Ching Mun Fong *v* Standard Chartered Bank
[2012] SGHC 5

Case Number	: Originating Summons No 149 of 2011 (Registrar's Appeal No 236 of 2011)
Decision Date	: 09 January 2012
Tribunal/Court	: High Court
Coram	: Lai Siu Chiu J
Counsel Name(s)	: Suresh Damodara (Damodara Hazra LLP) for the plaintiff; Patrick Ang, Mohammed Reza and Alina Chia (Rajah & Tann LLP) for the defendant.
Parties	: Ching Mun Fong — Standard Chartered Bank

Civil Procedure – Pre-action discovery

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 120 of 2011 was dismissed by the Court of Appeal on 26 July 2012. See [2012] SGCA 38.]

9 January 2012

Lai Siu Chiu J:

1 This was an appeal by Ching Mun Fong ("the plaintiff") in Registrar's Appeal No 236 of 2011 ("the Appeal") against the decision of the Assistant Registrar dismissing her application for pre-action discovery. I dismissed the Appeal. As the plaintiff has appealed (in Civil Appeal No 120 of 2011) against my decision, I shall now set out the grounds for my decision.

The background

2 The plaintiff is a private banking client of Standard Chartered Bank ("the defendant"). She opened an account with the defendant on 4 August 2009 by signing an Account Opening Application Form ("account opening form"). This account opening form was made subject to the Standard Chartered Private Bank General Terms and Conditions ("SCPB General Terms"). Over the course of the banking relationship between the parties, the defendant was instructed by the plaintiff to enter into two Commodity-Linked Premium Currency Investments ("CPCI") deals. This was an investment involving currency options which gave the defendant the right to repay the plaintiff her principal investment sum in either XAU (a unit of measurement for gold) or US Dollars upon the maturity of the CPCI. On 11and 14 September 2009, the defendant exercised the currency options such that US Dollars (and not gold) was credited into the plaintiff's account. The defendant's entitlement to do this was disputed by the plaintiff.

3 The present originating summons was thus filed by the plaintiff, seeking pre-action discovery of the following:

(a) A complete set/s of account opening forms including the terms and conditions thereof, which the plaintiff has or may have had with the defendant;

(b) All records, including mechanical, audio, written and computer records of the purported trades effected by the defendant in respect of any or all of the plaintiff's accounts with the defendant for the dates 29 June 2010, 1 July 2010, and 2 July 2010; and

(c) All records, documents, memos and correspondence related to the two CPCI deals.

4 Eventually, the plaintiff decided only to proceed with items (b) and (c) above – specifically, she was seeking pre-action discovery of the voice logs of the communications which she had with the defendant's representatives in relation to the two CPCI deals.

The plaintiff's case

5 As indicated by the plaintiff's affidavit, her contemplated claims are in contract and tort. She alleged that the defendant had breached its contractual obligations to her, and further that the defendant's failure to properly advise her was a breach of duty giving rise to a claim in the tort of negligence. However, the plaintiff submitted that she would not be able to plead a case against the defendant without the voice-logs. In particular, she argued that pre-action discovery of the voice-logs will enable her to evaluate whether she has a good cause of action (under contract and/or tort) against the defendant.

The defendant's case

6 As for the defendant, its position was that the plaintiff was not at all constrained from starting proceedings or pleading her case without the voice-logs. The defendant contended that the documentary records it had already provided gave the plaintiff sufficient information to institute proceedings and plead her case. Pre-action discovery should accordingly be refused.

The law on pre-action discovery

7 The power of the court to order pre-action discovery is found under O 24 r 6(1) of the Rules of Court (Cap 332, R5, 2006 Rev Ed) ("Rules of Court"). As per any application for discovery, the test of necessity defines the scope of the court's discretion in deciding whether or not pre-action discovery is appropriate (see O 24 r 7 of the Rules of Court). In the context of pre-action discovery however, the test of necessity must be understood in the light of the purpose for which pre-action discovery is sought (see *Singapore Court Practice 2009* (Jeffrey Pinsler gen ed) (LexisNexis, 2009) ["*Singapore Court Practice*"] at para 24/6/2).

