IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 64

Civil Appeal No 132 of 2019

Between

ED&F Man Capital Markets Limited

… *Appellant*

And

Straits (Singapore) Pte Ltd

… *Respondent*

In the matter of Originating Summons No 533 of 2017 (Summons No 1087 of 2019)

Between

Straits (Singapore) Pte Ltd

… *Applicant*

And

ED&F Man Capital Markets Limited

… *Respondent*

GROUNDS OF DECISION

Version No 1: 27 Oct 2020 (22:41 hrs)

[Abuse of Process] — [Collateral purpose]
[Abuse of Process] — [*Riddick* principle]
[Civil Procedure] — [Discovery] — [Pre-action discovery]
[Civil Procedure] — [Interrogatories] — [Pre-action interrogatories]

TABLE OF CONTENTS

INTRODUCTION **1**

MATERIAL FACTS **2**

DECISION BELOW **8**

SUMMONSES NOS 31 AND 46 OF 2020 ..... **11**

OUR DECISION **13**

SUI GENERIS NATURE OF PRE-ACTION DISCLOSURE 13

SCOPE AND PURPOSE OF PRE-ACTION DISCLOSURE 14

THE USE OF THE DOCUMENTS IN THE UK PROCEEDINGS WAS AN ABUSE OF PROCESS 16

No likely prospect of subsequent proceedings in Singapore *20*

THE RATIONALE AND AMBIT OF THE RIDDICK PRINCIPLE 28

INVOLUNTARY DISCLOSURE IN RELATION TO PRE-ACTION DISCLOSURE 37

THE OPEN JUSTICE EXCEPTION 42

CONCLUSION **43**

Version No 1: 27 Oct 2020 (22:41 hrs)

This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

ED&F Man Capital Markets Ltd
v
Straits (Singapore) Pte Ltd

[2020] SGCA 64

Court of Appeal — Civil Appeal No 132 of 2019 and Summonses Nos 31 and 46 of 2020
Judith Prakash JA, Steven Chong JA and Quentin Loh J
9 June 2020

6 July 2020

Steven Chong JA (delivering the grounds of decision of the court):

Introduction

1 Discovery is a critical process in any court proceeding. It fulfils the function of discovering the truth between the parties so that justice can be served. Typically, discovery is provided in aid of an action which is before the court and the issues in the action would define the scope and ambit of the discovery.

2 As an exception to this default rule, a court *may* order discovery *prior* to the commencement of court proceedings. This is achieved by way of an application for pre-action discovery. To prevent abuse, strict requirements must be satisfied before the court would exercise its discretion to grant this exceptional form of discovery, paramount of which is the mandatory requirement that the documents are intended for use in *Singapore* proceedings.

3 This appeal can be traced to an *unsuccessful* application for pre-action discovery and interrogatories by the appellant. In resisting the application, the respondent filed several affidavits to explain why the application should be dismissed. Various documents which formed part of the documents sought by the appellant were exhibited in the affidavits.

4 Despite failing in its application for pre-action discovery, the appellant nonetheless proceeded to use the disclosed documents in aid of its joinder application to add the respondent to proceedings commenced against other parties in the United Kingdom ("the UK proceedings").

5 Would the use of the disclosed documents in the UK proceedings under such circumstances constitute an abuse of the pre-action discovery regime? Is the principle articulated in *Riddick v Thames Board Mills Ltd* [1977] QB 881 ("the *Riddick* principle") engaged since there was no court order compelling the disclosure of the disclosed documents? If not, should the *Riddick* principle be extended to apply to all information and documents disclosed in the course of an application for pre-action discovery?

6 We agree with the Judge below that the appellant should be enjoined from using the disclosed documents in the UK proceedings, though our reasons differ from the Judge in some respects. At the end of the hearing, we dismissed the appeal and we now provide our detailed grounds.

Material facts

7 The appellant, ED&F Man Capital Markets Limited, is a company registered in England. It is the financial services division of ED&F Man Holdings Limited, and operates a global brokerage and financial services

Version No 1: 27 Oct 2020 (22:41 hrs)

business in a range of products which include commodities.[1] The respondent, Straits (Singapore) Pte Ltd is a company registered in Singapore and is a subsidiary company of Straits Financial Group Pte Ltd. It provides structured trade finance, physical inventory monetisation and risk management services, and finances exchange-grade commodities such as nickel and zinc products.[2]

8 In 2016, the appellant entered into repurchasing agreements with two Hong Kong companies, Come Harvest and Mega Wealth (collectively, "the Companies"). Under these agreements, the Companies sold nickel products ("the Commodities") to the appellant but retained the option of repurchasing the Commodities at a fixed price by a set date.[3] If the option was not exercised by that date, the appellant would be entitled to take possession of the Commodities. The Commodities were stored in warehouses that issued receipts for products in their custody. Possession of a duly-endorsed, original warehouse receipt entitled the holder to obtain possession of the goods identified in the receipt.[4]

9 Pursuant to the repurchasing agreements, the Companies handed what appeared to be original warehouse receipts for the Commodities to the appellant. The receipts reflected the respondent's endorsements which suggested that the respondent had sold the Commodities to the Companies, who in turn on-sold them to the appellant.[5] The appellant and the respondent did not have any direct contractual relationship or business dealings with each other.[6]

---

1 Joint Record of Appeal ("JROA") 3A 4 (Riley's 1st affidavit para 5–6).

2 JROA 3B 35 (He's 1st affidavit para 17).

3 JROA 3A 5–6 (Riley's 1st affidavit paras 10–13).

4 JROA 3A 6–7 (Riley's 1st affidavit para 16–17).

5 JROA 3A 6 (Riley's 1st affidavit para 18).

6 JROA 3B 36 (He's 1st affidavit para 22).

Version No 1: 27 Oct 2020 (22:41 hrs)

10 In January 2017, the appellant discovered that the warehouse receipts in its possession had been forged. Believing itself to be the victim of fraud, the appellant's solicitors contacted the respondent for its assistance and sought, *inter alia*, documents and records relating to the respondent's ownership of the Commodities and its relationship with the Companies.[7] The respondent's solicitors responded to state that the respondent had never handed the original warehouse receipts to the Companies, the receipts had always been in its possession, and it remained the owner of the Commodities. Furthermore, the respondent stated that it was not in a position to provide the appellant with the information and documents requested.[8] Further correspondence was exchanged, but the respondent maintained its stance and did not provide any further information.

11 On 17 May 2017, the appellant filed Originating Summons No 533 of 2017 ("OS 533") for pre-action discovery and interrogatories against the respondent pursuant to O 24 r 6 and O 26A r 1 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).[9] It raised potential causes of action against the respondent in the torts of conspiracy by unlawful means and dishonest assistance, and it also sought information from the respondent on the identities of the actual wrongdoers (*ie*, "*Norwich Pharmacal* relief", as established in *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133).[10]

---

7 JROA 3A 8 (Riley's 1st affidavit para 27).

8 JROA 3A 8 (Riley's 1st affidavit para 29), 124–125 (Letter from respondent's solicitors dated 2 March 2017).

9 JROA 2 12–25 (OS 533 of 2017).

10 JROA 3Q 70 (NEs 13 August 2018 para 68).

Version No 1: 27 Oct 2020 (22:41 hrs)

12 In the course of resisting OS 533, the respondent filed 12 affidavits deposed by its employees, solicitors and an expert witness. These affidavits and their exhibited documents ("the disclosed documents") form the core of the present dispute. The first affidavit ("He's 1st Affidavit") filed on behalf of the respondent contained the following reservation:[11]

> In this affidavit, I will begin by providing some background information on the warehouse receipts… Such information is provided to assist the Honourable Court and to demonstrate why [OS 533] should be dismissed. The disclosure is without prejudice to the [respondent's] position that the [appellant] is not entitled to any of the information and/or documents sought in [OS 533], for the reasons I will elaborate below.
>
> [emphasis in underline in original]

13 He's 1st affidavit also annexed copies of some documents sought in OS 533, specifically, the original warehouse receipts and the invoices issued by the warehouse to the respondent.[12] The affidavit also provided most of the information which the appellant had sought in its application for pre-action interrogatories, such as details of the respondent's transactions with the Companies.[13]

14 On 21 December 2017, while the hearing of OS 533 was pending, the appellant commenced an action against the Companies in the UK.[14] This was pursuant to a clause in the repurchasing agreements between the appellant and the Companies that provided for the exclusive jurisdiction of the English courts. The appellant claimed damages against the Companies for deceit and/or unjust

---

11 JROA 3B 29–30 (He's 1st affidavit para 5).

12 JROA 2 16 (OS 533, Schedule A).

13 See JROA 2 18 (OS 533, Schedule B) and 3B 35–36 (He's 1st affidavit paras 19–21).

14 JROA 3G 290 (Evans' 1st affidavit para 3).

Version No 1: 27 Oct 2020 (22:41 hrs)

enrichment.[15] The papers were served on the Companies in Hong Kong in January 2018.

