UMCI Ltd v Tokio Marine & Fire Insurance Co (Singapore) Pte Ltd and Others [2006] SGHC 142

Case Number : Suit 409/2005, SUM 1753/2006

Decision Date : 07 August 2006

Tribunal/Court : High Court

Coram : Sundaresh Menon JC

Counsel Name(s) : Jasmine Chin (Rajah & Tann) for the respondent/plaintiff; Anna Quah I-Lin (Ang & Partners) for the applicant/defendant; Wendy Tan (Haq & Selvam) for the non-parties

Parties : UMCI Ltd — Tokio Marine & Fire Insurance Co (Singapore) Pte Ltd; Morrison Express Logistics Pte Ltd; Lim Beng Wee

Civil Procedure – Discovery of documents – Application – Defendant in action commenced by plaintiff applying for discovery of documents against non-parties to action under O 24 r 6 Rules of Court – Whether court having power under O 24 r 6 to order non-parties to provide documents to defendant for inspection prior to trial – Order 24 r 6 Rules of Court (Cap 322, R 5, 2004 Rev Ed)

Civil Procedure – Judgments and orders – Defendant in action commenced by plaintiff applying for order of court compelling non-parties to action to provide certain documents and handwriting samples under First Schedule para 5(b) Supreme Court of Judicature Act – Whether ordering handwriting samples to be given to defendant amounting to preservation of evidence – Whether documents in danger of destruction – First Schedule para 5(b) Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed)

Civil Procedure – Judgments and orders – Defendant in action commenced by plaintiff applying for order of court compelling non-parties to action to provide certain documents and handwriting samples under O 29 r 3(1) Rules of Court – Whether order relating to "property which is the subject-matter of the cause or matter" – Order 29 r 3(1) Rules of Court (Cap 322, R 5, 2004 Rev Ed)

Civil Procedure – Judgments and orders – Defendant in action commenced by plaintiff applying for order of court compelling non-parties to action to provide certain documents and handwriting samples under s 75 Evidence Act – Whether court having power to order production of documents under s 75 – Whether non-party whose handwriting samples wanted by defendant amounting to "any person present in court" – Section 75 Evidence Act (Cap 97, 1997 Rev Ed)

Civil Procedure – Jurisdiction – Inherent – Defendant in action commenced by plaintiff applying for order of court compelling non-parties to action to provide certain documents and handwriting samples – Whether court having inherent jurisdiction to order non-parties to action to provide documents and handwriting samples to defendant for inspection prior to trial

7 August 2006 *Judgment reserved.*

Sundaresh Menon JC:

1 The Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules") spell out many of the powers of our courts to manage and regulate civil cases. The powers contained there are complemented by the courts' inherent jurisdiction, an amorphous source of power to do that which is deemed appropriate in the circumstances to secure the ends of justice. This case requires me to consider if the court's powers, whether under the Rules or in its inherent jurisdiction, extend to making orders against persons who are not parties to this action, requiring them to furnish handwriting samples. This is in order to enable the defendant, who is the applicant before me, to establish or to disprove certain

hypotheses upon which the plaintiff's case against it rests.

The facts

2 The facts of the case may be stated quite briefly. Under a marine open policy, Tokio Marine & Fire Insurance Company (Singapore) Pte Ltd ("the Defendant") was the insurer of goods and merchandise declared by UMCI Ltd ("the Plaintiff"). In or about April 2004, the Plaintiff made a declaration in respect of some semiconductor manufacturing equipment, which I refer to in this judgment simply as "the cargo".

3 According to the Plaintiff, the cargo had been purchased from Applied Materials Asia Pacific Ltd ("AMAPL"). Morrison Express Logistics Pte Ltd ("Morrison") was appointed to provide freight forwarding services to transport the cargo from AMAPL's premises in Austin, Texas, to Changi Airport. Morrison was to convey the cargo to Bee Hup Seng Kinetic Pte Ltd, a specialist moving company, also appointed by the Plaintiff, who was to transport the cargo from Changi Airport to the Plaintiff's premises.

4 On or about 30 April 2004, the Defendant was informed by Willis (Singapore) Pte Ltd ("Willis"), who was then the Plaintiff's insurance broker, of a claim under the policy. It appears that the cargo had arrived at the Plaintiff's premises in a damaged condition.

5 The Defendant took the view that the Plaintiff had failed to establish its claim under the policy and the present action was then commenced. The Plaintiff sought recovery of the sum of US$1,375,000 being the loss allegedly suffered by reason of the damage to the cargo.

6 The Plaintiff's claim rested on the contention that the cargo was in good order and condition when shipped and had been damaged in transit. In support of this contention, the Plaintiff submitted various documents, including a photocopy of a cargo checklist, which suggested that there had been no damage to the surface of the crates in which the cargo had been packed when it was inspected at the premises of AMAPL.

7 The Defendant requested inspection of the original of the cargo checklist in question and this was to take place on 17 March 2005. However, at the inspection, which took place at the Plaintiff's premises, an original document was produced but it was a different version of the cargo checklist and it suggested that in fact damage to the crates had been noted even when the cargo was inspected at AMAPL's premises. There were also some other differences between the document produced at the inspection and that which the Defendant had earlier seen a photocopy of.

8 The Defendant then applied for specific discovery and interrogatories. The Plaintiff's representative filed an affidavit in which it was stated that the cargo checklist was prepared by Morrison acting by its representative, one Mr Ben Lim Beng Wee ("Mr Lim"). It was stated that Mr Lim had made the cargo checklist in duplicate. The original was retained by Morrison while the Plaintiff had the duplicate cargo checklist. The Plaintiff further stated that the alleged damage to the surface of the crates recorded on the duplicate cargo checklist was reflected there by reason of a clerical error.

9 Faced with this, the Defendant pleaded, *inter alia*, that the Plaintiff was acting in breach of its duty of good faith by using fraudulent means to improve the prospects of a good outcome or settlement in respect of its claim.

10 There is every reason to believe that the authenticity and the circumstances of the coming into existence of the two versions of the cargo checklist will be relevant to the defences pleaded by

the Defendant. Ms Wendy Tan, who appeared for Morrison and Mr Lim (collectively referred to here as "the Non-parties"), initially accepted that the subject matter of the present application would be relevant to issues in the trial. To this end, the Defendant required the Non-parties to provide samples of Mr Lim's handwriting found on the originals of other similar checklists made in the normal course of business (referred to in this judgment as "documentary samples"); and Mr Lim to make and provide some specific handwriting samples (referred to here as "handwriting samples"). The Defendant's solicitors therefore approached the solicitors representing Morrisons and Mr Lim but the Non-parties were unwilling to accede to either request. This has given rise to the application before me.

The arguments

11 Ms Anna Quah appeared for the Defendant. She explained that her client had engaged a handwriting expert to opine on the authenticity of the two versions of the cargo checklist and whether these had in fact been made by Mr Lim. The application was initiated because the expert wished to have the two classes of samples that I have referred to in order to form reliable conclusions. Ms Quah initially founded her application on any one of the following three bases:

(a) It was within the power of this court to make such an order under O 29 r 3 of the Rules which concerns the taking of samples. That rule is not in terms limited in its application to parties to a matter. Moreover, Ms Quah contended, although the rule speaks of "property" there is no need to construe that narrowly so as to exclude the samples she was seeking.

