

**IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

[2023] SGHC 320

Suit No 616 of 2021 (Registrar's Appeals Nos 182 and 183 of 2023)

Between

Intertek Testing Services (Singapore)
Pte Ltd

... Plaintiff

And

Haidir bin Mohamad Khir

... Defendant

Counterclaim of Defendant

Between

Haidir bin Mohamad Khir

... Plaintiff in Counterclaim

And

Intertek Testing Services (Singapore)
Pte Ltd

... Defendant in Counterclaim

JUDGMENT

[Civil Procedure — Discovery]

[Contract — Breach — Independent breach]

[Contract — Remedies — Damages]

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Intertek Testing Services (Singapore) Pte Ltd

v

Haidir bin Mohamad Khir

[2023] SGHC 320

General Division of the High Court — Suit No 616 of 2021 (Registrar's Appeals Nos 182 and 183 of 2023)

Goh Yihan J

3 October 2023

8 November 2023

Judgment reserved.

Goh Yihan J:

1 There are two appeals before me. They stem from the claim that the plaintiff, Intertek Testing Services (Singapore) Pte Ltd, has brought against the defendant, Mr Haidir bin Mohamad Khir, in the underlying suit, HC/S 616/2021 (the “Suit”). The two appeals are:

(a) HC/RA 182/2023 (“RA 182”), being the defendant’s appeal against part of the learned Assistant Registrar’s (the “AR”) decision in HC/SUM 1536/2023 (“SUM 1536”) to refuse specific discovery of:¹

(i) documents and/or correspondence (internal or otherwise) evincing costs associated with the provision of services captured

¹ HC/SUM 1536/2023 filed on 22 May 2023, Annex A at paras 1–2.

by cl 11.1 of the Employment Agreement (the “Relevant Services”) for the period of February 2021 to 23 October 2021, including and not limited to profit and loss statements specific to the department which the defendant was formerly part of, ledgers, and department communications; and

(ii) documents evincing any difference (for the period of February 2021 to 24 April 2021; and 24 April 2021 to 23 October 2021) in costs associated with the provision of the Relevant Services.

For convenience, I will term these documents as the “RA 182 Documents”.

(b) HC/RA 183/2023 (“RA 183”), being the defendant’s appeal against part of the learned AR’s decision in HC/SUM 1529/2023 (“SUM 1529”) to grant specific discovery of documents and/or correspondence between the defendant and some of the plaintiff’s customers between 16 July 2021 and 24 October 2021, relating to and/or evidencing that the defendant had offered to provide and/or provided said customers with the sale or supply of “Infringing Services”, as defined in para 1 of the plaintiff’s Further and Better Particulars dated 27 October 2022.

For convenience, I will term these documents as the “RA 183 Documents”.

2 After hearing the parties and considering their submissions, I allow RA 182 in part and RA 183 in full. These are the reasons for my decision.

Background facts

3 I begin with the background facts. The plaintiff is a Singapore-registered company. Its key business is in the provision of petroleum, fuel, lubricant and petrochemical testing, and cargo inspection services for local and international clients.² The plaintiff had employed the defendant as an Operations Manager. The defendant’s employment with the plaintiff started on 2 January 2020. This was pursuant to an Executive Agreement dated 29 November 2019 entered into by the plaintiff and the defendant. I have referred to this as the “Employment Agreement” above and will continue to do so for the rest of this judgment.

4 It is undisputed that the defendant’s employment with the plaintiff was terminated on 24 April 2021. Although the defendant tendered his resignation on 23 April 2021,³ this was not effective on that day because it required three months’ prior notice or three months’ salary in lieu of such notice.⁴ In response, the plaintiff issued a Notice of Termination of Employment on 24 April 2021.⁵ The defendant joined his current employer, Saybolt (Singapore) Pte Ltd, by signing an employment agreement dated 28 April 2021.

5 The plaintiff commenced the Suit against the defendant on 16 July 2021. This was in relation to the defendant’s alleged breaches of contractual obligations set out in the Employment Agreement. The parties have taken different positions as to the said termination. The plaintiff’s position is that it

² 1st Affidavit of Ang Chee Teck dated 14 July 2021 at para 8.

