IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHCR 02

Suit No 1149 of 2017 (Summons No 3742 of 2018)

Between

ABSOLUTE KINETICS CONSULTANCY PTE LTD

… Plaintiff

And

SEAH YONG WAH

… Defendant

And

SINGAPORE TELECOMMUNICATIONS LIMITED

… Non-Party

GROUNDS OF DECISION

[Civil Procedure] — [Discovery of documents]

[Civil Procedure] — [Inherent powers]

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Absolute Kinetics Consultancy Pte Ltd
v
Seah Yong Wah
(Singapore Telecommunications Ltd, non-party)

[2019] SGHCR 02

High Court — Suit No 1149 of 2017 (Summons No 3742 of 2018)
Jonathan Ng Pang Ern AR
25 September; 30 October; 14 December 2018

14 January 2019

Jonathan Ng Pang Ern AR:

1 Summons No 3742 of 2018 ("SUM 3742") in Suit No 1149 of 2017 ("S 1149") was the plaintiff's application for non-party discovery. As originally framed, it was an application pursuant to O 24 r 6(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC"). However, the order which was eventually sought by the plaintiff took a somewhat different form. This gave rise to the question as to whether SUM 3742 could be founded on O 24 r 6(2) of the ROC, or if some other basis for SUM 3742 had to be resorted to. In addition, SUM 3742 also implicated issues relating to the non-party's supposed statutory duties of confidentiality, and the need for safeguards in an order for non-party discovery.

2 SUM 3742 came before me over three hearings. The first hearing on 25 September 2018 (the "First Hearing") was adjourned as the summons had not

been served on the defendant (as required by O 24 r 6(2) of the ROC). Thereafter, I heard parties on their substantive arguments on 30 October 2018 (the "Second Hearing") and 14 December 2018 (the "Third Hearing") and granted the application. These are the grounds of my decision.

Background

The claim in S 1149

3 The plaintiff, Absolute Kinetics Consultancy Pte Ltd, is a company which deals in the sale of Singtel Easy Mobile Top Up Credits ("Credits").[1] The defendant, Seah Yong Wah, was the plaintiff's former employee.[2]

4 S 1149 was commenced by the plaintiff on 7 December 2017. The plaintiff's claim against the defendant involves three business entities: (a) a company known as Afronco Pte Ltd ("Afronco"); (b) a company known as Nirja Mini Mart Pte Ltd ("Nirja"); and (c) a sole proprietorship known as M/s Rene Rene Trading (collectively, the "Three Entities").[3] The plaintiff alleges that the defendant's *modus operandi* in respect of each of the Three Entities was similar. This can be summarised as follows:

(a) The defendant purported to submit various forms on behalf of the Three Entities.[4] These forms were purportedly signed by individuals from each of the Three Entities,[5] and were applications for the Three Entities to act as the plaintiff's retailer of Credits and for the purchase

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1 Statement of Claim at paras 1-2.

2 Statement of Claim at para 4.

3 Statement of Claim at para 6.

4 Statement of Claim at paras 7, 19 and 33.

5 Statement of Claim at paras 8, 20 and 34.

of Credits to be delivered to mobile telephone numbers which were ostensibly registered to the Three Entities.[6]

(b) In the case of Nirja, the defendant also submitted a form to request that the name of Nirja as retailer be changed to that of "NJ Minimart" ("NJM"). This form was signed by an unknown person purportedly on behalf of both Nirja and NJM.[7] In the rest of these grounds of decision, no distinction will be drawn between Nirja and NJM.

(c) In the case of Afronco and Nirja, the defendant also submitted forms to request that Credits be delivered to other mobile telephone numbers which were ostensibly registered to Afronco and Nirja, instead of to some of the mobile telephone numbers referred to in [4(a)] above. These forms were signed by unknown persons purportedly on behalf of Afronco and Nirja respectively.[8]

5 The plaintiff claims that the various signatures were forged by the defendant or on the instructions of the defendant to fraudulently get the plaintiff to appoint the Three Entities as its retailer of Credits and to sell and deliver Credits to the Three Entities.[9] Pursuant to the various forms and subsequent orders placed by the defendant (purportedly on behalf of the Three Entities), the plaintiff sold and delivered Credits to various mobile telephone numbers.[10] As it turned out, however, these mobile telephone numbers were not registered to

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6 Statement of Claim at paras 7, 19 and 33.

7 Statement of Claim at para 21.

8 Statement of Claim at paras 9 and 23.

9 Statement of Claim at paras 11, 25 and 36.

10 Statement of Claim at paras 12, 26 and 37.

the Three Entities, and the Three Entities therefore did not obtain the benefit of the Credits.[11]

6 The plaintiff's case is that the various mobile telephone numbers were registered to the defendant or to a person or entity controlled by the defendant, and subsequently sold for a profit.[12] The plaintiff's claim in S 1149 arises out of this alleged fraud, and is for Credits, totalling $870,594.94, that it had delivered to the various mobile telephone numbers, and which remain unpaid.[13]

The application in SUM 3742

7 SUM 3742 was taken out on 15 August 2018 against the non-party, Singapore Telecommunications Limited, a leading telecommunications service provider in Singapore.[14] As already noted at [1] above, SUM 3742 was, as originally framed, an application pursuant to O 24 r 6(2) of the ROC. Indeed, this much was expressly stated on the face of SUM 3742 itself. The main prayer, prayer 1, read as follows:

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11 Statement of Claim at paras 13, 27 and 38.