(b) Under s 75 of the Evidence Act (Cap 97, 1997 Rev Ed), the court has the power to direct a witness before it to provide handwriting samples. Ms Quah submitted this should be construed to cover Mr Lim who is "before" me through his counsel, Ms Tan. Moreover, although the section speaks of "preservation", that should be construed broadly to cover the obtaining of evidence from a witness who conceivably may no longer be available or amenable to giving evidence at the time of the trial.

(c) Under para 5(*b*) of the First Schedule to the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) ("SCJA"), the court also has the power to make orders to preserve evidence, *inter alia*, by the taking of evidence and by conducting experiments.

12 Ms Quah's submissions initially made no distinction between the documentary samples and the handwriting samples. However, in the course of arguments, I invited Ms Quah to address me on whether in relation to the documentary samples, it would be possible to seek an order for discovery against a non-party under O 24 r 6(2) of the Rules and/or the inherent jurisdiction of the court; and whether in relation to the handwriting samples, it would be possible to have recourse to the inherent jurisdiction of the court.

13 Ms Quah then filed supplementary submissions in which she took up both these lines.

14 Ms Tan's position in relation to the initial lines of argument was that the court has no power to make the orders of the sort Ms Quah was seeking under the provisions relied on by Ms Quah. She maintained that O 29 r 3 should be construed as applying only to parties to the action. Where the Rules confer rights against non-parties this was in general spelt out in express terms. Further, she argued that O 29 was limited to situations where there was "property" in existence. The making of handwriting samples was a process and there was no property to speak of within the meaning of that rule.

15 As to para 5(*b*) of the First Schedule of the SCJA, Ms Tan submitted that this applied to the

"preservation of evidence" which contemplates that the evidence is in existence and is to be preserved. The orders sought in relation to the documentary samples were for delivery and not for preservation. As for the handwriting samples, there was nothing yet to preserve.

16 Lastly, with respect to s 75 of the Evidence Act, Ms Tan submitted that this was a provision of last recourse. It should not even be resorted to where more direct means were available to establish who made the document in question, as for instance in this case, by requiring Mr Lim to give evidence. Ms Tan indicated that Mr Lim had been requested by the Plaintiff to appear as a witness and he was in principle willing to do so. She further argued that in any case, there was nothing in s 75 of the Evidence Act which empowered me to make the order sought. Mr Lim was not present in court and hence not caught by the section.

17 In response to the supplementary submissions filed by Ms Quah, Ms Tan submitted that the documentary samples were not within the ambit of O 24 r 6(2); and in relation to the handwriting samples that there was no basis for me to invoke the court's inherent jurisdiction to make the order sought in this case.

18 For convenience, I deal with the issues raised as follows:

(a) the initial arguments in relation to both types of samples;

(b) O 24 r 6(2) and the inherent jurisdiction in relation to the documentary samples;

(c) the inherent jurisdiction in relation to the handwriting samples.

The initial arguments in relation to both types of samples

19 I deal with the initial arguments by reference to the way in which they were presented by Ms Quah.

Order 29 rule 3 of the Rules of Court

20 Order 29 r 3(1) of the Rules provides as follows:

> Where it considers it necessary or expedient for the purpose of obtaining full information or evidence in any cause or matter, the Court may, on the application of a party to the cause or matter, and on such terms, if any, as it thinks just, by order authorise or require any sample to be taken of any property which is the subject-matter of the cause or matter or as to which any question may arise therein, any observation to be made on such property or any experiment to be tried on or with such property.

21 It is relevant to note also the terms of O 29 r 2(1) which is in somewhat similar terms and which deals with the detention, custody, preservation or inspection of property. Rule 2(1) provides:

> On the application of any party to a cause or matter, the Court may make an order for the detention, custody or preservation of any property which is the subject-matter of the cause or matter, or as to which any question may arise therein, or for the inspection of any such property in the possession of a party to the cause or matter.

22 Order 29 r 3(1) does several things. First, it confers upon the court a discretionary power; second, it prescribes the overriding considerations that should guide the exercise of that discretion; third, it specifies who may initiate the application; and fourth, it prescribes the sort of orders the

court may make.

23 The present case concerns the last of the points I have just mentioned. The orders a court may make under this rule are to authorise or require the taking of samples of, or the making of observations or the conducting of experiments on "any property which is the subject-matter of the cause or matter or as to which any question may arise therein". It may be noted that identical words are also used in r 2(1).

24 Prof Jeffrey Pinsler in *Singapore Court Practice 2005* (LexisNexis, 2005) notes at para 29/3/1 that the process of taking a sample of property "is a form of discovery so that *appropriate information concerning that property* is available to the party" [emphasis added]. In my view, this highlights one of the difficulties which the Defendant faces in relying upon O 29 r 3(1).

25 On its express terms, r 3(1) contemplates that certain orders may be made in relation to the taking of samples of "property which is the subject-matter of the cause or matter".

26 This gives rise to what seems to me to be an insuperable difficulty for the Defendant, at least in so far as the handwriting samples are concerned. The handwriting in question does not yet exist and even were it to be brought into existence, it does not seem to me plausible to consider it to be a relevant species of "property". Indeed, the Defendant in fact is seeking an order that would compel Mr Lim to replicate the way in which he wrote certain words and that simply does not seem to me to be the taking of a sample of property within the ambit of O 29 r 3.

27 This is borne out by the authorities. In *Bocotra Construction Pte Ltd v AG* [1995] 2 SLR 523, the Court of Appeal was faced with an attempt by the appellants to restrain the respondents from making a demand under a performance bond. An order to this effect had been made by the arbitrator hearing the disputes between the parties but the arbitrator's order was held by the High Court (Goh Joon Seng J) to be void, *inter alia*, because the arbitrator had no power to do so under the relevant rules which were in terms similar to O 29 r 2(1). In dismissing the appeal, Karthigesu JA (who delivered the judgment of the court) had this to say at 540, [51]:

> The arbitrator evidently thought that he was empowered to order the preservation of the proceeds of payment under the guarantee. May LJ reasoned convincingly in *Potton Homes* [*Ltd v Coleman Contractors Ltd* (1984) 28 BLR 19] that such proceeds cannot be frozen under O 29 r 2(1), as they were not the subject matter of litigation in specie. The same reasoning would apply to r 18(g), which, contrary to what the appellants suggested, is indeed closely analogous to O 29 r 2(1) RSC. *We are of the opinion that r 18(g), like O 29 r 2(1) RSC, can only apply to enable the preservation of physical items which form the subject matter of arbitration in specie or are otherwise relevant thereto.* … Whether the 'property' was characterized as the right to call (ie a chose in action) or the proceeds of payment, we do not find the appellants' submissions persuasive. In the premises, we agree with the reasoning of the learned judge, who correctly held that r 18(g) applies only to physical items and not choses in action. [emphasis added]

28 It is true that this *dictum* relates specifically to O 29 r 2(1) whereas the present application is brought under O 29 r 3(1). However, I see no basis or reason for concluding that the position is in any way different under the latter rule. On the contrary, the principle stated above seems to me to accord with the literal words of O 29 r 3(1).

