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

[2024] SGHCR 4

Originating Application No 222 of 2023 (Summonses Nos 2987 of 2023 and 346 of 2024)

Between

DFD

… *Claimant*

And

(1) DFE
(2) DFF

… *Respondents*

GROUNDS OF DECISION

[Civil Procedure — Disclosure of documents]
[Civil Procedure — Judgments and orders — Peremptory orders]

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DFD
v
DFE and another

[2024] SGHCR 4

General Division of the High Court — Originating Application No 222 of 2023 (Summonses Nos 2987 of 2023 and 346 of 2024)
AR Perry Peh
24 October, 20 November 2023, 26, 28 February 2024

1 March 2024

AR Perry Peh:

Introduction

1 HC/OA 222/2023 ("OA 222") was an application by the claimant under s 19 of the International Arbitration Act 1994 ("IAA") read with O 48 r 6 of the Rules of Court 2021 ("ROC 2021") to enforce an arbitral award that it had obtained against the first and second respondents. By way of HC/ORC 1189/2023 ("ORC 1189"), the claimant obtained permission from the court to do so. The second respondent has applied by way of HC/SUM 952/2023 ("SUM 952") to set aside ORC 1189 pursuant to O 48 r 6(5) of the ROC 2021.

2 In HC/SUM 2987/2023 ("SUM 2987"), the second respondent applied for the claimant to produce eight categories of documents which it claimed are material to the determination of SUM 952. I heard SUM 2987 on 24 October 2023. By way of an oral judgment delivered on 20 November 2023 containing

brief reasons, I allowed seven of the eight categories requested in SUM 2987 and ordered the claimant to: (a) within 21 days, file a list of documents corresponding to the seven categories that have been allowed in SUM 2987 and provide to the second respondent copies of those documents; and (b) within 14 days from the time copies of those documents are provided, allow the second respondent to inspect those documents ("the Production Order"). There was no appeal against my decision in SUM 2987.

3 The due date for compliance with the Production Order was 11 December 2023. On that date, the claimant filed a list of documents producing 28 documents ("the LOD"). The second respondent took the view that the LOD was incomplete and on 20 December 2023, it wrote to the claimant's solicitors to seek clarification and requested for full compliance. No substantive response was received from the claimant until 30 January 2024, when it filed a supplementary list of documents producing a further 24 documents ("the SLOD"). The second respondent, having perused the LOD and the SLOD, maintained the view that the documents produced by the claimant were incomplete. In view of this, the second respondent applied by way of HC/SUM 346/2024 ("SUM 346") for an order that ORC 1189 be set aside and OA 222 be dismissed, unless the claimant: (a) complies fully with the Production Order; and (b) files an affidavit stating, among other things, the reasons for its non-compliance with the Production Order and to which categories in the Production Order do the documents produced and/or which it will produce correspond.

4 These grounds of decision set out my reasons for both SUM 2987 and SUM 346. In these grounds, I explain the considerations which came to mind in applying O 11 r 3 of the ROC 2021 in a case where the production of documents is requested, not directly in connection with the "action" (see O 1 r 3(1) of the

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ROC 2021), but an application filed in the action. I also explain why I took the view that the peremptory or "unless" order sought in SUM 346 was justified in the circumstances of this case. As a sealing order is in place for OA 222 as at the date of issuance of these grounds, the identities of the parties or any other references that may lead to the identification of the parties have been redacted.

Background

5 The factual background leading up to the applications before me is somewhat long and involved but I have to set it out briefly in order to provide context to the eight categories of documents requested by the second respondent in SUM 2987.

The parties

6 The parties to OA 222 are companies that are all somewhat related to one another. The first respondent is the ultimate parent of the second respondent, a company incorporated in Ruritania. The first respondent is also a 64.97% shareholder of the claimant. The remaining 33.84% shares in the claimant are held by an investment company, which I will refer to in these grounds as [M].

7 As a result of events that I will come to below, in October 2021, a bankruptcy petition was presented against the second respondent in Ruritania, and on 28 February 2023, a bankruptcy order was made against the second respondent in the Ruritania courts. The result of the bankruptcy order was that, with effect from 28 February 2023, an officer with functions akin to that of a liquidator or trustee-in-bankruptcy under Ruritanian law was appointed by the courts of Ruritania to take over the affairs and administration of the second respondent. For ease of reference, I refer to this officer as "the Liquidator". In

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these grounds, references to the second respondent in respect of the period before the pronouncement of the bankruptcy order will be a reference to the second respondent company itself, while such references in respect of the period from the time of the pronouncement of the bankruptcy order and onwards will be a reference to the Liquidator.

The transactions leading to the arbitration

8 The events leading to the arbitration and the award are set out in affidavits filed by the claimant in connection with OA 222. According to the claimant, in 2016, the first respondent acquired a controlling majority in a company, [P]. The second respondent was the special purpose vehicle through which shares in [P] were acquired. This acquisition was financed through a loan extended by another company [S] to the first respondent ("the Loan"). In December 2017, [M] acquired from [S] the Loan and the rights of repayment thereunder. On that same day, [M] assigned to the claimant its rights under the Loan. As I have mentioned earlier (at [6]), the first respondent and [M] both hold shares in the claimant, which was their joint venture vehicle.

9 In July 2018, the second respondent entered into an agreement with the claimant and the first respondent ("the Guarantee"), under which the claimant (which had taken an assignment of the rights to repayment under the Loan from [M]) was the creditor, the first respondent was the debtor, and the second respondent was the guarantor. In the Guarantee, the first respondent acknowledged the assignment of the Loan from [M] to the claimant and undertook to repay to the claimant the Loan, while the second respondent pledged the approximately 40.1m shares it held in [P] as a continuing guarantee of the first respondent's obligations under the Loan. One "[A]" signed the

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Guarantee Agreement as a manager of the second respondent at the material time.

10 In spite of the pledge of [P] shares under the Guarantee, in or around September 2018, the second respondent issued secured bonds ("the Bonds"), in connection with which some 28m of its shares in [P] were pledged as security ("the Pledged Shares"). One [L] was appointed as trustee for the bondholders in December 2020. The second respondent subsequently defaulted on the Bonds, and [L] took possession of some 21m of the Pledged Shares and appointed receivers over the remainder of the Pledged Shares in October 2021. [L] also commenced claims against the second respondent, including the bankruptcy petition in Ruritania which eventually resulted in the bankruptcy order made against the second respondent. The claimant's position is that it was not aware of the Bonds, and it only came to learn of the Bonds and the Pledged Shares sometime in or around the middle of 2021.

11 In October 2021, the claimant, after becoming aware of the Bonds and the Pledged Shares and out of concern as to its interest in the remaining [P] shares that were not pledged under the Bond by the second respondent ("the Remaining Shares"), issued notices to the second respondent for the transfer of the Remaining Shares. Pursuant to these notices, in October 2021, the Remaining Shares were transferred to another company, [Q]. The Liquidator's position is that the transfer of the Remaining Shares to [Q], which took place pursuant to the terms of a share sale agreement, had taken place at an undervalue.

12 After [L] discovered the transfer of the Remaining Shares to [Q], [L] commenced proceedings in the Orsinia against the second respondent, [Q] and [A]. In the Orsinian proceedings, [L] obtained a freezing junction against the

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second respondent and [Q] in November 2021. [L] also obtained freezing injunctions against the second respondent and [Q] in Singapore in November 2021. Subsequently, in October 2022, [L] obtained from the Orsinian Courts a summary judgment in respect of the debt owed by the second respondent to [L], and pursuant to which [L] became a creditor of the second respondent.

The arbitration

13 Separately, in November 2022, the parties to the Guarantee commenced an arbitration to address the claimant's rights to the Remaining Shares under the Guarantee ("the Arbitration"). According to the claimant, the parties' arbitration agreement is contained in Article V of the Guarantee, as varied by a memorandum signed by the parties in or around June 2019 ("the Memorandum"). Under Art V of the Guarantee, disputes thereunder were to be referred to an arbitral institution which I will refer to as the "NAC", but the Memorandum varied this so that disputes were now referred to the "HAC". The Memorandum records that "[NAC] does not have the conditions for hearing foreign-related arbitration cases" and so the parties "through negotiation" agreed to the variation as recorded in the Memorandum.

