Haywood Management Ltd *v* Eagle Aero Technology Pte Ltd
[2014] SGHC 164

Case Number : Originating Summons No 1055 of 2013, (Registrar's Appeal No 34 of 2014)
Decision Date : 19 August 2014
Tribunal/Court : High Court
Coram : Tay Yong Kwang J
Counsel Name(s) : Andy Lem, Toh Wei Yi and Zack Quek (Harry Elias Partnership LLP) for the appellant; Kristy Tan and Toh Jia Yi (Allen & Gledhill LLP) for the respondent.
Parties : Haywood Management Ltd — Eagle Aero Technology Pte Ltd

Civil Procedure – Discovery of Documents – Pre-action Discovery

19 August 2014

Tay Yong Kwang J:

Introduction

1 This appeal arises from an application by the respondent, Haywood Management Limited ("Haywood"), for pre-action interrogatories and discovery against the appellant, Eagle Aero Technology Pte Ltd ("EAT"), in contemplation of an action in conspiracy and/or fraud to be commenced by Haywood against EAT and other parties. The application by Haywood was granted in part by the learned Assistant Registrar ("the AR") on 23 January 2014 and EAT subsequently filed an appeal against the AR's decision. I dismissed EAT's appeal with respect to the AR's order as to pre-action discovery. With regard to the pre-action interrogatories, I declined to make any order for the time being and instead gave Haywood liberty to restore the application should EAT fail to comply adequately with its discovery obligations. EAT has since filed an appeal against my decision and I now set out the grounds for my decision.

The facts

Background facts

2 The present dispute arises from the sale of three multi-role light frigates ("the MRLFs") which were initially owned by the Royal Brunei Technical Services Sendirian Berhad ("RBTS"). [note: 1] At the outset, it is useful to note that Haywood and EAT do not have any direct contractual relationship or prior business dealings with each other. [note: 2] To understand how the present application by Haywood against EAT came about, it would be necessary to delve into the contractual relationship that each party had with the Lurssen group of companies ("the Lurssen Group").

3 In or around January 2007, Peter Lurssen ("Peter"), a central figure in the Lurssen Group, approached Mohamad Ajami ("Ajami"), the beneficial owner of Haywood, with a business proposal concerning the MRLFs. [note: 3] Peter told Ajami that he intended to get one of the wholly-owned subsidiaries of the Lurssen Group, Global Naval Systems Pte Ltd ("GNS"), a Singapore-incorporated company, to conclude an agreement with RBTS to market and procure the sale of the MRLFs. He proposed that Ajami could join him in the transaction by way of a joint venture in GNS. [note: 4] Ajami

agreed in principle to Peter's proposal and proceeded to incorporate Haywood as a special purpose vehicle to act in the intended transaction.

4 On 4 April 2007, GNS concluded a sales agency agreement with RBTS, under which RBTS appointed GNS as its agent to market and procure the sale of the MRLFs. [note: 5] Under this agreement, GNS owed certain payment obligations to RBTS. Haywood extended money to GNS for this purpose. Separately, GNS engaged the services of Lurssen Logistics UK ("LLUK") and/or its related company in Bremen ("LL Bremen"), both of which belong to the Lurssen Group, for the care and maintenance of the MRLFs. [note: 6]

5 However, the proposed joint venture did not materialise. Instead, Haywood and GNS entered into a loan agreement on 3 March 2008 for the outstanding sum of €11m which Haywood had extended to GNS to enable it to fulfil its payment obligations to RBTS. [note: 7] On 11 January 2010, Haywood and GNS executed an Amended and Restated Loan Agreement ("the ARLA"), in which the amount GNS had to repay Haywood was determined by, among other things, the price at which the MRLFs were sold. [note: 8] For present purposes, it suffices to note that Haywood would stand to benefit from a larger repayment sum if the MRLFs were sold at a higher price.

6 In or around April 2011, a director of GNS, Robertus Van der Wurff ("Rob"), informed Haywood that a company belonging to the Lurssen Group, Fr. Lurssen Werft GmbH & Co. KG ("FLW"), had obtained title in the MRLFs from RBTS. [note: 9] Thereafter, both GNS and FLW entered into negotiations with the Ministry of Defence of the Republic of Indonesia ("MOD") over the potential sale of the MRLFs.

7 Subsequently, it was agreed by the parties that the transaction would be structured as follows: [note: 10]

(a) a sale of the MRLFs from FLW to EAT;

(b) a back-to-back sale of the MRLFs from EAT to MOD.

Under this arrangement, the title of the MRLFs would be transferred directly from FLW to MOD. At that point in time, the reason which FLW gave for the interposition of EAT in the sale transaction was to facilitate the procurement of loan facilities for MOD. It was mentioned that, unlike EAT, FLW was not in a position to arrange for financing.

8 As Haywood was not privy to the ongoing negotiations between GNS, FLW, EAT and MOD, it only came to know about these developments in 2012 when Rob sent copies of the correspondence between the negotiating parties to Haywood. [note: 11] GNS also made several representations to the effect that the MRLFs had been properly maintained and were in excellent condition. [note: 12] On 22 September 2011, FLW sent a letter to EAT stating that it had agreed to the sale price of €270m for the MRLFs in the intended contract between FLW and EAT. [note: 13]

9 Subsequently, Rob forwarded draft copies of both the sale and purchase agreements between FLW and EAT ("the FLW-EAT contract") and that between EAT and MOD ("the EAT-MOD contract") to the business associate of Ajami, Rashid Ibrahim ("Ibrahim"), on several occasions in 2012. [note: 14] The material aspects in the draft EAT-MOD contract are as follows:

(a) the total contract price did not contemplate the inclusion of any costs for repairs or

upgrading of the MRLFs to be undertaken by EAT; and

(b) the MRLFs were to be sold on an "as is where is" basis with all faults and entirely without recourse whatsoever against the seller.

10 On 17 January 2013, Haywood got to know from an Indonesian media report that the MRLFs would be sold to MOD for a price of US$385m (approximately €300m). [note: 15] This figure was fairly similar to the amount of €270m as stated in FLW's letter to EAT dated 22 September 2011 (see [8] above).