29 Ms Tan for the Non-parties also submitted that an order requiring Mr Lim to actually make and produce a handwriting sample is analogous to requiring a process to be inspected. She cited the decision of the English Court of Appeal in *Tudor Accumulator Company Ltd v China Mutual Steam*

Navigation Company Ltd [1930] WN 200 ("*Tudor Accumulator*") as authority for the proposition that this was not permissible. The issue in that case concerned damages arising from a contract for the carriage of a consignment of battery plates and the application was for an order permitting inspection of the method adopted by the plaintiff in manufacturing and packing the plates for production.

30 The relevant rule in that case provided as follows:

> It shall be lawful for the court or a judge, upon the application of any party to a cause or matter, and upon such terms as may be just, to make any order for the detention, preservation, or inspection of any property or thing, being the subject of such cause or matter, or as to which any question may arise therein, and for all or any of the purposes aforesaid, to authorise any persons to enter upon or into any land or building in the possession of any party to such cause or matter, and for all or any of the purposes aforesaid to authorise any samples to be taken, or any observation to be made or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence.

31 Of interest to the case before me is that Lawrence and Greer LJJ in *Tudor Accumulator* both thought the order could not be sustained because the method of manufacturing and packing was not "property or thing" and that inspection under the rule was limited to physical things.

32 This was followed by Brooke J in *Ash v Buxted Poultry Ltd* The Times (29 November 1989) ("*Ash*") which concerned an application by the plaintiff requiring the defendant to provide facilities for a short video film to be taken showing the nature of the work done in one of its departments. It was accepted by counsel that the court had no power under O 29 r 2 of the English Rules of Court to make the order. Brooke J also considered that he was bound by *Tudor Accumulator* to hold that the rule was limited to property and did not extend to a method of manufacturing.

33 The court did, however, hold that it was within its inherent jurisdiction to make the order and it did so in the circumstances. I return to the issue of inherent jurisdiction later in this judgment. However, it is clear in my view that I do not have the power to make the order sought in respect of the handwriting samples under O 29 r 3(1) as there is no property in existence within the meaning of the rule.

34 I turn to the documentary samples. This seems to me similarly to fall outside the ambit of O 29 r 3(1). The samples being sought are copies of other documents wholly unrelated to the matter before me but bearing the handwriting of Mr Lim. Order 29 r 3(1) enables the court to make certain orders in respect of "property which is the subject-matter of the cause or matter or as to which any question may arise therein". However, the documentary samples are not the subject matter of the cause or matter here. Nor is any question going to arise in relation to those documents. The need to establish a sufficiently real connection between the issues in the action and the property that is the subject of the application was emphasised in *Scott v Mercantile Accident Insurance Company* (1892) 8 TLR 320, albeit in a different factual context.

35 Were I not constrained by authority I would have been inclined to dispose of this argument on this basis. However, Ms Quah did cite the decision of the English High Court in *In re Saxton, decd* [1962] 1 WLR 859 ("*Re Saxton*") and she relied on this quite heavily. This is a decision that warrants a closer look if only because it is a judgment of Wilberforce J (as he then was). The action had been brought by the plaintiff claiming to be entitled to the entire estate under a will. The plaintiff claimed that certain assets had been wrongfully handed by the executor of the will to the husband of the testatrix. The defendant set up a defence founded on an alleged written agreement by the testatrix to hold certain assets on behalf of the husband and the execution by the testatrix of the agreement

was put into issue by the plaintiff. The plaintiff applied for an order that the defendant should produce the original agreement and six cheques or other documents bearing the signature of the testatrix for examination by a handwriting expert. The application was brought under O 50 r 3 of the English rules (set out at [30] above).

36 In a short judgment unsupported by any authority, Wilberforce J concluded that the court could make the order on the basis that the rule, though not well drafted, was drawn widely enough to enable the order to be made. The focus of the argument appears to have been on whether the court had the power to make it a condition to the provision of the samples that the report of the document examiner be made available to the defendant. Wilberforce J thought the court could and an appeal to the Court of Appeal on only this point was successful: see [1962] 1 WLR 968. It does not appear that Wilberforce J in fact applied his mind to the question whether the order could be founded on the language of the provision he relied on. In any event, I observe that the language of the rule in question before Wilberforce J is somewhat different from that which is before me. *Re Saxton* is thus distinguishable simply on the basis that the language of the rule there did not on a literal construction necessarily present the difficulties I have identified at [34] above.

37 The case is also distinguishable on the basis that the order was sought by one party to the action against the other.

38 Reference may be made here to a case on a related point. In *Douihech v Findlay* [1990] 1 WLR 269, the plaintiff purchased a valuable cello for a sum of £50. It later turned out to have been stolen. The plaintiff brought an action for damages against the vendor represented by the difference between the true value of the instrument and the amount paid. To establish its true value it was necessary to inspect the cello which had by then been restored to its rightful owner. In an application to join the owner as a party in order to obtain an order for inspection it was held that this was impermissible.

39 Dobry QC, who heard the case sitting as a judge of the High Court, followed the decision of the Court of Appeal in *Shaw v Smith* (1886) 18 QBD 193, upon which Ms Tan relied, and held that inspection would not be permitted as between non-parties and further that the owner could not be joined as a party purely to enable an order for inspection to be made under the English equivalent of O 29 r 2(1) of the Rules.

40 In the present case, the order is sought against a person who is not a party to the action. Ms Quah argued that this was not a valid point of distinction. She maintained that O 29 r 2(1) is a provision that applies only to parties to the action and pointed to the words "for the inspection of any such property *in the possession of a party to the cause or matter*" [emphasis added] which is found in O 29 r 2(1) but not in r 3(1).

41 In my judgment, this is not correct. I consider that O 29 rr 2(1) and 3(1) are closely related and I can see no logical basis for holding that the former is limited in its application to parties to the action whereas the latter is wide enough to enable orders to be made against third parties. I note that the words cited by Ms Quah in fact specifically qualify only the property that is to be *inspected*. This is considerably less intrusive than ordering samples to be taken or experiments to be conducted on property as permitted in O 29 r 3(1). It would be illogical in the circumstances to hold that the more intrusive but not the less intrusive power could lie against a third party.

42 Further, I note that O 29 rr 2(2) and 3(2) are in identical terms:

> For the purpose of enabling any order under paragraph (1) to be carried out, the Court may by

the order authorise any person to enter upon any immovable property in the possession of any party to the cause or matter.

43 Lastly, I think there is some force in Ms Tan's observation that where the Rules do confer rights against persons not party to the proceedings, the position tends to be spelt out explicitly.

44 In my judgment, therefore, O 29 r 3(1) does not afford a basis for the orders sought.

Section 75 Evidence Act

45 I turn to consider whether s 75 of the Evidence Act avails the defendant. The section provides as follows:

Comparison of signature, writing or seal with others admitted or proved

75.—(1) In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal, admitted or proved to the satisfaction of the court to have been written or made by that person, may be compared by a witness or by the court with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

(2) The court may direct any person present in court to write any words or figures for the purpose of enabling the court to compare the words or figures so written with any words or figures alleged to have been written by such person.

