Whang Tar Liang *v* Standard Chartered Bank
[2011] SGHC 154

Case Number : Originating Summons No. 228 of 2011/H)

Decision Date : 17 June 2011

Tribunal/Court : High Court

Coram : Tan Sze Yao AR

Counsel Name(s) : Josephine Chong (Pinnacle Law LLC) for the plaintiff; Hri Kumar SC and James Low (Drew & Napier LLC) for the defendant.

Parties : Whang Tar Liang — Standard Chartered Bank

Civil Procedure

Discovery of Documents

Pre-action Discovery

17 June 2011 Judgment reserved.

Tan Sze Yao AR:

Introduction

1 This was an application for pre-action discovery pursuant to Order 24 Rule 6(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("Rules of Court") by the plaintiff, a private banking customer, against the defendant bank. The items sought for discovery were "[a]ll tape recordings of telephone conversations between the [p]laintiff and any officer(s)/representative(s) of the [d]efendant" pertaining to certain transactions and trades in equity-linked notes ("Transactions") allegedly entered into by the defendant on behalf of the plaintiff.

Facts

2 The facts are simple. Between June 2010 and December 2010, the Transactions were allegedly entered into by the defendant on the plaintiff's behalf. Subsequently, the plaintiff asserted that the Transactions were never authorised by him. The defendant responded to this assertion by saying that apart from documentary records that confirmed the plaintiff's cognizance and approval of the Transactions, they also had in their possession tape recordings ("Tape Recordings") of telephone conversations between the defendant's employees and the plaintiff where the plaintiff could be heard to be authorizing or agreeing to the Transactions.

3 In the event, the plaintiff was granted an opportunity by the defendant to listen to one of the Tape Recordings, specifically a conversation he had had with his relationship manager, one Mavis Koh ("the Mavis recording") on 8 November 2010. According to the defendant, the Mavis recording contained the plaintiff's confirmation and acknowledgment of one of the Transactions. However, the plaintiff eventually refused to sign the requisite request form to listen to the Mavis recording, asserting that "[w]hat I had requested to listen to … had been the earlier pre-trade telephone conversation with Dennis Ng, not the 8 November telephone conversation with Mavis Koh".

4 Subsequently, by a lawyer's letter dated 23 March 2011, the plaintiff informed the defendant that he had commenced the present application for pre-action discovery of the Tape Recordings.

Law

5 Pre-action discovery exists for the plaintiff who is unable to plead a case as he does not know whether he has a viable claim and requires the discovery to ascertain the gaps in his case. Where the plaintiff has evidence sufficient to commence a claim, he is generally not entitled to discovery *before* action: see generally *Kuah Kok Kim and others v Ernst & Young* [1996] 3 SLR(R) 485 ("*Kuah Kok Kim*"), *Bayerische Hypo- und Vereinsbank AG v Asia Pacific Breweries (Singapore) Pte Ltd and other applications* [2004] 4 SLR(R) 39 ("*Asia Pacific Breweries*") and *Lian Teck Construction Pte Ltd v Woh Hup (Pte) Ltd and others* [2005] 1 SLR(R) 266 ("*Lian Teck*").

6 The relevant provisions relating to pre-action discovery are found under Order 24 Rule 6 of the Rules of Court:

> 6. Discovery against other person (O. 24, r. 6)
>
> (1) An application for an order for the discovery of documents before the commencement of proceedings shall be made by originating summons and the person against whom the order is sought shall be made defendant to the originating summons.
>
> …
>
> (3) An originating summons under paragraph (1) or a summons under paragraph (2) shall be supported by an affidavit which must —
>
> > (a) in the case of an originating summons under paragraph (1), state the grounds for the application, the material facts pertaining to the intended proceedings and whether the person against whom the order is sought is likely to be party to subsequent proceedings in Court;
> >
> > (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 or the identity of the likely parties to the proceedings, or both, and that the person against whom the order is sought is likely to have or have had them in his possession, custody or power.
> >
> > …
>
> (9) Unless the Court orders otherwise, where an application is made in accordance with this Rule for an order, the person against whom the order is sought shall be entitled to his costs of the application, and of complying with any order made thereon on an indemnity basis.