14 The arbitral award ("the Award") is dated 10 January 2023. According to the Award, the hearing of the Arbitration took place before a sole arbitrator ("the Tribunal") and was completed in a single day, on 30 December 2022. The claimant's case in the Arbitration was based on the Guarantee, and it was alleged that the first respondent had failed to repay the principal amount under the Loan. The claimant prayed for the following reliefs: (a) that the first respondent repay the Loan; (b) that it had the right to the Remaining Shares pursuant to the pledge in the Guarantee. The Tribunal found in favour of the claimant in the Award.

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15 The Award recorded, among other things, the following:

(a) On 18 November 2022, after having accepted the claimant's application for arbitration with the HAC, the HAC served on the claimant and the respondents the relevant papers in the Arbitration, including the "notice of arbitration case", the "notice of proof", the "letter on the selection of arbitrators and the composition of the arbitration tribunal" and the "Arbitration Rules".

(b) The parties had agreed to a "summary procedure" and entrusted to the President of the HAC to appoint arbitrators.

(c) On 26 December 2022, the HAC served on the claimant and the respondents in accordance with its arbitral rules the notice of the hearing of the Arbitration.

(d) At the hearing on 30 December 2022, the claimant and respondents were represented by their respective "authorised agents", and they confirmed to have "no objection to the arbitration procedure, including the pre-trial procedure and the court hearing procedure".

(e) After setting out the reliefs claimed by the claimant in the Arbitration, the Award recorded the first and second respondents as having "no objection to the facts stated in the Claimant's arbitration application" and "no objection to the Claimant's requests for relief".

(f) After setting out the evidence adduced by the claimant in support of its case, the Award recorded the respondents as having "no objection to the authenticity, legality and relevance of the evidence submitted by the Claimant".

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The Liquidator's setting-aside application in SUM 952

16 After ORC 1189 was granted on 14 March 2023, the Liquidator filed SUM 952 to set aside ORC 1189. The Liquidator raises various grounds in support of SUM 952. I will come to these grounds in greater detail later, in so far as it is needed to contextualise the requests for production in SUM 2987. For now, it suffices for me to briefly outline them, as follows: (a) first, the arbitration agreement is invalid and unenforceable; (b) secondly, there had been no dispute between the claimant and the respondents in connection with the claimant's rights under the Guarantee and over the Remaining Shares, and so the jurisdiction of the Tribunal had not been enlivened as envisaged by the arbitration agreement, and for similar reasons, the Award is not an "arbitral award" coming within s 27(1) of the IAA and thus incapable of enforcement under the IAA; (c) thirdly, various circumstances point to the Award having been procured by fraud, and the Arbitration having been orchestrated for the claimant to steal a march ahead of the second respondent's other creditors in respect of the Remaining Shares. A common thread underlying the Liquidator's allegations of impropriety about the Arbitration is that it has, in its investigation of the second respondent's affairs thus far, not uncovered any documents or evidence of discussions relating to the dispute under the Guarantee, the parties' entry into the arbitration agreement and the Memorandum, as well as the Arbitration, all of which the Liquidator says ought to exist if the Arbitration had been genuine.

17 The claimant disputes each of these grounds raised by the Liquidator. Very briefly, its response is as follows: (a) first, the arbitration agreement is valid and enforceable, and the parties' reasons for varying the agreed arbitral institution have been recorded in the Memorandum; (b) secondly, the Liquidator's allegations about the absence of documents or evidence of

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discussions relating to the dispute over the Guarantee does not establish the absence of a "dispute", and the fact that the second respondent did not substantively contest the claimant's claims did not render the Arbitration and the Award invalid, since the second respondent had received independent legal advice by one lawyer [H] from the law firm [K] during the Arbitration; and (c) the Arbitration had been commenced for legitimate reasons and is not impugned by fraudulent motives.

SUM 2987

18 The overarching point made by the Liquidator in SUM 2987 was that the documents sought in SUM 2987 are those which the claimant ought to have adduced in the first place to meaningfully respond to the allegations it has made in SUM 952. These documents, the Liquidator said, will show that there had indeed been a genuine dispute between the parties that required adjudication through the Arbitration, and the procedure in the Arbitration had been valid and proper. The documents requested come within eight categories, as set out in the Schedule annexed to SUM 2987:

> (a) Communications between the claimant (which includes the claimant's representatives and lawyers) and the second respondent and/or its any of its representatives (including [A] and [A]'s father) regarding the need for and negotiation and execution of the Memorandum, including communications relating to the purported deficiency of the NAC and the circumstances which necessitated a variation of the agreed arbitral institution to the HAC ("Category 1"). For context, [A]'s father is the ultimate owner or controller of the group of companies of which the first respondent is part.

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(b) Communications from the claimant (which includes the claimants' representatives and lawyers) to the second respondent and/or [A] and [A]'s father and/or [H] or any other person from the law firm [K] (hereafter collectively referred to as "the second respondent and/or the second respondent's purported representatives), in respect of each of the following time periods and subject matter (collectively, "Category 2"):

(i) prior to the commencement of the Arbitration, alleging a dispute and demanding reliefs from the second respondent and/or the second respondent's purported representatives, whether in the nature of a demand letter or otherwise ("Category 2(a)");

(ii) after the commencement of the Arbitration, notifying the second respondent and/or the second respondent's purported representatives of the commencement of Arbitration ("Category 2(b)"); and

(iii) after the commencement of the Arbitration, in relation to any matter arising out of or in connection with the Arbitration, including but not limited to matters such as the terms of reference, list of issues, administrative matters and logistics of the hearing(s) for the Arbitration ("Category 2(c)").

(c) Communications in respect of any matter arising out of or in connection with the Arbitration, from:

(i) the claimant to the HAC ("Category 3"); and

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(ii) the HAC to the claimant, whether singly or together with the second respondent and/or the second respondent's purported representatives ("Category 4").

(d) Documents served on the second respondent and/or the second respondent's purported representatives by the claimant and/or the HAC and/or the Tribunal ("Category 5").

(e) Documents (including any evidence) filed and/or submitted to the HAC and the Tribunal by:

(i) the claimant ("Category 6"); and

(ii) the second respondent and/or the second respondent's purported representatives, and which were also served on or sent to the claimant ("Category 7").

(f) Communications between the claimant and the second respondent and/or the second respondent's purported representatives in relation to the Award, including communications that took place after the Award had been issued, in particular but not limited to communications relating to enforcement of the orders made in the Award ("Category 8").

The parties' submissions

19 The Liquidator argued that it is entitled to the requested documents because they relate to issues that are in dispute between the parties in SUM 952, which can be discerned from the parties' affidavits that have been filed for SUM 952. The requests in SUM 2987, if allowed, would ensure that all relevant and material evidence are put before the court so that the court has all the

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information it needs to decide SUM 952. The Liquidator emphasised that the sole objective of SUM 2987 was, again, to ensure that all relevant and material evidence is put before the court for the purposes of SUM 952, and it was not relying on the requests in SUM 2987 to identify or search for documents that might possibly strengthen its case in SUM 952.

20 The claimant made the following arguments in response. First, since the Liquidator's case on fraud in SUM 952 is in the first place mounted on the *absence* of documents or evidence of discussions relating to the dispute under the Guarantee or the Arbitration (see [16] above), it is difficult to see why the documents requested in SUM 2987 could be material to the issues in dispute. Pointedly, this is not a situation where a party lacks evidence or material to support its case. To the contrary, the Liquidator has been able to mount its case in SUM 952 despite the absence of the requested documents, which reinforce the view that the production of documents is unnecessary, having regard the need to balance economy, time and costs. Secondly, because none of the documents requested in SUM 2987 can come to be tested by the usual trial process, it is unclear what evidential value these documents would have, even if they were produced. Thirdly, if the Liquidator's intention is to rely on these documents in support of SUM 952, then that squarely reinforces the view that SUM 2987 is nothing but a fishing exercise, and the Liquidator is simply making up its case in SUM 952 as it went along. Finally, the claimant also attacked each of the categories in SUM 2987 as being overly broad and ill-defined.