15 At a hearing on 7 March 2018, the appellant's counsel informed the court of the existence of the UK proceedings.[16] Initially, the appellant confirmed through its counsel that it would file an affidavit to provide an update of the UK proceedings, but, at a later hearing, changed its position and decided not to file an affidavit.[17] In fact, at the hearing of OS 533 before the assistant registrar ("the AR"), the appellant took the position that the UK proceedings were "strictly irrelevant" to OS 533 because they involved different parties and different causes of action.[18] At the AR's directions, the appellant eventually filed a short affidavit, though that merely annexed the claim form it had filed against the Companies.[19]

16 OS 533 was dismissed by the AR on 13 August 2018. The AR found that the potential claims the appellant alleged against the respondent in conspiracy and dishonest assistance were speculative and it had not even alleged that the respondent was complicit in the fraud.[20] As for its application for *Norwich Pharmacal* relief, the appellant had already identified the main wrongdoers (*ie*, the Companies) and had commenced proceedings against them in the UK.[21] The AR also highlighted the "width and intrusiveness" of the

---

15 JCB 2 38–40 (Claim form against the Companies filed on 21 Dec 2017).

16 JROA 3H 18 (NEs 7 March 2018).

17 JROA 3P 253 (NEs 22 March 2018).

18 JROA 3Q 28 (NEs 14 June 2018).

19 JROA 3G 289–294 (Evans' 1st affidavit).

20 JROA 3Q 72 (NEs 13 August 2018 para 71).

21 JROA 3Q 73 (NEs 13 August 2018 para 74).

Version No 1: 27 Oct 2020 (22:41 hrs)

documents and information sought, and observed that the appellant had been resistant to disclosing the existence of the UK proceedings to the court. She found its conduct in this regard "somewhat troubling".[22]

17 The appellant appealed against the AR's decision. On 17 September 2018, while the appeal was pending before the Singapore courts, the appellant applied to the High Court of England and Wales to join the respondent in the UK proceedings,[23] stating that it intended to plead causes of action in deceit, unlawful means conspiracy, constructive trust and knowing receipt against the respondent.[24] In this joinder application, the appellant relied on information contained in the disclosed documents.[25] The joinder application was granted *ex parte* on 23 November 2018.[26]

18 The appellant withdrew its appeal against the AR's decision in OS 533 on 11 February 2019.[27] On 1 March 2019, the respondent applied for injunctions to restrain the appellant from (a) using the disclosed documents in the UK proceedings; and (b) continuing its suit against the respondent in the UK proceedings (*ie*, an anti-suit injunction).[28] In the UK proceedings, it applied

---

22 JROA 3Q 73–74 (NEs 13 August 2018 para 76).

23 JROA 3H 104 (Wang's 1st affidavit para 13), 178–180 (Application to amend the claim form), 187 (Whittaker's witness statement para 15); 3L 222 (Hawksworth's 3rd affidavit para 25).

24 JROA 3H 204–205 (Whittaker's witness statement para 85).

25 JROA 3L 159–161 (He's 7th affidavit paras 23 to 25).

26 JROA 3L 223 (Hawksworth's 3rd affidavit para 27).

27 JROA 3L 153 (He's 7th affidavit para 13).

28 JROA 4A 3–4 (SUM 1087).

Version No 1: 27 Oct 2020 (22:41 hrs)

to set aside the joinder order and challenged the jurisdiction of the English court.[29]

Decision below

19 The Judge enjoined the appellant from adducing or relying on the disclosed documents in any foreign proceedings but declined to grant the anti-suit injunction: *ED&F Man Capital Markets Ltd v Straits (Singapore) Pte Ltd* [2019] SGHC 203 ("GD") at [1]. The appeal before us concerns only the injunction against the use of the disclosed documents.

20 The Judge began his analysis with the provision that governs pre-action disclosure in para 12 of the First Schedule to the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA"). The statutory language of the SCJA and the Rules of Court pointed to the court being empowered to order pre-action disclosure for the purpose of Singapore proceedings (*Dorsey James Michael v World Sport Group Pte Ltd* [2014] 2 SLR 208 ("*Dorsey*") at [69]): GD at [20]. Any use outside that purpose would amount to a disregard of the statutory objective and for that reason an abuse of the court process, and an injunction had to be granted to prevent such abuse from continuing: GD at [18]. However, this did not mean that an applicant for pre-action disclosure had to commit to commence proceedings in Singapore. The statutory framework did not impose any such positive obligation, but it restricted the use of documents or information disclosed pursuant to pre-action disclosure to Singapore proceedings. This was a reasonable limitation as pre-action disclosure was an intrusive and compulsive process, and the legislature chose to temper the

---

29 JROA 3L 223 (Hawksworth's 3rd affidavit para 29).

Version No 1: 27 Oct 2020 (22:41 hrs)

compulsion used to obtain these materials with limited and restricted use: GD at [21].

21 The respondent relied in the alternative on the *Riddick* principle. The *Riddick* principle applied only to documents disclosed under compulsion of court process, and it did not apply where documents had been voluntarily disclosed or used in open court: GD at [26] and [27]. In assessing voluntariness, the respondent to a pre-action disclosure application should be treated differently. It did not merely risk default if it chose not to respond. Instead, if it failed to resist the application, there would be a serious intrusion into the privacy of a non-party. Given the intrusive nature of pre-action disclosure, the public interest in protecting the respondent's privacy and confidentiality featured more heavily: GD at [32]. The respondent's reliance on the disclosed documents in OS 533 did not amount to voluntary disclosure as the documents and information had been exhibited and deposed to resist OS 533. Much time and energy was saved by including those documents for the court to examine itself, and it would be unfortunate to restrain a party from choosing the best course of action out of a fear that they would open the door to unintended use: GD at [33]. The respondent's repeated references to "voluntary" disclosure in the hearings before the AR were in the context of demonstrating its cooperation and compliance; it did not show that the respondent was giving up the documents and information for all uses: GD at [34].

22 The Judge was of the view that even if he was wrong on the application of the *Riddick* principle, an obligation analogous to that under the *Riddick* principle could apply if, on a true construction of the rules of court under which the disclosure had been made, any rights of confidentiality or privilege in the documents and information had been reserved. He relied on the English case of *Prudential Assurance Co Ltd v Fountain Page Ltd and another* [1991] 1 WLR

Version No 1: 27 Oct 2020 (22:41 hrs)

756 ("*Prudential Assurance*"), which concerned the use of witness statements and experts' reports that had been disclosed pursuant to pre-trial proceedings but which were eventually not used at trial. Hobhouse J held that the *Riddick* principle did not apply as the documents had not been served under compulsion, but that the use of such documents could still be restricted by a duty analogous to the *Riddick* principle that was derived from the relevant rules of procedure or principles of law: GD at [37]. In the present case, the rules allowing pre-action disclosure were intended to save unnecessary costs and avoid needless claims. Just as how an applicant could not utilise such pre-action discovery to uncover further causes of action, the use of information disclosed to resist an order for pre-action disclosure should also be restricted to proceedings in Singapore: GD at [38].

23 The appellant also relied on the open justice exception to the *Riddick* principle articulated in *Foo Jong Long Dennis v Ang Yee Lim and another* [2015] 2 SLR 578, where the High Court stated that the principle ceased to apply to a document disclosed during discovery in a prior suit once it had been used in open court: GD at [39]. The present case fell within a limited exception to the open court exception to the *Riddick* principle. Considering the balance to be struck between the administration of justice and the right to privacy and confidentiality in the context of pre-action disclosure, applying the open court exception would unduly hamper the respondent's ability to resist an intrusion into its privacy and confidentiality prior to the commencement of the action: GD at [44].