12 Statement of Claim at paras 14, 16, 28, 30, 39 and 41.

13 Statement of Claim at paras 15, 18, 29, 32, 40 and 43.

14 Non-party's further written submissions at para 40.

> Singtel Telecommunications Limited, by its secretary or other officer duly authorised for the purpose or as the case may be, do within 7 days from the Order to be made herein (or such other period of time as this Honourable Court deems fit) file and serve on the Plaintiff an affidavit stating whether any of the documents set out in "Schedule 1" hereto are or at any time have been in their possession, custody or power, when they parted with them and what has become of them, subject to the Plaintiff's and the Defendant's undertaking that, except with the leave of Court, any documents disclosed and produced pursuant to the affidavit shall be used only for the purposes of these proceedings …

8 In turn, Schedule 1 of SUM 3742 read as follows:

> a. All communications, application forms, minutes, memoranda or documents showing or revealing the registered names and Singapore NRIC numbers and or other forms of identification numbers, including but not limited to, the business registration numbers, if the registered owner is a business entity, of the registered owners of the following mobile telephone numbers:
>
> i. [Phone number 1 redacted]
>
> ii. [Phone number 2 redacted]
>
> iii. [Phone number 3 redacted]
>
> iv. [Phone number 4 redacted]
>
> v. [Phone number 5 redacted]
>
> vi. [Phone number 6 redacted]
>
> vii. [Phone number 7 redacted]
>
> viii. [Phone number 8 redacted]

9 In its affidavit, the non-party took issue with various matters. Among other things, the non-party claimed that prayer 1 of SUM 3742 was over-inclusive, and suggested that it would have been sufficient for the plaintiff's purposes if the plaintiff had requested an order that the non-party provide, by way of an affidavit, discovery of one document, or as many documents as is necessary, setting out in respect of each of the eight mobile telephone numbers in Schedule 1: (a) the name of the registered subscriber; and (b) the NRIC

number or other form of identification number of the said registered subscriber (if any).[15] The non-party also pointed out that Schedule 1 did not contain any specific date or period.

10 Taking these objections into account, the plaintiff was subsequently willing to accept a more limited order along the lines of the non-party's suggestion. The order which was eventually sought by the plaintiff was set out in its written submissions. After correcting a typographical error in one of the dates for S/No. 6, this was as follows:[16]

> Singtel shall provide, by way of an affidavit, discovery of one document, or as many documents as is necessary, setting out the name of the registered subscriber and the NRIC number or other form of identification number of the said subscriber (if any), in respect of each of the eight mobile telephone numbers (the "**8 Numbers**") within the specified Relevant Period of Dates set out in **Schedule 1** below:
>
> **Schedule 1**

S/No.	8 Numbers	Relevant Period of Dates
1.	[Phone number 1 redacted]	17/12/2014 – 27/12/2015
2.	[Phone number 2 redacted]	17/12/2014 – 18/02/2017
3.	[Phone number 3 redacted]	15/01/2016 – 25/02/2017
4.	[Phone number 4 redacted]	04/10/2011
5.	[Phone number 5 redacted]	26/11/2014 – 17/04/2017
6.	[Phone number 6 redacted]	03/06/2017 – 22/07/2017
7.	[Phone number 7 redacted]	03/06/2015
8.	[Phone number 8 redacted]	22/12/2015 – 24/07/2017

[15] Leong Yeok Heng's affidavit at para 24.

[16] Plaintiff's written submissions at para 5(a) and (b).

Parties' submissions

11 In its written submissions, the plaintiff submitted that the requested documents existed in the non-party's possession.[17] Further, the plaintiff claimed that the requested documents were clearly relevant and necessary as the plaintiff was looking to identify or confirm that the defendant and/or his related entities were the registered owner(s) of the eight mobile telephone numbers and the recipient of the plaintiff's supply of Credits.[18] In the alternative, if the defendant and/or his related entities were not found to be the registered owner(s) of the eight mobile telephone numbers, the plaintiff would then have the requisite information and pursue the action in S 1149 against the correctly-identified party.[19]

12 In its further written submissions, the plaintiff added that it was relevant and necessary to determine the registered owner of the eight mobile telephone numbers so that the involvement of other parties (if any) could be revealed or linked to the defendant's conduct. Where necessary, the plaintiff would also be able to consider if any other party (if any) ought to be included as a defendant or called as a witness at trial.[20]

13 On its part, the non-party submitted, in its written submissions, that the plaintiff had not shown the relevance or necessity of the information it was seeking in SUM 3742 for the following reasons:

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17 Plaintiff's written submissions at para 26.

18 Plaintiff's written submissions at para 30.

19 Plaintiff's written submissions at para 31.

20 Plaintiff's further written submissions at para 11.

(a) First, the plaintiff did not appear to have undertaken a full consideration of the relevance of the information sought by reference to the pleaded issues in S 1149.[21]

(b) Second, the plaintiff's supporting affidavit in SUM 3742 attested to the defendant's admission of personal liability for all the unpaid Credits purportedly sold to the Three Entities. This being the plaintiff's position, it was not apparent why the information which was sought would be relevant or necessary. In addition, the defendant, in his first affidavit filed in SUM 3742, had admitted that he had used some of the eight mobile telephone numbers to purchase Credits.[22]

(c) Third, the plaintiff had not explained what it intended to do with the information which was sought. In particular, the plaintiff had not indicated whether it was seeking the information to: (i) prosecute its claim against the defendant in S 1149; or (ii) identify other potential wrongdoers it intended to bring claims against. If the plaintiff intended to bring proceedings against other potential wrongdoers, the non-party would seek to highlight certain safeguards for the Court's consideration.[23]

14 The non-party also submitted that the plaintiff's interests and/or the merits of SUM 3742 had to be balanced against the non-party's statutory duties of confidentiality owed to its subscribers.[24] In its further written submissions, the non-party maintained that the plaintiff had not shown how the subscriber

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21 Non-party's written submissions at para 48.

22 Non-party's written submissions at paras 49-50.

23 Non-party's written submissions at paras 51-52.

24 Non-party's written submissions at para 53.

information would be relevant to the plaintiff's pleaded cause of action against the defendant, and that the subscriber information would not be necessary for the fair disposal of S 1149 or for saving costs. In the course of oral submissions, the non-party also suggested that the Court's inherent jurisdiction could be the basis upon which SUM 3742 could be granted.