³ 1st Affidavit of Haidir bin Mohamad Khir dated 30 July 2021 at para 57 and p 55.

⁴ 1st Affidavit of Ang Chee Teck dated 14 July 2021 at paras 43–45.

⁵ 1st Affidavit of Ang Chee Teck dated 14 July 2021 at para 45.

terminated the defendant's employment because, amongst other things, the defendant had allegedly disclosed the plaintiff's confidential proprietary information to third parties without authorisation.⁶ As against this, the defendant's position is that he had terminated the Employment Agreement when he accepted the plaintiff's breaches of the Employment Agreement.⁷ For the purposes of the present appeals, it is sufficient to focus on just some of the plaintiff's claims against the defendant.

6 Among other things, the plaintiff alleges that the defendant breached cl 11.2.1 and 11.2.2 of the Employment Agreement. These clauses provide as follows:⁸

11.2 During the course of and as a consequence of the Employee's employment by the Company he will have access to and acquire knowledge of confidential information. He will also have regular dealings with and establish relationships with relevant persons. In order to protect the Company's interests the Employee agrees that he will not without the company's written consent, directly or indirectly (in any capacity) and whether for yourself or on behalf of anyone else, for a period of six months commencing on the date on which the Employee's employment ends,:

11.2.1 be engaged in the provision of relevant services to, for or on behalf of any relevant person;

11.2.2 solicit or attempt to solicit business from any relevant person in connection with the provision of relevant services

...

⁶ 1st Affidavit of Ang Chee Teck dated 14 July 2021 at paras 23–30.

⁷ 1st Affidavit of Haidir bin Mohamad Khir dated 30 July 2021 at para 71.

⁸ 1st Affidavit of Ang Chee Teck dated 14 July 2021 at p 55.

Accordingly, the effect of cll 11.2.1 and 11.2.2 of the Employment Agreement is that the defendant is prohibited from conducting the Relevant Services for a period of six months from the date of the end of his employment with the plaintiff. This would be from 24 April 2021 to 24 October 2021 (the “Restricted Period”).

7 More specifically, the plaintiff pleaded that the defendant breached cll 11.2.1 and 11.2.2 of the Employment Agreement by, among other acts, offering to provide and/or providing the Relevant Services during the Restricted Period. In particular, the plaintiff pleaded specifically as follows at para 7(c) of the Statement of Claim (Amendment No 2) dated 27 October 2022 (“SOC A2”):

After the termination of his employment in Intertek, Haidir offered to provide and/or provided one or more of Intertek’s Customers with the sale or supply of services which are the same as or similar to services provided by Intertek within the last 12 months of Haidir’s employment in Intertek.

The term “Intertek’s Customers” is defined at para 3A of the SOC A2 to include, among others, Equinor ASA (“Equinor”), Equinor Asia Pacific Pte Ltd, Total Trading Asia Pte Ltd (“TOTSA”), Trafigura Global Services Pvt Ltd, and Vitol Asia Pte Ltd. These are the five customers whose communications with the defendant that the plaintiff seeks specific disclosure of in SUM 1529.

8 As a result of the defendant’s alleged breaches of cll 11.2.1 and 11.2.2 of the Employment Agreement, the plaintiff further pleaded at para 10 of the SOC A2 that its “Gasoline Blending Team has suffered a sharp decline in business (i.e. falling outside an acceptable degree of variance) from customers such as Equinor and TOTSA since 24 April 2021”.

9 In his Defence and Counterclaim (Amendment No 2) dated 22 June 2022 (“DCC A2”), the defendant pleaded the following defences in respect of his alleged breaches of cll 11.2.1 and 11.2.2 of the Employment Agreement.

(a) He denied that he had breached these clauses by offering to provide and/or provided one or more of the plaintiff’s customers with the Relevant Services within the last 12 months of his employment with the plaintiff.⁹

(b) He denied that any of his act or omission resulted in a sharp decline in the plaintiff’s business.¹⁰

(c) He pleaded that the plaintiff “is not entitled to the reliefs sought”.¹¹

10 With these background facts in mind, I turn to consider each of the present appeals but begin by alluding to some general points on the applicable law on specific discovery.

