

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 74

Originating Summons 734 of 2016
(Registrar's Appeals Nos 362 and 378 of 2016)

Between

INTAS PHARMACEUTICALS LIMITED

... Plaintiff

And

DEALSTREETASIA PTE LTD

... Defendant

JUDGMENT

[Civil Procedure] — [Disclosure of Documents] — [Discovery of Documents] — [Pre-action Disclosure] — [Norwich Pharmacal Orders]

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**Intas Pharmaceuticals Ltd
v
DealStreetAsia Pte Ltd**

[2017] SGHC 74

High Court — Originating Summons 734 of 2016 (Registrar's Appeals
Nos 362 and 378 of 2016)
George Wei J
10 February 2017

10 April 2017

Judgment reserved.

George Wei J:

Introduction

1 The Plaintiff is Intas Pharmaceuticals Limited (“Intas”), an India incorporated company in the business of manufacturing, marketing and distributing pharmaceutical products. The Defendant is DealStreetAsia Pte Ltd (“DealStreetAsia”), a Singapore incorporated company which operates a financial news website at the Internet address www.dealstreetasia.com.

2 These appeals arise out of an application by the Plaintiff for pre-action interrogatories and pre-action discovery against the Defendant. The application was granted in part by the learned Assistant Registrar (“the AR”) on 26 September 2016. Both parties (“Parties”) appealed against different aspects of the AR’s decision. Having considered the arguments, I allow the Plaintiff’s appeal in part and dismiss the Defendant’s appeal.

Facts

3 The Parties’ dispute centres on an article published on the Defendant’s website on 21 December 2015 (“the Article”). The Article was written by one of the Defendant’s correspondents, Ms Bhawna Gupta (“Ms Gupta”). In gist, the Article reported that a competitor of the Plaintiff, Sun Pharmaceuticals Industries Ltd (“SPI”), was in “early talks” to acquire the Plaintiff’s business (“the alleged intended acquisition”).¹

4 A day prior to the publication of the Article, Ms Gupta had written an email to the Plaintiff’s Chief Financial Officer, Mr Jayesh Shah (“Mr Shah”), on 20 December 2015.² The email stated:

This is regarding a story we are doing on Intas Pharmaceuticals Ltd Ltd [sic]. We understand that the company is looking to sell its business and is in talks with Sun Pharmaceutical Industries Ltd for the same.

The email continued with Ms Gupta seeking confirmation and additional details in relation to the alleged intended acquisition.³

5 Mr Shah replied Ms Gupta on the morning of 21 December 2015, stating: “This report is completely base less [sic] and we fully deny it.”⁴

6 The Defendant asserts that Ms Gupta also contacted SPI and the Kotak Mahindra Group (who according to Ms Gupta’s source had been appointed to lead the mandate on behalf of SPI for the proposed deal) for their comments.⁵

¹ 1st Affidavit of Chandrasekhar Kantilal Yagnik, Exhibit CKY-2.

² 1st Affidavit of Chandrasekhar Kantilal Yagnik, Exhibit CKY-1; 1st Affidavit of Thomas Phillip Joji, para 11.

³ 1st Affidavit of Chandrasekhar Kantilal Yagnik, Exhibit CKY-1.

⁴ 1st Affidavit of Chandrasekhar Kantilal Yagnik, Exhibit CKY-1; 1st Affidavit of Thomas Phillip Joji, para 12.

7 Mr Thomas Philip Joji (“Mr Joji”) who is a director, shareholder and editor-in-chief of the Defendant asserts that Ms Gupta also sent the Article to him for review and comments.⁶ After vetting, the Article was published on 21 December 2015. The Article cited “multiple sources familiar with the development” and “executive(s) who [are] directly aware of the development”. The Article also reported that:⁷

- (a) Mr Shah had denied the alleged intended acquisition in response to email inquiries from the Defendant.
- (b) The Kotak Mahindra Group also denied the statement and had stated that they were not aware of any such transaction.
- (c) SPI had declined to comment.
- (d) “Temasek” had purchased a 10% stake in Intas.

8 I pause to note that the reference to “Temasek” appears to be a reference to Temasek Holdings Private Limited, the Singapore-based investment company.

9 Following the publication of the Article, the Plaintiff’s Vice Chairman, Mr Binish Chudgar (“Mr Chudgar”) sent an email to Ms Gupta on 24 December 2015, describing the Article as “false, baseless, unjustified and lacking substantial proof” and demanding that the Defendant publish an apology.⁸

⁵ 1st Affidavit of Thomas Phillip Joji at para 13.

⁶ 1st Affidavit of Thomas Phillip Joji at para 14.

⁷ 1st Affidavit of Chandrasekhar Kantilal Yagnik, Exhibit CKY-2.

⁸ 1st Affidavit of Chandrasekhar Kantilal Yagnik, Exhibit CKY-4.

10 Emailing Mr Chudgar in reply, Mr Joji stated that the Defendant had carried out “due diligence” and published the story “only after confirmations from reliable sources”.⁹ The Defendant also updated the Article on its website by inserting the following “Editor’s Note”:¹⁰

Editor’s Note: The above story, titled, ‘Exclusive: India’s Sun Pharma in ‘early talks’ to buy rival Intas in blockbuster \$2b deal’, was based on information provided by reliable sources, and published after following all standard protocol. The DEALSTREETASIA correspondent had included Intas’ comments/denial, in the original version, and had also sought reactions from all parties, including the advisors from both sides, before publishing the story. There was no deliberate attempt from our side “to create unnecessary confusion among the various stakeholders of our company so as to destabilize its smooth/efficient functioning” – as has been suggested by the company.

This portal wants to reiterate that the story was done after all requisite due diligence, and also wishes to clarify that there was no intention to harm Intas Pharmaceuticals.