Issues

15 In light of the above, the issues that I had to consider were:

(a) whether SUM 3742 could be founded on O 24 r 6(2) of the ROC (the "O 24 r 6(2) Issue");

(b) whether SUM 3742 could be founded on the Court's inherent powers (the "Inherent Powers Issue");

(c) if SUM 3742 could be founded on either O 24 r 6(2) of the ROC or the Court's inherent powers, whether the non-party's duties of confidentiality militated against it being granted (the "Confidentiality Issue"); and

(d) if SUM 3742 could be founded on either O 24 r 6(2) of the ROC or the Court's inherent powers, and the non-party's duties of confidentiality did not militate against it being granted, whether there should be any safeguards imposed in the granting of SUM 3742 (the "Safeguards Issue").

The O 24 r 6(2) Issue

16 The O 24 r 6(2) Issue was whether SUM 3742 could be founded on O 24 r 6(2) of the ROC. This provides as follows:

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

17 The requirements for an order under O 24 r 6(2) of the ROC are found in O 24 r 6(2) of the ROC itself as well as some other neighbouring provisions. These requirements are straightforward, and can be summarised as follows:

(a) First, the summons and a copy of the supporting affidavit must be served on: (i) the non-party personally; and (ii) every party to the proceedings (O 24 r 6(2) and (4) of the ROC).

(b) Second, the supporting affidavit must: (i) specify or describe the documents in respect of which the order is sought; (ii) show, if practicable by reference to any pleading served or intended to be served in the proceedings, that the documents are relevant to an issue arising or likely to arise out of the claim made or likely to be made in the proceedings or the identity of the likely parties to the proceedings, or both; and (iii) show that the person against whom the order is sought is likely to have or have had the documents in his possession, custody or power (O 24 r 6(3) of the ROC).

(c) Third, the necessity requirement in O 24 r 7 of the ROC must be satisfied.

18 For present purposes, there was no dispute that the service requirements in [17(a)] above were satisfied. It was also clear that the plaintiff's reply affidavit specified and described the documents in respect of which the order was sought (albeit in a slightly different form from what has been set out at [10] above)[25] (see [17(b)(i)] above). In these premises, the sub-issues that remained

for consideration related to: (a) the *relevance* of the documents sought (see [17(b)(ii)] above); (b) their *necessity* (see [17(c)] above); and (c) whether they were likely in the non-party's *possession, custody or power* (see [17(b)(iii)] above).

Relevance

19 The requirement of relevance is imposed by O 24 r 6(3)(*b*) of the ROC. This provides that an application for non-party discovery under O 24 r 6(2) of the ROC shall be supported by an affidavit which must, among other things:

> … show, if practicable by reference to any pleading served or intended to be served in the proceedings, that the documents are ***relevant*** *to an issue arising or likely to arise out of the claim made or likely to be made in the proceedings or the identity of the likely parties to the proceedings, or both …*
>
> [emphasis added in italics and bold italics]

20 The test for relevance in an application under O 24 r 6 of the ROC is the same test that is applied for other types of discovery under O 24 of the ROC (*Singapore Civil Procedure 2019* vol I (Justice Chua Lee Ming editor-in-chief; Paul Quan general editor) (Sweet & Maxwell, 2019) ("*Singapore Civil Procedure*") at para 24/6/3). Presumably, the test being referred to is the expanded test of relevance under O 24 r 5(3) of the ROC (as opposed to the test under O 24 r 1(2) of the ROC), since an order for the disclosure of documents by a non-party under O 24 r 6(2) of the ROC will not be for general discovery of documents as under O 24 r 1 of the ROC, but for discovery of particular documents as under O 24 r 5 of the ROC (*Singapore Civil Procedure* at para 24/6/5).

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[25] Yap Shia Chun's affidavit at para 8.

21 As noted at [6] above, the plaintiff's case is that the various mobile telephone numbers were registered to the defendant or to a person or entity controlled by the defendant, and subsequently sold for a profit. It seemed to me that this claim implicated in one way or another each of the eight mobile telephone numbers set out in Schedule 1 at [10] above. Further, it was clear from the Defence that this claim is disputed by the defendant.[26] Accordingly, it followed that the identities of the registered subscribers of these eight mobile telephone numbers were, to use the wording of O 24 r 6(3)(*b*) of the ROC, "relevant to an issue arising … out of the claim made".

Necessity

22 The requirement of necessity is imported by O 24 r 7 of the ROC, which provides as follows:

> **Discovery to be ordered only if necessary (O. 24, r. 7)**
>
> **7.** On the hearing of an application for an order under Rule 1, 5 or 6, the Court may, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, dismiss or, as the case may be, adjourn the application and shall in any case refuse to make such an order if and so far as it is of opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs.

23 I was of the view that discovery was plainly necessary in this case. The identities of the registered subscribers of the eight mobile telephone numbers were central to the plaintiff's case. Discovery would allow the plaintiff to make an informed decision as to whether it should proceed with its claim against the defendant, or if its recourse lay elsewhere.

24 Further, the plaintiff was only seeking the identities of the registered subscribers of the eight mobile telephone numbers within limited time periods

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[26] Defence at paras 9, 10, 17, 19, 27 and 29.

(see [10] above). At the Second Hearing, I asked counsel for the plaintiff, Ms Natasha Cheng, to take me through each of the dates referred to in Schedule 1 at [10] above, and Ms Cheng was able to point to either an invoice or form which reflected each date alongside the corresponding mobile telephone number. This suggested to me that the scope of discovery which was sought was not any wider than what was necessary. It should also be noted that counsel for the non-party, Mr Brinden Anandakumar, confirmed that he was content with the time periods provided by the plaintiff.