11 As a result, Haywood was shocked when it was subsequently informed by GNS via a letter dated 26 March 2013 that the sale price of the MRLFs in the FLW-EAT contract was US$170m, a decrease of US$215m from the US$385m figure stated in the Indonesian media report. [note: 16] Haywood suspected that EAT and the entities in the Lurssen Group, such as FLW and GNS, had conspired with one another to artificially depress the sale price of the MRLFs in order to reduce GNS' repayment obligations under the ARLA. Ibrahim subsequently met Rob in Amsterdam, where the following explanations were provided to justify the disparity in sale prices: [note: 17]

(a) GNS and/or FLW had transferred the MRLFs to EAT on an "as is where is" basis and EAT had reduced the sale price on the basis that a lot of repair and modification work was required; and

(b) EAT had sold the MRLFs to MOD at a higher price as it had effected repairs and upgrades to the MRLFs after receiving it from GNS and/or FLW.

12 Haywood was dissatisfied with the explanation provided. On 12 September 2013, Haywood's solicitors sent a letter to EAT requesting documents and information relating to the sale transactions. [note: 18] EAT rejected Haywood's request by way of a letter dated 3 October 2013. [note: 19] Thereafter, Haywood proceeded to take out the current application for pre-action interrogatories and discovery against EAT.

The AR's decision

13 The AR granted Haywood's application for pre-action discovery in part. It was held by the AR that there was a reasonable basis for contending that a wrong may have been committed against Haywood and the application was therefore not speculative or frivolous. On the issue of necessity, the AR agreed with Haywood that it would not be possible for Haywood to mount a proper claim without having access to the requested documents. The AR also rejected EAT's claim that the information sought to be disclosed was confidential. It was observed at [14] that:

> ... there is nothing to suggest that the information or documents sought would be injurious to public interest or that such information or documents are protected under the Official Secrets Act, thereby prohibiting their disclosure.

As a result, the AR granted the order for interrogatories in relation to items 3–6, 7–9 and 12 set out in Schedule A of Haywood's application. With regard to pre-action discovery, the AR granted disclosure of the documents in item 1 of Schedule B, in so far as they did not relate to LLUK and LL Bremen. Item 2 of Schedule B was disallowed. Dissatisfied with the outcome, EAT filed an appeal against the AR's decision.

The parties' arguments

The parties' arguments

14 In the present appeal, I note that both parties were largely in agreement with respect to the general legal principles applicable to pre-action interrogatories and discovery. The parties' dispute was primarily over the application of these legal principles to the factual matrix in the present case.

EAT's arguments

15 In the present appeal, EAT's arguments can be grouped into three broad categories, summarised as follows:

(a) Pre-action discovery is *unnecessary* as Haywood already has sufficient facts to plead its intended cause of action and is in a position to commence legal proceedings.

(b) The information sought by Haywood involves *confidential* military information which is subject to EAT's strict confidentiality obligations owed to the other contracting parties such as MOD.

(c) The application for pre-action discovery is an attempt by Haywood to circumvent the *arbitration* clause found in the ARLA entered into by Haywood and GNS.

16 With regard to the first issue, EAT referred to the lengthy affidavit filed by Ibrahim on behalf of Haywood to support its assertion that Haywood already had sufficient facts to plead a viable claim in the tort of conspiracy. [note: 20] In particular, EAT submitted that the alleged lack of knowledge in relation to the sale prices of the MRLFs in the FLW-EAT contract and the EAT-MOD contract was a red herring as Haywood already had access to the following documents and information: [note: 21]

(a) the letter of undertaking sent by FLW to EAT which indicated the sale price of the MRLFs in the FLW-EAT contract as €270m; [note: 22]

(b) the Indonesian media report which revealed that EAT had sold the MRLFs to MOD for US$385m; [note: 23]

(c) the letter from GNS to Haywood dated 26 March 2013 which stated that the sale price of the MRLFs in the FLW-EAT contract was US$170m; [note: 24] and

(d) a copy of the executed FLW-EAT contract which was shown to Ibrahim by Rob in a meeting conducted in Amsterdam on 16 April 2013. [note: 25]

17 On this basis, EAT argued that there were no gaps in Haywood's knowledge, in so far as Haywood already had the requisite information pertaining to the sale prices of the MRLFs. In response to Haywood's position that pre-action discovery was necessary to reveal the identities of the potential conspirators, EAT submitted that Haywood already knew and had, in fact, taken a position on this issue. [note: 26] In this respect, EAT referred to Ibrahim's affidavit where EAT, GNS, FLW, Peter, LLUK and/or LL Bremen were identified as the alleged potential conspirators. [note: 27]

18 EAT also highlighted the fact that Rob had already informed Haywood of the reasons behind the disparity in sale prices in the FLW-EAT contract and the EAT-MOD contract. It was argued that the application for pre-action discovery was driven by Haywood's disbelief of the explanation given by Rob. [note: 28] In this respect, EAT referred to the High Court decision of *Bayerische Hypo- und*

Vereinsbank AG v Asia Pacific Breweries (Singapore) Pte Ltd and other applications [2004] 4 SLR(R) 39 ("*Bayerische v APB*") for the proposition that the disbelief of one's position cannot be the basis for pre-action discovery. [note: 29]

19 EAT also argued that Haywood had failed to identify the nexus between the alleged wrongdoings and Singapore. EAT submitted that the alleged wrongdoings in Ibrahim's affidavit appear to have taken place outside Singapore and that most of the potential defendants, including Peter, FLW, LLUK and LL Bremen, were likely to be situated in Europe. [note: 30] On that basis, EAT argued that the absence of a credible nexus with Singapore is a factor which can be taken into account for the purposes of finding that Haywood's application was unnecessary.