11 Subsequently, the Plaintiff’s solicitors in Ahmedabad, India, Messrs Singhi & Co, wrote to the Defendant (specifically addressing Mr Joji and Ms Gupta) on 30 December 2015, calling upon the Defendant to explain what due diligence it had carried out in relation to the Article, and to provide details of the sources it had relied on (“the Sources”). The Defendant, however, refused to furnish the information sought by the Plaintiff. The letter was sent to the address of DealStreetAsia Pte Ltd situated in Boat Quay, Singapore. Whilst the letter was addressed to Ms Gupta at the Singapore office address, the Defendant claims that Ms Gupta was at that time based in India and that the Article was in fact written and published in India.¹¹

⁹ 1st Affidavit of Chandrasekhar Kantilal Yagnik, Exhibit CKY-4.

¹⁰ 1st Affidavit of Chandrasekhar Kantilal Yagnik, Exhibit CKY-5.

¹¹ 1st Affidavit of Thomas Phillip Joji at para 24.

12 The Plaintiff subsequently instructed solicitors in Singapore, Messrs Allen & Gledhill LLP, who sent a letter to the Defendant on 10 March 2016. The letter stated that the Plaintiff intended to commence proceedings against the Defendant for malicious falsehood, and requested that the Defendant furnish certain information as set out in a schedule to the letter.

13 The information sought generally related to what the Sources had communicated to the Defendant (“the Communications”), how the Communications were made and the identity of the Sources. Having received the letter, Mr Joji wrote an email to Mr Chudgar on 18 March 2016. The tone of the email was apologetic, and Mr Joji expressed a hope that the Parties could resolve their dispute amicably. However, as before, the Defendant did not furnish the requested information.

14 On 21 July 2016, the Plaintiff filed Originating Summons 734 of 2016 (“OS 734”) in the High Court. By OS 734, the Plaintiff sought leave to serve pre-action interrogatories on the Defendant under O 26A rr 1(1) and 1(5) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) (“the Rules”); as well as an order for pre-action discovery against the Defendant under O 24 rr 6(1) and 6(5) of the Rules. Again, broadly speaking, the Plaintiff sought disclosure of the Communications and the identity of the Sources.

Decision below

15 The AR allowed the Plaintiff’s application in part and ordered the Defendant to provide pre-action discovery of certain documents sought (“the Documents”). The AR was of the view that the Plaintiff ought to be shown these documents as these would “assist the Plaintiff in pursuing their intended claim for malicious falsehood”.¹²

16 For convenience, I reproduce below the list of Documents which the Defendant was ordered to disclose:¹³

(a) All documents and correspondence evidencing the statement in the “Editor’s Note” to the Article that the Article was “based on information provided by reliable sources”, namely the following:

(i) Documents and correspondence evidencing the statement in the Article that “multiple sources familiar with the development” had told the Defendant that “Sun Pharmaceutical Industries Ltd is now sweetening its sights to acquire local rival Intas Pharmaceuticals Ltd, and is in ‘early talks’ in what could be a Rs 15,0000 (\$2.3 billion) deal”.

(ii) Documents and correspondence evidencing the statement in the Article that “one of the executives who is directly aware of the development” had told the Defendant that the Acquisition would be a “cash-cum-stock deal [that] will see Sun Pharma cough up Rs 7,500 crore in cash and issue shares for the remaining amount.

(iii) Documents and correspondence evidencing the statement in the Article that “another of the executives quoted above” had told the Defendant that “Sun Pharma has hired Kotak Mahindra while Intas Pharma has appointed a leading Mumbai-based advisory firm to lead the mandate for the proposed deal”.

(iv) Documents and correspondence evidencing the statement in the “Editor’s Note” to the Article that the Defendant had “sought reactions” from the “leading Mumbai-based advisory firm” (as identified in (iii) above) that was allegedly appointed by the Plaintiff to “lead the mandate for the proposed deal”.

17 However, the AR declined to allow any of the interrogatories sought by the Plaintiff. He also took the view that it was not sufficiently material for the Plaintiff to know the identity of the Sources to pursue its claim in malicious falsehood against the Defendant.¹⁴ As such, the AR further directed

¹² Notes of Evidence at page 2, lines 1 to 4.

¹³ Order of Court HC/ORC 7332/2016 at para 1.

¹⁴ Notes of Evidence at page 1, lines 31 to 37.

that, in disclosing the Documents, the Defendant could redact any information that may lead to identification of the Sources.¹⁵

The Parties' arguments on appeal

The Plaintiff's arguments

18 By Registrar's Appeal 362 of 2016, the Plaintiff appeals, first, against the AR's decision declining to allow it to serve interrogatories on the Defendant, and secondly, against the AR's decision allowing the Defendant to redact from the Documents, any information which may lead to identification of the Sources.

19 The Plaintiff states that it requires pre-action disclosure of the Communications and the identity of the Sources for two purposes:

(a) First, to determine whether it has a viable cause of action against *the Defendant* for malicious falsehood ("the First Purpose"); and

(b) Secondly, to identify the Defendant's sources so as to commence proceedings for malicious falsehood against *the Sources themselves* ("the Second Purpose").¹⁶

20 In applying for disclosure for the Second Purpose, the Plaintiff effectively seeks a *Norwich Pharmacal* order. Such orders are named after the English decision of *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133 ("*Norwich Pharmacal*"), and are sought by a Plaintiff who wishes to ascertain the identity of a potential defendant with a

¹⁵ Order of Court HC/ORC 7332/2016 at para 4.

¹⁶ 1st Affidavit of Chandrasekhar Kantilal Yagnik at para 9.

view to commencing proceedings against that potential defendant. This remedy is now encapsulated in both O 24 r 6(5) and O 26A r 1(5) of the Rules.