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The applicable principles

21 The starting point for dealing with a request for production of documents in a proceeding commenced pursuant to the ROC 2021 is O 11 r 3(1), which states:

> The Court may order any party to produce the original or a copy of a specific 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.

22 As the High Court Registry explained in *Eng's Wantan Noodle Pte Ltd and another v Eng's Char Siew Wantan Mee Pte Ltd* [2023] SGHC 17 ("*Eng's Wantan Noodle*") (at [48]–[50]), O 11 r 3 imposes three conditions for a party seeking an order for the production of requested documents:

(a) the requested documents must be described with sufficient particularity;

(b) the requested documents must be "material" to the "issues in the case", in that they must (i) bear a demonstrable nexus with at least one of those issues, which is determined by reference to the parties' pleaded cases and (ii) have a significant bearing on that issue, such that it could potentially affect the court's ultimate decision; and

(c) the requesting party must provide sufficient evidence that the requested documents are in the possession or control of the producing party, which is not difficult to satisfy and ordinarily a deposition to this effect in the requesting party's supporting affidavit would suffice.

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23 The main difficulty I encountered in SUM 2987 (which was an application in an Originating Application ("OA")) was how to go about identifying the "issues in the case" for the purposes of assessing if the documents requested by the Liquidator satisfied the legal criteria in O 11 r 3(1) of the ROC 2021. For proceedings commenced by way of an Originating Claim ("OC"), the "issues in the case" are identified by reference to the pleadings (see *UMCI Ltd v Tokio Marine & Fire Insurance Co (Singapore) Pte Ltd and others* [2006] 4 SLR(R) 95 at [71]; *Dante Yap Go v Bank Austria Creditanstalt AG* [2007] SGHC 69 at [28] and [31]). However, it is important to note that the cases in which this approach has been taken involved the production of documents as part of the procedural steps for obtaining all required evidence in preparation for the trial of the OC. In these cases, the OC is the "case" for which production is sought, and the pleadings, which operate as the foundation of the OC, provide the reference point by which the "issues in the case" are identified. In my view, applying O 11 r 3(1) beyond the quintessential context of an OC raises two questions: (a) is there any limitation on the "case" in respect of which the production of documents can be requested; and (b) how are such "issues in the case" to be identified where the proceedings in question are not founded upon pleadings, as it otherwise would be in the context of an OC?

24 The word "case" in O 11 r 3(1)(*b*) is not defined in the ROC 2021. Since discovery is typically provided in aid of an action before the court (see *ED&F Man Capital Markets Ltd v Straits (Singapore) Pte Ltd* [2020] 2 SLR 695 at [1]), it stands to reason that a "case" would necessarily encompass an "action", which is defined in O 1 r 3(1) as "proceedings commenced by an [OC] or an [OA]". Thus, at the risk of stating the obvious, the word "case" therefore encompasses both an OC and an OA. The fact that O 11 r 3(1) uses a generic term like "case" rather than a defined term like "action" further suggests that it

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is not the intention of the drafters of the ROC 2021 to limit requests for production of documents under O 11 r 3 to be made only in connection with the "action" itself (such as the OC or the OA), and they intended that such requests can also be made in connection with any other proceeding arising in the action, such as an application brought in the OA, like SUM 2987.

25 As for how the "issues in the case" are to be identified, given the recognised role of pleadings in the identification of the "issues in the case" in an OC, lessons can be drawn from the function of pleadings in civil litigation. Pleadings contain the respective factual positions that the parties take in the action and which they each must make good at trial by the evidence adduced and which they must also persuade the court give rise to the legal consequences they seek (see generally, *V Nithia (co-administratrix of the estate of Ponnusamy Sivapakiam, deceased) v Buthmanaban s/o Vaithilingam and another* [2015] 5 SLR 1422 ("*V Nithia")* at [36] and *Acute Result Holdings Ltd v CGS-CIMB Securities (Singapore) Pte Ltd (formerly known as CIMB Securities (Singapore) Pte Ltd* [2022 SGHC 45 at [64]). Since the parties are required to set out in the pleadings all the relevant facts that they intend to rely on at trial, pleadings delineate the parameters of the case and set the boundaries in which the dispute is to be fought (see *V Nithia* at [34] and [36]).

26 Two points emerge from this. First, the "issues in the case", for the purposes of O 11 r 3(1), are identified with reference to the factual positions taken by the parties in support of their respective cases in the legal proceeding in connection with which the production of documents is requested. In all proceedings before the court (whether an OC, OA or an application in an OC or OA), parties necessarily rely on facts to obtain the desired outcome, save that where a factual issue is to be determined on the basis of affidavit evidence alone, the dispute of fact in question should neither be material nor be of such a nature

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that it is capable of determination only after a full trial (see O 6 r 1 of the ROC 2021; see also *Lim Soon Huat v Lim Teong Huat and others and another matter* [2023] SGHC 356 at [25]). Secondly, the "issues in the case" are identified from written statements in which the parties set out all the relevant facts which they intend to rely on and make good in the legal proceeding. In proceedings commenced by way of an OC, that would be the pleadings; in proceedings commenced by way of an OA, or for applications filed in the OA or OC, ordinarily, the closest functional equivalent of pleadings would be the affidavits filed by the parties in support of or responding to the OA or the application.

27 Therefore, in applications for production of requested documents under O 11 r 3 made in connection with an application in an action (that being the "case"), the "issues in the case" can be identified by reference to the factual positions taken by the parties in connection with that "case", and which are set out in the affidavits filed in connection with that "case". The only word of caution is, affidavits would obviously lack the precision or clarity that pleadings ought to have, and parties would often delve into matters of factual background and even elaborate extensively on the evidence that they adduce in support of the factual positions taken. Not all of that would be relevant in the process of issue identification and the court must separate the wheat from the chaff.

28 One might well argue that there can be little to no room for the production of requested documents in proceedings where parties conduct their cases by affidavits, which ought to set out in full both the factual positions and documentary evidence they rely on. Because each party has the prerogative to decide how to run its case, including what documentary evidence to adduce, where a party chooses not to do adduce certain classes or categories of documents despite its relevance to the proceeding, it bears the evidential consequences of that decision. This is unlike the case of OCs where the

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pleadings are not accompanied by documentary evidence of any form, and so a mechanism for production of documents is needed to ensure that all evidence material to the factual issues in the action can be obtained in preparation for trial. On this basis, it might be argued that a narrower approach ought to be taken where the court is asked to order the production of requested documents for the purposes of proceedings where parties conduct their cases on the basis of affidavits, such as in OAs or in applications in OAs or OCs, because there is little necessity for the same.

29 My response to this begins with the two-fold objectives underlying the regime for production of documents in our rules of civil procedure: (a) first, that the parties conduct the litigation with "cards face up on the table" by disclosing all relevant evidence before the hearing of the matter and reduce surprises at trial, so that neither side comes to win on "tactical considerations" alone (see *Teo Wai Cheong v Credit Industriel et Commercial and another appeal* [2013] 3 SLR 573 ("*Teo Wai Cheong*") at [41]); and (b) secondly, that all relevant evidence and information is put before the court, so that the that court can elicit the truth and base its decision on a firm foundation of fact, thereby achieving real justice between the parties (see *Teo Wai Cheong* at [42]; see also *Lim Mey Lee Susan v Singapore Medical Council* [2011] 4 SLR 147 at [7], citing *Tweed v Parades Commission for Northern Ireland* [2007] 1 AC 650 at [2]). These objectives do not cease to be relevant simply because parties conduct their cases on the basis of affidavits. To the extent that the parties can in their affidavits adopt unsubstantiated factual positions or certain factual positions which can come to be disproved if certain classes of documentary evidence were adduced or can be shown to not exist, the need to ensure that parties conduct litigation with "cards face up on the table" and that all material evidence be obtained for the court to base its decision on a firm foundation of truth is equally enlivened

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as it would be too in an OC. Allowing a case to turn on the insufficiency of evidence alone, where such evidence is in fact available or where its availability has not been ascertained, would allow the outcome of litigation to turn on purely tactical considerations and prevent the court from achieving real justice between the parties, the very thing which the rules on production of documents seek to avoid.