24 By the present appeal, the appellant appealed against the Judge's grant of the injunction.

Version No 1: 27 Oct 2020 (22:41 hrs)

Summonses Nos 31 and 46 of 2020

25 The appellant also filed two applications to adduce further evidence for this appeal. Summons No 31 of 2020 was an application to adduce, *inter alia*, the decisions of the High Court of Justice and Court of Appeal of England and Wales ("the English courts") dismissing the respondent's jurisdictional challenge in the UK proceedings, while Summons No 46 of 2020 was an application to adduce correspondence exchanged between the parties' English solicitors on the effect of the injunction in relation to the conduct of the UK proceedings. We dismissed both applications at the hearing as the evidence sought to be admitted was not relevant to the appeal.

26 After the decision of the Judge was handed down, the respondent's jurisdictional challenge was heard in the English courts. The High Court and the Court of Appeal both dismissed the challenge and found that England was the most appropriate forum for the substantive action. Thereafter, the respondent filed its defence in the UK proceedings. Counsel for the appellant, Mr Prakash Pillai ("Mr Pillai"), submitted that these decisions established that the appellant's use of the disclosed documents in the UK proceedings could not be an abuse of process as the documents were used in the "correct" jurisdiction.[30]

27 As the decisions of the English courts were reached after the decision of the Judge below, the test to admit the further evidence was whether it had a perceptible impact on the decision being appealed such that it was in the interest of justice that it should be admitted (*Yeo Chong Lin v Tay Ang Choo Nancy and another appeal* [2011] 2 SLR 1157 at [13]). This is a lower threshold of relevance than the test in *Ladd v Marshall* [1954] 1 WLR 1489, which requires

[30] Appellant's submissions in SUM 31 at paras 31–33.

Version No 1: 27 Oct 2020 (22:41 hrs)

that the evidence would have had an important influence on the result of the case (see *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2019] 2 SLR 341 at [21]). Yet even on this lower threshold, the evidence was not relevant. The question before us concerned the scope of pre-action disclosure in Singapore. As we observe below (see [34]), the purpose of the pre-action disclosure regime is to enable the applicant to bring a substantive claim before a court in Singapore and not the "correct" court. The fact that the substantive action was now properly before the English courts is not a factor in our consideration of whether there has been an abuse of the process as regards the appellant's use of the disclosed documents under Singapore law. Having said that, the decisions of the English courts are matters of public record which this court can always take cognisance of as we have done at [44] below.

28 As for the letters exchanged between the English solicitors, Mr Pillai submitted that they revealed that the respondent intended to abuse the injunction by resisting disclosure that should properly be ordered in the UK proceedings.[31] The parties were in disagreement about the proper threshold of relevance that had to be met but in any event, we did not see how the solicitors' letters were relevant at all. It is hardly surprising for lawyers to take opposing views on the effect of the injunction but its proper scope is ultimately a matter for the courts to decide. If properly granted, the injunction would not be rendered improper or unjust merely because there was a potential for abuse. The parties would have to take this matter up, should it arise, before the English courts and it would not be our place to intervene.

---

[31] Appellant's submissions in SUM 46 paras 22–24.

Version No 1: 27 Oct 2020 (22:41 hrs)

Our decision

29 We turn now to the reasons we dismissed the appeal. The issue before us was a narrow one: should the appellant be permitted to use documents in the UK proceedings that had been disclosed by the respondent in the Singapore proceedings, where the disclosure was not pursuant to a court order but to resist an application for an order? This question had to be considered in the context of pre-action disclosure.

Sui generis nature of pre-action disclosure

30 Pre-action disclosure, which encompasses both pre-action discovery and interrogatories, is unique by its very nature. First, unlike other interlocutory applications, an application for pre-action disclosure does not require a pleaded cause of action. When proceedings have commenced, the court is in a better position to determine the relevance of an application for discovery by reference to the issues raised in the pleadings (see *Dorsey* ([20] *supra*) at [49]), but it does not have a similar reference point in an application for pre-action disclosure. There is, however, a requirement to provide some provisional views of the cause of action which is being contemplated. The Rules of Court stipulate that, if practicable, the applicant should refer to pleadings served or intended to be served in the claim to show how the documents or information sought will be relevant (see O 24 r 6(3)(*b*) and O 26A r 1(3)(*b*)). The clearer the cause of action that an applicant is able to put before the court, the easier it will be for the court to ascertain the relevance and necessity of pre-action disclosure (*Dorsey* at [47]).

31 Second, the entire purpose of a pre-action disclosure application is to discover documents and information in order to determine whether there is a viable cause of action against the respondent or to identify the appropriate

Version No 1: 27 Oct 2020 (22:41 hrs)

parties to sue (*Dorsey* at [27] and *Kuah Kok Kim and others v Ernst & Young* [1996] 3 SLR(R) 485 at [31]). An application for pre-action disclosure is unique in the sense that it starts and ends with only one object, *ie*, the determination of the sole issue of whether the documents should be disclosed prior to commencement of the action.

Scope and purpose of pre-action disclosure

32 The court's power to order pre-action discovery and interrogatories is contained in para 12 of the First Schedule to the SCJA:

> **Discovery and interrogatories**
>
> 12. Power before or after any proceedings are commenced to order discovery of facts or documents by any party to the proceedings or by any other person in such manner as may be prescribed by Rules of Court or Family Justice Rules.

33 Pre-action discovery is governed by O 24 r 6 of the Rules of Court while pre-action interrogatories are governed by O 26A of the same. The provisions are worded in a similar manner and are governed by the same principles (*Dorsey* at [25]). The underlying objective of pre-action disclosure is to save judicial costs and time and efficiently manage court processes (*Dorsey* at [26]). To obtain a pre-action disclosure order, the applicant must demonstrate that the information sought is both *relevant* and *necessary* (*Dorsey* at [28] and [47]).

34 In *Dorsey*, this court highlighted an important limitation on pre-action interrogatories: it could only be ordered in relation to intended proceedings before a Singapore court (at [68]). It was not disputed that the same principle would apply to pre-action discovery (see *Dorsey* at [25]). Order 26A r 1(3) and O 24 r 6(3)(*a*) of the Rules of Court require the applicant to show that the person against whom the order is sought "is likely to be party to subsequent proceedings in Court". In the present case, the Judge reasoned that, by reference

Version No 1: 27 Oct 2020 (22:41 hrs)

to s 2 of the Interpretation Act (Cap 1, 2002 Rev Ed), this referred to proceedings in a court of competent jurisdiction *in Singapore*: GD at [20]. That must be correct because it would be unsustainable for the court to consider the viability of a claim that may be pursued in foreign jurisdictions. The court's powers do not extend to pre-action disclosure in aid of proceedings beyond Singapore, and the applicant has to show some credible evidence of a Singapore nexus to the alleged third party wrongdoings to obtain an order for pre-action disclosure (*Dorsey* at [69]). Where there is *no likely prospect* of subsequent proceedings being commenced in Singapore, the court will not order pre-action disclosure (*Dorsey* at [70]).

35 Under the statutory regime, all documents and information disclosed in the course of any pre-action disclosure can only be used in furtherance of commencing proceedings in a Singapore court. As the Judge highlighted, pre-action disclosure is an intrusive and compulsive process: GD at [21]. For that reason, the court will not permit the procedure to be employed for any collateral purpose that suggest the commencement of proceedings in Singapore is not the key consideration that underpins the relevant application (*Dorsey* at [47]).

36 We agree with the Judge that in spite of this territorial limitation on the scope of pre-action disclosure, it does not follow that an applicant for pre-action disclosure *must* commit to commence the action in Singapore and there is no such positive obligation in the statutory language: see GD at [21]. As such, an applicant for pre-action disclosure must establish credible evidence of a Singapore nexus but does not have to prove that Singapore is the most appropriate forum in which to commence a substantive action (*Intas Pharmaceuticals Ltd v DealStreetAsia Pte Ltd* [2017] 4 SLR 684 at [59]). We accepted the appellant's argument that there will inevitably be circumstances

Version No 1: 27 Oct 2020 (22:41 hrs)

where, post-disclosure, another forum might emerge as a more appropriate one.[32] An applicant for pre-action disclosure is free to commence proceedings in any other appropriate jurisdiction but if he elects to do so, he would not be permitted to use the documents and information he obtained in the course of the pre-action disclosure application. If the applicant decides to use the documents and information, he can only do so for the purposes of substantive proceedings in Singapore.

The use of the documents in the UK proceedings was an abuse of process

37 As we recently observed in *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [98], citing our earlier decision in *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd and others* [2018] 2 SLR 159 ("*JTrust*") at [99], the concept of abuse of process pervades the whole law of civil procedure. It informs the exercise of the court's procedural powers (*Lim Geok Lin Andy v Yap Jin Meng Bryan and another appeal* [2017] 2 SLR 760 at [39]) and is a control mechanism "essentially targeted at addressing abusive conduct" (*Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 ("*Vinmar*") at [129]).