20 It was also argued by EAT that both Haywood's original application and the AR's order were highly intrusive, in so far as the scope of disclosure was very wide and that the information concerned highly confidential military secrets. [note: 31] It was highlighted by EAT that it had no prior relationship with Haywood and had, in fact, only came across Haywood shortly before the application for pre-action discovery was instituted. Finally, EAT also raised the argument that Haywood's application was unnecessary and wholly disproportionate, in so far as there was a significant degree of overlap between the requests for pre-action interrogatories and pre-action discovery. [note: 32]

21 With regard to the second issue of confidentiality, EAT argued that the information sought by Haywood involved confidential military information, such as the weaponry and technical specifications of the MRLFs, and the operations of MOD. [note: 33] In this respect, EAT emphasised that the information sought was subject to strict obligations of confidentiality owed to MOD. These obligations would inevitably be breached in the event that EAT was ordered to disclose the requested information. In response to Haywood's arguments that information concerning the weaponry and specifications of the MRLFs had already been passed from GNS to Haywood, and had also been disclosed by the Indonesian media, EAT submitted that these had no bearing on the obligations of confidentiality that it owes to MOD. [note: 34] Furthermore, EAT referred to the draft EAT-MOD contract that was disclosed in Ibrahim's affidavit in support of its proposition that it owes confidentiality obligations to MOD. On this basis, EAT argued that its reasonable expectations to maintain its confidentiality obligations should not be defeated by Haywood's fishing expedition. [note: 35]

22 Finally, in relation to the third issue, EAT highlighted that the ARLA entered into between Haywood and GNS contained an arbitration clause and that Haywood had taken out a similar application against GNS for pre-action disclosure. In this respect, EAT took the view that the present application was an attempt to obtain pre-action discovery of information concerning the sale and purchase of the MRLFs in the event that the application against GNS was dismissed. EAT submitted that this amounted to an abuse of the court's procedure in so far as the present application was an attempt to circumvent the arbitration clause in the ARLA. [note: 36]

Haywood's arguments

23 In response to EAT's arguments that it already had knowledge concerning the sale prices of the MRLFs, Haywood pointed out that it does not know, as a fact, what the sale price in the EAT-MOD contract was as its only source of information was the Indonesian media report. [note: 37] Haywood submitted that it was therefore not in a position to commence legal proceedings as the Indonesian media report may well turn out to be inaccurate.

24 With regard to the meeting between Ibrahim and Rob, while it was accepted that a copy of the FLW-EAT contract was shown to Ibrahim, Haywood highlighted the fact that Rob did not allow Ibrahim to inspect the EAT-MOD contract. On that basis, Haywood was still none the wiser about the sale price in the EAT-MOD contract. In fact, Haywood further argued that with reference to the draft EAT-MOD contract dated 22 November 2013, it appeared that the EAT-MOD sale price did not cover the repairs or upgrading of the MRLFs. To this end, EAT has taken no position on what could be the possible reason behind the vast disparity in sale prices. [note: 38]

25 Haywood further argued that the necessity of pre-action discovery had to be considered from the perspective of whether it would result in the saving of time and costs in relation to the parties to the action and the court. [note: 39] In this regard, it was submitted that Haywood would require the requested information to ascertain whether it had a *viable* cause of action. In the event that it is revealed after pre-action disclosure that it did *not* have a viable claim against EAT and the other parties, a potentially costly action would be averted for all parties.

26 Apart from that, Haywood also highlighted the requirement for the pleadings to be supported by full particulars where a claim concerns an allegation of conspiracy to defraud. [note: 40] A general allegation of fraud would not be enough. Given that Haywood was not privy to the negotiations between EAT, FLW and the other potential conspirators, there were gaps in Haywood's knowledge which would prevent it from pleading its claim sufficiently. [note: 41]

27 In relation to EAT's reference to Ibrahim's lengthy affidavit and the numerous documents exhibited therein, Haywood pointed out that the length of a party's affidavit was hardly conclusive as to the necessity of pre-action discovery. [note: 42] It was further submitted that Haywood only had access to limited correspondence involving EAT, FLW, GNS and MOD. Apart from that, Haywood was only given the old drafts of the FLW-EAT and EAT-MOD contracts and these were provided by GNS to Haywood back in 2012. In this respect, there remained gaps in Haywood's knowledge as it had no further information on what the parties finally agreed on.

28 In response to EAT's argument that Haywood already had the requisite information to commence legal proceedings in so far as it had already identified the intended cause of action and provided particulars of the same, Haywood submitted that it was merely complying with the requirement set out in the High Court decision of *Kuah Kok Kim and others v Ernst & Young* [1996] 1 SLR(R) 478 at [16]. [note: 43] In this respect, the applicant for pre-action discovery is required to first write to the intended defendants "stating their case sufficiently to enable the defendants to take legal advice and act accordingly". Therefore, Haywood's compliance with this requirement should not be construed as it having sufficient knowledge in relation to the viability of its claim. Haywood further pointed out that Loiter's affidavit filed on behalf of EAT contained only bare and unsubstantiated allegations that EAT had dealt with FLW at arm's length. [note: 44] It was therefore submitted that EAT had failed to discharge its burden of showing that pre-action discovery was not necessary.

29 With regard to the issue of confidentiality, Haywood submitted that EAT's argument that the information sought involved confidential military information was a mere blanket assertion in so far as snippets of such information had already been revealed in the Indonesian media and the documents forwarded to Haywood by GNS. [note: 45] In this respect, Haywood also pointed to the fact that it is merely interested in ascertaining the commercial terms of the transactions and not the technical details such as the weaponry systems of the MRLFs. Haywood submitted that it was disingenuous of EAT to hide behind its "sweeping and indiscriminate use" of the label of confidential military information. [note: 46]

30 Haywood also argued that the requested documents and interrogatories would likely include both confidential and non-confidential information. [note: 47] To that end, EAT should not be allowed to use the label of confidential military information to defeat Haywood's application entirely. Furthermore, it was also pointed out by Haywood that EAT had failed to disclose the terms, content and scope of its alleged confidentiality obligations. [note: 48] There was thus a possibility that the disclosure sought by Haywood may fall outside the scope of EAT's confidentiality obligations.

31 From a practical perspective, Haywood also highlighted the fact that EAT had given drafts of the EAT-MOD contract to GNS. [note: 49] This was in spite of EAT's position that it owed onerous confidentiality obligations to MOD. Further, GNS had disclosed these documents to Haywood and there were no allegations that GNS had acted wrongfully as a result of that.