7 In *Kuah Kok Kim*, Lai Kew Chai J described the nature of pre-action discovery under Order 24 Rule 6 as follows (at [31] and [56]):

> 31 It can be seen from the tenor of the cases that where pre-action discovery is sought, the plaintiff has a duty to set out the substance of his claim to enable a potential defendant to know what the essence of the complaint against him is. ***This is because in the nature of pre-action***

discovery, the plaintiff does not yet know whether he has a viable claim against the defendant, and the rule is there to assist him in his search for the answer . Thus the safeguards specified in the rules are to ensure that the plaintiff is not allowed to take advantage of the rules merely to enable him to go on a fishing expedition.

…

56 In deciding whether to order discovery of [the relevant] documents, we were … concerned with … the *purpose of the discovery*, namely, ***that the appellants wanted to find out if they had a good cause of action in tort or contract against the respondents*** .

[emphasis added in bold italics]

8 Subsequently in *Asia Pacific Breweries*, Belinda Ang J acknowledged and expounded on the authority of *Kuah Kok Kim* at [4]-[5]:

4 The requirements of O 24 r 6(3) as guided by the decision of Kuah Kok Kim are that the application for pre-discovery be supported by an affidavit setting out the grounds for the application, the material facts pertaining to the intended action and whether the person against whom the order is sought is likely to be a party to subsequent proceedings. The tests of "possession, custody or power" and "relevance" remain applicable for the purposes of pre-action discovery. *The criterion of the rule is intended to ensure that the application for pre-action discovery is not brought frivolously or without justification. Lai Kew Chai J, in delivering the judgment of the Court of Appeal in Kuah Kok Kim*, … said that the court's duty is to ensure that the application is not frivolous or speculative and that the applicant is not on a fishing expedition. That duty was adopted and applied by Choo Han Teck JC (as he then was) in *Ng Giok Oh v Sajjad Akhtar* [2003] 1 SLR(R) 375.

5 *Once the court is satisfied*, based on an assessment of the formal evidence before the court, that the criteria of the rule are met, *the next consideration* is whether discovery is necessary either for disposing fairly of the cause or matter or for saving costs. …

[emphasis added]

9 But what, exactly, is a "viable" or "good" cause of action, as alluded to in *Kuah Kok Kim*? A "cause of action" is a legal term of art; one makes out a cause of action simply by fulfilling and articulating certain legal criteria based upon a set of facts. Would therefore a "viable" or "good" cause of action refer to a cause of action that possesses a healthy likelihood of success? Counsel for the plaintiff submitted that the affixation of these adjectives, prevalent in the case law, indicated that the inquiry was one that necessarily segued into the merits. This interpretation appeared to be a reasonable one, given the specific insertion of "good" and "viable" over and above the basic phrase "cause of action".

10 To properly address the issue, I found it instructive to refer to Jeffrey Pinsler SC, *Supreme Court Practice 2009* (LexisNexis, 2009) at p 632:

The High Court [in *Asia Pacific* Breweries] ruled that pre-action discovery should only be permitted if the potential plaintiff is unable to initiate a case without the desired information. … *As the banks had indicated the causes of action that lay against the defendant, pre-action discovery was inappropriate. …*

> *Ng Giok Oh* and [*Asia Pacific Breweries*] stand for the proposition that if the claimant has sufficient evidence to mount a claim, he is not entitled to discovery before proceedings in order to complete his 'entire picture' of the case. He does not have the right to all the evidence before he sues simply because this is not necessary. *If it were otherwise, the ordinary processes of general and particular discovery pursuant to O 24 r 1 and r 5 respectively would be rendered otiose. Therefore, he is not allowed to 'snoop'*.
>
> [emphasis added]

From the extract above it is clear that pre-action discovery is for the plaintiff to come to a *determination of its cause(s) of action*. It is not an opportunity for the plaintiff to come to an early assessment of *the merits or strengths of its case*. The plaintiff banks in *Asia Pacific Breweries* had sufficient information and evidence to begin their lawsuit against the defendant; indeed, no mention was made in Belinda Ang J's decision about the strength or weakness of the banks' case. Additionally, given that no plaintiff is "entitled to discovery before proceedings in order to complete his 'entire picture' of the case", any talk about merits at that juncture would be both moot and misguided; a half-formed impression of any case would be an unfaithful mirror to that case's true nature on the merits. The question posed at [9] above, therefore, has to be answered in the negative – a "viable" or "good" cause of action means no more than a cause of action that is made out in law. The two adjectives do not express a degree, but rather indicate a binary inquiry.

