) whether the counterclaim has a reasonably good prospect of success;

(c) whether the application for security for costs is being used oppressively;

(d) whether the defendant's want of means has been brought about by the claimant;

(e) the delay in taking out the application; and

(f) whether the claim and counterclaim are co-extensive.

67 In assessing the relevant circumstances, it is useful to rationalise them through the three key purposes underlying the provision of security for costs. These key purposes are: (a) to protect a defendant, who cannot avoid being sued,

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[48] DWS at paras 20-21.

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by enabling him to recover costs from the claimant out of a fund within the jurisdiction if the defendant succeeds in his defence; (b) to ensure, within the limits of protecting a defendant, that the claimant's ability to pursue his claim is not stifled; and (c) to maintain a sense of fair play between the parties amidst the cut-and-thrust of civil litigation: see *Cova Group* at [20].

68 In the present case, after careful consideration of the relevant circumstances, I find that it will not be just to order the defendant to provide security for costs. I highlight below the matters that stood out for me, but I emphasize at the outset that nothing I say here should be taken to pre-empt the outcome of the trial.

Overlap between the claim and counterclaim in OC 365

69 I start with the overlap between the claim and the counterclaim, which was described in *SIC College* (at [77]) to be a weighty factor.

70 In my view, there is a substantial overlap between the claimants' claim and the defendant's counterclaim in the present case (see [29] to [31] above).

(a) The claimants seek negative declarations that the defendant has no cause of action for trade mark infringement and in passing off, and claim for groundless threats of infringement proceedings. The defendant's defence is that it has valid causes of action against the first claimant for trade mark infringement and in passing off, for which the second claimant ought to be personally liable as director. Put simply, the claimants say they have no liability for trade mark infringement and passing off; the defendant contends that the claimants are so liable.

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(b) The defendant's counterclaim against the claimants is for trade mark infringement, passing off and well known trade marks. The former two counterclaims raise almost the same issues traversed in the defence. Only the counterclaim for well known trade marks is new in the sense that it is not raised in the claim or defence, but even then, it will cover some matters covered in the defence (for example, whether the marks are owned by the defendant through the Deed of Assignment (see [17] above)).

71 The substantial overlap in this case militates against the ordering of security for two reasons.

(a) First, the claimants have chosen to bring an action against the defendant and seek negative declarations as to their liability for passing off and trade mark infringement. Far from being persons who are forced into litigation at the election of someone else (see *SIC College* at [75]), the claimants brought the fight to the defendant and cannot now complain if the defendant wishes to establish this liability in response. The rationale of protecting a defendant who cannot avoid being sued does not apply here.

(b) Second, the counterclaim will be stayed under s 388 of the Companies Act if security is ordered but not furnished by the defendant. This may result in injustice if the defendant succeeds in its defence but is unable to secure judgment on its counterclaim since both turn on the same issues: see *SIC College* at [84]. Further, the ordering of security could amount to indirectly aiding the claimants to pursue their claims against the defendant: see *SIC College* at [78]. Accordingly, security for

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costs should not be ordered as it will give the claimants an unjust advantage in the litigation: see *Cova Group* at [54].

Merits of the counterclaim

72 Although the court will generally not enter into a detailed examination of the merits of the case in an application for security for costs (see *SW Trustees Pte Ltd (in compulsory liquidation) and another v Teodros Ashenafi Tesemma and others (Teodros Ashenafi Tesemma, third party)* [2023] SGHC 160 ("*SW Trustees*") at [35]), it appears to me on the face of the evidence and the pleadings that the defendant's counterclaim for infringement of the 1st and 3rd Name Marks has a reasonably good prospect of success. This is another factor that weighs against the ordering of security.

73 The defendant is entitled to sue for infringement of the 1st and 3rd Name Marks from 8 June 2018 and 31 July 2018 respectively, pursuant to s 27(2) of the TMA (see [24] above). These Name Marks and the first claimant's mark share a common denominator, specifically the word "Eng's". The defendant and the first claimant sell identical goods (*ie*, wanton noodles) in a restaurant setting and there is evidence of confusion amongst customers, who have mistaken the first claimant (or outlets related to the 1st claimant) for the defendant.[49]

74 The claimants argue that the word "Eng's" is part of the first claimant's name (*ie*, Eng's Wantan Noodle Pte Ltd), and as such, they are entitled to the own name defence under s 28(1)(*a*) of the TMA.[50] However, the defence is only available if the first claimant uses the name in accordance with honest practices in industrial or commercial matters: see s 28(1) of the TMA; *The Audience*

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49 TCH AEIC at para 43; DB at pp7-20.