21 In respect of the First Purpose, the Plaintiff argues that it requires the information sought in OS 734 because this information is necessary for it to determine whether it has a viable claim in malicious falsehood against the Defendant. Specifically, the Plaintiff submits that it should be allowed to serve pre-action interrogatories on the Defendant because the Sources may have communicated with the Defendant orally, and pre-action discovery of the Documents will not reveal such oral communications. The Plaintiff further states that it requires disclosure of the *identity* of the Sources, because both what the Sources communicated to the Defendant, as well as the identity of the Sources, materially impact whether the Defendant can be said to have acted with malice, a key element of malicious falsehood.

22 In respect of both the First and Second Purposes, the Plaintiff argues that this Court has the jurisdiction to order pre-action interrogatories against the Defendant because there is a sufficient nexus between any intended causes of action (both against the Defendant and against the Sources) and Singapore. The Plaintiff also maintains that the Defendant is not entitled to withhold the identity of the Sources on the ground of confidentiality. This is because the Defendant's interests in maintaining the confidentiality of the Sources are outweighed by the "interests of justice" which, according to the Plaintiff, require that the Plaintiff be able to pursue its claims against the Defendant and/or the Sources.

The Defendant's arguments

23 By Registrar's Appeal 378 of 2016, the Defendant appeals against the AR's decision directing the Defendant to disclose the Documents.

Unsurprisingly, the Defendant also takes the position that the AR was correct to have allowed it to withhold the identity of its sources. Thus, the Defendant argues that it should neither be compelled to disclose the Documents, nor the identity of the Sources. This is because, according to the Defendant, both the contents of the Documents and the identity of the Sources are confidential, and the interests of justice demand that such confidentiality be preserved. The Defendant further argues that this court has no jurisdiction to order pre-action disclosure because the Plaintiff has failed to demonstrate the requisite nexus between Singapore and the alleged wrongdoings by the Defendant and/or the Sources.

Issues to be determined

24 Pre-action interrogatories and pre-action discovery are both forms of pre-action disclosure. This judgment will use the term “pre-action disclosure” to generally describe the relief sought by the Plaintiff in OS 734 and by extension, in these Registrar’s Appeals.

25 Broadly speaking, the issues to be determined may be characterised as follows:

- (a) Whether the Plaintiff is entitled to pre-action disclosure of the Communications and/or the identity of the Sources for the First Purpose; and
- (b) Whether the Plaintiff is entitled to pre-action disclosure of the Communications and/or the identity of the Sources for the Second Purpose.

Decision and analysis

Whether the Plaintiff was entitled to pre-action disclosure of the Communications and/or the identity of the Sources for the First Purpose

The law on pre-action disclosure

26 Both O 26A r 1 and of O 24 r 6 of the Rules (which govern pre-action interrogatories and pre-action discovery respectively) are largely similar in wording and, as stated by the Court of Appeal in *Dorsey James Michael v World Sport Group Pte Ltd* [2014] 2 SLR 208 (“*Dorsey*”) at [25], the principles underlying pre-action discovery and pre-action interrogatories are broadly the same.

27 The controlling requirements for both types of pre-action disclosure are that the court must be satisfied that it is necessary (see O 26A r 2 and O 24 r 7) and just (see O 26A r 1(5) and O 24 r 6(5)) to order such disclosure. *Dorsey* at [33] explains that aside from the threshold requirement of relevance, the prescribed test is that of “justness underpinned by necessity.”

The requirement of necessity

28 Jeffrey Pinsler SC comments in *Singapore Court Practice 2017*, Vol 1 (LexisNexis, 2017) at p 1189 that whilst necessity is a fundamental requirement of any application for discovery, the apparent simplicity of the word belies its deeper and more difficult meaning in the context of pre-action discovery. The comment is well-made for indeed the issue of necessity, what it relates to, and the standard by which it is assessed has been the subject of considerable judicial discussion.

29 It is established law that the applicant who seeks pre-action disclosure must provide the defendant with sufficient information to enable him to take

legal advice on the issue of necessity and justness. This will require the applicant to provide sufficient information so that the defendant will understand the nature of the complaint being made. The applicant is not permitted to take advantage of the rules merely to go on a fishing expedition (see *Kuah Kok Kim v Ernst & Young* [1996] 3 SLR(R) 485 (“*Kuah*”) at [31] and [38]). It follows that an applicant who is unable to even set out the core substance of the complaint is not entitled to ask for pre-action disclosure.

30 In *Kuah*, the substance of the complaint related to the negligent valuation of shares sold by the minority shareholders to the majority shareholders. An application was made for disclosure of the documents and working papers relied upon by the respondent in obtaining its valuation. This was to enable the minority shareholders to decide whether an action lay against the valuer for breach of contract and/or negligence. The Court of Appeal found that the minority shareholders had already adduced evidence showing a reasonable basis for their allegations (at [42]). In the Court’s view, the minority shareholders sought pre-action discovery to determine whether those documents would ground their cause of action (at [60]). Overall, since the documents were relevant to an issue likely to arise out of the claim which would probably be made in the intended proceedings, and were also necessary for disposing fairly of the cause or matter, pre-action discovery was granted (at [61]).

31 The case of *Kuah* therefore illustrates that pre-action disclosure is meant to assist a plaintiff who, whilst able to set out the core substance of the complaint, does not yet know whether he has a viable or good cause of action against a potential defendant (at [31] and [57]).

32 The Court of Appeal in *Ching Mun Fong v Standard Chartered Bank* [2012] 4 SLR 185 (“*Ching*”) clarified at [21] that whilst *Kuah* used the terms “viable” and “good” interchangeably, this did not mean that pre-action discovery could be granted to assist a plaintiff to develop and finesse his cause of action. A “good” cause of action is simply one that is possible to fashion into a claim, as opposed to a set of facts which does not give rise to any cause of action at all. Pre-action discovery is only necessary if a plaintiff lacks sufficient knowledge to fashion a claim and commence proceedings against the would-be defendant (see *Ching* at [23] and [40]). By “fashion a claim”, what is meant is that the plaintiff must be able to bring a claim that is viable. Necessity is not assessed by reference to the goal of determining whether the plaintiff has a strong case and is likely to succeed in his cause of action. Necessity is assessed by reference to whether the plaintiff knows what the intended causes of action are, and the basis on which the causes of action are said to have arisen. That basis depends of course on the cause of action relied upon.