11 Support for this view may also be found in Kan Ting Chiu J's recent decision in *EC-Asia International Ltd (in liquidation) v PricewaterhouseCoopers* [2011] 2 SLR 607 ("*EC-Asia*"), a case in fact cited to me by counsel for the plaintiff. In this case, the plaintiff had applied for pre-action discovery for the audit and working papers of the defendant auditor, with the plaintiff's liquidator taking the view that the defendant's audit procedures needed to be scrutinised carefully. In reversing the assistant registrar's decision disallowing pre-action discovery, Kan J stated at [24]-[25]:

> … The [l]iquidator had deposed in the affidavit in support of the application that "the [d]efendants' audit procedures need to be scrutinized carefully" and, "although I have not come to a firm conclusion on this, the [d]efendants are likely to be a party to future proceedings". *On a fair and careful reading of the [l]iquidator's affidavit, it was clear that the plaintiff was not ready or able to plead a cause of action without reviewing the requested papers … The [l]iquidator had explained in his affidavit that he needed the audit papers and working papers to come to an informed decision whether the plaintiff had a viable cause of action*. Unless he was dishonest or wrong in his affidavit, his professional conclusion should be accorded due weight, and there was nothing to suggest that he was being disingenuous or was mistaken.
>
> [emphasis added]

In granting pre-action discovery in *EC-Asia*, Kan J was concerned only with the binary question of whether said discovery, if granted, would assist the plaintiff in making out its cause of action. Indeed, in the extract above he uses the phrase "cause of action" without prefixing it with "viable" or "good": a clear indication of the either-or nature of the test for pre-action discovery.

12 Kan J therefore was interested only in the *necessity* of such a grant: see Order 24 Rule 7 of the Rules of Court ("the Court may, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, dismiss or … adjourn the application"). He was not interested, and it is readily apparent from the italicized portions above, in whether the case against the defendant auditor was a strong or weak one.

13 Counsel for the plaintiff nonetheless further cited to me the following passage from *Atkin's Court Forms – Singapore* (LexisNexis, 2010) in support of her proposition that in deciding whether or not to grant pre-action discovery, a court should look to see if such discovery would strengthen the plaintiff's case (as opposed to merely furnishing a cause of action) (at para XVII [803]):

> [803]
>
> It has been suggested that one of the objects of pre-action discovery is to enable the plaintiff to find out, before he starts proceedings, whether he has a good cause of action against the defendant. This object would be defeated if he has to show in advance that he has already got a good cause of action before he saw the documents. *Hence, it has been held that it is immaterial that the likelihood of the claim being made against the defendant is dependent on the outcome of the discovery*. The court is not precluded from making an order if the only basis for saying that a claim was not likely was the absence of the documents of which discovery was sought.
>
> [emphasis added]

14 This passage, to my mind, is a puzzling one. There is a sizeable – and unexplained – logical leap between the italicized sentence and the sentences that precede it. If the "likelihood of the claim being made" (interpreting the phrase broadly to mean either "likelihood of the cause of action being determined" or "likelihood of success of the cause of action") is *not* dependent on the outcome of the pre-action discovery, why should any court grant pre-action discovery in the first place? What would be the point of pre-action discovery, regardless of whichever test for pre-action discovery employed, if its prospective result is discounted even before its grant? Indeed, the remainder of the passage appears to indicate otherwise: (to paraphrase) the court may grant pre-action discovery if the only reason for saying that a claim is not likely is the absence of the selfsame undiscovered documents.

15 Accordingly I am of the opinion that, at best, the passage is of neutral value; it does not prefer either definition of "good" or "viable", as set out at [9]-[10] above. It merely employs the prefix "good" without defining it further. At worst, the passage is internally inconsistent and somewhat incomprehensible. In either case, the passage can be of no assistance to the position adopted by counsel for the plaintiff.