38 As this court observed in *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others* [1997] 3 SLR(R) 649 at [22], the categories of conduct that may constitute an abuse of process are not closed:

> The term, "abuse of the process of the Court", in O 18 r 19(1)(*d*), has been given a wide interpretation by the courts. It includes considerations of public policy and the interests of justice. This term signifies that the process of the court must be used *bona fide* and properly and must not be abused. The court will

[32] Appellant's case para 5.2.8.

Version No 1: 27 Oct 2020 (22:41 hrs)

> prevent the improper use of its machinery. It will prevent the judicial process from being used as a means of vexation and oppression in the process of litigation. *The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed and will depend on all the relevant circumstances of the case.* A type of conduct which has been judicially acknowledged as an abuse of process is the bringing of an action for a collateral purpose …
>
> [emphasis added]

39 A party who commences proceedings for the predominant purpose of achieving something other than what the legal process was designed to achieve (*ie,* a collateral purpose) is someone who has abused the process of the court (*Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [2018] 2 SLR 866 at [136]). A collateral purpose might be the use of the court as a platform to broadcast the plaintiff's vilification of the defendants (see *Lonrho plc v Fayed (No 5)* [1993] 1 WLR 1489) or, in the context of an application for Mareva relief, to oppress the defendant's financial interests (*JTrust* at [101]).

40 In this appeal, the question we considered was whether the use of the disclosed documents in the UK proceedings amounted to a collateral purpose. Mr Pillai argued that the purpose of pre-action disclosure was to enable the applicant to commence substantive proceedings, and the commencement of proceedings in the UK therefore cannot be said to be an ulterior or alien purpose.[33] We rejected this argument. As explained earlier (see [34] above), the sole purpose of pre-action disclosure is to facilitate the commencement of proceedings in *Singapore*. An application for documents or information to commence proceedings in a foreign jurisdiction would have been dismissed without hesitation based on the statutory language and this court's decision in

---

[33] Appellant's case para 5.3.4.

Version No 1: 27 Oct 2020 (22:41 hrs)

Dorsey (*supra* [20]). It would be an abuse of the pre-action disclosure regime and contrary to its purpose if an application was commenced to obtain documents in aid of foreign proceedings.

41 Mr Pillai submitted that the jurisdictional limitation in the SCJA did not apply to the present situation because para 12 referred to the court's power to *order* discovery and no such order was made in OS 533.[34] He then argued that *Dorsey* did not apply because *Dorsey* also referred to the court's power to *order* pre-action interrogatories. In our view, this argument misses the point. By applying for pre-action disclosure, the appellant had in fact sought to persuade the court to exercise its power to make such an order. The fact that the order was not eventually made cannot render the jurisdictional limitation meaningless. The implication of the appellant's argument would be that if the appellant had been successful in its application for pre-action disclosure, it would not have been permitted to use the disclosed documents in the UK proceedings. It would be incongruous if the appellant, despite being unsuccessful in its application, could then somehow be permitted to use the documents in the UK proceedings. As astutely submitted by the respondent,[35] the appellant would then be better off by the dismissal of OS 533. This would be patently anomalous.

42 Counsel for the respondent, Mr Toh Kian Sing *SC* ("Mr Toh"), submitted that the act of commencing an application for pre-action disclosure amounted to a representation or an undertaking to the court that the applicant

---

34 Appellant's case para 4.2.2.

35 Respondent's case para 66(e).

Version No 1: 27 Oct 2020 (22:41 hrs)

would only commence proceedings in Singapore, if at all.[36] We did not think an application for pre-action disclosure should be construed in this manner. There is a measure of artificiality in imputing a specific intention to an applicant for pre-action disclosure when in reality, it is part and parcel of the obligation imposed on all parties to legal proceedings not to abuse the court's processes. It is sufficient to recognise that the sole purpose of pre-action disclosure is to obtain information to commence proceedings in Singapore, and the use of the information elsewhere, including the UK proceedings, would be for a collateral purpose and therefore an abuse of process.

43 Although this holding would be sufficient to dispose of the appeal, we also found on the facts of this case that there was an additional basis to ground our finding of abuse of process, *ie*, that the appellant did not have any genuine intention to commence proceedings against the respondent in Singapore when it filed OS 533.

44 We recognise that the English courts appeared to have accepted that the appellant did hold a provisional intention to commence proceedings against the respondent in Singapore *prior to August 2018*, when the appellant applied to join the respondent in the UK proceedings (see *ED&F Man Capital Markets Limited v Come Harvest Holdings Limited and others* [2019] EWHC 1661 (Comm) at [45]–[47] and *ED&F Man Capital Markets Ltd v Straits (Singapore) Pte Limited* [2019] EWCA Civ 2073 at [18]–[19]). However, that observation was made in the context of the *appellant's* submission that while it had held that provisional intention, it was entitled to change its mind and pursue the claim against the respondent in the UK proceedings instead. This submission was in

---

[36] Respondent's case para 23.

Version No 1: 27 Oct 2020 (22:41 hrs)

aid of its case that England was the most appropriate forum notwithstanding its initial intention to commence proceedings against the respondent in Singapore. In other words, the observation by the English courts was not made in the context of any argument by the *respondent* that the appellant never held such an intention in the first place or that there was no likely prospect of the appellant commencing the action against the respondent in Singapore when OS 533 was filed. That argument was simply not before the English courts. Instead, the focus of the parties' submissions before the English courts was whether the appellant was entitled to *change* its minds as regards the forum to sue the respondent.

45 Unlike the UK proceedings, the issue as to whether the appellant had held a genuine intention to commence proceedings against the respondent in Singapore when OS 533 was filed is directly relevant to this court as any application for pre-action disclosure can only proceed on the premise of contemplated proceedings in Singapore. Hence, it was imperative for this court to undertake a detailed analysis of the evidence with reference to the contemplated causes of action against the respondent. For the reasons set out below, we arrived at a different view from the English courts.

No likely prospect of subsequent proceedings in Singapore

46 The appellant claimed that it had originally held the intention to commence proceedings in Singapore and then changed its mind when the Companies became contactable.[37] We did not think this was borne out by the facts before us. Instead, it appeared that at the time of filing OS 533, the appellant did not genuinely contemplate commencing an action against the respondent in Singapore even if the application had been successful. Had the

[37] JROA 3L 228–229 (Hawksworth's 3rd affidavit para 43).

Version No 1: 27 Oct 2020 (22:41 hrs)

appellant genuinely contemplated proceedings in Singapore, it would first have to consider the viability of any claim against the respondent in Singapore based on the information that was available to it at the time.

47 As we stated above (at [30]), in an application for pre-action disclosure, the applicant is required to indicate what potential causes of action it may pursue against the respondent. What were the possible actions which the appellant contemplated when it filed OS 533? The appellant had no claim in contract because the parties did not have any contractual relationship with each other. The only conceivable causes of action would have been in tort. Before the AR, the appellant raised the torts of conspiracy and dishonest assistance and at one hearing it may have raised a potential cause of action in knowing receipt.[38] At the hearing before us, Mr Pillai also raised the tort of deceit or misrepresentation. However, the new alleged claims in deceit and misrepresentation would appear to be plainly unsustainable as the parties did not have any interaction prior to January 2017. Mr Pillai conceded that there could not have been a viable claim in deceit or misrepresentation as there were no direct dealings between the parties.

48 The Companies were the middlemen in the transactions involving the Commodities and the appellant had always acknowledged that any contemplated action would involve the Companies. The discovery and interrogatories it sought in OS 533 largely concerned the relationship between the respondent and the Companies, such as transfer documents and

---

[38] JROA 3Q 70–71 (NEs 13 August 2018 para 69); 4B 21–22 (Appellant's submissions in OS 533 para 58); 4B 83 (Respondent's submissions in OS 533 para 110); 3H 20 (NEs 7 March 2018).