46 That section in effect provides one among a number of permitted methods for proving that a given piece of handwriting is that of a particular person. Section 75 enables a conclusion to be drawn on the basis of comparing the handwriting in issue with some other handwriting which is admitted or proved to be genuinely made by that individual in question. Here, I include a signature within the term "handwriting". Ms Tan suggested on the authority of *Chua Kim Eng Carol v The Great Eastern Life Assurance Co Ltd* [1998] SGHC 403 ("*Chua Kim Eng Carol*") that s 75 is a method of last resort. In *Chua Kim Eng Carol*, the plaintiff sued the defendant for wrongful termination of an agency agreement. One of the defences raised was that certain signatures of alleged policyholders were not genuine. The policyholders themselves were not called even though they were available and in those circumstances, Tay Yong Kwang JC (as he then was) felt it unsafe to conclude that the signatures were forged based only on the evidence of the forensic document examiner.

47 In my judgment, Tay JC's conclusion was simply that on the facts before him the better evidence would have been the disinterested evidence of the policyholders, but it went no further than that. Indeed, if Ms Tan's submission were correct, it would be impossible to challenge the evidence of a witness who was present to either affirm or deny that a given piece of handwriting is his. That cannot be right in my view and it is implicit in the very existence of s 75(2) where the court may direct a witness to furnish a sample of his handwriting for comparison purposes that s 75 may be resorted to even where the maker of the handwriting is present and available to give evidence, especially where that evidence is being challenged.

48 The real problem for Ms Quah is a more basic one in my view. While s 75 makes the comparison samples relevant in cases where the authenticity of handwriting is in dispute, it does not empower the court to order production of the documentary samples. As for the handwriting samples, while it is clear that there is power to direct the provision of such samples under s 75(2), on its terms, this is a power exercisable in respect of "any person present in court". Ms Quah was unable to

cite any authority for construing this as applicable to potential witnesses as opposed to those already before the court. Instead, she submitted that the Non-parties were "before the Court" in the sense that they were represented by Ms Tan. I do not think that is sufficient especially when Ms Tan is before me solely for the purpose of persuading me that I do not have power to make the orders sought. In the final analysis, Ms Quah candidly accepted there were difficulties with this argument and did not press this too forcefully. Although neither side referred to *Sarkar on Evidence* (Wadhwa and Company, 15th Ed, 1999) vol 1, I note that the view I have taken accords with the position set out there at p 1170.

Paragraph 5(b), First Schedule, Supreme Court of Judicature Act

49 Ms Quah then relied upon para 5(*b*) of the First Schedule to the SCJA which provides that the court shall have "[p]ower before or after any proceedings are commenced to provide for the preservation of evidence by seizure, detention, inspection, photographing, the taking of samples, the conduct of experiments or in any manner".

50 The essence of the provision is a power to *preserve evidence* by a variety of means. The fact that one of those means is by the taking of samples should not obscure the fact that the only purpose for which this power may be exercised is to preserve evidence. The notion of preservation suggests that the evidence is in existence and, in my view, for this reason the provision cannot empower me to order Mr Lim to provide the handwritten samples since these are not yet in existence. As for the documentary samples, there is no suggestion that these are in danger of destruction. Indeed, there is no material before me to suggest the need for any steps to be taken to *preserve* any evidence.

51 Indeed, the real reason for which the application has been brought is to enable the Defendant to obtain independent evidence as to whose handwriting is to be found on the two versions of the cargo checklist and more particularly whether it is Mr Lim's. It would not be possible to construe this as falling within para 5(*b*) of the First Schedule to the SCJA without doing some violence to the language of the provision. Ms Quah was again unable to cite any authority to support her submission.

52 In the circumstances, I was of the view that none of the initial arguments warranted the making of the orders sought.

Order 24 rule 6 of the Rules of Court and/or inherent jurisdiction in relation to the documentary samples

53 It will be noted that this application started as one brought under O 29 r 3 of the Rules. Ms Tan therefore took objection to the application being considered under O 24 r 6. The material parts of that rule are as follows:

> (2) An application after the commencement of proceedings for an order for the discovery of documents by a person who is not a party to the proceedings shall be made by summons, which must be served on that person personally and on every party to the proceedings.
>
> (3) An originating summons under paragraph (1) or a summons under paragraph (2) shall be supported by an affidavit which must —
>
> ...

(*b*) in any case, specify or describe the documents in respect of which the order is sought and show, if practicable by reference to any pleading served or intended to be served in the proceedings, that the documents are relevant to an issue arising or likely to arise out of the claim made or likely to be made in the proceedings … and that the person against whom the order is sought is likely to have or have had them in his possession, custody or power.

…

(6) An order for the discovery of documents may —

(*a*) be made conditional on the applicant's giving security for the costs of the person against whom it is made or on such other terms, if any, as the Court thinks just; and

…

(7) No person shall be compelled by virtue of such an order to produce any document which he could not be compelled to produce —

…

(*b*) in the case of a summons under paragraph (2), if he had been served with a writ of subpoena to produce the documents at the trial.

54 In terms of the formal stipulations, it seems to me the essential requirements in O 24 rr 6(2) and 6(3) are these:

(a) that the application is made by summons;

(b) that it be supported by an affidavit that describes the documents sought, explains their relevance, and deposes to the belief that the person against whom the order is sought has the documents.

55 There can be no issue with respect to the fact that the application was made by summons. It is true that the summons does not mention O 24 r 6 as one of the provisions under which the application was brought. However, I do not see this giving rise to any difficulty. Directions were given to the parties to address this issue by way of supplementary submissions and there is no suggestion that the Non-parties have been taken by surprise.

56 Ms Tan did submit that on a close reading of the prayer in the summons, the application was directed only at the handwriting samples and not at the documentary samples. I think that is not tenable. The prayer in the summons makes reference to samples as identified in a letter from Mr Chris Anderson, the forensic document examiner engaged by the Defendant, and it is plain on reading that document that it covers both types of samples.

57 The application was supported by the second affidavit of Mr Stephen Kang Ser Leng. I do not propose to reproduce its contents here but at paras 11 to 19, there is a careful articulation of the basis upon which the samples in question were considered relevant.

58 As to the description of the documents sought, Ms Tan submitted that it was not sufficient to exhibit Mr Anderson's letter in the affidavit of Mr Kang. I do not accept this since there is no real

doubt what documents are being referred to. Mr Anderson's letter in fact sets out the following description:

> Normal course of business writing, in a similar writing style to the writing on the questioned checklists from the Morrison Express representative on a number of other checklists not associated with this enquiry.

59 The Non-parties did not suggest that they did not have such documents. In the premises, I think there is no substance in the objections as to the form of the application.