25 What the non-party took issue with, however, was the fact that the plaintiff's supporting affidavit in SUM 3742 attested to the defendant's admission of personal liability for all the unpaid Credits purportedly sold to the Three Entities (see [13(b)] above). In this regard, the non-party pointed to a note which was exhibited in the plaintiff's supporting affidavit in SUM 3742. This note was dated 1 March 2017 and appeared to be signed by the defendant and two witnesses. The note read:

> I Seah Yong Wai [NRIC number redacted] affirmed that I will repay Absolue Kinetics Consultancy Pte ltd
>
> Half of $1.027,854.00 by the end of March 2017. This is regarding the E load for pre-paid cards that AKC supplied to me.

26 It appeared that this note had earlier featured in the defendant's application in Summons No 925 of 2018, which was an application to set aside a default judgment that had been entered against him. The application was granted by an Assistant Registrar, who observed, in her oral grounds (which, in fairness to the non-party, the non-party was not privy to), that the defendant had asserted that the note was written under duress. In the final analysis, the defendant's supposed admission was simply part of the plaintiff's case. It was

not an undisputed position, and therefore had no bearing on the necessity or otherwise of discovery in the present case.

27 But the non-party had a second string to its bow, *ie*, the defendant's admission, in his first affidavit filed in SUM 3742, that he had used some of the eight mobile telephone numbers to purchase Credits (see [13(b)] above). This was based on para 11 of the affidavit, which read as follows:

> On behalf of Afronco Pte Ltd, I placed the orders on these numbers, through proper channels. I paid the orders using Afronco Pte Ltd's money by cash or through Afronco Pte Ltd's company account. The sales personnel, administration staff and management, were fully aware of these transactions coming from Afronco Pte Ltd. This can be from some of the whatsapp messages to various parties of AKC. They applied the company signboard of Afronco Pte Ltd from Singtel marketing and approved it.

28 To my mind, however, this submission was irrelevant to the issue of necessity. As Ms Cheng pointed out, the defendant was the plaintiff's former employee, and would have placed orders on those numbers anyway. Accordingly, this second supposed admission by the defendant spoke nothing to the plaintiff's case that the various mobile telephone numbers were registered to the defendant or to a person or entity controlled by the defendant, and subsequently sold for a profit (see [6] above).

Possession, custody or power

29 The requirement relating to the documents being in the non-party's possession, custody or power is imposed by O 24 r 6(3)(*b*) of the ROC. This provides that an application for non-party discovery under O 24 r 6(2) of the ROC shall be supported by an affidavit which must, among other things:

> … show … that the person against whom the order is sought is *likely to have or have had [the documents in respect of which the order is sought] in his* ***possession, custody or power***.
>
> [emphasis added in italics and bold italics]

30 Implicit in this requirement is the logically-anterior assumption that the documents in question *exist*. In my view, this was where SUM 3742 ran into an insuperable difficulty. Before me, Mr Anandakumar explained that if SUM 3742 were granted, what the non-party would do would be to file an affidavit exhibiting a spreadsheet containing the relevant information. Crucially, Mr Anandakumar also confirmed that, at the time SUM 3742 was taken out, this spreadsheet *did not exist*. Indeed, it did not exist even at the time of the Third Hearing. Instead, it was something that the non-party *would* put together in the event SUM 3742 were granted. Accordingly, it could not be said to be in the non-party's possession, custody or power.

31 For this reason, I was of the view that, in respect of the O 24 r 6(2) Issue, SUM 3742 could not be founded on O 24 r 6(2) of the ROC.

Form of the order which was sought

32 Before leaving the O 24 r 6(2) Issue, I should add one further observation. Even if all the requirements for an order under O 24 r 6(2) of the ROC, as set out at [17] above, were satisfied, I had some doubts over whether the form of the order which was sought fell within the ambit of O 24 r 6(2) of the ROC. This was because the provision in O 24 r 6 of the ROC which appeared to be applicable to SUM 3742 was O 24 r 6(6)(*b*) of the ROC. This provides as follows:

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

> (*b*) require the person against whom the order is made to *make an affidavit stating whether the documents specified or described in the order are, or at any time have been, in his possession, custody or power and, if not then in his possession, custody or power, when he parted with them and what has become of them.*
>
> [emphasis added]

33 It was immediately evident that the order which was sought (see [10] above) did not fall within this description. While O 24 r 6(6)(*b*) of the ROC seems, on its face, to be permissive (as evidenced by the word "may"), there is in fact no other provision in O 24 r 6 of the ROC that suggests what form an order under O 24 r 6(2) of the ROC should take.

34 I raised this particular concern to parties, and various possibilities were mooted in the course of submissions. For instance, Ms Cheng suggested that O 24 r 6(6)(*b*) of the ROC was only invoked in circumstances where the non-party confirmed that the documents were not in his possession. With respect, however, this cannot be the case because O 24 r 6(6)(*b*) of the ROC requires the non-party to state in the affidavit, among other things, *whether* the documents specified or described in the order are, or at any time have been, in his possession, custody or power. On his part, Mr Anandakumar pointed to O 24 r 6(5) of the ROC, which states as follows:

> (5) An order for the discovery of documents before the commencement of proceedings or for the discovery of documents by a person who is not a party to the proceedings may be made by the Court for the purpose of or with a view to identifying possible parties to any proceedings in such circumstances where the Court thinks it just to make such an order, and on such terms as it thinks just.

35 In particular, Mr Anandakumar emphasised that the Court could, pursuant to O 24 r 6(5) of the ROC, make an order "on such terms as it thinks just". However, it is clear that the phrase "on such terms as it thinks just" relates

to the earlier reference in O 24 r 6(5) of the ROC to "[a]n order … for the discovery of documents by a person who is not a party to the proceedings". And this, in turn, refers to the order referred to in identical terms in O 24 r 6(2) of the ROC, which has been reproduced at [16] above. The phrase "on such terms as it thinks just" allows the Court to impose additional terms when it makes such an order, but it does not answer the prior question of what form such an order should *itself* take.