Version No 1: 27 Oct 2020 (22:41 hrs)

correspondence.[39] In its affidavits filed in support of OS 533, the appellant stated that pre-action disclosure was necessary to identify if the *Companies* were involved or complicit in a potential fraud.[40] As the AR noted, the appellant did not even allege that the respondent had been complicit in the fraud or had been dishonest.[41] In fact, in a later affidavit filed to explain its conduct of the UK proceedings, the appellant took the position that it "has always been of the view that [the Companies] may have been involved in the forgery of warehouse receipts and/or the potential fraud" and it filed OS 533 to answer questions about *how* the forgery or fraud had been perpetrated and whether third parties were involved.[42]

49 The appellant had never expressly indicated that it intended to bring an action solely against the respondent in Singapore. This is only logical since any contemplated tortious claim against the respondent in Singapore should include the main protagonists, the Companies. While there is no rule that every alleged conspirator must be sued for an action in conspiracy to succeed, if the party omitted from the suit is a protagonist, the plaintiff may find it difficult to prove its case as a matter of evidence (*JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd and others* [2020] SGCA 54 at [88]). It was not disputed that the Companies would be the main wrongdoers in any action for fraud or conspiracy,[43] and so the exclusion of the Companies from an action against the respondent would be fatal to any claim in conspiracy. Indeed, this was

---

39 JROA 2 15 (OS 533 Schedule A).

40 JROA 3A 11 (Riley's 1st affidavit para 42) 154 (Riley's 2nd affidavit para 42).

41 JROA 3Q 73 (NEs 13 August 2018 para 71).

42 JROA 3E 43–44 (Hawksworth's 1st affidavit paras 13–14)

43 JROA 3Q 28 (NEs 14 June 2018); 38 (NEs 13 August 2018).

Version No 1: 27 Oct 2020 (22:41 hrs)

corroborated by the appellant's commencement of the UK proceedings against the Companies.

50 As for knowing receipt, while we accepted that such a claim could be brought against the respondent alone without the Companies (see *Relfo Ltd (in liquidation) v Bhimji Velji Jadva Varsani* [2008] 4 SLR(R) 657 ("*Relfo Ltd*") at [51]), there was simply no factual assertion or evidential substratum to support any such claim before us.

51 First, the appellant's submissions before the AR were focused on the torts of conspiracy and dishonest assistance, and knowing receipt was only raised in passing at a previous hearing.[44] Second, in order to establish a claim in knowing receipt the appellant would have had to establish the following elements (*Relfo Ltd* at [21]):

(a) that the appellant's assets had been disposed of in breach of trust and/or fiduciary duty;

(b) that the respondent had beneficially received assets which were traceable as representing the assets of the appellant that had been wrongfully disposed of; and

(c) that the respondent had knowledge that the assets that it had received were traceable to a breach of trust or fiduciary duty such that it would make it unconscionable for the respondent to retain the benefit of the assets.

---

44 JROA 3Q 70–71 (NEs 13 August 2018 para 69); 4B 21–22 (Appellant's submissions in OS 533 para 58); 4B 83 (Respondent's submissions in OS 533 para 110); 3H 20 (NEs 7 March 2018).

Version No 1: 27 Oct 2020 (22:41 hrs)

52 It is thus crucial that there must be some material to the effect that the respondent had received assets which are traceable to the assets of the appellant. However, there was no such assertion raised by the appellant against the respondent. In short, there was simply no material before us to support a claim in knowing receipt, *ie*, it was a non-starter. Perhaps this might explain why the claim in knowing receipt was raised only in passing.

53 In our view, the appellant did not and could not have contemplated commencing proceedings in Singapore solely against the respondent. This is because any claim against the respondent would necessarily include the Companies and a claim against them in Singapore would be confronted by the exclusive jurisdiction clauses in the contracts governing the repurchasing agreements:[45]

> **15. Governing Law, Jurisdiction and Arbitration**
>
> (a) Except for any dispute relating to Exchange Contract and as provided in clause 15(d) below, this Agreement and any disputes or claims arising out of or in connection with its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with the law of England and Wales.
>
> (b) Subject to other provisions in this clause 15, [the appellant and the Companies] irrevocably agree that the courts of England have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with this Agreement, its subject matter or formation (including non-contractual disputes or claims).

54 In *Vinmar* ([37] *supra*), this court held that where there is an exclusive jurisdiction clause in a contract, the court would lean in favour of granting a

---

45 JROA 3A 33–34 (Commodities Sale and Purchase Master Agreement between the appellant and Come Harvest dated 29 April 2016); 47–48 (Commodities Sale and Purchase Master Agreement between the appellant and Mega Wealth dated 13 June 2016).

Version No 1: 27 Oct 2020 (22:41 hrs)

stay of proceedings so as to give effect to the parties' agreement to bring all disputes within the scope of that agreement to the agreed forum (at [114]). A stay would only be refused if the party resisting the stay could demonstrate strong cause (at [112]). It is not disputed that any claims the appellant might have against the Companies are governed by the exclusive jurisdiction clauses. Had the appellant brought claims against the respondent and the Companies in Singapore, in all likelihood, the Companies would have been able to obtain a stay.

55 Since there was no realistic prospect of the appellant commencing action solely against the respondent in Singapore, the inference is that OS 533 was filed to obtain documents and information in aid of the UK proceedings. This inference is substantiated by the following sequence of events.

56 OS 533 was filed on 17 May 2017. The appellant claimed that at that time, it held the provisional intention to commence suit against the respondent in Singapore because the Companies were not contactable. This is plainly untenable.

57 While OS 533 was pending hearing before the AR (it was eventually heard on 14 May 2018 and 14 June 2018, and decided on 13 August 2018),[46] the appellant commenced the UK proceedings against the Companies. The commencement of the UK proceedings, on 21 December 2017, is very significant because by that date at the very least, the appellant must have recognised that the primary defendants were the Companies and decided to pursue them. Significantly, the appellant reached that decision without the

---

46 JROA 3Q 44 (NEs 13 August 2018 para 2).

Version No 1: 27 Oct 2020 (22:41 hrs)

benefit of any pre-action disclosure order since OS 533 was still pending. By commencing the UK proceedings, the appellant had effectively ruled out any realistic prospect of suing the respondent in Singapore. Yet when the application was heard before the AR, the appellant held the view that there was no necessity to disclose the UK proceedings to the court. The AR found the omission "troubling"[47] while the Judge observed that such omission "came close to crossing the line on sharp practice": GD at [60]. In our view, the line was crossed. The non-disclosure of the UK proceedings was both deliberate and material.

58 It was material because the nature of pre-action disclosure is sensitive to the identity of the forum where the action is to be brought (see [40] above). The existence of the UK proceedings was clearly material and relevant in the exercise of the court's discretion, in so far as it could demonstrate that the appellant had no genuine intention to commence an action in Singapore, and that OS 533 was thus brought for the collateral purpose of obtaining documents in support of foreign proceedings. For the reasons stated above, had the court's attention been drawn to this fact, it would have concluded that no action against the respondent in Singapore could have been contemplated by the appellant and that would have been another ground on which to dismiss the application.

59 In proceeding with OS 533, the appellant had implicitly represented to the court that it still intended to commence proceedings against the respondent in Singapore despite knowing that this was not the case or at the very least no longer the case. It informed the AR that the UK proceedings only involved the Companies and not the respondent, highlighted that the causes of action did not

---

47 JROA 3Q 73 (NEs 13 August 2018 para 76).

Version No 1: 27 Oct 2020 (22:41 hrs)

involve conspiracy, and stated that it might not be able to obtain discovery against the respondent in the UK.[48] By painting the UK proceedings as separate and unrelated to OS 533, it represented that it would pursue an action against the respondent in Singapore only.

60 OS 533 was fixed for three separate days of hearing in part because the appellant's initial refusal to elaborate on the UK proceedings in an affidavit led to an adjournment.[49] By the third and final hearing on 13 August 2018 when the AR gave her decision, the Companies had already filed their defence in the UK proceedings. That should have alerted the appellant to the fact that the action would be fought in the UK and it should have disclosed this information to the AR. Instead, the AR was under the impression that the Companies had yet to file their defence despite numerous extensions of time.[50]

61 It was fallacious for the appellant to claim that no representation was made when it commenced OS 533 because a pre-action disclosure application could have revealed another forum which was more appropriate for the action.[51] The appellant knew well before OS 533 was filed that its claim against the Companies was subject to the exclusive jurisdiction clauses. The contracts were in its possession and had been annexed to its affidavits in support of OS 533.[52] Besides, the appellant did not demonstrate how the disclosed documents aided the appellant to decide that the claim against the respondent should be brought in the UK instead of Singapore. This assertion, in our view, was a contrived

---

48 JROA 3Q 28 (NEs 14 June 2018); 3Q 39 (NEs 13 August 2018).

49 JROA 3P 258 (NEs 18 May 2018); 3Q 51–52 (NEs 13 August 2018 para 21).

50 JROA 3Q 52 (NEs 13 August 2018 para 21(e)); 73 (NEs 13 August 2018 para 75).

51 See Appellant's case para 5.2.6.

52 JROA 3A 5 (Riley's 1st affidavit para 12).

Version No 1: 27 Oct 2020 (22:41 hrs)

afterthought in an attempt to justify the improper use of the disclosed documents.