60 I therefore turn to the substance of the application.

61 I start from the premise that the documentary samples are relevant to the issues raised in this action. I understood Ms Tan to concede this point when she appeared before me. However, in her supplementary submissions, she retreated from this somewhat and stated that she had taken no issue with relevance only in the context of the application being brought under O 29 r 3. In any event, she submitted that the documentary samples could not in themselves be relevant to the issues in this action. Aside from the question of relevance, she also argued that the usual orders for discovery extended to listing relevant documents, producing them for inspection and permitting copies to be made but not to have experiments or tests conducted on the original documentary samples. She submitted that this served to highlight the fact that it is not the documentary samples themselves but the results of the handwriting analysis that are potentially of relevance in this case.

62 In my judgment the question of relevance can be disposed of quite shortly. One of the issues in the action is the authenticity of the cargo checklists and whether it was made by Mr Lim. Where the authenticity of handwriting is in issue, one of the modes for proving this is by undertaking a handwriting comparison and analysis and this is usually done by comparing the handwriting in question (*ie*, that found on the cargo checklists) with that found on control samples, the authenticity of which is not disputed or is proved to the court's satisfaction: see *Halsbury's Laws of Singapore* vol 10 (Butterworths Asia, 2000) para 120.300; and ss 47 and 75 of the Evidence Act.

63 Section 47 of the Evidence Act expressly makes the opinion of an expert on such a comparison relevant (see illus (c)). In such circumstances, I cannot see how the control sample can be said not to be relevant. This is also made explicit by s 75(1) of the Evidence Act which I have set out above.

64 However, the inquiry does not end there. Mr Anderson did set out what he proposed to do with the samples when he had them. It was not clear to me if this extended to experiments or tests being done on the documentary samples. I therefore sought clarification from the parties and the Defendant confirmed that in relation to the documentary samples, Mr Anderson required them in order to carry out a comparative analysis with the cargo checklists.

65 In short, the application is for an order for Morrison to produce these samples and make them available to the Defendant's expert for him to examine them though conceivably he might use microscopes or such equipment to examine them closely. I am satisfied that this is an order I am empowered to make. It is implicit from O 24 r 6(7) that an order may be made requiring the production of documents and, in my view, this would extend to one requiring production of the originals into the possession of the applicant subject to any necessary safeguards as to their preservation.

66 Inspection in this context is not limited to ocular inspection and equipment may be used to "inspect" documents. It was so held by Walton J in *Grant v Southwestern and County Properties Ltd*

[1975] Ch 185 ("*Grant*"). Two short passages from the judgment are instructive. At 197, Walton J observed as follows:

> It is, I think, quite clear that the mere interposition of necessity of an instrument for deciphering the information cannot make any difference in principle. A litigant who keeps all his documents in microdot form could not avoid discovery because in order to read the information extremely powerful microscopes or other sophisticated instruments would be required. Nor again, if he kept them by means of microfilm which could [not] be read without the aid of a projector.
>
> Does such a difference exist? In my view it does not.

67 Then later at 198, he observed:

> [Counsel for the plaintiffs'] argument did not, however, stop there, because he argued that the heading to R.S.C. Ord. 24 of "Discovery and Inspection of Documents" implied that its provisions extended only to such documents as could usefully be "inspected," and that once again this led one back to something which provided information to the eye. Here again the help of the *Oxford English Dictionary* is invaluable. The *Shorter Oxford English Dictionary* defines "Inspection" as follows: "The action of inspecting or looking narrowly into; careful scrutiny or survey; close examination;" From this it is, I think, quite clear that inspection is not confined to mere ocular inspection.

68 *Grant* was followed by Vinelott J in *Derby & Co Ltd v Weldon (No 9)* [1991] 1 WLR 652 in the context of extending an order for discovery to cover access to the database of a computer's online system. Vinelott J also highlighted that if the applicants were to have direct access to the database, there would be a need to make the order subject to conditions and safeguards so as to ensure there would be no damage to the system. There is no logical basis in my view for holding that the same approach should not apply to an examination that is directed primarily not at accessing the contents of the document but certain of its properties. As to the power to impose conditions this is provided for in O 24 r 6(6)(*a*) which states that the order may be "made conditional … on such other terms … as the Court thinks just".

69 I move on to consider whether in the circumstances the order should be made. There are essentially two remaining points made by Ms Tan as to why such an order should not be made. First, she submits, this is in fact a fishing expedition and the court will not make an order for discovery in such circumstances. She relies upon the decision of the Court of Appeal in *Tan Chin Seng v Raffles Town Club Pte Ltd* [2002] 3 SLR 345 ("*Raffles Town Club*") in this regard.

70 In my judgment, no exception can be taken with the principles articulated in *Raffles Town Club*. The following passage from the judgment of Chao Hick Tin JA (as he then was) at [17]–[19] is instructive:

> 17 … Documents which were required to be discovered under the concept of 'train of inquiry' are no longer discoverable under the present O 24 r 1. However, this is not to say that the concept of 'train of inquiry' has been removed from the Rules. It has reappeared in r 5 which relates to discovery of specific documents.
>
> 18 However, it must not thereby be taken that cases decided under the previous rules are no longer pertinent. As was the position under the previous rules, one of the essential preconditions to be satisfied before discovery will be ordered is that of 'relevance'. *Whether a document would affect that party's claim, or adversely affect another party's case, or support*

another party's case, must depend on the issues pleaded in the action. The cases that shed light on 'relevancy' are just as useful today.

19 Some of the principles on 'relevancy' established by the cases are the following. In *Thorpe*'s case (referred to earlier) it was decided that a document was not discoverable if it was to be used only for the purpose of cross-examination to establish credibility of witnesses. A discovered document can also be blanked out in part if the blanked out portion is irrelevant to the issues of the action: *GE Capital Corporate Finance Group v Bankers Trust Co* [1995] 2 All ER 993; [1995] 1 WLR 172. The discovery process should not be allowed to 'fish' a cause of action: see *Wright Norman v Oversea-Chinese Banking Corp* [1992] 2 SLR 710. Where an allegation is not pleaded, seeking discovery of a document to bank up such an allegation constitutes fishing: *Marks & Spencer plc v Granada TV* (unreported, 8 April 1997).

[emphasis added]

71 In my view, the case affirms the importance of considering the relevance of documents sought in discovery by reference to the pleaded issues. Where discovery is sought in relation to an issue not raised in the pleadings, then it may well constitute a fishing exercise. However, there is no doubt that on a fair reading of the pleadings in this case, the authenticity of the cargo checklists has been put in issue. The following paragraphs in the defence show this:

12 Further, and/or alternatively, the Defendants aver that the Plaintiffs at all material times, by operation of law, owed the Defendants a duty not to make or maintain a fraudulent claim under the contract of insurance, and/or not to use a fraudulent device or means, which if believed by the Defendants, would prior to any final determination at trial of the parties' rights, improve the Plaintiffs' prospects of obtaining a settlement, or a better settlement, from the Defendants, or of winning at trial against the Defendants.

…

15 Paragraph 5 of the Statement of Claim is denied and the Plaintiffs are put to strict proof. The Defendants will aver that the Cargo was not collected in good order and condition at the Plaintiff' vendor's premises, as evidenced by *inter alia*, the UMCi Cargo Checklist, which was in the Plaintiffs' possession at all material times. The UMCi Cargo Checklist show[s], *inter alia*, there was damage on the surface of crate at the Plaintiffs' vendor's premises.