Application

16 From the foregoing, we can see that pre-action discovery occupies a very thin space in the civil procedure real estate. It cannot be held to the same standards or be used for the same purposes as regular discovery, as that would render the latter procedure redundant. It *must* be circumscribed by the one singular feature of its existence, *viz*, its invocation *prior* to an action being brought. Accordingly, as has already been stressed before, pre-action discovery should only be granted where a plaintiff is unable to plead its case legally due to certain voids or gaps in his or her knowledge.

17 That scenario is patently not the scenario here. The plaintiff here knows his case: he did not authorise the defendant bank to carry out the Transactions, whether over the telephone or otherwise. He therefore has a cause of action against the defendant for entering into the same purportedly on his behalf. Indeed, the plaintiff said as much in his initial affidavit in support of this application, at para 16:

> My causes of action against the [d]efendant in subsequent proceedings would be for breach of contract or mandate, negligence, breach of fiduciary duty and/or fraud, which has caused me loss and damage.

18 Counsel for the plaintiff submitted the English case of *Shaw v Vauxhall Motors Ltd* [1974] 1 WLR 1035 ("*Shaw*") in an attempt to draw an analogy between the circumstances in that case with those here. In *Shaw*, the plaintiff was injured driving a fork lift truck at the defendant's factory. He subsequently sought pre-action discovery of the fork lift truck's maintenance records, suspecting that the fork lift truck was defective. Lord Denning MR, in granting the application for pre-action discovery, stated at pp 1039-1040:

> One of the objects of the section is to enable the plaintiff to find out before he starts proceedings whether he has a good cause of action or not. That object would be defeated if he had to show in advance that he already had a good cause of action before he saw the documents. The reasoning applies to the present case. *If the reports did show a want of proper maintenance or repair of this truck, an action would no doubt be brought. Whereas if they show that there was proper maintenance and repair, an action would not be brought*.
>
> …
>
> Counsel for the [plaintiff] has told us that [he] has only one cause of complaint, namely, that this machine was defective; and furthermore, that if the reports show that the machine was in good condition and that it was properly maintained, the legal advisers would not feel able to recommend to the legal aid fund a continuance of the proceedings. The claim would no longer be proceeded with. That would be a great saving in costs. … I would allow the appeal accordingly.
>
> [emphasis added]

It was argued by plaintiff's counsel that *Shaw* was directly analogous to the facts at hand. In both cases, the discovery of one category of items would resolve all dispute; in both cases, pre-action discovery would lead to great savings in costs; in both cases, the binary inquiry (see italicized portion above) countenanced would justify the court's employment of its discretion to allow pre-action discovery.

19 To my mind, however, the present facts are readily distinguishable from those in *Shaw*. To begin with, the plaintiff here *is in possession of the information that he seeks from the defendant bank*. The Transactions involved significant sums of money. They were hardly likely to be entered into carelessly or forgetfully by the plaintiff. Indeed, in his initial affidavit the plaintiff was very certain that he "did not give any instructions over the telephone or via any means verbally for the [Transactions] to be entered into on [his] behalf". Why should the presence or absence of the Tape Recordings make any difference to this position? Unlike in *Shaw*, where the plaintiff genuinely had no idea about the maintenance records of the fork lift truck, the plaintiff here *must have known* if he had authorised the Transactions. It beggars belief that the plaintiff would contemplate filing a suit when he was not even aware of what it was that he had or had not done. Indeed, his affidavits were all filed based on his memory, a memory that was good enough for him to specify causes of action (see [17] above). Taken at face value, the plaintiff appears to be delegating the decision of suing to the defendant; and, upon scrutiny, fishing around for evidence to bolster causes of action already known.

20 Second, regardless of whether the Tape Recordings are produced or even exist, *the plaintiff already has his cause of action* (see above at [17] again). The point about a "good" cause of action, terminology employed in *Shaw* as well, has already been discussed above at [8]-[12]. Suffice it to say that unlike here, the plaintiff in *Shaw* could not have known his cause of action without the maintenance records of the fork lift truck.