62 In light of the above, it appeared to us that, from the outset of the pre-action disclosure application, the appellant did not genuinely contemplate proceeding against the respondent in Singapore. We add that this finding is consistent with the AR's finding that the appellant's claims against the respondent in conspiracy and dishonest assistance were "speculative" (see [16] above). It would have been apparent to the appellant that any action would have to include the Companies and would thus have to be commenced before the English courts. Not only did it fail to disclose this information in court, it implicitly represented to the court that it would not commence proceedings against the respondent in the UK so that it could continue with its pre-action disclosure application.

63 The application for pre-action disclosure was an attempt to obtain documents and information to assist the appellant in the UK proceedings. That is not the purpose of the pre-action disclosure regime and the use of the disclosed documents in the UK proceedings therefore amounted to an abuse of process and could not be permitted to continue.

The rationale and ambit of the Riddick principle

64 Given our decision that the injunction should be maintained on grounds of abuse of process, it is not strictly necessary to address the respondent's alternative argument that use of the documents should also be enjoined under the *Riddick* principle, but we address it for completeness.

65 The Judge accepted the argument that the *Riddick* principle applied to the disclosed documents because in the context of pre-action disclosure, they

Version No 1: 27 Oct 2020 (22:41 hrs)

could not be said to have been voluntarily disclosed: GD at [33] to [35]. With respect, we disagree with the Judge that the *Riddick* principle can apply to the disclosed documents in the absence of an order compelling discovery.

66 The *Riddick* principle states that a party who discloses a document in discovery in an action under compulsion is entitled to the protection of the court against any use of the document otherwise than in that action (*Hong Lam Marine Pte Ltd and another v Koh Chye Heng* [1998] 3 SLR(R) 526 ("*Hong Lam Marine*") at [14]; *Beckkett Pte Ltd v Deutsche Bank AG* [2005] 3 SLR(R) 555 at [14]). The principle derives its name from the decision of the English Court of Appeal in *Riddick v Thames Board Mills Ltd* [1974] 1 QB 881 ("*Riddick*"). In articulating the rationale for the principle, Lord Denning MR observed that the court was balancing the public interest in discovering the truth and maintaining the disclosing party's privacy and confidentiality (at 895–896):

> The reason for compelling discovery of documents in this way lies in the public interest in discovering the truth so that justice may be done between the parties. …. The balance comes down in the ordinary way in favour of the public interest of discovering the truth, i.e., in making full disclosure. …
>
> I proceed to hold the balance in the present case. On the one hand discovery has been had in the first action. It enabled that action to be disposed of. The public interest there has served its purpose. Should it go further so as to enable the memorandum of April 16, 1969, to be used for this libel action? I think not. The memorandum was obtained by compulsion. Compulsion is an invasion of a private right to keep one's documents to oneself. The public interest in privacy and confidence demands that this compulsion should not be pressed further than the course of justice requires. The courts should, therefore, not allow the other party — or anyone else — to use the documents for any ulterior or alien purpose. Otherwise the courts themselves would be doing injustice.

67 As Hobhouse J elaborated in *Prudential Assurance* ([22] *supra*) at 765:

> The rational basis for the rule is that where one party compels another, either by the enforcement of a rule of court or a specific

Version No 1: 27 Oct 2020 (22:41 hrs)

> order of the court, to disclose documents or information whether that other wishes to or not, the party obtaining the disclosure is given this power because the invasion of the other party's rights has to give way to the need to do justice between those parties in the pending litigation between them; it follows from this that the results of such compulsion should likewise be limited to the purpose for which the order was made, namely, the purposes of that litigation then before the court between those parties and not for any other litigation or matter or any collateral purpose…
>
> It was argued before me that the compulsion principle is not simply confined to orders which require the disclosure of documents or information. In litigation a party may be subjected to orders or rules of procedure which require him to do various things or take various steps in the action. It was argued that whenever a party was in this position he was acting under a compulsion which brought the implied undertaking into force. This argument can be attractively developed. It is said that many things in actions are done because a party is ordered or otherwise required to do them. They are required to deliver pleadings, swear and lodge affidavits, call witnesses, or, in the present context, serve advance copies of the evidence upon which he proposes to rely at the trial. In all these situations the practical sanction is similar to that which arises from a failure to give discovery or respond to other orders. The primary sanction that the court imposes is to strike out the claim or the defence. If a party fails to deliver a pleading or to lodge or adduce evidence he will fail to protect his rights and the other party's claims or defences will prevail. The outcome for the litigant is in practical terms the same. However in legal terms this is not correct. There is distinction between orders, the breach of which is a contempt of court and those orders or rules which merely give rise to a default. The principle of compulsion applies in the former category only.

68 As these cases demonstrate, the *Riddick* principle is not engaged simply because information has been disclosed in the course of court proceedings. The critical factor is the element of *compulsion* that accompanies the discovery (see also *Hong Lam Marine* at [19] and [21], *Derby & Co Ltd & Others v Weldon & Others* The Times (20 October 1988) ("*Derby*") at 5–6). It does not apply to disclosure that is voluntary and we elaborate on voluntariness below (see [82]).

Version No 1: 27 Oct 2020 (22:41 hrs)

69 We should explain that it is not invariably necessary for a breach of the court order to be punishable by contempt of court to engage the *Riddick* principle. One party's breach of its general discovery obligation is a default that may lead the other party to apply for specific discovery or a peremptory order. Such a breach would constitute a *default* of the rules of court but it will typically not attract contempt of court as the first response to the default. It is nonetheless accepted that documents disclosed pursuant to general discovery are covered by the *Riddick* principle; in *Riddick* itself the document in question was disclosed pursuant to general discovery in an earlier suit (at 891F), while in *Sim Leng Chua v Manghardt* [1987] SLR(R) 52, Chan Sek Keong JC (as he then was) held that the *Riddick* principle applied to a document disclosed "pursuant to the usual orders for discovery of documents" made in an earlier action (at [1]). The *Riddick* principle naturally applies with greater force where there is an order for specific discovery or production of specific documents because the element of compulsion is direct and targeted and a breach of a specific discovery order could, in the proper circumstances, amount to contempt of court. In this court's decision in *BNX v BOE and another appeal* [2018] 2 SLR 215 ("*BNX v BOE*"), it was held that disclosure of documents pursuant to a court order for production of that specific document was disclosure *compelled* by court order, and that the *Riddick* principle applied (at [66]–[69]).

70 Given the necessity of the element of compulsion, the *Riddick* principle does not apply to any and all disclosure obtained in the course of court proceedings *per se*. It remains necessary to inquire whether the discovery was compelled. At the hearing before us, Mr Toh cited the decision of Tay Yong Kwang J (as he then was) in *Haywood Management Ltd v Eagle Aero Technology Pte Ltd* [2014] 4 SLR 478 ("*Haywood*") as authority for the proposition that the *Riddick* principle can apply to pre-action disclosure.

Version No 1: 27 Oct 2020 (22:41 hrs)

Haywood involved an application for pre-action discovery of documents. In *allowing* the application, Tay J observed that the court was entitled to take into account the fact that the applicant was legally obliged not to use the disclosed documents for any extraneous purpose by reason of the *Riddick* principle (at [59]). *Haywood*, however, did not assist the respondent because Tay J's observations applied to documents that were disclosed pursuant to a pre-action discovery order. In other words, there is no question that the *Riddick* principle can apply to disclosure made in the context of an application for pre-action discovery *provided* the documents were ordered to be disclosed, *ie*, under compulsion. Since the disclosed documents in the present case were not disclosed pursuant to an order of court, the *Riddick* principle was not engaged.

71 Mr Toh suggested that the *Riddick* principle was engaged because it should be applied to the pre-action disclosure regime with modifications.[53] The Judge was also of the view that the *Riddick* principle could apply with the modification that, in the context of pre-action disclosure, the public interest in protecting the respondent's privacy and confidentiality featured more heavily in the balancing exercise: GD at [32]. With respect, we disagree. There was no principled basis to extend the *Riddick* principle to apply to documents which were not ordered to be disclosed but were instead disclosed by a party to resist a pre-action disclosure application. The *Riddick* principle was developed to balance competing public interests in the context of discovery made under compulsion, and it has no application where there is no court order compelling the disclosure.