My decision

30 In arriving at my decision for SUM 2987, I began by identifying the "issues in the case" by reference to the affidavits that the parties have filed in connection with SUM 952, before then considering whether the three-fold conditions in *Eng's Wantan Mee* ([22] above) have been satisfied in relation to each of the categories of requested documents in SUM 2987.

31 At the outset, I should add that only the first and second conditions – proper identification and materiality to the "issues in the case" – arose for consideration in SUM 2987. I found the third condition – that the requesting party provide sufficient evidence that the requested documents are in the possession or control of the producing party – satisfied across all the categories of requested documents in SUM 2987, as it is sufficiently made out by the position taken by the Liquidator, namely, that the claimant is likely to have each of the documents requested in SUM 2987 but is unwilling to disclose them. Indeed, the claimant did not take the position that these documents do not exist or that it lacks possession or control of the same; it resisted SUM 2987 on the basis that they are not material to the issues in SUM 952 and hence unnecessary.

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General observations

32 Before turning to the "issues in the case", I make two general observations about the arguments made in SUM 2987.

33 First, since the effect of the documents sought by the Liquidator in SUM 2987 is to disprove or refute the claimant's case in SUM 952, to some extent, I agreed with the claimant that SUM 2987 appears to be an attempt by the Liquidator to find more documents and thereby strengthen its case in SUM 952. However, that does not in and of itself render SUM 2987 a "fishing" exercise. The word "fishing" describes the *opportunistic use* of the process for production of documents by a party to *randomly* search for information in the *hope* that documents which may be beneficial or advantageous to it in some way will emerge (see *Banque Cantonale de Geneve SA v Allen & Gledhill LLP* [2010] SGHC 39 at [3]). However, there can be no question of fishing if the Liquidator is able to (a) properly articulate each category of the requested documents and (b) demonstrate that they are material to the "issues in the case" in SUM 952, *ie*, show that its requests in SUM 2987 satisfy the substantive legal criteria in O 11 r 3(1). Where these criteria are satisfied, then it is a case where the rationale for production of documents is engaged (see [29] above). That the requests in SUM 2987 have the effect of allowing the Liquidator to strengthen its case in SUM 952 is not *per se* objectionable.

34 Secondly, although SUM 2987 is made in support of an application to challenge the enforcement of an arbitral award (SUM 952), the policy of minimal curial intervention in arbitral proceedings and the limited role that the courts play in arbitral proceedings generally (see *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 at [37]–[39]) does not, in my view, have an impact on the approach that the court should take in an application like

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this. To begin with, by its application in SUM 2987, the Liquidator is simply availing itself of a procedural remedy available to any similarly placed litigant under the ROC 2021 and there is no basis for SUM 2987 to be viewed differently. The policy of minimal curial intervention requires that the court avoid engaging with the substantive merits of an arbitral award in proceedings seeking to challenge that award, but SUM 2987 is not such a proceeding. Of course, the Liquidator's ultimate objective is to obtain documents which it believes will strengthen its attempt in SUM 952 to challenge the Award, but the question of whether the Liquidator is entitled to these documents in SUM 2987 does not in any way engage the substantive merits of the Award.

Identifying the issues in SUM 952

35 With reference to the parties' respective positions (see [16]–[17] above) as well as the affidavits that they have filed, I identified at least three "issues in the case" in SUM 952. For the avoidance of doubt, these issues are identified only for the purposes of considering the requests for production made in SUM 2987 and is not to be viewed as suggestive of the actual issues in SUM 952, which has yet to be heard.

36 The **first** issue is whether there had in fact been any agreement between the parties to vary the identified arbitral institution from the NAC to the HAC, as purportedly recorded by the Memorandum ("the First Issue"):

> (a) In the Liquidator's supporting affidavit for SUM 952, it disputed the existence of any such agreement, and pointed out the following discrepancies in connection with the Memorandum: (i) first, the agreement to vary the arbitral institution from the [NAC] to the [HAC] had been made in 2019, more than two years before the dispute under the Guarantee even arose; (ii) secondly, it had not seen any documents

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or information relating to: (1) discussions by the parties about the suitability of the [NAC] and that it was an unsuitable institution; (2) internal discussions within the second respondent on entering into the Memorandum to vary the specified arbitral institution in the arbitration clause contained in the Guarantee; and (3) discussions between the claimant and the respondents on varying the specified arbitral institution.

(b) The claimant does not directly respond to the Liquidator's allegations about the non-existence of any agreement for the variation of the identified arbitral institution, but simply states that "[t]he reasons for the parties agreeing to the change in arbitral institutions is set out in the Memorandum", and that it was within the parties' prerogative to decide which arbitral institution was to hear their dispute. Notwithstanding the absence of a direct response to the Liquidator's allegation, effectively, the claimant is saying that there exists an agreement between the parties for the variation of the identified arbitral institution, and this agreement, as well as the reasons for why the parties had entered into the agreement, is evidenced by the Memorandum.

(c) Given the disagreement between the claimant and the Liquidator as to whether there existed an agreement between the parties for the variation of the identified arbitral institution from the NAC to the HAC, I was satisfied that the First Issue is an "issue in the case" in SUM 952.

37 The **second** issue is whether, *before* the commencement of the Arbitration, there existed any dispute between the claimant and the respondents (including the second respondent) in connection with the subject matter of the

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Arbitration, *ie*, the Guarantee and the claimant's rights to the Remaining Shares ("the Second Issue"):

(a) The Liquidator's position in SUM 952 is that no such dispute existed at any point in time, which would include the period of time prior to the commencement of the Arbitration. As the Liquidator stated in its supporting affidavit for SUM 952, it believes that the Arbitration had "taken place *purely* to produce an 'award' for the Claimant to enforce … with the force of a judgment …" [emphasis added]. The Liquidator has also pointed to the following, which it said shows that there was no dispute between the parties over the Guarantee "to begin with", including: (i) the fact that the second respondent had in the Arbitration indicated no objections to the evidence adduced by the claimant as well as the facts asserted and reliefs claimed by the claimant; (ii) that it has so far not been able to identify any documents or evidence of discussions relating to the dispute under the Guarantee, including (1) discussions or communications between the claimant and the second respondent regarding payment of the Loan allegedly due from the first respondent; and (2) internal documents of the second respondent referring to the dispute under the Guarantee or the possible commencement of arbitration by the claimant to resolve any such dispute.

(b) The claimant does not appear to dispute that the respondents (including the second respondent) raised no substantive dispute to its claims *after* the commencement of the Arbitration and during the pendency of the Arbitration. The claimant's affidavit in SUM 952 are however silent on whether a dispute existed *before* the commencement of the Arbitration and indeed appears ambiguous on this issue. The claimant stated that, after it learnt of the Bonds and the Pledged Shares,

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which affected its rights to the [P] shares under the Guarantee, it desired that the issue relating to the Guarantee be "authoritatively resolved in arbitration", especially given its interest in the Remaining Shares. The claimant further states that, although it had been clear that the claimant's rights to the Remaining Shares would have superseded those of any other unsecured creditor, [A], [A]'s father, as well as the second respondent, "did not appear prepared to take such an unequivocal position", and for these reasons, the claimant commenced the Arbitration to have the issue of the claimant's rights to the Remaining Shares determined.

(c) In the round, comparing the respective positions taken by the Liquidator and the claimant, I was satisfied that the Second Issue is an "issue in the case" in SUM 952. Although the claimant does not directly dispute the Liquidator's allegation that there had been no dispute before the commencement of the Arbitration, given the standard caveat of non-admission of facts not specifically traversed contained in the claimant's affidavit, the absence of a direct response by the claimant is not to be construed as an admission by the claimant of the Liquidator's allegations. On the other hand, it would appear that the claimant's position is that it had commenced the Arbitration because of its desire to have its rights to the Remaining Shares adjudicated. On its face, this position appears inconsistent with the second respondent (or indeed, the respondents) having raised no dispute to the claimant's claims before the commencement of the Arbitration. Therefore, the only sustainable reading that can be made of the parties' affidavits is that the claimant disagrees with the Liquidator as to whether there existed a dispute in connection with the subject matter of the Arbitration before the commencement of the Arbitration.