33 I pause to note that *Dorsey* at [27] also held that pre-action disclosure could assist a claimant to ascertain who the appropriate parties to sue are, or whether he even has any cause of action against them. This of course is the “*Norwich Pharmacal*” aspect of pre-action discovery (see [20] above).

The concept of justness

34 Turning to the issue of “justness”, the Court of Appeal in *Dorsey* advocated taking a multi-factorial approach to deciding whether pre-action disclosure ought to be ordered, bearing in mind that such disclosure is “quintessentially intrusive in nature” (at [1] and [27]). Various considerations come into play. The goal of pre-action disclosure is to save time and costs as

well as to promote efficient management of court processes. Against this, there are the needs (i) to guard against fishing and roving requests in an attempt to make out a contemplated claim which is wholly speculative in nature; (ii) to take account of the reasonable expectations of non-parties in maintaining confidentiality and privacy; and (iii) to be aware of the danger that judicially administered orders for pre-action disclosure can increase the expense of resolving disputes (see *Dorsey* at [26], citing Neil Andrews, *Andrews on Civil Processes vol I Court Proceedings* (Intersentia Publishing Ltd, 2013) at p 264).

35 It follows that some factors which a court can, in appropriate cases, have regard to in deciding whether the order sought is just, include:

- (a) The seriousness of the injury and or the loss and damage behind the complaint made;
- (b) The extent to which the intended cause of action that is said to underpin the complaint is supported by material facts or to the contrary is wholly speculative in nature (see *Kuah* at [33]);
- (c) The degree of relevance of the material to the issues pertaining to the cause of action;
- (d) The scope or width of the documents or information being sought;
- (e) Whether there is credible evidence that the alleged wrongdoing has a nexus to Singapore (see *Dorsey* at [69]) (“the Singapore nexus factor”); and

(f) Whether there are relevant confidentiality (or related) obligations that the defendant relies on, and if so, whether the interests of justice lie in favour of maintaining or compromising such confidentiality obligations (see *Haywood Management Ltd v Eagle Aero Technology Pte Ltd* [2014] 4 SLR 478 (“*Haywood*”) at [56]–[57]).

Is pre-action disclosure of the Communications and/or identity of the Sources necessary for the First Purpose?

The Communications

36 I am of the view that disclosure of the Communications is necessary for the First Purpose – that is, the Plaintiff needs to fill certain gaps in its knowledge to determine whether it has a viable cause of action against the Defendant for malicious falsehood. Specifically, without disclosure of the Communications, the Plaintiff cannot determine whether there has been any malice on the Defendant’s part, which is a key aspect of a claim in malicious falsehood.

37 Gary Chan, *The Law of Torts in Singapore*, 2nd edition (“*The Law of Torts in Singapore*”) at para 14.034 citing *Challenger Technologies Pte Ltd v Dennison Transoceanic Corp* [1997] 2 SLR (R) 618 states that to prove malicious falsehood, the plaintiff must show that:

- (a) the defendant published a false statement to another person about the plaintiff, his business, property or other interests;
- (b) the defendant made the statement maliciously; and

- (c) the plaintiff suffered actual damage as the direct and natural result of the publication.

38 Malice is made out if a party publishing a falsehood was (i) actuated by an improper or ulterior motive; or (ii) if the defendant did not honestly believe that the statement was true or has acted with reckless disregard as to the truth of the statements (see *WBG Network (Singapore) Pte Ltd v Meridian Life International Pte Ltd* [2008] 4 SLR(R) 727 at [72], and *The Law of Torts in Singapore*, at para 14.042).

39 The immediate difficulty the Plaintiff has in pleading a viable cause of action is that it is unable to make an informed assessment on malice. Whilst the Plaintiff knows that the Article was published despite its denial and the absence of confirmation of the story from Kotak Mahindra Group and SPI, it does not have sufficient knowledge as to the source and content of the information provided to the Defendant in order to make a judgment on malice.

40 Whether the Defendant can be said to have acted with malice depends materially on what the Sources communicated to the Defendant, and specifically whether, based on these Communications as well as the other facts and circumstances, including the Plaintiff's denial of the alleged facts, the Defendant acted in reckless disregard as to the truth of the impugned statement. Without disclosure of such Communications, the Plaintiff does not have a reasonable basis to make an assessment as to whether the Defendant was "reckless" as to the truth, and therefore whether it can viably claim in malicious falsehood. It simply lacks the knowledge to fashion a claim against the Defendant.

41 I pause to note that O 18 r 12(1)(b) of the Rules provides that every pleading must contain the necessary particulars of the claim or defence including:

[...] where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.

42 In the present case, the Plaintiff's position is that it will only be in a position to make an assessment on malice if it has sufficient knowledge of the nature or identity of the Sources. An order for disclosure of this information may help in saving time and costs.

43 The core complaint against the Defendant is clear. The intended cause of action is malicious falsehood. After considering the submissions, in my judgment, the intended claim is not speculative. There is some evidence or material on the circumstances relating to the writing and publication of the Article. This is not a case of fishing, speculative or otherwise. Mr Joji has deposed on affidavit that, based on his experience in India, it is normal for parties in commercial deals to respond with bare denials when contacted by the press.¹⁷ I make no finding as to whether that is true, but if it is, that would simply be another reason why the Plaintiff cannot assess the viability of its claim armed only with the knowledge that Mr Shah denied the alleged intended acquisition in his email to Ms Gupta. If indeed such bare denials are commonplace, then whether the Defendant can be said to have recklessly disregarded the truth depends all the more on whether it received reliable information from sources other than the Plaintiff. That would fortify the

¹⁷ 1st Affidavit of Thomas Phillip Joji at para 16.

conclusion that it is necessary for the Plaintiff to have disclosure of the Communications.