---

53 Respondent's case para 67.

Version No 1: 27 Oct 2020 (22:41 hrs)

72 We should add, as we have explained in some detail above, that the mere fact that the appellant's use of the disclosed documents in the UK proceedings was not in breach of the *Riddick* principle does not mean that it was not an abuse of process. As we stated earlier, abuse of process is a broad concept that permeates all of civil procedure.

73 In fact, as we explained at the hearing, the *Riddick* principle is essentially an expression of the doctrine of abuse of process. *Riddick* involved an action for libel brought by Mr Riddick after he had been dismissed by his former employer on the basis of a memorandum. The memorandum had been disclosed in discovery in Mr Riddick's previous unsuccessful suit against the employer for wrongful arrest and false imprisonment. One of the defences put forth by the employer was that the use of the memorandum in the libel action was an abuse of process of the court (at 902C). In identifying what became known as the *Riddick* principle, Lord Denning MR held that the courts should not allow any party to use documents disclosed under compulsion "for any ulterior or alien purpose" (at 896D). As we set out above, the commencement of litigation for a collateral purpose is an instance where the court will find an abuse of process.

74 The notion that the *Riddick* principle is a subset of the doctrine of abuse of process is evident in the judgment of Stephenson LJ in *Riddick* (at 902F–903A):

> … [I]n my judgment the court has and should generally use the power to protect parties who make full and frank disclosure of documents, and the public interest in such disclosure, by discouraging the use by a plaintiff in a later action of a document obtained on discovery in an earlier action. If the court can require an undertaking from a plaintiff not to misuse a document before it is produced to him, it should have the power to restrain him from misusing it after it has been produced. And if he misuses it before the court restrains him why should the

Version No 1: 27 Oct 2020 (22:41 hrs)

> court allow itself to be used to countenance his misuse of it? I think it is entitled and indeed bound to refuse him help and to regard his attempt to get it as an abuse of its process.
>
> I would therefore allow the appeal on this ground. There may be cases in which a plaintiff would be justified in bringing an action on a document disclosed in an earlier action. I do not say that it could never be done without abusing the process of the court. But generally speaking, *it would be an abuse of its process and in the circumstances of this case the plaintiff's use of this memorandum is an improper use which the court should not countenance*.
>
> [emphasis added]

75 Similarly, Waller LJ observed (at 912C):

> I am of the opinion that to use this document, which had been compulsorily disclosed in other proceedings, *is an abuse of the process of the court* and it would be contrary to public policy to allow it to be used in these proceedings.
>
> [emphasis added]

76 The restriction was conceived as an expression of the obligation to prevent collateral or alien use of the process of the court. In that regard, we agree with the Judge that the justification of the *Riddick* principle as an implied undertaking to the court not to use documents obtained by compulsion for an ulterior purpose does not reflect the actual basis for the restriction: see GD at [25]. The Judge opined that it would be preferable to confront potential abuses of the court process directly and characterise the restriction as an obligation imposed by the court to protect against an abuse of process, but was of the view that he was bound by other decisions of this court to utilise the formulation of an implied undertaking: GD at [25]. While in the present context we see little difference in substance between an obligation imposed by the court and an implied undertaking to the court, we agree that the court should confront abuses of process directly rather than impute specific intentions to parties. In this context, it has been demonstrated that the sole purpose of pre-action

Version No 1: 27 Oct 2020 (22:41 hrs)

disclosure is to obtain information to commence proceedings in Singapore, and the use of the information elsewhere, including the UK proceedings, would be for a collateral purpose and therefore an abuse of process (see [42] above). In our view, this can provide the premise to establish an abuse of process without extending the *Riddick* principle.

77 The respondent also relied on the Judge's decision that, applying the English decision of *Prudential Assurance* ([22] *supra*), an obligation analogous to that under the *Riddick* principle could apply to enjoin the use of the disclosed documents if, on a true construction of the rules of court, any rights of confidentiality or privilege in the documents and information had been reserved: GD at [35]. The Judge was of the view that the rules allowing for pre-action disclosure were intended to serve the policy goals of saving unnecessary costs and avoiding needless claims in relation to actual or anticipated proceedings in Singapore: GD at [38]. In that context, an obligation arose to enjoin the use of the disclosed documents.

78 The documents in *Prudential Assurance* were witness statements and an expert report that had been served by the plaintiffs on the defendant prior to trial pursuant to the relevant English rules of court. As the matter was settled before trial, the witnesses never testified and the documents were not used in open court. The defendant subsequently participated in separate proceedings in Texas and sought to use those documents, but the plaintiffs objected. Hobhouse J held that the *Riddick* principle did not apply because there was no compulsion (see [67] above), but observed (at 770):

> … [I]f the… plaintiffs are to succeed on this line of argument it must be by the demonstration of a duty owed to the court, analogous to that owed under the implied undertaking [ie, the *Riddick* principle], which derives from the circumstances of the case and in particular as a matter of implication from the

Version No 1: 27 Oct 2020 (22:41 hrs)

> relevant rules of court. … *Prima facie*, the use of documents and information in litigation is inconsistent with any such restriction or the reservation of any private law right. However, such restrictions are capable of existing and where they do they derive from rules of procedure or principles of law recognised by the courts as being incidents of such procedure.

79 Hobhouse J then examined the relevant English rules of court. While the rule governing expert reports stated that the recipient was entitled to use the expert report in unqualified terms, the rule that governed witness statements provided that where a party serving the statement did not call the witness to whose evidence it relates, no other party may use the statement in evidence at trial. Therefore, expert reports could be used in other actions but witness statements remained privileged (at 773).

80 To the extent that Hobhouse J referred to the existence of a duty deriving from the circumstances of the case and the relevant rules of court (at 770B), we believe he was essentially relying on the broad concept of abuse of process. The inference from the rule governing witness statements was that the statements would be served on the other party so that it may be put in evidence at the trial *if* the witness was called to give evidence (at 773E). Apart from the trial, "the receiving party and his solicitor may not use the material nor allow it to be used for any purpose other than the proper conduct of that action on behalf of the receiving party and may not use it or allow it to be used for any collateral or ulterior purpose" (at 773F). The purpose of the witness statement was for its use at that *same* trial and, as there was no trial, the statements should not have been used for the collateral purpose of an action elsewhere. While we accept that the decision in *Prudential Assurance* was another expression of the doctrine of abuse of process, we do not think it is necessary to ground our decision on an obligation analogous to that under the *Riddick* principle. In our judgment, it

Version No 1: 27 Oct 2020 (22:41 hrs)

would suffice to rely on the broad doctrine of abuse of process without needing to extend the *Riddick* principle or to recognise an obligation analogous to it.

Involuntary disclosure in relation to pre-action disclosure

81 In his discussion of the *Riddick* principle, the Judge considered voluntary disclosure to be an "exception" to the *Riddick* principle: GD at [27]. The appellant, too, referred to the "voluntariness exception" to the *Riddick* principle.[54] Strictly speaking, that is not correct. Voluntariness is not an exception to the *Riddick* principle; the principle simply has no application to documents that have been voluntarily disclosed: GD at [26] and see *BNX v BOE* ([69] *supra*) at [66]. We found that the *Riddick* principle was not engaged because the subject documents were not disclosed under compulsion of a court order. For completeness, however, and since this point featured prominently in the parties' submissions, we explain why notwithstanding the inapplicability of the *Riddick* principle, we did not regard the respondent's disclosure to be voluntary in any event.

82 We did not accept the appellant's submission that the fact that the documents were not disclosed by compulsion of an order of court rendered the disclosure voluntary. In determining whether the discovery was voluntary or otherwise, the court must examine the context under which the disclosure was made.

83 In pre-action disclosure, as there is no pleaded cause of action, there is no pleaded reference point to assess relevance (see [30] above). A party resisting pre-action disclosure would necessarily have to file an affidavit to provide

---

[54] Appellant's case para 4.3.4.

Version No 1: 27 Oct 2020 (22:41 hrs)

sufficient context to explain why the application should be refused. In so doing, it is to be expected that such a party may have to exhibit documents and provide background information, and the documents and information may well form part of what was being sought in the pre-action disclosure application. It cannot be denied, and Mr Pillai did not contest this point before us, that a respondent who fails to file an affidavit or provide sufficient information would risk an order for pre-action disclosure being made against it.