32 Finally, Haywood also referred to both local and overseas authorities to support its proposition that confidentiality does not preclude the court from ordering pre-action disclosure. It was also submitted by Haywood that with reference to the Court of Appeal decision of *Dorsey James Michael v World Sport Group Pte Ltd* [2014] 2 SLR 208 ("*Dorsey v WSG*"), a distinction ought to be drawn between "potential parties" and "non-parties". In this respect, Haywood argued that a potential party like EAT should not be allowed to resist disclosure on the ground of alleged confidentiality obligations. [note: 50]

33 In any event, Haywood submitted that with reference to authorities such as *KLW Holdings Ltd v Singapore Press Holdings Ltd* [2002] 2 SLR(R) 477 ("*KLW v SPH*") and *Odex Pte Ltd v Pacific Internet Ltd* [2008] 3 SLR(R) 18 ("*Odex v Pacific Internet*"), the court should consider the interests of justice in determining whether to order pre-action disclosure. In this respect, Haywood argued that in spite of EAT's alleged confidentiality obligations, the interests of justice are in favour of allowing pre-action disclosure. [note: 51]

34 Finally, in relation to the issue concerning the arbitration clause in the ARLA, Haywood's response is relatively straightforward – that the arbitration clause does not apply to EAT in so far as it has no contractual relationship with Haywood. [note: 52] On this basis, the presence of the arbitration clause governing the contractual relationship between Haywood and GNS has no bearing on the potential claim Haywood has against EAT.

The decision of the court

35 Haywood's application for pre-action discovery includes both pre-action interrogatories and pre-action discovery. At first instance, the AR granted orders in relation to both pre-action discovery and pre-action interrogatories. As mentioned at [1] above, I affirmed the AR's decision with respect to pre-action discovery but declined to make any order for pre-action interrogatories. Instead, I granted Haywood liberty to restore the application should EAT fail to comply adequately with its discovery obligations. For ease of reference, I will first give the reasons why I decided to affirm the AR's order on pre-action discovery, before moving on to explain why I was of the view that the order for pre-action interrogatories was unnecessary at this juncture in the light of my decision on pre-action discovery. In any event, the Court of Appeal has, in its recent decision of *Dorsey v WSG* (at [25]), recognised that "the principles underlying both pre-action discovery and pre-action interrogatories ... remain broadly the *same*" [emphasis in original]. Therefore, the considerations applicable to pre-action discovery are likely to be similar to those in relation to pre-action interrogatories.

36 The general principles governing pre-action discovery are relatively straightforward and were not heavily disputed by the parties. Therefore, I will proceed to deal with the three main objections that have been raised by EAT in the appeal before me: necessity, confidentiality and the arbitration clause in the ARLA.

Necessity

37 With regard to the first issue of necessity, the leading authority on pre-action discovery is the decision of *Kuah Kok Kim v Ernst & Young* [1996] 3 SLR(R) 485 ("*Kuah Kok Kim*"), where the Court of Appeal made the following observations at [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.
>
> [emphasis added]

In this respect, pre-action discovery would not be ordered if the applicant already has the requisite knowledge to commence legal proceedings. This was recognised by the Court of Appeal in *Ching Mun Fong v Standard Chartered Bank* [2012] 4 SLR 185 at [23]:

> Thus, the scheme of pre-action discovery is to accommodate the situation where a potential plaintiff *does not have sufficient facts to commence proceedings*. This is consistent with its purpose being to allow a potential plaintiff to determine whether he has a "good cause of action". It follows that pre-action discovery is *unnecessary where an individual is in a position to commence proceedings*. In this regard, we think the phrase in O 24 r 7, "discovery is not necessary, or not necessary at that stage of the cause or matter" lends weight to this approach.
>
> [emphasis added]

38 An example of when pre-action discovery was rejected on the basis that the applicant was already in a position to commence proceedings can be found in the High Court decision of *Bayerische v APB*. In that case, Belinda Ang J held at [25] that the applicant banks were not constrained from starting proceedings without pre-action discovery as they had already taken the view as to whether they had a case against the defendant and whether to plead a case. The judge made the following observations at [25]:

> ... 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. ...

39 On the other hand, in the light of the invasive nature of pre-action discovery, the courts must also guard against frivolous or speculative applications. This was recognised by the Court of Appeal in *Kuah Kok Kim* at [59]:

> ... It was not the court's function, at this stage of the application, to dwell into the merits of the case and to determine, based on what little available evidence, whether there is a good claim or

not. The court's duty is only to ensure that the application was not frivolous or speculative or that the applicants were [not] on a fishing expedition.

40 Therefore, on one end of the spectrum, there exist cases where the applicant already has sufficient information to plead its case and is in a position to commence proceedings. On the other end, there are applications which are so frivolous or speculative in nature that the applicant should not be allowed to invade the documentary domain of the defendant. In order for an applicant to successfully obtain an order for pre-action discovery, he must fall somewhere in the middle ground, where he does not know whether he has a viable claim against the potential defendant and thus requires pre-action discovery to fill the gaps in his knowledge.

41 In the present appeal, EAT has not contended that Haywood's application ought to be dismissed on the basis that it is either frivolous or speculative. Instead, EAT adopted the position that Haywood already has the requisite knowledge to plead its claim and is in a position to commence legal proceedings without the need for pre-action discovery.

42 I did not accept EAT's argument that Haywood should be construed as having sufficient knowledge to commence legal proceedings on the ground that it had identified the intended claim as the tort of conspiracy and set out the identities of the potential conspirators. In this respect, it is acknowledged that O 24 r 6(3)(*a*) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) requires the applicant's supporting affidavit to "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". The Court of Appeal in *Kuah Kok Kim* stated at [31] 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.

43 From a practical perspective, the applicant will necessarily have to set out the substance of its intended claim so as to avoid allegations that its application is either frivolous or speculative. Therefore, the fact that Haywood has identified its intended claim and the potential parties to the action is not determinative of the issue of whether it has a viable claim. In this regard, it can be seen from the tenor of the cases discussed above that the real issue is whether the applicant has sufficient knowledge regarding the viability of its claim.