The identity of the Sources

44 As for the identity of the Sources, I respectfully depart from the decision of the learned AR and find that pre-action disclosure of the nature of the Sources is necessary for the Plaintiff to know if it has a viable cause of action. Again, the Plaintiff requires this information in order to form a view as to whether it can viably claim that the Defendant has acted with malice in the sense of a reckless disregard of the true facts (see [38] above).

45 Counsel for the Plaintiff drew my attention to the English case of *South Suburban Co-operative Society Ltd v Orum and Croydon Advertiser Ltd* [1937] 3 All ER 133 (“*South Suburban Co-operative Society*”). That case concerned an action for libel against a newspaper and against the contributor of a letter to the newspaper. The plaintiff sought leave to serve interrogatories to question the contributor on the identity of his sources of information. The English Court of Appeal held that the plaintiff was entitled to make such inquiries. Specifically, the Court noted that when malice is in issue, then not only what was communicated to the defendant by its sources, but also the “position, standing, character and opportunities of knowledge” of such sources are relevant pieces of information (see *South Suburban Co-operative Society* at 135H–136A). I would add that such information is not only *relevant* but *material* to the issue of malice. The Court in *South Suburban Co-operative Society* endorsed an earlier decision, *White & Co v Credit Reform Association & Credit Index Ltd* [1905] 1 KB 653 (“*White & Co*”), in which Sir Richard Henn Collins MR stated at 658:

The issue being as to the condition of mind of the defendants when the libel was published, and whether they were actuated by malice, an important factor would be, not merely what inquiry they made into the truth of the statements published, but to whom such inquiry was addressed. If there is to be an investigation into the motives of the person publishing the libel, it is essential to know all the facts; and it is obvious that, if the information upon which he acted was procured from a person or persons who could not possibly know anything about the matters in question, and he nevertheless published the statements complained of as if they were based on sufficient information, that might be cogent evidence of malice. *To sever the question from whom such information was obtained from the question whether any and what information was obtained appears to me quite illogical.*

[emphasis added]

46 These comments are apposite to the present case. I accept that both *South Suburban Co-operative Society* and *White & Co* involved defamation and discovery after the commencement of proceedings, instead of pre-action disclosure. In the context of a defamation action, it is of course not necessary to plead malice in order to bring a viable claim. Malice may however be relevant in response to certain defences such as fair comment and qualified privilege. Thus in *Nirumalan K Pillay and others v A Balakrishnan and others* [1996] 2 SLR(R) 650 it was held at [10] that:

If the defendant pleads fair comment on a matter of public interest and the plaintiffs intend to defeat it on the ground that it was actuated by express malice, they are required by O 78 r 3(3) of the RSC to serve a reply giving particulars of facts and matters from which the malice may be inferred. Needless to state, plaintiffs who intend to allege express malice must be in possession of facts and matters which support malice and not concoct a case by introducing irrelevant facts which embarrass the defendant.

47 The tort of malicious falsehood is different from defamation in several important respects. For the purposes of this application, the most significant difference is the fact that the plaintiff must be able to plead malice to bring a viable claim in the former. Whilst the plaintiff in a defamation claim may

plead that the statement was falsely and maliciously published, malice is presumed from the publication of the defamatory words. It is only where the plaintiff seeks to destroy the defence of fair comment or qualified privilege by asserting express malice that particulars of facts from which the malice is to be inferred must be contained in the reply (see *Singapore Civil Procedure 2017*, Vol 1 (Foo Chee Hock gen ed) (Sweet & Maxwell, 2017) at para 18/12/26).

48 In an action for malicious falsehood, the burden is on the plaintiff to allege and prove malice. Where the defendant asserts reliance on “reliable sources”, as in the present case, the “position, standing, character and opportunities of knowledge” of those sources materially impact the question of whether a defendant has been “reckless” in publishing the information received from those sources. What information was obtained from a defendant’s sources cannot be artificially severed from who those sources are. The claim that the information disclosed by the source to the Defendant appears on its face to validate the impugned statement must be assessed in the context of the nature or identity of the source.

49 As mentioned, the gap in the Plaintiff’s knowledge at present is that it does not know whether it has a basis for pleading that the Defendant has acted with malice. In my view that gap cannot be filled by simply disclosing the contents of the Communications without also disclosing the identities of the Sources. What information the Defendant obtained, and from where and/or whom it was obtained, are both issues going to the heart of whether the Defendant recklessly disregarded the truth, and thus whether the Plaintiff may viably claim in malicious falsehood.

50 In any event, I note that the Defendant’s arguments were not focused so much on questioning the *necessity* of the information sought by the

Plaintiff. Rather, the Defendant emphasised that the identity of the Sources should be protected for reasons of confidentiality and the lack of a Singapore nexus. This leads me to the “justness” of the pre-action disclosure orders sought.

Is it just to order pre-action disclosure of the Communications and/or the Sources?

51 As mentioned at [34] above, justness is to be assessed using a multi-factorial approach. The Defendant argues that it would not be just to order pre-action disclosure of the Communications and/or the identity of the Sources based on several factors, including the lack of a Singapore nexus and the Defendant’s interests in maintaining confidentiality. I will analyse these arguments in turn.

The Singapore nexus requirement

52 Interpreting s 18(2) read with para 12 of the First Schedule of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed), the Court of Appeal in *Dorsey* at [68] held that pre-action disclosure can only be ordered in relation to intended proceedings in a Singapore court. That being so, the Court of Appeal stated that it was necessary for the applicant to adduce “credible evidence of a Singapore nexus” (at [69]). These comments were made in a context where the respondent, World Sports Group, had applied for a *Norwich Pharmacal* order compelling the appellant, James Dorsey (“Mr Dorsey”), to reveal the identity of sources he had cited in an article that was allegedly defamatory of the respondent. The respondent also alleged that certain confidential reports had been released by the sources in breach of confidence to Mr Dorsey (at [10]). It is stressed that the Court of Appeal’s comments

regarding the need for a Singapore nexus apply not only to *Norwich Pharmacal* orders, but to pre-action disclosure in general.