84 Mr Pillai cited the English decision of *Derby* ([68] *supra*), which concerned documents disclosed by the respondents to resist an application by the Salomon Group for a Mareva injunction. The respondents' affidavits attempted to show that the Salomon Group did not have a good arguable case and that the respondents were unlikely to dissipate their assets. A third party subsequently obtained a subpoena against the Salomon Group to produce these affidavits in proceedings in New York. The respondents resisted this and submitted that there was an implied obligation on the Salomon Group not to disclose those documents based on the *Riddick* principle. Sir Nicholas Browne-Wilkinson VC rejected that submission (at 5–6):

> [Counsel for the respondents] submits that even though the documents were not disclosed under compulsion of a Court Order or Court procedure, there is an implied obligation on the Salomon Group not to disclose those documents at least until they have been used in open Court. I reject that submission without any hesitation. There is no trace of the existence of any such obligation in any authority. Indeed, the whole development of the law relating to the implied undertaking affecting documents disclosed on discovery would have been quite unnecessary had any such general principle… existed in English law.
>
> The voluntary disclosure of documents in the course of interlocutory proceedings by a party does not come within the rationale which is the basis of the implied undertaking relating to documents disclosed on discovery. In relation to documents voluntarily disclosed the court has not invaded the privacy of the party. The party has, for his own purposes in defending a

Version No 1: 27 Oct 2020 (22:41 hrs)

> case, decided himself to use the documents rather than maintain his privacy. It is the party who has destroyed the privacy of the document, not the plaintiff or the court …

85 He then explained why he found that the disclosure of the affidavits had been done voluntarily and the *Riddick* principle did not apply (*Derby* at 6):

> In this case *Salomon Group made no demand for documents of this class from [the respondents]. The documents were thrust upon them in the form of affidavits and exhibits by [the respondents]*. It is true, as [counsel for the respondents] says, that apart from litigation the [respondents] would not have disclosed the documents. They had the unhappy choice of deciding whether to defend the proceedings at that stage maintaining that privacy, or to put in the documents. But it is an unavoidable consequence of all litigation that a party who chooses to put in evidence, necessarily risks that such evidence becomes available to others.
>
> [emphasis added]

86 Mr Pillai submitted that *Derby* was authority for the proposition that affidavits filed to *resist* an application would be treated as having been filed voluntarily. As the specific issue in *Derby* was strictly not before us, it is not necessary for this court to express any concluded view as to whether documents disclosed to resist an application for a Mareva injunction in one action could be used for another unrelated action. Nonetheless, we did not think that *Derby* assisted the appellant's argument. In our view, the context of pre-action disclosure matters. The entire purpose of the application was to obtain discovery and interrogatories. The disclosed documents contained some of the documents and all of the information that the appellant had requested in OS 533.[55] In this context, we could not accept the submission that the disclosed documents were thrust upon the appellant voluntarily when the appellant had initiated court proceedings precisely to obtain them.

---

55 Respondent's case para 10.

Version No 1: 27 Oct 2020 (22:41 hrs)

87 Mr Pillai also submitted that the disclosure was voluntary because the respondent did not disclose all the documents sought in OS 533 and only *chose* some to disclose.[56] The fact that the party "chose" what to disclose could not make it voluntary. In general discovery, the documents disclosed are likewise "chosen" by a party to comply with its discovery obligations but it would be plainly incorrect to describe such discovery as "voluntary". We recognise that this may not be an analogous situation, as general discovery is given pursuant to an order of court (see [69] above and O 24 r 1(1) read with O 25 r 8(1)(*a*) of the Rules of Court), but it shows that even under compulsion of court or the rules of court, an element of choice is inherently involved. In disclosing the documents with the sole object to defeat OS 533, the respondent could not be regarded as having given up its rights of confidentiality in respect of the disclosed documents.

88 As for the respondent's description of its own actions as "voluntary" in the course of proceedings before the AR,[57] we agree with the Judge that this was in the context of demonstrating its cooperativeness with the court process: GD at [34]. Certainly, the respondent's willingness to disclose some information was of assistance to the AR in reaching her decision in OS 533.

89 Disclosure that is not made pursuant to a court order is not necessarily a voluntary one. Upon discovery of the fraud, the appellant had reached out to the respondent seeking documents and information relating to its relationship with the Companies (see [10] above). Had the respondent replied at that time with the disclosed documents, there would have been no question that such action

---

56 Appellant's case para 4.4.4.

57 Appellant's case para 4.4.6.

Version No 1: 27 Oct 2020 (22:41 hrs)

would be viewed as voluntary, but the respondent did not do so. Instead, its solicitors replied that it was refusing to provide the requested documents and information and this led to the commencement of OS 533. In that context, we find it difficult to accept that the disclosure was voluntary. In contrast, for example, the question of voluntariness in *Hong Lam Marine* ([66] *supra*) involved an affidavit that had been filed in *support* of the appointment of provisional liquidators in winding-up proceedings (at [26]). An assessment of voluntariness in court proceedings must thus be situated in the proper context.

90 The appellant also claimed that the disclosed documents were voluntarily provided to prevent "further disclosure".[58] This is plainly wrong. They were provided to show that there was no legitimate basis to order *any* pre-action disclosure. The respondent made an *express* reservation in He's 1st affidavit that the disclosure was to assist the court and to demonstrate that the application should be dismissed (see [12] above). The disclosure was without prejudice to the respondent's position that the appellant was not entitled to *any* of the information and documents sought in the application.

91 An express reservation of rights also formed part of the basis of this court's decision in *BNX v BOE* ([69] *supra*), which involved BNX's application to adduce documents that it had obtained in a separate suit with a third party, A.

92 This court rejected the BNX's submission that the documents had been voluntarily disclosed, and were thus not subject to the *Riddick* principle. First, they had been disclosed pursuant to a court order for production in the suit with A. A had therefore been *compelled* by a court order to produce the documents,

---

58 Appellant's case para 4.4.1.

Version No 1: 27 Oct 2020 (22:41 hrs)

and the *Riddick* principle thus applied. Secondly, BOE's inclusion of the documents in their reply affidavit could not have released BNX from its *Riddick* obligation (owed to A) as BOE was not a party to the suit (between BNX and A) where the *Riddick* obligation had applied (at [67] to [68]). Further, in resisting BNX's application, BOE had exhibited the documents in their reply affidavits with an express reservation (*BNX v BOE* at [68]):

> For the avoidance of doubt, the [documents] are being provided notwithstanding, and without prejudice to, [BOE's] position that they should not be admitted into the appeals… at all and that the present application seeks to circumvent the requirement that [BNX] obtain leave of the Court in [the suit between BNX and A] to use them for the purposes of the proceedings against [BOE].

93 We accept that the reservation provided in *BNX v BOE* differs from the present case as it was made, in that case, to preserve the *Riddick* obligation. Here, the disclosure was not made in response to an order for disclosure but the express reservation nonetheless demonstrated that the disclosure could not possibly be regarded as voluntary since it was disclosed in order to defeat the application. If the express reservation was insufficient to preserve the respondent's right of privacy in its documents, we cannot conceive of how else the respondent could have protected its rights save by not filing an affidavit at all and thereby risking the order being made. Confronted with these options, the respondent's disclosure of the documents could hardly be said to be voluntary.

The open justice exception

94 The Judge also considered the open justice principle: GD at [44]. In light of our decision, it was not necessary to examine whether the open justice principle operates as an exception to the *Riddick* principle.

Version No 1: 27 Oct 2020 (22:41 hrs)

Conclusion

95 Our decision was that the appellant's use of the disclosed documents in the UK proceedings was an abuse of this court's process given the manner and context under which the disclosure was made. We affirmed the Judge's order to enjoin the appellant from using those documents and affidavits for that purpose.

96 However, it should be made clear that nothing in our decision prevents the appellant from *independently* seeking discovery of documents, including the documents which are the subject matter of this appeal, from the respondent in the UK proceedings. For avoidance of any doubt, the respondent is free to rely on this order to resist the discovery.

97 For these reasons, we dismissed the appeal. After hearing parties on costs, we ordered costs for the appeal and both summonses in favour of the respondent fixed at $65,000 inclusive of disbursements.

Judith Prakash Judge of Appeal	Steven Chong Judge of Appeal	Quentin Loh Judge

Prakash Pillai and Koh Junxiang (Clasis LLC) for the appellant;
Toh Kian Sing *SC*, Ting Yong Hong and Davis Tan Yong Chuan
(Rajah & Tann Singapore LLP) for the respondent.

Version No 1: 27 Oct 2020 (22:41 hrs)