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38 The **third** issue is whether the Arbitration had been a sham ("the Third Issue"):

(a) The essential element of a sham is that the parties did not intend to create legal relations which the acts done or documents executed give the impression of creating (see *Toh Eng Tiah v Jiang Angelina and another appeal* [2021] 1 SLR 1176 at [74]). The substance of the Liquidator's position in its supporting affidavit for SUM 952 is that the Arbitration had been a sham, in that the parties had went through the motion of the Arbitration to create an impression that the claimants' rights under the Guarantee and to the Remaining Shares had been adjudicated, as recorded in the Award, with the shared intention and sole purpose of obtaining the Award and thereby an enforceable judgment to allow the claimant to obtain a priority right over the Remaining Shares ahead of the second respondent's other creditors, and the parties never actually intended for their legal rights under the Guarantee to be adjudicated through the Arbitration, an impression which the Award otherwise conveyed. This is apparent from the following allegations that the Liquidator has made:

(i) First, it believes that the Guarantee had been fraudulently created, executed and backdated after the second respondent defaulted on its obligations on the Bond and after [L] had initiated bankruptcy proceedings against the second respondent, to create a fictitious basis for the transfer of the Remaining Shares, and the claimant then, with the cooperation of [A], used these documents to "create the *cover* of a 'dispute' to refer to arbitration to generate an award" that could be enforced against the Remaining Shares.

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(ii) Secondly, it has not located any internal documents of the second respondent which refer to relate to a possible dispute under the Guarantee with the claimant, the possible commencement of the Arbitration, the procedures to be adopted in the Arbitration, and the appointment of lawyers to represent the second respondent in the Arbitration.

(iii) Thirdly, despite the second respondent appearing to have multiple grounds for putting up a credible defence to the claimant's claims in the Arbitration, the second respondent put up no resistance to the claims and effectively presented the claimant's entitlement to the Remaining Shares in priority to those of other creditors of the second respondent as a *fait accompli*.

(iv) Fourthly, the parties had engineered the commencement of the Arbitration and the conduct of the Arbitration to procure the Award to confer on the claimant a right of priority over the Remaining Shares, and the Award is effectively an "agreement" by the claimant and the respondents that the claimant is entitled to the value of the Remaining Shares.

(b) It is obvious from the claimant's reply affidavit that it disputes the Liquidator's characterisation of the Arbitration as a sham. The claimant's position is that the Arbitration had been genuinely commenced for the parties' rights under the Guarantee to be determined, and specifically for the issue pertaining to the claimant's rights over the Remaining Shares to be "authoritatively resolved". The claimant also disagrees with the Liquidator's claim that the lack of a substantive contest by the second respondent in the Arbitration showed that the

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Arbitration had been a sham. Although the claimant does not dispute that the respondents indeed put up no substantive dispute to the claimant's claims after the commencement of the Arbitration and during the pendency of the Arbitration – a point which is borne out on the face of the Award (see [15] above) – the claimant's position is that the second respondent had acted under independent legal advice of [H] from the law firm [K] throughout the Arbitration, and accordingly the lack of a substantive contest would not invalidate the Award. In effect, the claimant appears to disagree with the Liquidator's allegation that the Arbitration had been presented as a *fait accompli* and says that the second respondent had taken the position it did in the Arbitration as a result of independent legal advice.

(c) Given this disagreement between the claimant and the Liquidator, I was satisfied that the Third Issue is an "issue in the case" in SUM 952.

Category 1: Communications relating to the Memorandum

39 With the above in mind, I now turn to the requests in SUM 2987, beginning with Category 1. To briefly recap, Category 1 seeks all communications between the claimant and the second respondent (including its representatives [A] and [A]'s father) regarding the parties' entry into the Memorandum, including communications about the purported deficiency of the NAC and why the parties had varied the identified arbitral institution to the HAC.

40 The documents in Category 1, if they exist, would show that the parties had indeed engaged in discussions before entering into the Memorandum. On the claimant's case, and in the light of what is recorded on the face of the

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Memorandum, these discussions would have addressed the reasons why the identified arbitral institution had to be varied from the NAC to the HAC. In other words, these documents would show that the claimant and the respondents had entered into the agreement for the variation of the identified arbitral institution as evidenced by the Memorandum, for the reasons recorded in the Memorandum. The documents in Category 1, if they exist, would also constitute direct evidence of any such discussions that might have taken place and in and of themselves show that the parties had in fact agreed to vary the identified arbitral institution from the NAC to the HAC and the reasons for that agreement. I therefore accepted that the documents in Category 1, if they exist, would bear a demonstrable nexus to, and have a significant bearing on the question of whether there had in fact been a genuine agreement between the parties for the variation of the identified arbitral institution. The documents in Category 1 are therefore "material" to the First Issue.

41 I was also satisfied that the request in Category 1, as framed, properly identified the documents coming within its scope. I disagreed with the claimant's submission that there was no proper identification in Category 1 because the temporal dimension of Category 1 is ill-defined, with no start and end date for the documents requested. The lack of a definition in timeframe in a request for production does not in and of itself render the request defective, provided that the requested documents have been described with sufficient particularity to enable the producing party to know what documents are requested (see *Singapore Civil Procedure 2022* vol I (Cavinder Bull SC gen ed) (Sweet & Maxwell, 2022) at para 11/3/2), and such description can well take other forms besides a reference to timeframe. In this case, the claimant's case is that the parties had entered into the Memorandum in June 2019 and it follows from this that any discussions that the parties might have had about the

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deficiencies of the NAC would presumably also have taken place in or around that period of time. The request in Category 1 as it is framed sufficiently enables the claimant to know the scope of the documents that are being requested and it was unnecessary to require the Liquidator to specify time limits for its request in Category 1.

Category 2(a): Pre-arbitration communications that evidence a dispute

42 I now turn to Category 2(a), which seeks all communications from the claimant to the second respondent and/or the second respondent's purported representatives alleging disputes and demanding reliefs prior to the commencement of the Arbitration. Although not expressly stated in Category 2(a), it was common ground that the "dispute" and "relief" referred to in Category 2(a) is in connection with the subject matter of the Arbitration, *ie*, the Guarantee and the Remaining Shares.

43 The documents in Category 2(a), if they exist, would show that the parties had been in a state of disagreement in connection with the subject matter of the Arbitration prior to the commencement of the Arbitration. Similar to the case for Category 1, the documents in Category 2(a), if they exist, would also constitute direct evidence of any such dispute the parties might have had over the Guarantee and the Remaining Shares prior to the commencement of the Arbitration. I therefore accepted that the documents in Category 2(a), if they exist, would bear a demonstrable nexus to, and have a significant bearing on the question of whether there existed a dispute between the parties over the Guarantee and the Remaining Shares prior to the commencement of the Arbitration. The documents in Category 2(a) are therefore "material" to the Second Issue.

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44 I was also satisfied that the request in Category 2(a), as framed, properly identified the documents coming within its scope. Just as it did for Category 1, the claimant also submitted that the documents requested in Category 2(a) lacked proper definition because its temporal dimension was ill-defined. I disagreed with this submission. Any discussions evidencing a dispute under the Guarantee and over the Remaining Shares before the commencement of the Arbitration would have taken place between when the claimant first learnt of the Bond and the Pledged Shares and when the Arbitration was subsequently commenced in November 2022. The request in Category 2(a) as it is framed already sufficiently enables the claimant to know the scope of the documents requested.

Category 2(b) to Category 7: Documents that exist in a routine arbitration

45 There is a common theme in the documents coming within Category 2(b) onwards and until Category 7 – that is, these are documents that one would ordinarily expect to exist in a routine arbitration. In a routine arbitration, one would expect there to be communications between the parties notifying the other about the commencement of arbitration (*ie*, Category 2(b)) and one would also expect parties to correspond about logistical and other matters in connection with the conduct of the Arbitration (*ie*, Category 2(c)). There would also likely exist communications whether from the parties to the arbitral tribunal (*ie*, Category 3) or from the arbitral tribunal to the parties (*ie*, Category 4). The respondent in an arbitration would also be served documents, whether by the claimant in the arbitration or by the tribunal (*ie*, Category 5). Finally, for the purposes of the arbitration (including but not limited to the hearing of the arbitration), the parties would also file or submit documents to the arbitral tribunal (*ie*, Category 6 and Category 7).