53 In refusing the application to order disclosure of the identity of the sources, the Court of Appeal stated at [69] that the sheer uncertainty of where the alleged wrongdoing took place was a strong factor which weighed against the ordering of pre-action interrogatories, as the courts’ powers do not extend to interrogatories in aid of proceedings beyond Singapore. The Court also found that the balance was tipped against granting the order because, *inter alia*, it had not even been suggested that the breach or disclosure had taken place or was actionable in Singapore (at [70]).

54 In reaching its decision, the Court of Appeal accepted that as far as the defamation action against Mr Dorsey was concerned, there was no issue with seeing a clear Singapore nexus. After all, Mr Dorsey resided and blogged from Singapore (at [66]). The problem was with the alleged wrongdoing by the sources in leaking the information to Mr Dorsey. The Court of Appeal found that there was no evidence at all that Mr Dorsey obtained the information in Singapore (at [67]). In short, the Court was of the view that there was nothing to suggest that the breach of confidence occurred in Singapore, or that the respondent had a potential cause of action against the sources in Singapore. However, as regards the intended defamation action against Mr Dorsey, the Court of Appeal found at [71] that the respondent already had a “complete” cause of action.

55 It bears repeating that in the present case, the cause of action the Plaintiff intends to bring in Singapore against the Defendant is malicious falsehood. In addition, it is asserted that a claim for malicious falsehood may be brought against the Sources.

56 The Parties had different views on what it means to adduce “credible evidence of a Singapore nexus”. The Plaintiff submitted that the court only needs to be satisfied that the applicant could potentially bring a cause of action in Singapore. For its part, the Defendant argued that the court needs to go beyond the threshold question of whether it has jurisdiction over the intended cause of action. Rather, on the Defendant’s interpretation of *Dorsey*, the court should consider the test set out in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 46 (“the *Spiliada* test”) and whether the various connecting factors point to Singapore as the appropriate forum.

57 I agree with the Defendant that establishing a Singapore nexus means something beyond the mere possibility that the applicant could potentially bring a cause of action in Singapore. The Court of Appeal in *Dorsey* used the language of “*likely prospects* of subsequent proceedings being held in Singapore” [emphasis added] (at [70]). That said, *Dorsey* does not bear out the Defendant’s suggestion that the court ought to consider the *Spiliada* test or whether Singapore would be the most appropriate forum. I note that in *Dorsey*, the Court felt that there was “no issue with seeing a *clear* nexus with Singapore” [emphasis added], as far as the respondent’s cause of action against Mr Dorsey was concerned (at [67]). In coming to that conclusion, the Court took what may perhaps be described as a “broad brush” approach, and simply noted that Mr Dorsey resided in, and blogged from Singapore. The Court did not, however, go into a detailed analysis of where the witnesses and evidence were located, or other connecting factors that may be relevant to a *Spiliada* enquiry.

58 A similar approach may be seen in the recent decision of *Success Elegant Trading Ltd v La Dolce Vita Fine Dining Co Ltd* [2016] 4 SLR 1392. In that case, the plaintiffs alleged that one Mdm Zhang had made fraudulent

misrepresentations that induced them to acquire shares in a food and beverage business. They discovered that large sums of money had been transferred from Mdm Zhang's bank account in Hong Kong to bank accounts in Singapore belonging to SETL, a company which the plaintiffs believed to be owned by Mdm Zhang. The plaintiffs then applied to court for pre-action discovery of banking documents relating to SETL's bank accounts. Andrew Ang SJ held that there was a sufficiently clear nexus to Singapore by virtue of the fact that, since SETL's bank accounts were in Singapore, there was a real possibility of proceedings being commenced in Singapore (at [85]). Again, Ang SJ came to this conclusion without a detailed examination of the connecting factors in that case.

59 Thus, the principle that a party applying for pre-action disclosure must establish credible evidence of a Singapore nexus *does not* require the applicant to prove that the *Spiliada* factors point to Singapore as the appropriate forum. That position is not only consistent with the authorities but also principled and sensible. Any attempt to delicately balance the various connecting factors would be premature and speculative at a stage where the plaintiff does not even yet know if he has a viable cause of action, or who his potential defendant is.

60 Counsel for the Defendant pointed me to [67]–[70] of *Dorsey*, where, as mentioned, the Court noted that there was no evidence to show that Mr Dorsey's sources had committed any wrongdoing in Singapore, or any wrongdoing that was actionable in Singapore. This led the Court to find that there was no credible evidence of a Singapore nexus in respect of any intended cause of action against the *sources*. However, unlike the Court in *Dorsey*, at this point, I am not assessing the likelihood of the Plaintiff commencing proceedings against the *Sources*. Rather, I am assessing the application for

pre-action disclosure in the context of the First Purpose – *ie*, the Plaintiff’s potential claim against the *Defendant* in Singapore for the tort of malicious falsehood.