50 Defence to Counterclaim (Amendment No. 1) at para 47(b).

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Motivation Company Asia Pte Ltd v AMC Live Group China (S) Pte Ltd [2016] 3 SLR 517 ("*Audience Motivation Company*") at [65]. This will entail a consideration of, among other things, the *bona fides* of using the name, the basis for the choice of name, and any compelling reasons to explain similarities between the marks: see *Audience Motivation Company* at [66]. In my view, the own name defence will face considerable difficulty due to the findings at [118] of *Eng's (HC)*, which were affirmed on appeal (see *Eng's (AD)* at [15]– [16]):

> … I agree that on a balance of probabilities, Pauline (together with Jason) assisted in the set-up of [the first claimant]. First, Pauline admitted at trial that Jason co-managed [the first claimant]. Second, Pauline's own evidence shows that she was involved in setting up [the first claimant]. The accountants she hired to look into [Eng's Noodles'] finances were told that "the shareholders of [Eng's Noodles] have each set up their own respective noodle house in the vicinity of [Eng's Noodles'] location". Third, Pauline and Jason were instrumental in the setting up of [the first claimant]. It was Jason who introduced [the second claimant] to the real estate agent to enable [the second claimant] to secure the lease for [287 Tanjong Katong Road]; it was Jason who "recommended" Mr Law Boon Meng, [Eng's Noodles'] head chef, to work for [the first claimant]; it was Jason who assisted with [the first claimant's] renovation of the premises; and it was Pauline who gave [the first claimant] the use of the main operational telephone number which customers had used to call [Eng's Noodles] for six years.

75 The claimants also rely on the prior use of the first claimant's mark from March or April 2018, which occurred before the registration of the 1st and 3rd Name Marks on 8 June 2018 and 31 July 2018 respectively.[51] Even assuming the use of the first claimant's mark for 2-odd months is sufficient to meet the threshold of continuous use under s 28(2) of the TMA, the first claimant will face an uphill task showing that its mark was used before the defendant or its predecessor in title first used the "Eng's" mark.[52]

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51 *Ibid*.

52 Defence and Counterclaim (Amendment No. 1) at para 20.

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Defendant's impecuniosity

76 As the proceedings in OC 365 are bifurcated, the evidence relating to damages for trade mark infringement or passing off will only be fully ventilated *after* liability is determined. Nevertheless, at this stage, there is evidence which suggest that the defendant's want of means, to some extent, was caused by the first claimant's infringing acts: see *Sembawang Engineering Pte Ltd v Priser Asia Engineering Pte Ltd* [1992] 2 SLR(R) 358 at [26]. In this regard, I refer to the confusion amongst customers (see [73] above) and the fall in revenue after the business of Eng's Noodles ceased and the Ng family operated out of the defendant (see [52(b)] above).

77 The defendant accepts that it does not have the means to furnish security on the scale sought by the claimants.[53] In view of the merits of the defendant's counterclaim, and the evidence suggesting that the defendant's impecuniosity was caused by the first claimant's conduct, an order for security would operate oppressively against the defendant and stifle a genuine claim: see *SW Trustees* at [21]. This is yet another reason against ordering security.

Delay

78 Finally, the defendant's counsel cited the factor of delay in that security for costs was only sought by the claimants after the AEICs were exchanged, with trial scheduled to take place in three months.

79 At the hearing, I sought clarification on why the claimants did not seek security at an earlier point in time, given that they would have known of the closure of the defendant's restaurant from November 2022 onwards. According

53 NMH Reply Affidavit at para 8.

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to the claimants' counsel, it only became clear after the AEICs were exchanged that the defendant is impecunious, and that the ROC 2021 further requires security for costs to be sought in the SAPT.

80 As the issue of delay was only raised by the defendant for the first time at the hearing, it will not be appropriate to place any weight on this factor or express any view on when the claimants realised the defendant was impecunious. However, as the issue of whether security for costs can only be sought in the SAPT may arise in future cases, I make some brief observations below.

81 It is true that on a plain reading of O 9 r 9(2)-(4) of the ROC 2021, the default position is that security for costs is a matter to be sought in the SAPT. However, a party can file an application for security for costs before the filing of the SAPT, if prior approval is obtained from the court under O 9 r 9(7) of the ROC 2021. The process for obtaining the court's approval is set out in O 9 r 9(8) of the ROC 2021 and para 66(6) of the Supreme Court Practice Directions 2021 ("Practice Directions"). In short, a party must file a Request in Form B9 of the Practice Directions to set out the essence of the intended application and the reasons why the application is necessary at that stage of the proceedings.

82 In my view, security for costs should be sought promptly, and before the SAPT, if a defendant is aware from an early stage that the claimant company is impecunious. This is because a claimant should be entitled to know at the earliest opportunity, before it has committed substantial resources to pursuing the litigation, whether it will be required to provide security: see *SIC College* at [79]. In the absence of a good reason, leaving the seeking of security only to the SAPT stage, especially in cases where AEICs are ordered before the filing of

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the SAPT, may be seen to be a tactical move used to stifle a *bona fide* claim by an impecunious claimant.

Conclusion

83 In respect of the production of documents pursued by the parties, I have found that the requested documents do not relate to issues in OC 365 or are not material to the issues being adjudicated in the trial on liability. As for the security for costs sought by the claimants, I am satisfied based on the circumstances of this case that it will not be just to make the order. Both SAPTs are therefore dismissed.

84 On the issue of costs, the parties are to file written submissions not exceeding three pages by 4.00 pm on 27 October 2023.

85 In closing, it remains for me to thank counsel for their helpful submissions, from which I have derived much assistance in the preparation of this judgment.

Navin Anand
Assistant Registrar

Wong Siew Hong and Kuek Kai Liang (Eldan Law LLP) for the claimants;
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