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46 In other words, the documents across Category 2(b) to Category 7, if they exist, would show that the Arbitration had been just like any other arbitration that parties undergo with the genuine intention of having their rights adjudicated upon. These documents, if they exist, would by themselves support the contention that the Arbitration had been a genuine arbitration in which the claimant sought to have its rights under the Guarantee and over the Remaining Shares adjudicated, and would constitute direct evidence which refutes the Liquidator's case that the Arbitration is a sham. I therefore accepted that the documents across Category 2(b) to Category 7, if they exist, would bear a demonstrable nexus to, and have a significant bearing on the question of whether the Arbitration had been a sham. These documents are therefore "material" to the Third Issue.

47 At the hearing before me, counsel for the Liquidator refined the requests across Category 2(b) to Category 7, in that they were now limited in time to between (a) one week before the commencement of the Arbitration on 18 November 2022 (*ie*, 11 November 2022) and (b) one week after the Award was obtained on 10 January 2023 (*ie*, 17 January 2023). In view of this, I accepted that the requested documents across these categories have been properly identified.

48 For the avoidance of doubt, even if counsel had not proposed the further refinement, I would not have found the requested documents across these categories to be improperly identified. As stated earlier, the requirement of proper identification in O 11 r 3(1)(*a*) of the ROC 2021 is not insisted upon for its own sake and the objective is to enable the producing party to know what documents are requested. The documents requested across Category 2(b) to Category 7, by virtue of the subject matter to which they relate, are of such a nature that they could only have come into being within a definite period of

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time, namely, after the Arbitration was commenced and during the pendency of the Arbitration. The requests across these categories, as framed, already sufficiently enables the claimant to know the scope of the documents that are being requested.

49 At this juncture, let me address two arguments which were raised by the claimant in connection with the requests in Category 3 and Category 4. First, the claimant argued that the Liquidator is not entitled to maintain these requests because the Liquidator has taken the position in SUM 952 that there is no such arbitral institution as the HCA. I disagreed with this submission. It is true that the Liquidator does take the position in SUM 952 that the HCA does not exist, but it is the claimant's case that the HCA exists. There is nothing wrong in principle for a party to maintain its requests for production on the basis of the producing party's case and that is precisely what the Liquidator has done in connection with Category 3 and Category 4. In fact, this coheres with the first of the two-fold objectives underlying the regime for production of documents, which is to ensure that parties conduct the litigation with their "cards face up on the table" (see [29] above). It is consistent with this objective that the Liquidator be entitled to request for documents that, if shown to exist, would militate against the claimant's case. Secondly, the claimant resisted the Liquidator's requests for these categories on the basis that the Liquidator has apparently not made any independent enquiries with the HAC or made attempts to seek these documents from the HAC. I found this neither here nor there. It is no part of the requirements in O 11 r 3(1) that a requesting party must first make an independent attempt on its own accord to obtain the documents requested before it is entitled to make a request for production. Whether the requested documents are to be produced turns solely on whether they satisfy the substantive legal criteria for production in O 11 r 3(1).

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50 In connection with Category 5, Category 6 and Category 7, the claimant argued that these requests are inconsistent with the Liquidator's position in SUM 952, where it has relied on the procedural history of the Arbitration set out on the face of the Award. I did not find any merit in this argument. The Liquidator's reliance on the procedural history of the Arbitration is not inconsistent with its case that the Arbitration had been a sham. As I stated earlier, the Liquidator does not appear to dispute in SUM 952 that the Arbitration had taken place within the periods of time and in accordance with the sequence of events as recorded on the face of the Award (see [48] above). In particular, for SUM 952, the Liquidator does not dispute, and indeed relies on the fact that the second respondent had in the Arbitration raised no substantive contest to the claimant's claims for relief and evidence adduced. The Liquidator's complaint in SUM 952 lies in the purpose for which the Arbitration had been conducted and why the second respondent came to take the positions that it took in the Arbitration, and it is that which forms the basis of its case that the Arbitration had been a sham.

Category 8: Post-Award communications including those relating to the enforcement of the Award

51 I now turn to Category 8. To briefly recap, Category 8 sought communications between the claimant and the second respondent and/or the second respondent's purported representatives in relation to *the Award*, including post-Award communications relating to the enforcement of the Award. These are similarly documents that would otherwise exist in a routine arbitration – one would expect the parties to communicate in relation to matters arising from the making of an arbitral award, whether for the purposes of enforcement or other matters. I therefore accepted that the documents in Category 8, if they exist, would have a demonstrable nexus with the Third Issue.

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52 However, I was not satisfied that the documents in Category 8, if they exist, would be "material" to the Third Issue. What is ultimately determinative of the Third Issue – whether the Arbitration had been a sham – turns on what had taken place before and during the Arbitration, and not the events that took place *after* the Arbitration. Even if the Arbitration had been a sham, there could still have been communications between the parties relating to the claimant's attempts to enforce the Award, such as the claimant's demands for the second respondent's compliance with the Award and threats of enforcement action in the event of the second respondent's non-compliance. Put simply, the existence of post-Award communications between the parties including those relating to the enforcement of the Award neither supports nor refutes the Liquidator's characterisation of the Arbitration being a sham. It therefore cannot be said that the documents in Category 8, if they exist, would have a significant bearing on the Third Issue. I therefore refused the request in Category 8.

53 The fact that there exist no post-Award communications of the nature described in Category 8 might well reinforce the Liquidator's case that the Arbitration had been commenced for the *sole purpose* of enabling the claimant to obtain the Award and consequently a judgment giving it priority over the Remaining Shares ahead of the second respondent's other creditors. However, even if the Liquidator can show that the Arbitration had been commenced for that purpose alone, that is not inconsistent with the parties having commenced the Arbitration with a genuine intention to have their rights adjudicated through the Arbitration. A claimant in arbitration obviously engages in that process to achieve what in its view is the desired outcome (namely, to obtain an award in its favour), and the fact that the arbitration had been commenced for that purpose alone does not translate to the arbitration being a sham. In other words, the existence or non-existence of any such post-Award communications is neither

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here nor there in connection with the question of a sham, and the documents in Category 8 cannot be "material" to the Third Issue.

Conclusion and costs

54 For the reasons above: (a) I allowed the requests in Category 1 and Category 2(a); (b) I allowed the requests across Category 2(b) to Category 7, varied in accordance with the refinement in timeframe that counsel for the Liquidator had proposed (see [47] above); and (c) I disallowed the request in Category 8.

55 In respect of an application of this nature, the Guidelines for Party-and-Party Costs Awards in Appendix G of the Supreme Court Practice Directions 2021 ("Appendix G") provide for a costs range of $6,000 to $21,000. the Liquidator argued that it be paid $8,000 in costs and disbursements of around $900. On the other hand, the claimant argued that any costs it is ordered to pay should lie between $3,000 to $4,000, since the request in Category 8 was refused, and variations had been made to the requests across Category 2(b) to Category 7 in view of the concessions that counsel for the Liquidator had made at the hearing, and which ought to have made earlier.

56 Having considered the arguments, I ordered the claimant to pay costs of $8,500 (all in). In arriving at my decision on costs, I took into account the following. First, the variation of the requests allowed across Category 2(b) and Category 7 was not in my view a factor that ought to count against the Liquidator in terms of costs. As mentioned, I would not have found the requests across Category 2(b) to Category 7 as they originally stood to be improperly identified, and the refinements in terms of timeframe proposed by counsel, which I accepted, were merely clarificatory in nature (see [48] above).

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Secondly, I agreed with the starting point for costs identified by the Liquidator's counsel, given the length of the hearing and that both sides had appointed instructed counsel for the purposes of arguments, much of which required reference to the other cause papers and affidavits filed in OA 222, in addition to the materials filed for SUM 2987. Thirdly, I considered a discount appropriate to reflect the Liquidator's lack of success in Category 8, which I found to be without merit, but that was very minor given that the majority of the arguments had been devoted to the requests in the other categories.