61 It is clear, in my view, that there is sufficient evidence of a nexus between Singapore and any potential cause of action against the Defendant. The Defendant is a Singapore-incorporated company. The Defendant’s website describes the Defendant as being “founded in May 2014 in Singapore” and “[having] come to life through its main news and intelligence portal www.dealstreetasia.com in October 2014”. Additionally, Mr Joji, who “lead[s] a team of journalists and business developers across the Asian market”, is described as being “based in the Asian financial headquarters in Singapore”. It is not in dispute that the Article was made accessible in Singapore. It is unclear whether the Article was actually accessed by readers in Singapore. If it was, then the Article was certainly published in Singapore, since for materials that are made available on the Internet, publication takes place when the material is accessed by the end user (see *Dow Jones and Company Inc v Gutnick* (2002) 210 CLR 575, endorsed in *Ng Koo Kay Benedict v Zim Integrated Shipping Services Ltd* [2010] 2 SLR 860 at [26]). In this regard, I note that Mr Joji’s response to a letter from the Plaintiff’s solicitors in India, Singhi & Co, was to say that the Defendant “may consider removing the story itself from the web-site *in Singapore*” [emphasis added].¹⁸ There is also evidence that at least one investor in the Plaintiff is a Singapore-incorporated company (see [8] above), the point being that Singapore-based investors may have an interest in the pharmaceutical industry in India and Asia. Taking all of these factors into consideration, I am satisfied that the requirement of a Singapore nexus is fulfilled. In the language of the Court in *Dorsey* (at [70]),

¹⁸ 1st Affidavit of Chandrasekhar Kantilal Yagnik, Exhibit CKY-4.

there is a “likely prospect” that the intended cause of action against the Defendant for malicious falsehood will be brought in Singapore.

Confidentiality of the Sources

62 As noted by Tay Yong Kwang J (as he then was) in *Haywood* at [56], where confidentiality obligations are at stake, the court has to balance the interests of the applicant against those of the defendant. The question, therefore, is whether the Plaintiff’s interest in ascertaining the viability of its intended claim outweighs the Defendant’s interest in maintaining the confidentiality of the Sources, or vice versa.

63 Counsel for the Defendant highlighted the case of *KLW Holdings v Singapore Press Holdings Ltd* [2002] 2 SLR(R) 477 (“*KLW*”). There, Choo Han Teck JC (as he then was) suggested that, in the context of pre-action discovery applications, the courts should *prima facie* lean in favour of confidentiality (at [10]). I pause to note that there is now some doubt over this position. In *Haywood*, Tay J (as he then was) was of the view that *Odex Pte Ltd v Pacific Internet Ltd* [2008] 3 SLR(R) 18 (“*Odex*”), a decision subsequent to *KLW*, had “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” (at [54]). What is clear and uncontroversial, however, is that the guiding test is whether it is in the interests of justice to grant disclosure (see *KLW* at [11], *Odex* at [59] and *Haywood* at [55]). The question has to be approached having regard to the specific rules pertaining to the relevancy and admissibility of the evidence (see *KLW* at [11]).

64 On that front, I was of the view that *KLW* could be distinguished on its facts. There, the appellant, *KLW*, had commenced proceedings against Singapore Press Holdings for an allegedly libellous article published in a

newspaper. K LW then applied for pre-action discovery of the interview notes with the maker of the allegedly libellous statement and the working drafts of the article. Choo JC (as he then was) noted that there was “no disguise” that the discovery application had been brought with a view to ascertaining the identity of the source (at [3]). The key fact was that the intended cause of action was in libel; the “big question” was whether the article was libellous. In view of this, the journalist’s interview notes and drafts, as well as the identity of the source, were found to be irrelevant (at [12]). In contrast, the Plaintiff in the present case intends to claim in the tort of malicious falsehood. As set out earlier, what was communicated to the Defendants and the identity of its sources are both material and certainly relevant issues going to the heart of whether there was any malice on the Defendant’s part (see [44]–[49] above). The Plaintiff therefore has an interest in obtaining this information for the purpose of assessing whether it is able to plead a viable claim, as far as the question of malice is concerned.

65 There are two other factors which weigh in favour of compromising the confidentiality of the Defendant’s sources in the interests of justice. The first is that, although Mr Joji’s affidavit states generally that “news tip-offs received by our journalists are *very often* provided on the condition of anonymity and confidentiality” [emphasis added],¹⁹ the Defendant has not deposed on affidavit that the information about the alleged intended acquisition was *in fact* communicated to it in confidence. The second point I would make is that the Article does not involve the type of subject matter for which compelling public interest considerations might otherwise justify protecting the sources’ confidentiality. By way of comparison, in *Dorsey*, the

¹⁹ 1st Affidavit of Thomas Philip Joji at para 32.

allegedly defamatory publication related to the exposure of flagrant corruption. The Court noted at [75] that:

[T]here is a compelling public interest consideration ever present in Singapore to encourage whistle blowing against corruption: under s 36 of the Prevention of Corruption Act (Cap 241, 1993 Rev Ed) complaints made under the Act cannot be admitted as evidence in any civil or criminal proceedings, and no witness shall be obliged or permitted to disclose the name of the informer. Needless to say, such protection does not literally extend to *Dorsey* in this case as this matter does not involve such a complaint. Nonetheless, the provision is a salutary reminder of the enlightened legislative approach that has been taken to coax the exposure of corrupt activities.

66 This, among other factors, led the Court to conclude that the balance of interests lay in favour of not ordering the interrogatories. Not exposing the sources and maintaining their confidentiality at the pre-action stage was in keeping with the “enlightened legislative approach” that sought to encourage whistle blowing against corruption. In contrast, the subject matter of the Article in the present case was simply a commercial deal allegedly in the pipeline. Public interest considerations do not come down in favour of maintaining the Sources’ confidentiality, certainly not the way that they did in *Dorsey*.

67 I turn now to the scope of the information requested and justness. The question is whether it is sufficient to merely require the Defendant to disclose the “nature” of the Source (such as the fact that he is a manager of a financial institution said to be engaged on the project, or a reporter working for another news organisation, or an Internet website *etc*) as opposed to the actual identity of the individual(s) involved. Given the intrusive nature of the order, it is right in principle that a nuanced order may be preferable, at least where the nuanced order is practical. The Defendant in the Article and its responses has already indicated that it had relied on “multiple sources” and these appear to be

“executives with direct knowledge.” It appears that these executives are likely to be either from Intas, SPI or the Kotak Mahindra Group. That being so, the question is whether it is sufficient to require the Defendant to disclose (i) whether the executive(s) were from any of the aforementioned entities and if not, to state in general terms the nature of the organisation from which the executive came, such as professional advisers; and (ii) the seniority of the executive(s) involved, such as their managerial level (if known).