44 In my judgment, I agree with the AR's decision that the documents sought by Haywood are necessary in order to fill the gaps which exist in its knowledge for the following reasons. First, while it is accepted that Haywood does indeed have access to a significant number of documents handed over by GNS, it cannot be overlooked that many of the documents in Haywood's possession are drafts, as opposed to the final executed copies. For instance, while it is undisputed that GNS had sent draft copies of the EAT-MOD contract to Haywood, a quick examination of those drafts reveals the absence of certain crucial terms of the contract, such as the actual sale price of the MRLFs. [note: 53] In fact, Haywood emphasised that it only came to know about the sale of the MRLFs from EAT to MOD for the price of US$385m in the Indonesian media report. Furthermore, many of those documents were provided by GNS to Haywood back in 2012. On that basis, apart from the sale price of the MRLFs that was reported by the Indonesian media, Haywood does not have any knowledge about the commercial terms that were eventually agreed upon by the relevant parties.

45 In approaching the issue of whether the applicant possesses sufficient knowledge about the viability of its claim, the court will have to take into consideration the applicant's intended cause of action. This will allow the court to arrive at a finding on whether the applicant has sufficient facts to plead its claim. It bears emphasising that this is important from a practical perspective as the general discovery framework will only commence after pleadings have closed. In the absence of sufficient

evidence to support its pleadings, the applicant will inevitably be placed in a vulnerable position in so far as its claim may be struck out by the court. Therefore, the grant of pre-action discovery may allow both parties to avert a potentially costly action, as was alluded to by the Court of Appeal in *Dorsey v WSG* at [26]:

> ... Ultimately, if these forms of disclosure, at an early stage, reveal that a claimant's suspicions are actually unfounded, litigation will be avoided and, if so, there will be costs and time savings for all. ...

46 In the present case, Haywood's intended cause of action appears to be the tort of conspiracy and/or fraud. To successfully plead its claim, Haywood has to first establish that a disparity exists between the sale prices of the MRLFs in the FLW-EAT contract and the EAT-MOD contract. As explained above at [44], Haywood will require access to the final executed copies of these contracts. A comparison of the terms in the FLW-EAT contract and the EAT-MOD contract will also allow Haywood to ascertain if the disparity in sale prices, if any, is warranted.

47 In the event that there exists an inexplicable disparity in sale prices, Haywood will then have to turn to the correspondence between the relevant parties to determine the viability of its claim for conspiracy and/or fraud. The specific letters and proposals listed in para 1 of Haywood's request for discovery will enable Haywood to have an understanding of how the deal was negotiated and concluded by the relevant parties. In this regard, Haywood's application for pre-action discovery is necessary as it was not privy to the negotiations between GNS, FLW, EAT and MOD. These negotiations will go towards revealing whether Haywood has a viable claim in the tort of conspiracy and/or fraud.

48 In my view, the documents sought to be disclosed will enable Haywood to fill the gaps in its knowledge. After having access to the disclosed documents, Haywood should be in a position to determine the viability of its intended claim. In the event that it is revealed after pre-action disclosure that it does not have a viable claim against EAT and/or the other parties, a potentially costly action would be averted for all parties.

49 With regard to the documents relating to LLUK and LL Bremen, I agree with the AR's observation that there is currently no indication that these entities were involved. In the absence of any further evidence, Haywood's argument that EAT may have subcontracted the repair and upgrading works to LLUK and LL Bremen at exorbitant prices is purely speculative. I am therefore of the view that Haywood does not require the documents concerning LLUK and LL Bremen to ascertain the viability of its intended claim in conspiracy and/or fraud at this juncture.

Confidentiality

50 Having found that Haywood's application for pre-action disclosure fulfils the requirement of necessity, I will now move on to address EAT's objections on the ground of confidentiality. In brief, EAT argued that the information sought to be disclosed falls within the scope of its confidentiality obligations owed to other contracting parties, such as GNS and MOD.

51 The interface between confidentiality obligations and the power of the court to compel disclosure is not without its difficulties. In the context of pre-action disclosure, the court has to consider the interests of both the applicant, who may require the information to determine whether it has a viable claim, and the defendant, who may have a legitimate interest in fulfilling its confidentiality obligations.

52 When a defendant seeks to rely on a confidentiality clause to oppose an application for pre-action disclosure, the court has to determine whether the information sought falls within the scope of the confidentiality clause. An instance of when this question was resolved against the defendant can be found in the High Court decision of *Beckkett Pte Ltd v Deutsche Bank AG Singapore Branch* [2003] 1 SLR(R) 321. In that case, the plaintiff had sought pre-action discovery against the defendant bank for information pertaining to the realisation of shares it had pledged to the bank. One of the objections raised by the bank was the duty of confidentiality arising from the share pledge agreements. This was rejected by Kan Ting Chiu J on the basis that the information sought about the sale of the pledged shares did not fall within the scope of the confidentiality clause. It was further held (at [29]) that the confidentiality clause only prohibited the bank from disclosing such information to third parties without the consent of the shareholder. In that regard, disclosure of the information to the plaintiff shareholder did not amount to disclosure to a third party. On that basis, the bank's reliance on the confidentiality clause to resist the application for pre-action disclosure was unsuccessful.

53 Where a defendant manages to establish that the information sought to be disclosed falls within the scope of its confidentiality obligations, there remains the issue of whether the court ought to favour confidentiality, at least in the context of pre-action discovery. This issue arose in the High Court decision of *KLW v SPH*, a case which involved an application for pre-action discovery against a defendant media company. The application was in respect of notes of interviews and working drafts for a story alleged to be defamatory of the plaintiffs. The purpose of the application was to uncover the source of information in the story. In rejecting the plaintiffs' application, Choo Han Teck JC (as he then was) made the following observations at [10]:

> ... It suffices for me to say that therefore, even in the course of an action (whether at an interlocutory stage or at trial) the court may not order disclosure of the identity of a newspaper's informant unless it thinks that it is relevant to do so. *The present application before me is a pre-action discovery application. Slightly different considerations apply. Prima facie, in such circumstances, the courts are entitled to lean in favour of confidentiality. What is spoken in confidence ought to be kept in confidence. Confidentiality must, therefore, be observed unless the greater interests of justice demand otherwise.* The burden of proof lies with the applicant.
>
> [emphasis added]

It was further held that a person may "be compelled to disclose confidential information only when the applicant can persuade the court that he has a right to that information" (at [12]). In this regard, the decision of *KLW v SPH* suggests that a distinction ought to be drawn between pre-action discovery and discovery at an interlocutory stage or at trial. Objections on the basis of confidentiality appear to be accorded more weight in so far as pre-action discovery was concerned.