SUM 346

57 I now turn to SUM 346. I have already mentioned in the introduction to these grounds the procedural history that led to the filing of SUM 346. To briefly recap, on 11 December 2023, which was the due date for compliance with the Production Order, the claimant filed the LOD (containing 28 documents). The Liquidator took the view that the LOD was incomplete and on 20 December 2023, it wrote to the claimant's solicitors seeking clarification and requesting for full compliance. The claimant's solicitors replied on 9 January 2024, stating that they were taking instructions. By 15 January 2024, no response was received from the claimant. On 16 January 2024, the Liquidator's solicitors wrote to inform the court that the claimant has failed to fully comply with the Production Order, and it was intending to take out an application for a peremptory order to secure the claimant's compliance. The court directed that the claimant provides a response, but the Liquidator's solicitors omitted to communicate these directions to the claimant's solicitors.

58 In the event, there was no response by the claimant to the Liquidator's letter to the court of 16 January 2024. On 30 January 2024, the claimant filed the SLOD (containing a further 24 documents). The Liquidator stated that,

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having perused the LOD and the SLOD, the documents that have been produced by the claimant remain incomplete, and in particular, it identified three categories allowed in the Production Order for which no documents have been produced by the claimant. In view of this, the second respondent brought SUM 346 for an order that ORC 1189 be set aside and OA 222 be dismissed unless: (a) the claimant complied fully with the Production Order; and (b) file an affidavit explaining (i) why it failed to fully comply with the Production Order, (ii) the categories of the Production Order in which the documents produced and/or will be produced by the claimant respectively fall under and (iii) whether the claimant has lost possession or control of any of the documents responsive to the Production Order, and if so, the circumstances in which it lost possession or control.

59 In its supporting affidavit for SUM 346, the second respondent explained why, having reviewed the documents produced by the claimant in the LOD and the SLOD, it came to the view that the claimant has failed to disclose any documents responsive to the requests in Category 1, Category 2 and Category 3 as granted in the Production Order ("the Identified Categories"). The claimant was directed to file a reply affidavit responding to the second respondent's allegations in SUM 346 by 19 February 2024, and the parties were to file written submissions by 21 February 2024. However, the claimant did not file any reply affidavit or written submissions. Instead, on 19 February 2024, the claimant's solicitors wrote to the Liquidator's solicitors, stating that: (a) the claimant is prepared to have a consent order recorded in respect of the prayers in SUM 346 save for its peremptory effect; and (b) an "unless" order sought in the terms of SUM 346 is unwarranted, as the claimant has been forthcoming in disclosing documents as soon as practicable and has given substantial discovery via the LOD and the SLOD. Unsurprisingly, the Liquidator disagreed with the

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claimant's position that an "unless" order is unwarranted. In view of the claimant's position, the only issue that remained for determination in SUM 346 when it came to be heard on 26 February 2024 was whether an "unless" order is warranted in the circumstances of this case.

The applicable principles

60 Under the ROC 2021, the court has the power to make orders to address the failure by a party to comply with an order made for the production of documents. This is provided for in O 11 r 7, which states:

> If any party fails to comply with any order made by the Court under this Order, the Court may —
>
> (*a*) order that the action be dismissed or that the defence be struck out and judgment be entered accordingly;
>
> (*b*) draw an adverse inference or make any such order as the Court deems fit;
>
> © punish that party for contempt of court if the order has been served on that party's solicitor, but it is open to that party to show that that party was not notified or did not know about the order; or
>
> (*d*) order that that party may not rely on any document that is within the scope of the order unless the Court approves.

61 The language of O 11 r 7 makes clear that the orders specified within the subparagraphs of that rule are not exhaustive of the types of orders which the court can make to address the defaulting party's non-compliance with orders for production of documents. One such order which the court can make, and which is not expressly specified in O 11 r 7, is an "unless" or peremptory order that stipulates dismissal of the action as a consequence of non-compliance. In this context, the function of an "unless" order is not to punish misconduct but to secure a party's compliance with orders for production and in turn a fair trial

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in accordance with the due process of the law (see *Mitora Pte Ltd v Agritrade International (Pte) Ltd* [2013] 3 SLR 1179 ("*Mitora*") at [45]; *Alliance Management SA v Pendleton Lane P and another and another suit* [2008] 4 SLR(R) 1 ("*Alliance Management SA*") at [8]). Because of the potency of an "unless" order, the Court of Appeal in *Mitora* (at [45]) emphasised that it is to be scrupulously used, and provided the following guidance: (a) such an order was only to be given as a last resort when the defaulter's conduct is inexcusable; (b) the conditions appended to the order should as far as possible be tailored to the prejudice which would be suffered should there be non-compliance; and (c) there were other less drastic means of penalising contumelious or persistent breaches of procedure.

62 In addition to applying for an "unless" order, a party faced with the other's non-compliance with orders for production has the option of applying for the action to be dismissed and have judgment entered pursuant to O 11 r 7(*a*) of the ROC 2021. In *Alliance Management SA* (at [5]–[6]), the High Court, considering the equivalent provision of O 11 r 7 in the ROC 2014, held that the court may exercise its discretion to strike out in circumstances involving (a) procedural abuse or questionable tactics; (b) peremptory orders where the basis of the failure to comply with a peremptory order was contumacious; or (c) repeated and persistent defaults of the rules of court or non-peremptory orders amounting to contumacious conduct. Examples of these include cases where the defaulting party failed to comply with successive non-peremptory orders for discovery, or where the failure to comply is due to a deliberate suppression of evidence by the defaulting party. At the opposite end of the spectrum were cases of ordinary procedural defaults of a technical complexion, and which were unlikely to give rise to the exercise of the discretionary power to strike out.

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63 There is a distinction between a striking out order under O 11 r 7(*a*) and an "unless" order, which speaks to the requirements to be satisfied before a court is minded to grant the order sought. A striking out order serves to rectify a situation where the defaulting party's conduct was so contumelious and egregious that a continuation of the action would amount to an abuse of the court's process, so that it is necessary for the action to be struck out to ensure that the court's processes do not be misused as a means of achieving injustice (see *Alliance Management SA* at [9]) Therefore, the question of whether a striking out order is to be made is concerned with the *manner* in which the defaulting party had breached the relevant orders for production. On the other hand, an "unless" order is designed to secure the defaulting party's compliance and in turn a fair trial or hearing of the matter. Therefore, whether an "unless" order is to be granted turns on what is necessary to secure or compel the defaulting party's compliance in the specific circumstances of the case before the court. In this analysis, the manner in which the defaulting party had acted in breach is necessarily a relevant consideration. However, that is not the only consideration because the circumstances of the case can well persuade the court to come to a view that an order stipulating dismissal is necessary as a last-resort measure to secure compliance, even where the breach in question might be perceived as minor when considered in isolation.

The submissions

64 The Liquidator argued that an "unless" order is necessary to secure the claimant's compliance with the Production Order. It highlighted that the claimant had filed the LOD, which was incomplete, and then filed the SLOD, which was similarly incomplete, after several chasers. It made no sense for the court to record the orders sought in SUM 346 without any peremptory effect because that effectively asks the claimant to comply with the Production Order,

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something which it ought to do in the first place. If there were no "unless" order, it would be very likely that the claimant would fail to disclose all documents required under the Production Order by the time SUM 952 comes to be heard on 28 March 2024.

65 The claimant argued that the present case falls short of the high threshold for the grant of "unless" orders as set out by the Court of Appeal in *Mitora* ([61] above). The claimant pointed out that the Liquidator has not explained in its supporting affidavit for SUM 346 the prejudice that it has suffered as a result of the claimant's non-compliance with the Production Order, and in turn, there was no indication that the conditions of the "unless" order sought in SUM 346 have been tailored to the prejudice that the Liquidator has suffered due to the claimant's non-compliance. Finally, the claimant highlighted that its willingness to comply with what the Liquidator seeks in SUM 346 (save for the peremptory effect) will more than sufficiently address the court's concerns over its non-compliance with the Production Order.