36 However, given my findings at [29]–[31] above, it was not necessary for me to come to a firm view on these difficulties.

The Inherent Powers Issue

37 The Inherent Powers Issue was whether SUM 3742 could be founded on the Court's inherent powers. It is apposite to begin the analysis by highlighting two points.

38 First, while the non-party highlighted various concerns with SUM 3742, the fact that the spreadsheet which was sought did not exist was not one such concern. In fact, the provision of a spreadsheet was *suggested by the non-party* (see [9] and [30] above). As I understood it, the non-party suggested as such because it took the view that such an order would be a *less* intrusive means of disclosing information found in underlying documents that were indisputably in its possession, custody or power. Further, the plaintiff was agreeable to this proposed course of action (see [10] above). In these circumstances, it was apparent to me that justice would not be served if SUM 3742 were defeated simply because the spreadsheet which was sought did not exist.

39 Second, such an order was not unprecedented. In this regard, Mr Anandakumar drew my attention to similar orders made by the High Court in

Originating Summons No 347 of 2017 ("OS 347") and Originating Summons No 858 of 2018 ("OS 858").

40 Taken together, these two points necessitated the search for an alternative basis for SUM 3742. In the course of the Second Hearing, Mr Anandakumar suggested that the Court's inherent jurisdiction could be the basis upon which SUM 3742 could be granted (although he appeared to recoil from this position at the Third Hearing). Further, although no written grounds were issued in either OS 347 or OS 858, the preambles of the orders extracted in both cases begin as follows:

> Pursuant to Order 24 Rule 6 of the Rules of Court and/or pursuant to the *inherent jurisdiction* of the Court …
>
> [emphasis added]

41 Before proceeding further, it is perhaps appropriate to clarify that there is a difference between the Court's inherent *jurisdiction*, on the one hand, and the Court's inherent *powers*, on the other. While the two terms are often used interchangeably, there remains a distinction between them which I think is helpful to bear in mind. This distinction was explained by the High Court in *BBW v BBX and others* [2016] 5 SLR 755 (at [19]) ("*BBW*") as follows:

> As stated at [1] above, the second ground for [BBW]'s applications was based on the court's inherent jurisdiction. Before proceeding further, I should state this was somewhat of a misnomer. In *Re Nalpon Zero Geraldo Mario* [2013] 3 SLR 258 ("*Nalpon*"), the Court of Appeal clarified (at [32]) that the *jurisdiction* of a court and the *powers* of a court are "two distinct and entirely different concepts". ***The jurisdiction of a court is "its authority, however derived, to hear and determine a dispute that is brought before it", whereas the powers of a court "constitute its capacity to give effect to its determination by making or granting the orders or reliefs sought by the successful party to the dispute"*** (*Muhd Munir v Noor Hidah* [1990] 2 SLR(R) 348 at [19] cited in *Nalpon* at [31]). The Court of Appeal in *Nalpon* further exhorted (at [41]) that in the interests of conceptual clarity, ***it would be preferable to***

> ***refer to the exercise of the right to regulate matters properly before the court as the exercise of the court's inherent powers rather than its inherent jurisdiction***. Given the nature of [BBW]'s applications, it was clear to me that what [BBW] was really relying on was the court's inherent *power*.
>
> [emphasis in original in italics; emphasis added in bold italics]

42 Like in *BBW*, the relevant concept in the present case was that of the Court's inherent *powers*, and it is to this that I now turn.

The Court's inherent powers generally

43 As observed by the High Court in *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR(R) 117 ("*Wellmix*") (at [80], and albeit in the context of an earlier edition of the ROC), the Court's inherent powers find their recognition in, *inter alia*, O 92 r 4 of the ROC, which provides as follows:

> **Inherent powers of Court (O. 92, r. 4)**
>
> **4.** For the avoidance of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

44 The Court's inherent jurisdiction should only be invoked in exceptional circumstances where there is a clear need for it and the justice of the case so demands (*Roberto Building Material Pte Ltd and others v Oversea-Chinese Banking Corp Ltd and another* [2003] 2 SLR(R) 353 at [17]). Indeed, it has been said that the key criterion justifying invocation of O 92 r 4 of the ROC is that of "need" – in order that justice be done and/or that injustice or abuse of process of the Court be avoided (*Wellmix* at [81]). How the Court's inherent jurisdiction should be exercised should not be circumscribed by rigid criteria or tests (*Wee Soon Kim Anthony v Law Society of Singapore* [2001] 2 SLR(R) 821 at [27]).

45 Having regard to these general principles, it followed from what I have said at [38] above that this was a proper case for the Court's inherent powers to be exercised.

The Court's inherent powers in the context of O 24 r 6 of the ROC

46 But the analysis can be taken yet a step further. In *UMCI Ltd v Tokio Marine & Fire Insurance Co (Singapore) Pte Ltd and others* [2006] 4 SLR(R) 95 ("*UMCI*"), the High Court had occasion to consider the Court's inherent powers in the specific context of O 24 r 6 of an earlier edition of the ROC. One of the issues before the Court was whether, in respect of documents that were being ordered to be discovered or produced for inspection under O 24 r 6 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("ROC 2006"), the Court had the power under O 24 r 6 of the ROC 2006 to *further* order that the original documents be handed over to the applicant for examination. The Court held that it did have such a power. However, and relevantly for present purposes, the Court also held that even if it did not have such a power, it would be within the Court's inherent jurisdiction to make such an order.