…

22 The Defendants further aver that the Plaintiffs' [*sic*] had in breach of contract, and/or their duty of good faith, or their duty at law, used a fraudulent device or means, to improve the Plaintiffs' prospects of obtaining a settlement, or a better settlement, from the Defendants, or of winning at trial against the Defendants.

PARTICULARS

The following are best particulars the Defendants are able to provide pending further discovery and/or interrogatories:

22.1 The Plaintiffs had at all material times between April 2004 to May 2005, used a copy of a UMCi Cargo Checklist, which purportedly show[s] that there was no damage sustained on the surface of the crates at the Vendor's premises, to support the Plaintiffs' claim against

the Defendants under the contract of insurance.

22.2 The Plaintiff had at all material times between April 2004 [and] May 2005, the original UMCi Cargo Checklist which show[s] that there was damage sustained on the surface of the crates [at the] Vendor's premises.

…

72 The issue is then also canvassed in the reply. This, coupled with the fact that the class of documents sought has been very narrowly defined, is sufficient in my view to dispose of this objection.

73 The last objection raised by Ms Tan is that an order for discovery is not necessary. This argument arises from O 24 r 7 of the Rules which provides:

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

74 This provision was considered by Belinda Ang Saw Ean J in *Bayerische Hypo-und Vereinsbank AG v Asia Pacific Breweries (Singapore) Pte Ltd* [2004] 4 SLR 39 ("*BHV*"). That was a case concerning an application for pre-action discovery under O 24 r 6(1) which, in common with the present application under O 24 r 6(2), is subject to the overriding requirements of O 24 r 7: see *Raffles Town Club* ([69] *supra*) at [15].

75 Notwithstanding this, it bears recalling that the issue before Ang J in *BHV* was whether it was necessary for the applicants to have the documents in question in order to start the proceedings. Ang J held at [23] that it was not necessary and that they could commence proceedings without first having access to the documents. In that context, Ang J went on at [26] to make the point that the fact that the applicants did not believe what had been said by the respondent was not a basis for ordering pre-action discovery. Instead, she held at [28] that the applicants should commence proceedings (as they were able to) and seek discovery in the normal course thereafter.

76 Ang J then went on to consider an argument made by one of the applicants to the effect that discovery should be ordered as it would lead to a saving in costs. In that context, Ang J said as follows at [36] to [38]:

> 36 Mr Chong [counsel for one of the applicant banks] acknowledges that the documents sought may be wide-ranging in nature, but he argues that they are necessarily so because of the magnitude of the fraud, the unusual features of this case, the length of time involved and Chia's position in the company. So long as the banks can demonstrate the relevance of the documents requested to an issue likely to arise in a potential cause of action, these documents, he argues, should be disclosed even if the disclosure may be wide-ranging.
>
> 37 The banks are seeking an order for pre-action discovery as in listing and production of documents. Whilst O 24 r 7 deals with discovery, orders for production of documents are covered under O 24 r 13. The ultimate test is whether discovery is necessary for disposing fairly of the proceedings or for saving costs. An assertion that the documents are relevant will not be good enough. Equally, an assertion that the documents are necessary because they are relevant will

not be enough. Obviously, if a document is not relevant, it cannot be necessary for disposing of the cause or matter. On the other hand, documents may be relevant to a case without being necessary to it. The word used in O 24 r 7 is "necessary" and not "desirable" or "relevant". It is the common experience of lawyers and the court that often many documents are produced because they are relevant, but only very few of them are of use. To illustrate, part of the e-mail correspondence between HVB's representatives and one Teresa Lim of APBS [the respondent] that was referred to in the affidavit of Philip Armstrong, a director of HVB, filed on 6 April 2004, revealed nothing more than the senders arranging a luncheon.

38 The court is, by O 24 r 7, concerned with the discretion to refuse disclosure of a document unless the necessity for disclosure is clearly demonstrated. In a way, it calls for an exercise in considering and selecting documents or some parts of them. The wider the range of documents requested the more difficult it is for the court to decide whether the documents are necessary for "disposing fairly" of the matter or cause before proceedings are commenced or for "saving costs". As necessity for disclosure was not demonstrated in the present case (the banks having concentrated on the relevancy of the documents), the applications cannot be upheld.

77 Ms Tan relied upon *BHV* and in particular the passage of the judgment at [37] and [38] to contend that there was no necessity to make the orders sought here since Mr Lim would be giving evidence as a witness. Ms Tan argued in effect that what the Defendant was ultimately seeking was to discredit Mr Lim if he testified that he did prepare the cargo checklists. She submitted that discovery to discredit a witness is not permitted.

78 In my view, this again is an objection that cannot stand. The point is well made in the decision of the English Court of Appeal in *Thorpe v Chief Constable of Greater Manchester Police* [1989] 1 WLR 665. Dillon LJ who gave the leading judgment said at 669:

> It would indeed be an impossible situation in my view if discovery had to be given of every document, not relevant to the actual issues in the action, which might open up a line of inquiry for cross-examination of the litigant *solely* as to credit. [emphasis added]

That is simply not the nature of the present application.

79 Further, there is a subtle but an important difference between being satisfied that discovery is "necessary" and being satisfied that it is "not necessary". Order 24 r 7 is directed to the latter standard. Consistent with this the English Court of Appeal has held in *Dolling-Baker v Merrett* [1990] 1 WLR 1205, construing the equivalent provision in the English rules, that the burden is on the party resisting the order to show that the order is *not* necessary. Ang J in *BHV* was in fact applying the same standard as shown in the passage I have quoted from the judgment. What was not noted in Ms Tan's submissions was that the argument that was presented to Ang J as noted at [36] of that judgment was that the court need only be satisfied as to the relevance of the documents. This was rejected by Ang J and she concluded that pre-action discovery was not necessary in that case because the applicants had enough information to plead their case and could get any additional information they needed through discovery in the ordinary course. Relevance *per se* was not sufficient.

80 Turning to the grounds relied on by Ms Tan for contending that discovery is not necessary in the present case, it may well be true that Mr Lim will be giving evidence. However, it may be noted that he has kept a curious silence so far as to what his position is in relation to the authenticity of the handwriting on the cargo checklists. Ms Quah argued that since Mr Lim would be giving evidence, if at all, on behalf of the Plaintiff, it seemed reasonable to infer that he would be saying that the

handwriting on the cargo checklists was in fact his. I think this is not an unfair supposition in the circumstances.

81 The fact that the Defendant might wish to challenge Mr Lim's evidence on that score does not mean it is seeking this discovery *purely* to discredit the witness. Ms Quah would not in fact be seeking to discredit the witness but to challenge what she believes he will be saying on one of the central issues in the case. Far from being unnecessary, the discovery being sought may hold the only meaningful hope for the Defendant to make out its case on an important issue. Without it, the Defendant would simply have to accept whatever Mr Lim said on a matter that was solely within his knowledge and be denied the opportunity to challenge his anticipated testimony even though the scientific means exist for it to be done.

82 Further, unlike the position in *BHV*, it is not suggested that the evidence will become available at a later stage in the proceedings. If the Non-parties have their way, it will not ever be available. In my view, the facts of the present case are far-removed from *BHV* and it cannot be said that the discovery here is not necessary.