68 After considering the submissions of the Parties, I am of the view that whilst it was both just and necessary in all the circumstances to grant the pre-action disclosure sought by the Plaintiff, the pre-action interrogatories should be limited in the manner as indicated in [67] above. The Plaintiff cannot expect to have complete knowledge of all facts: what it is entitled to is disclosure of facts sufficient to give it a reasonable basis upon which to form a view on whether it can plead a viable case, as far as the question of malice is concerned.

Whether the Plaintiff was entitled to disclosure of the Communications and/or the identity of the Sources for the Second Purpose

69 The Plaintiff sought pre-action disclosure for a Second Purpose – to identify potential defendants to its claims for malicious falsehood against the Sources. As mentioned earlier, the Plaintiff effectively sought what is commonly referred to as a *Norwich Pharmacal* order in this respect.

70 After considering the submissions, I have come to the view that the Plaintiff is not entitled to an order that the identity of the Sources be disclosed for the Second Purpose. In *Dorsey*, the Court of Appeal summarised the principles governing grant of a *Norwich Pharmacal* order as encapsulated within O 26A r 1(5) of the Rules as follows:

- (a) The person possessing the information must have been involved in the wrongdoing whether the involvement was innocent or otherwise (at [39]);
- (b) The applicant must have a real interest or real grievance to pursue which must be weighed against other relevant interests such as (i) public interest in an applicant vindicating his rights; (ii) strength of the possible cause of action; (iii) proportionality and whether the information can be acquired by other means; (iv) degree of confidentiality; (v) whether it will deter further wrongdoing (at [41]–[44]).
- (c) It must be necessary, just and convenient to allow the application (at [45]).

71 These principles must be applied bearing in mind the Court of Appeal’s ruling that pre-action interrogatories can only be ordered in respect of intended proceedings in a Singapore court. As discussed earlier, one of the factors relevant to determining whether making such order would be “just” is whether there is credible evidence of a Singapore nexus (see [52] above). The pre-action disclosure now in question is sought to enable the Plaintiff to bring an action against the Sources. The gravamen of the complaint against the Sources remains malicious falsehood and not, for example, unauthorised disclosure of confidential information. The difficulty however is that there is no evidence to suggest the Sources disclosed the information in Singapore to Ms Gupta or Mr Joji. It may well be that the Sources in question were in India and that whatever information was passed to the Defendant took place in India. The question as to whether the Source is legally responsible together with the Defendant for the publication of the Article on the website in

Singapore is by no means clear. Whilst the passing of the “information” to the Defendant in India may well constitute an independent publication under the tort of malicious falsehood, the nexus between that publication and the separate publication of the Article by the Defendant in Singapore is tenuous at best. On the facts before me, I am not persuaded by the Plaintiff’s argument that it would have been reasonably foreseen by the Sources that, as a consequence of their communications to the Defendant, there would be a “malicious” publication of an allegedly false article in Singapore. Thus, unlike the Plaintiff’s potential claim against the Defendant, I find there is insufficient basis for a real possibility that the Plaintiff would bring a claim against the *Sources* in Singapore for malicious falsehood.

72 It will be recalled that in *KLW*, the High Court declined to order a newspaper to give discovery of the identity of the source in connection with a libel suit. The disclosure of the source was not relevant at the point in time when discovery was sought. Whilst *Norwich Pharmacal* was raised, it does not appear that the High Court was ultimately concerned with the issue as to whether discovery could be granted simply to enable the plaintiff identify the source so that defamation proceedings could be brought against the source. In the case before me, the Plaintiff has made clear that the identities of the Sources are being sought for two purposes: first, to enable the plaintiff to make a viable claim in malicious falsehood against the Defendant and secondly, to discover the Sources’ identity so that proceedings can also be brought in Singapore against the Sources themselves. Nevertheless, as indicated, I am not satisfied that justness supports the grant of the order for the latter purpose. As the Court of Appeal observed in *Dorsey* at [62], a balance must be maintained between the competing interests.

Conclusion

73 For the reasons above, the Defendant's appeal is dismissed and the Plaintiff's appeal is allowed in part.

74 I affirm the AR's order as to pre-action discovery of the Documents, including his decision permitting redaction of information which may lead to identification of the Sources.

75 The Plaintiff is granted leave to serve interrogatories on the Defendant to obtain information concerning the nature of its sources, to the extent set out in [67] above – *ie*,

- (a) whether the executive(s) or source(s) were from Intas Pharmaceuticals, Sun Pharmaceuticals Industries or the Kotak Mahindra Group;
- (b) the seniority of the executive(s) involved, such as their managerial level (if known); and
- (c) if the source(s) or executive(s) are not from the aforementioned organisations, the type of organisation the source(s) or executive(s) are from, and the nature or character of the source(s) or executive(s) by reference to their seniority and/or managerial level (if known).

76 Parties are to agree on the precise terms of the interrogatories according to this guidance within 14 days from the date of this judgment, failing which they have liberty to apply.

77 Costs to be taxed if not agreed.

78 In conclusion, I note that the discovery and disclosure orders made today are, of course, subject to the usual implied undertakings arising from *Riddick v Thames Board Mills Ltd* [1977] QB 881 as applied and developed in Singapore in *Relfo Ltd (in liquidation) v Bhimji Velji Jadv Varsani* [2009] 4 SLR(R) 351 and *Beckett Pte Ltd v Deutsche Bank AG* [2005] 3 SLR(R) 555. I add that nothing in this decision is to be taken as suggesting that any allegation of malicious falsehood is proven. Quite aside from the issue of malice and publication there is also the question of damage and harm taking account of s 6(1) of the Defamation Act (Cap 75, 2014 Rev Ed).

79 All that remains is for the Court to thank the counsel for their helpful submissions and arguments.

George Wei
Judge

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