47 In arriving at this conclusion, the Court held (at [92] and [96]) that the Court's inherent jurisdiction may be resorted to, to make orders that are reasonably necessary in order for justice to be done in a case or to prevent any abuse of the process of the Court. In particular, this extends to the power to make suitable orders and directions that are reasonably required to prepare the way for a just and proper trial of the issues between the parties and for evidence to be gathered. Such jurisdiction will be exercised having regard to all the circumstances of the case, including the nature of the order sought, whether it may result ultimately in a saving in costs, the degree of intrusiveness the non-

party may be required to endure, and the availability of the evidence through other means.

48 I was cognisant that this test was established in a slightly different context but, to the extent that it simply elaborates on the general principles set out at [43]–[44] above, I saw no reason why it could not apply to the present case. To this end, I was of the view that it was amply satisfied. The issue of necessity has already been addressed at [22]–[28] above. Further, the considerations referred to in *UMCI* also pointed towards the exercise of the Court's inherent powers. As alluded to at [38] above, the order which was sought was a less intrusive means for the non-party to disclose information found in underlying documents that were indisputably in its possession, custody or power. Such an order might have also resulted ultimately in a saving in costs, should it have turned out that the plaintiff's recourse lay elsewhere (see [23] above). And apart from the non-party, it was not immediately evident that there were other means of obtaining the same evidence.

49 For these reasons, I was satisfied that the Court's inherent powers could and should be exercised in the present case. In respect of the Inherent Powers Issue, therefore, I was of the view that SUM 3742 could be founded on the Court's inherent powers.

The Confidentiality Issue

50 As I was of the view that SUM 3742 could be founded on the Court's inherent powers, it was necessary to consider the Confidentiality Issue, *ie*, whether the non-party's duties of confidentiality militated against SUM 3742 being granted. The Confidentiality Issue arose because the non-party claimed

that it owed statutory duties of confidentiality to its subscribers (see [14] above).

51 Both parties referred to the High Court's decision in *Haywood Management Ltd v Eagle Aero Technology Pte Ltd* [2014] 4 SLR 478 ("*Haywood*"). *Haywood* was a case relating to, among other things, *pre-action* disclosure, but there is no reason why the principles enunciated therein would not be applicable in the context of non-party discovery. Two points are key. First, 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 (*Haywood* at [52]). Second, 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 (or, in the present case, in the context of non-party discovery) (*Haywood* at [53]). In this regard, confidentiality obligations do not operate as a *trump* to foreclose disclosure. Rather, they are a factor to be taken into account in what is essentially a *balancing* exercise. As explained by the Court (at [55], [56] and [57]):

> 55 … *[T]he fact that the defendant may owe confidentiality obligations to other parties* ***does not mean that the application for pre-action discovery must necessarily fail***. … [A]ny 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. …
>
> [emphasis added in italics and bold italics]

52 In the present case, there was no need for me to consider whether the information sought fell within the scope of the non-party's statutory duties of confidentiality (or even the anterior question of whether such statutory duties of confidentiality existed (*Haywood* at [61])). Even if I had taken the non-party's case at its highest, and assumed all this in its favour, the non-party had not proffered any convincing reason as to why I ought to favour confidentiality.

53 First, in suggesting that the Court should lean in favour of non-disclosure, the non-party repeated its submissions on the issue of relevance and necessity.[27] These issues have already been addressed at [19]–[28] above. I noted that these submissions also included a point about how the plaintiff had not explained what it intended to do with the information it was seeking,[28] but this, in my view, was more germane to the Safeguards Issue.

54 Second, the non-party submitted that the Court should also take into account whether there existed an alternative and more appropriate method of

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27 Non-party's written submissions at para 53.

28 Non-party's written submissions at para 53 read with paras 51-52.

obtaining the information the plaintiff was seeking from the non-party. In this regard, the non-party highlighted that the plaintiff could have, for example, served interrogatories on the defendant.[29] However, it was not clear to me that interrogatories served on the *defendant* (as opposed to the non-party) would yield the same information. As I have already noted at [48] above, it was not immediately evident that, apart from the non-party, there were other means of obtaining the same evidence.

55 In *Haywood*, the Court found (at [64]) that the appellant had failed to substantiate *how* the disclosure of the requested documents would be against the interest of justice. For the two reasons set out at [53]–[54] above, the same could be said in the present case. In the circumstances, there was no reason why confidentiality ought to be favoured. In respect of the Confidentiality Issue, therefore, I was of the view that even if: (a) the non-party's statutory duties of confidentiality existed; and (b) the information sought fell within the scope of such duties, such duties did not militate against SUM 3742 being granted.

The Safeguards Issue

56 As I had decided that SUM 3742 could be founded on the Court's inherent powers, and that the non-party's duties of confidentiality did not militate against it being granted, the final issue was the Safeguards Issue, *ie*, whether there should be any safeguards imposed in the granting of SUM 3742.

Background to the Safeguards Issue

57 The Safeguards Issue arose from the non-party's position that, if the plaintiff intended to bring proceedings against other potential wrongdoers, the non-party would seek to highlight certain safeguards for the Court's

[29] Non-party's written submissions at para 54.

consideration (see [13(c)] above). The Safeguards Issue was raised for the first time at the Second Hearing *via* written and oral submissions. At that hearing, Ms Cheng was unable to provide any firm response as to what the plaintiff intended to do with the information obtained from the spreadsheet which was sought. But she really could not be faulted for this. First, as the Safeguards Issue was raised for the first time at the Second Hearing, there was really no reason to expect Ms Cheng to have taken instructions on this. Second, as I pointed out to parties at the Second Hearing, it seemed slightly premature for the plaintiff to have taken a position on this when the spreadsheet which was sought in SUM 3742 had not even been made available yet. Accordingly, I adjourned SUM 3742 and gave directions in relation to the Safeguards Issue.