21 Third, the issue of costs savings is *logically subsequent* to the issue of whether or not a cause

of action may be made out without pre-action discovery. *Shaw* was a legal aid fund case, so costs were a primary concern; but nonetheless it was not a case that disregarded principle in favour of "practicalities" (to employ a phrase utilised by the plaintiff's counsel). It was first determined in *Shaw* that pre-action discovery was required in order that the plaintiff could properly frame a cause of action (at p 1039); only thereafter did considerations about costs arise (at p 1040). This mirrors the approach taken in the extract from *Asia Pacific Breweries* at [8] above, where Belinda Ang J, in outlining the theoretical approach to pre-action discovery, first considered issues of relevance, justifiability and necessity *before* segueing into any assessment of cost savings ("Once the court is satisfied … that the criteria of the rule are met, the next consideration is whether discovery is necessary … for saving costs").

22 Counsel for the plaintiff separately submitted that the plaintiff did not know whether to believe that the defendant actually possessed the Tape Recordings in question, and that since a simple disclosure by the defendant would allow the dispute to be cleanly resolved in one fell swoop, pre-action discovery ought to be ordered. (The lack of belief was necessarily so, for if he had believed the defendant this application would never have been brought.) To my mind this argument was clearly flawed. In *Lian Teck*, Lai Siu Chiu J stated the following concerning belief as a justification at [32] of her decision:

> 32 … The basis put forward by the plaintiffs for seeking pre-action discovery was their disbelief that A[sia] P[acific] B[reweries] had no knowledge of the unauthorised accounts and the unauthorised loans taken by Chia. However, disbelief of APB's position itself could not be a sufficient reason for seeking pre-action discovery.

In *Asia Pacific Breweries*, Belinda Ang J was of a similar view (at [25]-[26]):

> 25 It seems to me that the banks are not constrained from starting proceedings without pre-action discovery. From their contentions, it is obvious that the banks have taken a view as to whether they have a case that [Asia Pacific Breweries] is responsible for the loans and whether to plead a case. It has not been said anywhere in the affidavits or in submissions by counsel that without pre-action discovery the banks are unable to plead a case. This is unlike the case of an applicant who is unable to plead a case as he does not yet know whether he has a viable claim against the opponents, and needs pre-action discovery to fill the void or gaps in his knowledge. That is the nature (and I should add, function) of pre-action discovery, and the rule is there to assist him to search for the answer …
>
> 26 It is plain that the banks simply do not believe anything that [Asia Pacific Breweries] has said. *In my judgment, a disbelief of [Asia Pacific Breweries'] position itself cannot be a sufficient reason for seeking pre-action discovery. Otherwise, it will result in pre-action disclosure being applied for as a matter of course. That is not what the procedure is intended for. Invariably, cases that make their way to court are founded on a mutual disbelief of each other's perception of things, and a face-off situation is common in any dispute before the commencement of proceedings*. I have already pointed out in [4] that the criterion of O 24 r 6(3) is intended to ensure that the application for pre-action discovery is not brought frivolously or without justification.
>
> [emphasis added]

23 The positions taken in *Lian Teck* and *Asia Pacific Breweries* must be correct. Mutual disbelief is what engenders lawsuits; pre-action discovery cannot be manipulated into becoming a matter-of-course application in the name of "practicalities". Although there appears to be something to be said

for the convenience that would be precipitated in the present case via the disclosure of the Tape Recordings, this instinct towards gratification has to be balanced against a wider policy interest in preventing the widespread abuse of O 24 r 6.

24 Finally, I also found the plaintiff's reason for not wanting to listen to the Mavis recording to be disingenuous, and indicative of his lack of *bona fides*. He had expressed a desire to listen to conversations wherein his acknowledgment of the Transactions was recorded, and indeed this application is for pre-action discovery of the same. The Mavis recording was an example of one such conversation. On what basis, then, did the plaintiff turn down the defendant's offer for him to listen to the Mavis recording? It surely would have made no difference *which* recording he listened to, had he been sincere in wanting to hear any proof of his sanctioning the Transactions.

Conclusion

25 In the light of all of the above, I dismissed the plaintiff's application. Costs were fixed at $8,000 on an indemnity basis (exclusive of reasonable disbursements) pursuant to Order 24 Rule 6(9) of the Rules of Court (see above at [6]).

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