My decision

66 I began by considering how the claimant's non-compliance with the Production Order is to be characterised. As a starting point, I thought it is apparent from the claimant's filing of the SLOD and its subsequent offer to concede to the prayers sought in SUM 346 save for its peremptory effect that the claimant has failed to comply with the Production Order. For this reason, I did not have to go into the merits of the arguments made by the Liquidator as to why it took the view that the claimant has failed to produce any documents responsive to the requests in the Identified Categories of SUM 2987. I also further note that, while the Liquidator referred only to the Identified Categories in its supporting affidavit for SUM 346, the prayers in SUM 346, to which the

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claimant is prepared to consent, contain no such specification, and instead refer to compliance with the Production Order generally. This distinction in the scope of the Production Order that is referenced by the Liquidator's supporting affidavit in SUM 346 and the prayers in SUM 346 is immaterial in view of the claimant's consent to SUM 346. It suffices for me to state that I would not have found this distinction material anyway because, given the clear indication that the claimant has failed to comply with the Production Order (which, as explained, flows in large part from its offer to consent to SUM 346), it would not be reasonable to expect the Liquidator to specifically pinpoint the categories of the Production Order that have not been complied with, a matter within the knowledge of the claimant and on which the Liquidator would be none the wiser.

67 I am also prepared to find that the claimant's non-compliance with the Production Order has been deliberate and persistent. As the claimant chose not to file a reply affidavit in SUM 346, I do not have the benefit of the claimant's explanations as to why it failed to comply with the Production Order by the due date for compliance. As the claimant has been legally represented throughout these proceedings, it would have been advised of the full extent of its legal obligations under the Production Order by its solicitors, who, as officers of the court, owe a special duty to properly explain to their client what their obligations under orders for production are, and they also owe a duty of involvement in and supervision of the disclosure process (see *Teo Wai Cheong* ([29] above) at [43]). At this juncture, it bears repeating that the claimant never defended SUM 2987 on the basis that it lacked possession or control of the documents which now come within the Production Order (see [31] above). In spite of the legal advice which it would have received, the claimant chose to only disclose in the LOD part of those documents which came within the Production Order, and it was

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only after the Liquidator raised questions that the claimant disclosed further documents in the SLOD, which in any event, was incomplete given its concession now to consent to the prayers sought by the Liquidator in SUM 346 to fully comply with the Production Order. This pattern of conduct reveals nothing but deliberate non-disclosure which persisted until the threat of an "unless order" possibly depriving the claimant of the fruits of ORC 1189 was imminent. In the lead up to the hearing of SUM 346, what the claimant did was not to produce the required documents or file a reply affidavit in SUM 346 explaining the reasons for its non-compliance. Instead, it *offered* to do those things – part of which came within its original legal obligations under the Production Order in the first place – and utilise that offer as a bargaining chip in SUM 346 to avoid an "unless" order. The claimant's offer on 19 February 2024 therefore did not put an end to its pattern of deliberate and persistent non-compliance with the Production Order; if anything, it only reinforced that characterisation.

68 In this case, a fact of some significance is that SUM 952, to which the documents coming within the Production Order are material, is due to be heard in about four weeks' time. The parties were informed in end-November 2023 that SUM 952 will be heard sometime in March or April 2024, and on 6 December 2023 (which was a few days before the due date for compliance with the Production Order) the parties were informed that the hearing of SUM 952 is fixed on 28 March 2024. In other words, the claimant knew full well that the hearing of SUM 952 was close by when it chose not to comply with the Production Order. Given this context, the claimant's deliberate and persistent non-compliance with the Production Order fully justified an "unless" order. If an order were made in SUM 346 without any peremptory bite, it could result in a situation where the material documents remain undisclosed by the time

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SUM 952 comes to be determined and the court is deprived of the evidence that is needed to secure a fair hearing of SUM 952.

69 Since the effect of an "unless order" in this context is to secure the claimant's compliance with the Production Order, the stipulated conditions of the "unless order" should either be coextensive with the Production Order or have the effect of securing compliance with the Production Order. For this reason, the conditions of the "unless" order in SUM 346 should be limited to only the following: (a) the claimant complies fully with the Production Order; (b) the claimant files and serves on the second respondent an affidavit explaining (i) which documents it have produced and/or will produce fall within the respective categories covered by the Production Order; and (ii) whether the claimant has lost possession or control of any documents that are responsive to the Production Order and if so, provide an explanation of the circumstances in which it lost possession or control of such documents. It needs no explanation that condition (a) is coextensive with the Production Order. As for condition (b), I accept that the Production Order only obliged the claimant to produce the documents ordered, and it did not require the claimant to do what the two limbs of condition (b) now seek. However, given the manner in which the claimant has thus far complied with the Production Order, the performance of condition (a) alone would not give the Liquidator much comfort as it is left guessing whether all documents coming within the Production Order have been produced. In my view, the performance of both limbs of condition (b), which effectively require the claimant to specify the category to which each of the produced documents correspond and identify whether there are any documents that ought to be provided under the Production Order but which it could not provide due to the lack of possession or control, are necessary to secure the claimant's full compliance with the Production Order. The part of SUM 346

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requiring the claimant to file an affidavit explaining why it failed to fully comply with the Production Order is not coextensive with the Production Order and does not in any way serve to secure the claimant's compliance with the Production Order. Therefore, in my view, that condition ought not to come within the "unless" order granted in this case.

Conclusion and costs

70 For the reasons above, I granted an "unless" order, with the conditions specified above (at [69]). However, given the ambiguity in what it means for the claimant to "comply fully" with the Production Order (*ie*, condition (a)), to avoid any subsequent dispute over whether the claimant has indeed performed the conditions in the "unless" order, I amended condition (a) so that it exactly reproduces what the claimant had been required to do under the Production Order, namely, to file a list of documents corresponding to the seven categories that have been allowed in SUM 2987 and provide to the Liquidator copies of those documents (see [2] above) by the date specified in the "unless" order. I also ordered that the claimant explain in the affidavit to be filed by the date specified in the "unless" order why it failed to fully comply with the Production Order, though this did not come within the scope of the "unless" order.

71 I also ordered the claimant to pay: (a) costs of $8,500; (b) disbursements in terms of filing fees of $1,552; and (c) costs incurred by the Liquidator in translating documents in the LOD and the SLOD of $4,318.53. The claimant argued that a discount ought to be applied to the costs to which the Liquidator is entitled given that not all conditions specified in SUM 346 came within the scope of the "unless" order. I disagreed with that submission. My conclusion earlier that the Liquidator is fully entitled an "unless order" makes it amply clear

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that the Liquidator has succeeded in SUM 346 and there is no basis on which any discount can be made to those costs. There was no quarrel between the parties on the filing fees. As for translation costs, the claimant objected to them on the basis that part of those costs would have been incurred for the purposes of the proceedings in OA 222 anyway and were not incurred only for SUM 346. As such, the question of whether the translation costs were recoverable should be reserved for a future occasion, and not be determined in SUM 346. In so far as those translations would eventually be used by the Liquidator to prepare its affidavits and submissions in SUM 952, which outcome is yet unknown, there was some merit in this contention. However, I agreed with the Liquidator's submission that the exercise of translating *all* the documents in the LOD and the SLOD only became necessary because the Liquidator had to put together its supporting affidavit in SUM 346 and make good its case that the claimant has failed to comply with the Production Order. In my view, that, coupled with the 30% discount that counsel for the Liquidator proposed be applied to the original quantum for translation costs, fully justified the Liquidator recovering from the claimant translation costs to the order above (which includes the 30% discount), bearing in mind that none of these costs (along with the other costs and expenses of SUM 346) would have been incurred at this juncture had the claimant complied with the Production Order in the first place.

Perry Peh
Assistant Registrar

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Kelvin Poon SC and Devathas Satianathan (Rajah & Tann Singapore LLP) (instructed) and Terence Tan (Genesis Law Corporation) for the claimant in Summons No 2987 of 2023;
Jordan Tan and Damien Chng (Audent Chambers LLC) (instructed) and Nicholas Poon and Michael Chan (Breakpoint LLC) for the second respondent in Summons No 2987 of 2023;
Devathas Satianathan (Rajah & Tann Singapore LLP) (instructed), Terence Tan and Lena Tan (Genesis Law Corporation) for the claimant in Summons No 346 of 2024;
Jordan Tan and Damien Chng (Audent Chambers LLC) (instructed) and Nicholas Poon and Michael Chan (Breakpoint LLC) for the second respondent in Summons No 346 of 2024.

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