58 Pursuant to these directions, the plaintiff wrote in to Court on 13 November 2018 to set out its intended course of action should SUM 3742 be granted. The material paragraphs of its letter were as follows:

> 3. … [S]hould the Plaintiff's application be granted, the Plaintiff will in the first place write to each of the identified registered subscribers along the lines as set out in the proposed draft letter enclosed in Appendix A herewith.
>
> 4. In the event the registered subscriber responds and it is established that he, she or it did not have any involvement in the placing of the orders for the Credits and did not benefit from the Credits at all, the Plaintiff will not take any action against such a registered subscriber.
>
> 5. If on the other hand, no response is received from a particular registered subscriber, the Plaintiff will have to decide whether to take any action against that registered subscriber. The Plaintiff is however unable at this juncture to confirm whether any action will be taken at all.
>
> 6. If however the Plaintiff is aware that the registered subscriber is someone who is closely related or connected to the Defendant or an entity controlled by the Defendant, then the Plaintiff may not even write to

> that particular registered subscriber as the information would corroborate the Plaintiff's case against the Defendant.
>
> 7. We would like to respectfully highlight that the steps that the Plaintiff would take will still depend every much on the information supplied by the non-party and by the registered subscribers, if any. Accordingly, at this juncture, the Plaintiff is unable to set out all that it intends to do, should the application be allowed.

59 Appendix A of this letter (which was referred to in para 3 of the same) was a draft letter to the registered subscribers (the "Draft Letter"). The Draft Letter set out some background before proceeding to pose the following five questions:

> a. Do you know Seah Yong Wah? If so, please let us know how you came to know him.
>
> b. As you are the registered subscriber of the Mobile Number? If not, can you explain why Seah Yong Wah had placed orders for Credits to be supplied to the Mobile Number?
>
> c. Did you instruct Seah Yong Wah to place the orders for Credits?
>
> d. Did you make use of the Mobile Number during the relevant time period? If not, do you know who did?
>
> e. Did you make use of the Credits supplied to the Mobile Number? If not, do you know who did?

60 The non-party subsequently wrote in to Court on 27 November 2018. In its letter, the non-party took the position that safeguards should be imposed in the event an order was granted.

61 I subsequently fixed the matter for hearing and also gave directions for the filing of further written submissions.

Parties' submissions on the Safeguards Issue

62 As I understood it, the main crux of the plaintiff's submissions on this issue was that the non-party's concern had been catered for in the Draft Letter. Further, reference was also made to the plaintiff's obligations (or, more accurately, the plaintiff's solicitors' obligations) under r 8(4) and (5) of the Legal Profession (Professional Conduct) Rules 2015 (S 706/2015). Accordingly, it was contended that no further safeguards were required.[30]

63 On its part, the non-party submitted that judicial supervision over the first letter of demand sent to its subscribers would help assuage concerns it might have over the potential for abuse of any order granted. It was said that such judicial scrutiny would also ensure fairness to the non-party's subscribers.[31] To this end, the non-party submitted that the proposed letter of demand should set out: (a) a statement of non-determination of liability; and (b) a statement informing the recipient that he/she may seek legal advice before responding to the same and appoint solicitors to act for him/her in this regard (the "Additional Statements").[32] Further, the non-party asked that an accompanying undertaking (that the first letter sent to its registered subscribers be in the form of the proposed letter) be provided by way of affidavit.[33]

Decision on the Safeguards Issue

64 Having regard to the principles set out at [43]–[44] above, I was of the view that there existed, pursuant to the Court's inherent powers, the *power* to impose the safeguards which were sought. However, whether this power should

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30 Plaintiff's further written submissions at paras 37-39.

31 Non-party's further written submissions at para 37.

32 Non-party's further written submissions at para 49.

33 Non-party's further written submissions at para 50.

be *exercised* was a different matter and remained governed by the key criterion of "need".

65 At the Third Hearing, it became evident that the parties were broadly agreed on the Safeguards Issue. Mr Anandakumar clarified that the non-party was not objecting to the Draft Letter; it was simply asking that the Additional Statements be included. On her part, Ms Cheng indicated that the plaintiff was agreeable to including the Additional Statements in the Draft Letter (subject to the precise wording of the first Additional Statement being fine-tuned) and to providing the accompanying undertaking by way of affidavit.

66 I was content to impose safeguards in the granting of SUM 3742. Aside from the fact of parties' broad agreement, I was satisfied that such safeguards would also be necessary to guard against the potential for abuse highlighted by the non-party (see [63] above). In respect of the Safeguards Issue, therefore, I was of the view that there should be safeguards imposed in the granting of SUM 3742.

Conclusion and orders made

67 In light of my conclusions on the O 24 r 6(2) Issue (see [31] above), the Inherent Powers Issue (see [49] above) and the Confidentiality Issue (see [55] above), I granted, pursuant to the Court's inherent powers, an order in the terms set out at para [10] above, save that the reference to "Singtel" was to be replaced by the non-party's full name.

68 In light of my conclusion on the Safeguards Issue (see [66] above), this order was subject to the plaintiff's undertaking, which was to be exhibited in an affidavit, that the plaintiff's first letter to the non-party's registered subscribers as identified in accordance with this order was to be in the form of the Draft Letter, save that: (a) the Draft Letter was to include the Additional Statements in a wording parties were to agree on; and (b) two typographical errors were to be corrected.

69 As for costs, O 24 r 6(9) of the ROC provides as follows:

> (9) Unless the Court orders otherwise, where an application is made in accordance with this Rule for an order, the person against whom the order is sought shall be entitled to his costs of the application, and of complying with any order made thereon on an indemnity basis.

70 The non-party submitted that costs should be payable on an indemnity basis. A sum of $1,000 was sought in respect of the costs of compliance, and a sum of $18,000 to $20,000 (all in) in respect of the costs of SUM 3742. The plaintiff agreed that it had to pay costs. However, it submitted that costs should not be on an indemnity basis. The plaintiff was agreeable to paying $1,000 for the costs of compliance, but submitted that the costs of SUM 3742 should be fixed at $3,000 to $7,000 (all in).