83 Ms Quah also made the point that she could have obtained the documentary samples by issuing a writ of subpoena *duces tecum* to secure their production at the trial. However, she noted this would be disruptive and would almost certainly cause considerable costs to be incurred as matters might have to be deferred pending the examination of the documents by Mr Anderson.

84 She referred me to the decision of the House of Lords in *O'Sullivan v Herdmans Ltd* [1987] 1 WLR 1047 where the plaintiff sought discovery of certain medical reports from the Department of Health and Social Services. The application was brought against a non-party and the provisions in question were broadly similar to those under consideration here and Lord Mackay of Clashfern with whose judgment the other law lords concurred, noted as follows at 1055–1056:

> In my opinion, there is no factor present in the circumstances of this case which would indicate that it would be just to refuse to exercise the power and there are strong factors in favour of the exercise of the power. If the case goes to trial it is obviously in the interests of justice that these documents of central importance should be available to both parties before the trial starts so that the jury may be given a fair impression of the central issues from the beginning. To force the defendants to refuse to deploy their full position in cross-examination until the stage is reached at which these documents would be available to them under a subpoena duces tecum would not be in any way in the interests of justice. Further the early production of these documents may well affect the course of the litigation before the trial. It may lead the defendants to consider a settlement of the action and it certainly will enable the medical advisers and the legal advisers of the defendants to appreciate the real issues in the case when they are preparing for trial. The interests of justice are, in my opinion, served by the promotion of settlements rather than the prolongation of litigation and by the possibility of early, complete preparation for both parties to a trial rather than by obliging one party to delay its full preparation until after the trial has actually started.

85 It is true that the third party in that case was not objecting to the order but I do not think that makes any difference to the analysis.

86 In the circumstances, I am satisfied that the Defendant is entitled to an order for discovery and production of a limited number of documentary samples. I leave the details as to the number and content of these samples as well as in respect of any safeguards the Non-parties may wish to have to the parties to try to agree on. Failing agreement, I will hear submissions and then make the

necessary orders.

87 For the sake of completeness, I should touch on one other point. Ms Tan submitted that it was beyond the scope of an order for discovery or inspection to require that the documents be produced and handed over to the applicant for experiments or tests to be done. I note first that based on the brief description provided by Mr Anderson it appears to be his intention to *examine* the documentary samples as well as the cargo checklists, and this was confirmed upon my request for clarification: see at [64] above. As I have noted above, I cannot see why this should be seen as falling outside the ambit of an order for discovery or production for discovery even if it should happen to entail the use of specialised equipment to aid the examination of the documents, subject to appropriate safeguards being imposed to protect against loss or damage to the documents.

88 In any event, were I wrong on this, I consider, as submitted by Ms Quah, that it would be within the inherent jurisdiction of the court to make such an order, in respect of documents that are being ordered to be discovered or produced for inspection under O 24 r 6.

89 The ambit of the court's inherent jurisdiction was reviewed in some detail by Andrew Phang Boon Leong J (as he then was) in *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR 117 ("*Wellmix*") and the following observation he made at [81] is instructive:

> The parameters of O 92 r 4 are, understandably, not particularly precise. What does appear clear is that if there is an existing rule (whether by way of statute or subsidiary legislation or rule of court) already covering the situation at hand, the courts would generally *not* invoke its inherent powers under O 92 r 4, save perhaps in the most exceptional circumstances (see, for example, the Singapore Court of Appeal decision of *Four Pillars Enterprises Co Ltd v Beiersdorf Aktiengesellschaft* [1999] 1 SLR 737 at [27] and the Singapore High Court decision of *Tan Kok Ing v Tan Swee Meng* [2003] 1 SLR 657). It is commonsensical that O 92 r 4 was not intended to allow the courts *carte blanche* to devise any procedural remedy they think fit. That would be the very antithesis of what the rule is intended to achieve. The key criterion justifying invocation of the rule is therefore that of "need" – in order that justice be done and/or that injustice or abuse of process of the court be avoided. [emphasis in original]

90 Ms Tan also cited the decision of Lightman J in *Mitsui & Co Ltd v Nexen Petroleum UK Ltd* [2005] 3 All ER 511 ("*Mitsui & Co*") where he noted as follows at [24]:

> In my judgment despite the argument of Mr Carr QC that there is no authority directly in point, it is clear that the exercise of the jurisdiction of the court under *Norwich Pharmacal* against third parties who are mere witnesses innocent of any participation in the wrongdoing being investigated is a remedy of last resort. (It is the claimant's case that the defendant is such an innocent third party.) The jurisdiction is only to be exercised if the innocent third parties are the only practicable source of information. The whole basis of the jurisdiction against them is that, unless and until they disclose what they know, there can be no litigation in which they can give evidence: see eg Lord Kilbrandon in *Norwich Pharmacal* … [1974] AC 133 at 203, 205. Whilst there is a public interest in achieving justice between disputing parties, there is also a public interest in not involving third parties if this can be avoided: see John Donaldson MR in *Harrington v North London Polytechnic …* [1984] 1 WLR 1293 at 1299. The jurisdiction is both exceptional and only to be exercised when it is necessary: Lord Woolf CJ in *Ashworth Hospital Authority v MGN Ltd* [[2002] 1 WLR 2033] at [57]. The necessity required to justify exercise of this intrusive jurisdiction is a necessity arising from the absence of any other practicable means of obtaining the essential information.

91 The foregoing statement of principle by Lightman J was made in the context of an application for discovery specifically resting on the jurisdiction articulated by the House of Lords in *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133 ("*Norwich Pharmacal*"). That jurisdiction which was directed at disclosing information relating to the identity of an ultimate wrongdoer has been extended to cover a variety of situations some of which are summarised at [19] of the judgment of Lightman J. Those categories are by no means closed but it is important, I think, to keep in mind the proper context in which Lightman J made the observations referred to by Ms Tan. I am not basing my order for discovery and production of the documentary samples upon the *Norwich Pharmacal* jurisdiction. Rather, it is based on the jurisdiction found in O 24 r 6 which admittedly at least overlaps with the *Norwich Pharmacal* jurisdiction. If, contrary to my views set out at [65] to [68] above, the court's jurisdiction under O 24 r 6 does not extend to requiring the original documentary samples to be handed over to the Defendant to enable them to be examined by Mr Anderson, then I consider the court nonetheless has the inherent jurisdiction to make such a further order.

92 Ms Tan submitted that the principle to be extracted from *Wellmix* ([89] *supra*) is that "the touchstone for invoking the court's inherent jurisdiction is necessity" and specifically, it is the necessity to prevent injustice or abuse of the process of the court. I agree with this. I would add that in looking at the question of necessity in the context of the court's inherent jurisdiction, one must take a sensible approach that has regard to all the circumstances of the case. Thus, where the jurisdiction is being invoked against a non-party, the court will have due regard to the public interest in ensuring that such persons are not unduly troubled by litigation involving others – a point made by Lightman J in *Mitsui & Co*. The matters to be considered by a court in such a case will include the nature of the order sought, whether it may result ultimately in a saving in costs, the degree of intrusiveness the non-party may be required to endure, and the availability of the evidence through other means.