54 Nevertheless, in the subsequent decision of *Odex v Pacific Internet*, Woo Bih Li J dispelled any notion that a higher standard of proof should be imposed in situations where the defendant owes a duty of confidentiality to other parties. With regard to the earlier decision of *KLW v SPH*, Woo J made the following observations at [59]:

> ... Judicial Commissioner Choo Han Teck had to deal with the "newspaper role" which purportedly exempted newspapers from disclosing sources of information in a pre-action process. *However, on pre-action discovery generally, he thought that the guide should be the interest of justice.* On the facts before him, he dismissed the plaintiff's appeal.
>
> [emphasis added]

In this respect, it was held that ultimately, the guide should still be the "interest of justice". The fact that the defendant may owe a duty of confidentiality to other parties is a factor that the court can take into account. However, it should not, in and of itself, give rise to a higher standard of proof. With regard to the defendant's argument that it owed a contractual and regulatory duty of confidentiality, Woo J observed at [62] that:

> ... such a duty would be subject to any order of court which a court might make. It could not seriously be suggested that [the defendant] would be in breach of either duty if it made disclosure pursuant to a court order and counsel for [the defendant] stopped short of making such a suggestion. ...

55 In my opinion, the fact that the defendant may owe confidentiality obligations to other parties does not mean that the application for pre-action discovery must necessarily fail. If such contractual obligations of confidentiality are a sufficient reason to militate against the grant of discovery, this may very well give rise to potential abuse by scheming individuals. Contracting parties may deliberately incorporate confidentiality clauses in their contracts or enter into separate confidentiality agreements for the sole purpose of avoiding downstream discovery obligations. Legitimate claims may be stifled prematurely if defendants are allowed to raise the guise of confidentiality to wholly defeat applications for pre-action discovery. Therefore, any obligations of confidentiality that the defendant may owe to other parties cannot be a decisive consideration. It is but one factor that the court should take into account in ascertaining where the interests of justice lie.

56 In deciding whether to grant pre-action discovery when confidentiality obligations are at stake, the court has to balance the interests of the applicant against those of the defendant. On one hand, the plaintiff may have a legitimate interest in requiring access to the documents in order to ascertain the viability of its intended cause of action. In this regard, the courts should be careful not to allow legitimate claims to be stifled by indiscriminate objections on the ground of confidentiality. On the other hand, the defendant may have a legitimate interest in maintaining any confidentiality obligation owed to other parties. In this respect, the courts should not allow the reasonable expectations of contracting parties to be defeated by fishing expeditions hinged on frivolous or speculative claims.

57 Ultimately, the court will have to adopt a multi-factorial approach in determining whether the interests of justice necessitate the disclosure by the defendant in spite of the confidentiality obligations it owes to other parties. It is further noted that there exists an implied undertaking by the party who is entitled to discovery of documents to use the disclosed documents for the conduct of the case only and not for any other purpose. This fundamental principle of discovery finds its origins in the landmark English Court of Appeal decision of *Riddick v Thames Board Mills Ltd* [1977] 1 QB 881. Widely referred to as the *Riddick* principle, it is undisputed that a party who is entitled to pre-action discovery would also be subject to this implied obligation.

58 The foundation of the *Riddick* principle was explained succinctly by Lord Denning MR at 895–896:

> The reason for compelling discovery of documents in this way lies in the public interest in discovering the truth so that justice may be done between the parties. That public interest is to be put into the scales against the public interest in preserving privacy and protecting confidential information. The balance comes down in the ordinary way in favour of the public interest of discovering the truth, i.e., in making full disclosure. ...
>
> ... The public interest in privacy and confidence demands that this compulsion should not be pressed further than the course of justice requires. The courts should, therefore, not allow the

other party – or anyone else – to use the documents for any ulterior or alien purpose. Otherwise the courts themselves would be doing injustice. ...

59 In the context of pre-action disclosure, the court is entitled to take into account the fact that the plaintiff is legally obliged not to use the disclosed documents for any extraneous purpose. While not strictly relevant to pre-action discovery, Lord Denning MR made the following observations on the disclosure of confidential information at 895:

> ... Again I have known a party to say to his solicitor: "But these are my own confidential papers – my own personal diary – our own inter-departmental memoranda. Must I disclose them?" The answer of the solicitor again is "Yes. You must disclose them. Confidential information has no privilege from disclosure ... The court insists on your producing them so as to do justice in the case."

In the event where a party uses a disclosed document for any ulterior or alien purpose, the opposing party which disclosed the document is not without remedy. It may commence proceedings for contempt against the party who has breached the implied obligation. Alternatively, it may also invoke the injunctive powers of the court to restrain the unjustified use of the disclosed documents.

60 On the facts in the present case, I am of the view that EAT should be compelled to disclose the documents in the interests of justice. At the outset, I note that EAT has argued that it was not able to adduce evidence to demonstrate that the requested information fall within the scope of EAT's confidentiality obligations to MOD as doing so would result in EAT breaching its confidentiality obligations. To support its assertion that it owed confidentiality obligations to MOD, EAT has instead chosen to rely on the draft EAT-MOD contract that was exhibited by Haywood.

61 There is an inherent circularity in EAT's reasoning here. In opposing an application for discovery on the ground of confidentiality, the defendant has to establish: first, the existence of the confidentiality obligations; and second, that the information sought to be disclosed falls within the scope of those obligations. Therefore, the defendant cannot rely on confidentiality as a basis to avoid having to satisfy the court that such confidentiality obligations even exist in the first place. If the defendant claims confidentiality over the very document giving rise to the confidentiality obligations, as in the present case, the defendant should, at the very least, disclose a redacted copy of the document for the court's perusal. Therefore, I do not accept EAT's reliance on the draft EAT-MOD contract as the basis for its claim of confidentiality as the terms of the final executed contract may be substantially different.