71 Notwithstanding that O 24 r 6(9) of the ROC was not strictly applicable, I saw no reason to depart from the default position of costs on an indemnity basis. The non-party was an innocent party with no interest in S 1149, and this did not change just because SUM 3742 was granted pursuant to the Court's inherent powers and not O 24 r 6(2) of the ROC. As regards quantum, I took as a starting point the range of $2,000 to $6,000 stipulated for discovery applications in Appendix G of the Supreme Court Practice Directions (1 January 2013 release). However, I bore in mind that this range: (a) can be awarded for a

single hearing; (b) excludes disbursements; and (c) is presumably premised on costs on the standard basis. In the present case, SUM 3742 was substantively argued over two hearings (*ie*, the Second and Third Hearings), for which two rounds of written submissions were prepared. There was also parties' brief attendance at the First Hearing. Further, Mr Anandakumar quantified the non-party's disbursements at around $1,000, and an uplift had to be applied to take into account the fact that costs were to be on an indemnity basis. In light of these considerations, I ordered the plaintiff to pay the non-party the costs of SUM 3742, on an indemnity basis, fixed at $10,000 (all in) and the costs of complying with this order, also on an indemnity basis, fixed at $1,000.

72 Finally, I also ordered that the non-party was to comply with the order set out at [67] above within two weeks from the time: (a) the plaintiff filed its affidavit exhibiting the undertaking referred to at [68] above; and (b) the plaintiff paid the costs ordered at [71] above.

Postscript: O 24 r 6(5) of the ROC

73 Before ending off these grounds of decision, I add a final observation on O 24 r 6(5) of the ROC. For ease of reference, I reproduce this provision again:

> (5) An order for the discovery of documents before the commencement of proceedings or for the discovery of documents by a person who is not a party to the proceedings may be made by the Court for the purpose of or with a view to identifying possible parties to any proceedings in such circumstances where the Court thinks it just to make such an order, and on such terms as it thinks just.

74 Up to the Second Hearing, the only significant reference to O 24 r 6(5) of the ROC by parties was as I have set out at [34]–[35] above. In its further written submissions, and at the Third Hearing, however, the non-party contended that the SUM 3742 was based on both O 24 r 6(2) and (5) of the ROC.[34]

75 In my view, however, there was no real need to consider O 24 r 6(5) of the ROC. First, O 24 r 6(5) of the ROC is not a standalone provision. As I have alluded to at [35] above, the reference therein to "[a]n order … for the discovery of documents by a person who is not a party to the proceedings" refers to the order referred to in identical terms in O 24 r 6(2) of the ROC, which has been reproduced at [16] above. Thus, although case law establishes a test for applications under O 24 r 6(5) of the ROC, it is apparent that this test must apply *in addition to* the requirements for an order under O 24 r 6(2) of the ROC, which I have set out at [17] above. These requirements include the requirement, imposed by O 24 r 6(3)(*b*) of the ROC, relating to the documents being in the non-party's possession, custody or power. For the reasons set out at [29]–[30] above, this requirement was not satisfied. Accordingly, SUM 3742 could not have been granted pursuant to O 24 r 6(5) of the ROC in any event.

76 Second, added to the above was Ms Cheng's clarification, in no uncertain terms, that the plaintiff's main focus was to corroborate its case against the defendant. This was consistent with the plaintiff's further written submissions, which stated that the plaintiff's intention was to discover the link or relationship between the defendant and the newly-identified parties, and not to bring a new action against the same.[35] It must be recalled that SUM 3742 was

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34 Non-party's further written submissions at para 7.

35 Plaintiff's further written submissions at para 27.

the *plaintiff's* application. And as the plaintiff was not relying on O 24 r 6(5) of the ROC in any meaningful way, I saw little reason to substantively engage the point.

77 There was, however, one possible way in which O 24 r 6(5) of the ROC could have been relevant to SUM 3742, and this related to the *Riddick* principle. The *Riddick* principle derives from the decision of the English Court of Appeal in *Riddick v Thames Board Mills Ltd* [1977] 1 QB 881. As Lord Denning MR held (at 896), there is an implied undertaking that "[a] party who seeks discovery of documents gets it on condition that he will make use of them only for the purposes of that action, and no other purpose". The scope of this undertaking would be clear if SUM 3742 were granted pursuant to either O 24 r 6(2) or (5) of the ROC. However, it would be less so if SUM 3742 were granted pursuant to the Court's inherent powers.

78 It was tempting, in these circumstances, to express some sort of a view on this issue. However, I eventually declined to do so. The issue of the scope of the undertaking pursuant to the *Riddick* principle which applied in this case was not properly before me in SUM 3742. Indeed, this issue would only become live should the plaintiff choose to proceed against any of the non-party's registered subscribers identified as a result of SUM 3742 being granted. Even then, it would presumably be for these registered subscribers, and not the non-party, to take up any objection on the basis of the *Riddick* principle. Further, I did not think that the scope of the undertaking pursuant to the *Riddick* principle which applied in this case was entirely opaque just because I had granted SUM 3742 pursuant to the Court's inherent powers. This was something that could be determined by reference to my orders (and, I should add, these grounds of decision). Finally, Ms Cheng had also accepted that if SUM 3742 were granted pursuant to the Court's inherent powers, the *Riddick* principle *would* apply to

prevent the plaintiff from commencing a fresh action, unless the plaintiff first applied for a release from this undertaking. This, in my view, would go some way in addressing the issue.

Jonathan Ng Pang Ern
Assistant Registrar

Natasha Cheng Yi Hui and Lim Charmaine Jillian Phipps (Eldan Law LLP) for the plaintiff;
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