8 What then is the purpose of pre-action discovery? In *Kuah Kok Kim v Ernst & Young* [1996] 3 SLR(R) 485 ("*Kuah Kok Kim*") at [31], the Court of Appeal explained that pre-action discovery is to assist a plaintiff who "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". The word "viable" must not be understood to mean that the plaintiff is entitled to pre-action discovery for the purposes of augmenting his case or to 'complete his entire picture of the case'. If that was the case, the ordinary processes of general and specific discovery under O 24 r 1 and r 5 respectively would be subverted (see *Singapore Court Practice* at para 24/6/2). Instead, pre-action discovery serves a somewhat more modest purpose: it is merely to allow the plaintiff who suspects he has a case to obtain the necessary information to allow him to commence proceedings.

9 In *Bayerische Hypo-und Vereinsbank AG v Asia Pacific Breweries (Singapore) Pte Ltd* [2004] 4 SLR(R) 39 ("*Asia Pacific Breweries*)", the finance manager of the defendant, one Mr Chia, had deceived the plaintiff banks into thinking the defendant was borrowing money from them by forging the signatures of the defendant's directors on various resolutions. Mr Chia eventually pleaded guilty to forgery and cheating. In an attempt to sue the defendant itself for return of the money, the plaintiff banks sought pre-action discovery of documents relating to Mr Chia's circumstances of employment and responsibility to show that, in spite of Mr Chia's fraud, a banker-customer relationship

nevertheless existed between the plaintiff banks and the defendant. The High Court explained at [25] that pre-action discovery should only be allowed if the potential plaintiff is unable to initiate a case without the desired information: the purpose of pre-action discovery is simply to fill the voids or gaps in his knowledge which otherwise prevent him from pleading a case.

10 The High Court in *Asia Pacific Breweries* at [26] also stressed that the court will not allow pre-action discovery simply because the potential plaintiff disputed the defendant's version of events, for it would otherwise lead to pre-action discovery being granted in every dispute:

> In my judgment, a disbelief of APBS's 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 is a situation 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.

As it was clear that the banks knew their causes of action and were not otherwise constrained from commencing proceedings, the court declined to grant pre-action discovery. *Asia Pacific Breweries* thus illustrates that pre-action discovery would be flatly refused by the court if instead of seeking to ascertain whether there was any basis for bringing a claim, the purpose of the application was in reality to enable the potential plaintiff to either assess or augment the strength of his claim.

11 *Ng Giok Oh v Sajjad Akhtar* [2003] 1 SLR(R) 375 ("*Ng Giok Oh*") involved applicants claiming to have a cause of action in negligence against certain court assessors in relation to the valuation of properties done by the latter. As the applicants were in a position to commence proceedings, the court ruled that they ought to commence discovery in the usual course, instead of applying for pre-action discovery in order to uncover further causes of action against the assessors. The court stated at [7] that pre-action discovery "is not an instrument for private detectives snooping for action". This must be correct as pre-action discovery exists only for the limited purpose of allowing potential plaintiffs to obtain the evidence needed to mount a claim, and not to fish for additional evidence to ground further causes of action.

12 The two cases discussed above may be contrasted with the case of *Beckkett Pte Ltd v Deutsche Bank AG Singapore Branch* [2003] SLR(R) 321 ("*Beckkett*"). In *Beckkett*, the defendant bank (*qua* pledgee) had sold certain shares belonging to the plaintiff (*qua* pledgor). The plaintiff sought pre-action discovery of documents relating to the "details of the manner of sale of the pledged shares (whether by private treaty or auction)". Pre-action discovery was granted as without the information sought, the plaintiff would have no idea whether it had a basis to bring a claim against the defendant for failing to take reasonable steps to obtain the best sale price.

13 The Rules of Court exists to provide a systematic and orderly process for the discovery of evidence leading to trial. The rule allowing for pre-action discovery complements this by helping potential plaintiffs to ascertain if they are in a position to commence proceedings: by virtue of the disclosed documents the potential plaintiff will be able to decide if he has a cause of action against the defendant. It is in this sense that the procedure for pre-action discovery helps "to encourage the quick settlement of disputes by early and full disclosure of relevant documents" (see *Kuah Kok Kim* at [40]). However, in the event that the plaintiff is already in a position to commence proceedings, he must not be allowed to take advantage of the rules to jump-start the ordinary process of discovery of evidence in order to gain a tactical advantage, harass his opponent, or to 'snoop for action'. To allow that would be to subvert the regime for discovery of evidence put in place by the Rules of Court.