62 EAT argued that the disclosure by GNS and the Indonesian media has no bearing on the obligations of EAT to ensure confidentiality. While there is some merit in that argument, I am of the view that the court is still entitled to take into account any disclosure of such information by other parties. This may be a relevant factor for the purpose of assessing the quality of confidence of the requested documents. Where the alleged confidential information has been disclosed substantially by other parties, the defendant will have to apprise the court on why its objections on the ground of confidentiality should still be accorded any weight. For instance, the defendant can bring the court's attention to specific undisclosed material which falls within the scope of its confidentiality obligations.

63 I agree with Haywood that the documents sought to be disclosed in the present case would likely comprise both confidential and non-confidential information. In this respect, allowing EAT to avoid having to disclose the entire document, including the non-confidential aspects of the document, would be swinging the balance too far in favour of upholding confidentiality. In fact, Haywood argued that it was only interested in the commercial aspects of the transactions. It was not interested in the

confidential military information, such as the technical specifications of the MRLFs or the weapons system. Such information would be wholly irrelevant to its purpose of ascertaining whether it had a viable claim against the potential conspirators.

64 In my judgment, while Haywood's position does go some way towards striking a balance between the interests of both parties, the same cannot be said of EAT's sweeping objections on the ground of confidentiality. Apart from the mere assertion that it was unable to provide further details as that itself would amount to a breach of its confidentiality obligations, EAT has failed to substantiate how the disclosure of the requested documents would be against the interests of justice. EAT did not provide an outline of how the requested documents consist of confidential information. There was only a general and sweeping assertion that all the requested documents and interrogatories "involve confidential military information such as the weaponry and technical specifications, and the sensitive control systems of the 3 MRLFs, and the operations of the [MOD] and Navy". [note: 54] There was also no attempt by EAT to provide redacted copies of the requested documents, so as to strike a balance between its interests in maintaining its confidentiality obligations and Haywood's interest in ascertaining whether it has a viable cause of action. To allow potential defendants to avoid having to disclose any documents on the basis of such wide-ranging and unqualified claims of confidentiality would amount to a complete denial of the public interest in discovering the truth in order that justice may be done between the parties.

65 For the reasons above, coupled with the fact that Haywood would undoubtedly be bound by the *Riddick* principle, I am of the view that it is in interests of justice that EAT should be compelled to disclose the requested documents as directed by the AR's order on pre-action discovery.

Arbitration

66 Finally, I deal with EAT's objection that the application for pre-action discovery by Haywood was an attempt to circumvent the arbitration clause in the ARLA. At the outset, it is noted that EAT does not have any prior contractual relationship with Haywood. EAT was not a party to the ARLA entered into between Haywood and GNS. Therefore, the arbitration clause in the ARLA does not govern the relationship between EAT and Haywood.

67 In the Court of Appeal decision of *Navigator Investment Services Ltd v Acclaim Insurance Brokers Pte Ltd* [2010] 1 SLR 25, Andrew Phang JA, in delivering the judgment of the court, made the following observations at [58]:

> Alternatively, as in the present case, pre-action discovery and/or pre-action interrogatories may be sought with a view to mounting a claim not only against a party with whom the applicant has an arbitration agreement, but also against third parties with whom the applicant has no such agreement ... Looked at in this light, the fact situation in the present proceedings is distinguishable from the usual situation where the parties to the arbitration agreement *and* the parties to the court proceedings concerned are (as was the case in, for example, *Woh Hup* ([48] *supra*)) *one and the same*. Indeed, where an application for pre-action discovery and/or pre-action interrogatories is made, as was the case here, in the context of multi-party proceedings, there appears, *ceteris paribus*, to be no reason why the court's power to grant pre-action discovery or pre-action interrogatories should be curtailed, although this power will be exercised *sparingly* and only (we hasten to add) *where valid reasons can be shown*.
>
> [emphasis in original]

68 In the present case, the parties to the ARLA (*ie*, Haywood and GNS) are not "one and the

same" as the parties to the potential court proceedings. In fact, among all the potential conspirators that have been identified by Haywood, GNS is the only party which has an arbitration agreement with Haywood. There is no bar to Haywood commencing legal proceedings in court against parties with which it has no arbitration agreement. Therefore, I am not convinced that Haywood's application for pre-action disclosure against EAT amounts to an attempt to circumvent or otherwise undermine the arbitration process. EAT is clearly not a party to the ARLA and there is no basis for arguing that Haywood's application amounts to an abuse of process which ought to be restrained by the court.

69 For the reasons above, I affirmed the AR's order as to pre-action discovery.

Interrogatories

70 With regard to the issue of pre-action interrogatories, I agree with EAT that there is a significant degree of overlap in so far as the information disclosed in the discovered documents would likely provide answers to most, if not all, of the interrogatories requested by Haywood. In fact, counsel for Haywood accepted that the disclosure of the documents pursuant to the AR's discovery order would likely address most of the interrogatories. On that basis, counsel for Haywood asked for liberty to apply for interrogatories subsequently in the event that the application was not allowed at this juncture. In this respect, O 26A r 2 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) states that:

> On the hearing of an application for an order under Rule 1, the Court, if satisfied that interrogatories are not necessary, or *not necessary at that stage of the cause or matter*, may 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 interrogatories are not necessary either for disposing fairly of the cause or matter or for saving costs.
>
> [emphasis added]

71 In the light of the significant overlap between the documents ordered to be disclosed pursuant to the AR's order and the information sought in Haywood's request for interrogatories, I am of the view that the administration of interrogatories is not necessary at this stage of the dispute. On that basis, I gave no order in respect of the pre-action interrogatories. Haywood is at liberty to restore the application for pre-action interrogatories should EAT fail to comply adequately with its discovery obligations.

Conclusion

72 For the reasons above, I affirmed the AR's order as to pre-action discovery and made no order in respect of the pre-action interrogatories. EAT was given 14 days, as requested, to disclose the documents ordered. I also made no order as to costs for EAT's appeal against the AR's decision as it had succeeded in half of the matters on appeal.

73 After I gave my decision, EAT filed an application on 4 June 2014 for leave to appeal to the Court of Appeal. This was followed by the filing of a notice of appeal by EAT on 19 June 2014. At the hearing of the application for leave on 2 July 2014, counsel for EAT clarified that they were of the view that no leave to appeal was required. This was not contested by counsel for Haywood. Accordingly, I granted leave to EAT to withdraw its application for leave to appeal and awarded costs of $800 to Haywood.