93 I have found assistance in the judgment of Brooke J in his unreported decision in *Ash* which I have referred to at [32]. A transcript is available on LexisNexis and it contains a useful review of the cases concerning the court's inherent power to make orders to facilitate the gathering of evidence by modern means as long as it is reasonably necessary for the cause of justice. It bears quoting from at some length. Brooke J noted as follows in his judgment:

> I do not think there is now any question about the existence of this jurisdiction, which I shall refer to as the 'ancillary jurisdiction'. It may be procedural in character, but it is much more than that. It is a jurisdiction which confers power*, in the exercise of a judicial discretion, to prepare the way by suitable orders or directions for a just and proper trial of the issues joined between the parties* …
>
> This ancillary jurisdiction is, of course, subject to the limitations and modifications imposed by Parliament and, in particular aspects, it has been codified and replaced by the rules of court. But that is not to say it has vanished. The rule book naturally tends to lag behind new methods of proof and ascertainment, and the essential purpose of this ancillary jurisdiction means that it cannot be tied to what is old or outmoded.
>
> [emphasis added]

94 Brooke J also cited the following passage from the unreported opinion of Lord Cullen in the Vacation Court in Edinburgh on 19 August 1987 in *Christie v Arthur Bell & Sons Limited*:

> The decisions did not provide much assistance as to the test which the Court should apply in

deciding whether or not to order inspection, although I noted that in the case of *Brown* the Court required to be satisfied that the inspection was 'necessary for the justice of the cause'. I was content to adopt that approach.

However in my view 'necessary' should be treated in a reasonable sense. In my view it would go too far to state that as a matter of rule the evidence which is sought to be obtained must be evidence without which the party seeking an order for inspection cannot succeed; or must be evidence which is 'of fundamental importance' to the party's case, whatever may be the scope of the meaning of that expression, although obviously the fact that the evidence is of either description will be an important consideration in the particular case. What is reasonably necessary in the circumstances of the particular case will depend upon a variety of considerations. It is plainly appropriate to consider, among other matters, whether the inspection is likely to yield evidence which is relevant to the proof of an essential part of the pursuer's case and whether the pursuer is able without doubt or difficulty to prove that part of the case without subjecting the defenders to the order for inspection.

95 Brooke J then concluded as follows:

[T]he inherent jurisdiction of the High Court to make interlocutory orders for the purpose of promoting a fair and satisfactory trial is available to assist the Plaintiff in a case like this. The Court should not, in my judgment, be thwarted by the inherent laggardliness of the rule-book … from making use of new methods of adducing evidence for the court if such evidence is otherwise admissible. …

… I consider that Lord Cullen was right when he ruled that such an order should be available if a Court is satisfied that it is reasonably necessary for the justice of the cause.

96 I have quoted at some length from this unreported judgment because in my view, there is much good sense that underlies its reasoning. I consider that the court's inherent jurisdiction may be resorted to, to make orders that are reasonably necessary in order for justice to be done in a case or to prevent any abuse of the process of the court. In particular, this extends to the power to make suitable orders and directions that are reasonably required to prepare the way for a just and proper trial of the issues between the parties and for evidence to be gathered. Such jurisdiction will be exercised having regard to all the circumstances of the case including those I have noted at [92] above. In the context of the present case, I have already explained at [80] to [86] above why it is reasonably necessary for the Defendant to obtain the documentary samples and to have them examined by Mr Anderson. In my view, requiring the Non-parties to make the documentary samples available to Mr Anderson would not be materially more intrusive than the usual order for discovery and production under O 24 r 6. It seems inevitable that the question whether it is Mr Lim's handwriting that is found on the two versions of the cargo checklists will feature at the trial and I consider that the present order would prepare the way for this material issue to be properly tried. It is also likely to result in a saving in costs as compared to the scenario set out at [83] above. I am therefore satisfied that assuming this is not within the ambit of my power under O 24 r 6, the basis exists for me to make the order at [86] above in the court's inherent jurisdiction even though it is directed against a non-party.

Inherent jurisdiction and the handwriting samples

97 This brings me to the last aspect of the present application. It is worth noting first that the handwriting samples requested by Mr Anderson would require Mr Lim to write out various things a number of times and under several different conditions. The question is whether I should resort to the

inherent jurisdiction of the court to make such an order.

98 Ms Quah submitted that given that the evidence of the forensic document examiner will be relevant, the "corollary must be that in order for the handwriting expert to deliver a considered opinion that would be of value to the Court in its quest for the truth the Court must have the jurisdiction to order the provision of the specimen handwriting".

99 Ms Quah cited several cases where the evidence of handwriting experts was admitted based on comparing samples with the impugned handwriting. However, these cases are of no relevance to the issue before me, which is the extent of my power to order a non-party to produce handwriting samples in the manner requested by Mr Anderson.

100 Ms Quah relied on the broad interests of justice and cited the decision of the House of Lords in *S v S* [1972] AC 24 where the issue raised was whether a blood test could be ordered of a child in order to determine the issue of paternity. On the facts, the House of Lords held that it had the requisite jurisdiction and that it could be exercised as long as it was not against the child's interest.

101 In reply, Ms Tan submitted that the order here would be an intrusive one requiring Mr Lim to write out a passage several times over under different conditions. She relied on the judgment of Lightman J in *Mitsui & Co* which I have already referred to at [90] above and submitted this was the equivalent of a mandatory injunction against a non-party and the making of such an order would be most unusual to say the least.

102 It seems clear to me that even assuming it is within the inherent jurisdiction of the court to make an order for the provision of the handwriting samples requested here, such jurisdiction at least as against a non-party would indeed be an exceptional one only to be exercised in rare circumstances. This is because of the onerous demands it would make upon the non-party. In such circumstances, there would need *at least* to be a showing that the order was necessary "arising from the absence of any other practicable means of obtaining the essential information" (*per* Lightman J in *Mitsui & Co* at [24], which although noted in a slightly different context, is apposite here). This is where the application must fail.

103 There is simply nothing in the material before me to explain or demonstrate the necessity for the handwriting samples to be provided. While comparison with a control sample consisting of handwriting made in the ordinary course is a well-known means of obtaining such expert evidence, the necessity for handwriting samples of the sort requested by Mr Anderson is not evident. Indeed, it is suggested at pp 1185–1186 of *Sarkar on Evidence* ([48] *supra*) that such handwriting made for "the purpose of comparison will be less satisfactory as a person may feign or alter [the] ordinary character of his handwriting with the object of defeating a comparison". Furthermore, by reason of the first part of my order, Mr Anderson will have the documentary samples and he will therefore be able to base his opinion on a comparison of the handwriting found on the cargo checklists and that found on the documentary samples. The relevant evidence therefore can be obtained.

104 In the premises, having regard to the prospective intrusiveness upon a non-party, the absence of any explanation as to the need for the handwriting samples, and the availability of other means of obtaining the information, I dismiss this part of the application.

105 I will hear the parties on any ancillary orders they may require arising from the orders I have made and on costs.

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