The decision

14 In the light of the principles elucidated above, it became immediately apparent that the plaintiff's application for pre-action discovery of the voice-logs was without justification. Unlike the pledgor in *Beckkett*, the plaintiff was not in a position in which she required the voice-logs in order to determine if she had a claim against the defendant. The dispute here centred on what took place during the conversations between the plaintiff and the defendant's representatives. Both parties did not dispute that the conversations took place. The gravamen of the plaintiff's complaint was simply that the defendant's representatives had failed to properly advise her before exercising the currency options. The defendant argued that it did. Based on the contract between the parties and the plaintiff's own personal knowledge of what transpired during those conversations, the plaintiff was more than able to plead her case for breach of contract and/or the tort of negligence; more so when the plaintiff also had in her possession the relevant bank statements provided by the defendant evidencing the CPCI transactions.

15 Like the plaintiff banks in *Asia Pacific Breweries*, the plaintiff was trying to bolster her contemplated claim(s). By her own admission in her skeletal submissions, she sought pre-action discovery of the voice-logs in order to evaluate whether the defendant had discharged its duty of care in contract and tort. She was seeking pre-action discovery of the voice-logs in order to determine whether she had a "good cause of action" as opposed to "a cause of action". As explained above, that plainly is not the purpose of O 24 r 6(1). The proper course of action was for the plaintiff to commence proceedings and avail herself of the ordinary processes of general and specific discovery under O24 r 1 and r 5 respectively. Since the defendant was asserting positively that it did discharge its duty of care towards the plaintiff, the likelihood is that it must necessarily produce the voice-logs. That however was ultimately a matter for post-action and not pre-action discovery.

Is there anything in the SCPB General Terms and/or the Banking Act that would otherwise entitle the plaintiff to pre-action discovery?

16 For completeness, it ought to be pointed out that the plaintiff also sought to rely on cl 9.1 of the SCPB General Terms read with s 47 of the Banking Act (Cap 19, 2008 Rev Ed) ("the Banking Act"). In so far as the plaintiff was arguing that the cl 9.1 and/or s 47 of the Banking Act entitled her to pre-action discovery, despite her failure to meet the test of necessity under O 24 r 6(1), my view was that this argument was wholly misguided and without merit.

17 Clause 9.1 of the SCPB General Terms reads:

> **Telephone Recordings:** The Client consents to the Bank recording or memorialising telephone and oral conversations with the Client by audio recording devices...and the Client agrees that any such notes and records of the Bank will constitute conclusive evidence as against the Client of the fact and content of the instructions and verbal communications, and the Client consents to the production of such written, audio or electronic recordings (and transcripts of such recordings) as evidence in any legal or other proceedings...

It is evident from a plain reading of the clause that it is of no assistance to the plaintiff, as it only states that the defendant can use such recordings as evidence in proceedings. In the light of this, the plaintiff sought to further rely on s 47 (read with the Third Schedule) of the Banking Act to argue that it obliges the court to grant pre-action discovery even when it would otherwise be disallowed.

18 Section 47 of the Banking Act was enacted to stipulate a wider set of circumstances under which banks can disclose customer information, and the terms of such disclosure. The stated object

of the change was to strike a better balance between operational requirements of banks and the need to preserve customer confidentiality. In other words, the enactment of s 47 sought to loosen the hitherto tight banking secrecy laws in order to benefit banks seeking to take advantage of potential operational benefits and savings by for example, securitising mortgage loans or outsourcing data processing to third parties (see the Second Reading of the Banking (Amendment) Bill, *Singapore Parliamentary Debates* (16 May 2001) vol 73 at col 1689). There was nothing here to suggest that s 47 of the Banking Act even remotely supported the plaintiff's submission that it buttressed her claim for pre-action discovery.

19 As explained above, the Rules of Court is the port of call for a party seeking either pre-action or post-action discovery. In the event that a party fails to meet the requirements for the granting of pre-action discovery, s 47 of the Banking Act can provide no relief. The plaintiff's attempt to rely on cl 9.1 and s 47 of the Banking Act was therefore an exercise in futility.

Conclusion

20 In the final analysis, I saw no basis to allow the plaintiff's application for pre-action discovery. I therefore dismissed the Appeal and fixed costs at $4,500 on an indemnity basis to the defendant in accordance with its contractual entitlement from the plaintiff.

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