[note: 1] Rashid Ibrahim's 1st Affidavit dated 30 October 2013 at p 3, para 9.

[note: 2] Yaakov Carlos Loiter's 1st Affidavit dated 6 January 2014 at p 9, para 38.

[note: 3] Rashid Ibrahim's 1st Affidavit dated 30 October 2013 at p 3, para 9.

[note: 4] Rashid Ibrahim's 1st Affidavit dated 30 October 2013 at pp 3–4, para 10.

[note: 5] Rashid Ibrahim's 1st Affidavit dated 30 October 2013 at p 4, para 11.

[note: 6] Rashid Ibrahim's 1st Affidavit dated 30 October 2013 at p 4, para 12.

[note: 7] Rashid Ibrahim's 1st Affidavit dated 30 October 2013 at p 4, para 14.

[note: 8] Rashid Ibrahim's 1st Affidavit dated 30 October 2013 at pp 52–53.

[note: 9] Rashid Ibrahim's 1st Affidavit dated 30 October 2013 at p 6, para 17.

[note: 10] Rashid Ibrahim's 1st Affidavit dated 30 October 2013 at p 7, para 18; Yaakov Carlos Loiter's 1st Affidavit dated 6 January 2014 at p 7, para 27.

[note: 11] Rashid Ibrahim's 1st Affidavit dated 30 October 2013 at p 7, para 19.

[note: 12] Rashid Ibrahim's 1st Affidavit dated 30 October 2013 at pp 7–9, paras 20–22.

[note: 13] Rashid Ibrahim's 1st Affidavit dated 30 October 2013 at p 12, para 30.

[note: 14] Rashid Ibrahim's 1st Affidavit dated 30 October 2013 at pp 15–18, paras 37–41.

[note: 15] Rashid Ibrahim's 1st Affidavit dated 30 October 2013 at p 18, para 42.

[note: 16] Rashid Ibrahim's 1st Affidavit dated 30 October 2013 at pp 18–19, para 43.

[note: 17] Rashid Ibrahim's 1st Affidavit dated 30 October 2013 at p 20, para 44(4)–(5); Yaakov Carlos Loiter's 1st Affidavit dated 6 January 2014 at p 7, paras 29–30.

[note: 18] Rashid Ibrahim's 1st Affidavit dated 30 October 2013 at pp 312–316; Yaakov Carlos Loiter's 1st Affidavit dated 6 January 2014 at p 9, para 38.

[note: 19] Rashid Ibrahim's 1st Affidavit dated 30 October 2013 at p 317; Yaakov Carlos Loiter's 1st Affidavit dated 6 January 2014 at p 9, para 40.

[note: 20] Defendant's Written Submissions dated 7 March 2014 at pp 27–28, paras 56–57.

[note: 21] Defendant's Written Submissions dated 7 March 2014 at pp 32–33, paras 64–65.

[note: 22] Rashid Ibrahim's 1st Affidavit dated 30 October 2013 at p 12, para 30.

[note: 23] Rashid Ibrahim's 1st Affidavit dated 30 October 2013 at pp 303–307.

[note: 24] Rashid Ibrahim's 1st Affidavit dated 30 October 2013 at pp 309–310.

[note: 25] Rashid Ibrahim's 1st Affidavit dated 30 October 2013 at p 19, para 44(2).

[note: 26] Defendant's Written Submissions dated 7 March 2014 at p 36, paras 69–70.

[note: 27] Rashid Ibrahim's 1st Affidavit dated 30 October 2013 at p 22, para 48.

[note: 28] Defendant's Written Submissions dated 7 March 2014 at p 38, para 77.

[note: 29] Defendant's Written Submissions dated 7 March 2014 at p 40, para 83.

[note: 30] Defendant's Written Submissions dated 7 March 2014 at pp 41–42, para 90.

[note: 31] Defendant's Written Submissions dated 7 March 2014 at p 42, para 91.

[note: 32] Defendant's Written Submissions dated 7 March 2014 at p 43, para 93.

[note: 33] Defendant's Written Submissions dated 7 March 2014 at pp 43–44, para 94.

[note: 34] Defendant's Written Submissions dated 7 March 2014 at pp 44–45, paras 97–98.

[note: 35] Defendant's Written Submissions dated 7 March 2014 at p 46, para 101.

[note: 36] Defendant's Written Submissions dated 7 March 2014 at p 47, para 107.

[note: 37] Plaintiff's Written Submissions dated 10 March 2014 at p 37, para 69.

[note: 38] Plaintiff's Written Submissions dated 10 March 2014 at pp 37–38, para 70.

[note: 39] Plaintiff's Written Submissions dated 10 March 2014 at pp 38–39, para 71.

[note: 40] Plaintiff's Written Submissions dated 10 March 2014 at pp 40–41, para 75.

[note: 41] Plaintiff's Written Submissions dated 10 March 2014 at pp 41–42, para 76.

[note: 42] Plaintiff's Written Submissions dated 10 March 2014 at p 42, para 77.

[note: 43] Plaintiff's Written Submissions dated 10 March 2014 at pp 42–43, para 78.

[note: 44] Plaintiff's Written Submissions dated 10 March 2014 at p 44, para 80.

[note: 45] Plaintiff's Written Submissions dated 10 March 2014 at pp 46–47, paras 86–88.

[note: 46] Plaintiff's Written Submissions dated 10 March 2014 at p 48, para 89.

[note: 47] Plaintiff's Written Submissions dated 10 March 2014 at p 49, para 94.

[note: 48] Plaintiff's Written Submissions dated 10 March 2014 at p 50, para 95.

[note: 49] Plaintiff's Written Submissions dated 10 March 2014 at p 50, para 97.

[note: 50] Plaintiff's Written Submissions dated 10 March 2014 at pp 55–56, para 104.

[note: 51] Plaintiff's Written Submissions dated 10 March 2014 at pp 57–59, paras 106–107.

[note: 52] Plaintiff's Written Submissions dated 10 March 2014 at p 59, para 109.

[note: 53] Rashid Ibrahim's 1st Affidavit dated 30 October 2013 at pp 178–179, 220, 270.

[note: 54] Defendant's Written Submissions dated 7 March 2014 at pp 43–44, para 94.