The applicable law on specific discovery

11 To begin with, the law on specific discovery, based on O 24 rr 5 and 7 of the Rules of Court (2014 Rev Ed) (the “ROC 2014”), is trite and not in dispute. Reduced to its essence, first, the documents must be relevant; and

⁹ Defence and Counterclaim (Amendment No 2) dated 22 June 2022 (“DCC A2”) at para 12.

¹⁰ DCC at para 13.

¹¹ DCC at para 22.

second, even if relevance is proven, discovery must be necessary either for disposing fairly of the cause or matter or for saving costs.

12 Further, in assessing relevance, the parties “seeking discovery must show a nexus between the pleaded causes of action and the documents they want discovered” (see the High Court decision of *Dante Yap Go v Bank Austria Creditanstalt AG* [2007] SGHC 69 (“*Dante Yap Go*”) at [28]). If discovery is sought in relation to an issue unrelated to the pleaded causes of action, this may constitute an impermissible fishing exercise (see the High Court decision of *UMCI Ltd v Tokio Marine & Fire Insurance Co (Singapore) Pte Ltd and others* [2006] 4 SLR(R) 95 at [71]). As for necessity, the test is whether discovery is necessary for disposing fairly of the proceedings or for saving costs. Here, a bare assertion that the documents are necessary because they are relevant will not be sufficient (see *Dante Yap Go* at [32], citing the High Court decision of *Bayerische Hypo- und Vereinsbank AG v Asia Pacific Breweries (Singapore) Pte Ltd and other applications* [2004] 4 SLR(R) 39 at [37]). It is incumbent on the party seeking discovery to put his case forward, supported by an affidavit, so that the counterparty knows the case it has to meet if it wishes to resist discovery.

13 In fact, I can do no better than refer to Assistant Registrar Scott Tan’s concise and helpful summary of the applicable law in the High Court decision of *EQ Capital Investments Ltd v Sunbreeze Group Investments Ltd and others* [2017] SGHCR 15 (at [46]):

- (a) The court’s *jurisdiction* to grant an order for specific discovery is enlivened when (i) there is sufficient evidence to show that the requested documents are in the possession, custody or power of the requested party and (ii) the requested documents are relevant: see decision of the Singapore High Court in *The Management Corporation Strata Title Plan No 689*

v DTZ Debenham Tie Leung (SEA) Pte Ltd and another [2008] SGHC 98 (“*DTZ Debenham*”) at [29] and [30].

(b) A deposition in an affidavit to the effect that the requested documents are in the possession, custody or power of the requested party is normally sufficient to constitute ‘sufficient evidence’ of the same: see *DTZ Debenham* at [30].

(c) The ‘relevance’ of a document must be determined by reference to the pleaded cases of the parties (see the decision of the Singapore High Court in *Dante Yap Go v Bank Austria Creditanstalt AG* [2007] SGHC 69 (“*Dante Yap Go*”) at [20]) and can take one of two forms:

(i) A document is directly relevant if it is one on which the party relies or will rely; where it could adversely affect his own or another party’s case; or where it supports another party’s case: see O 24 rr 5(3)(a) and (b) of the Rules and *Dante Yap Go* at [18].

(ii) A document is indirectly relevant if may lead the applicant to a “train of inquiry resulting in his obtaining information which may” adversely affect his or another party’s case or which may support another party’s case: see O 24 r 5(3)(c) of the Rules and *Dante Go Yap* at [29].

(d) If discovery is sought of a *class* of documents rather than a specific document, relevance must be shown in relation to the entire class described as a class, and not only some parts of the class (see the decision of the Singapore High Court in *CIFG Special Assets Capital I Ltd (formerly known as Diamond Kendall Ltd) v Polimet Pte Ltd and others* [2016] 1 SLR 1382 at [24]).

(e) Even after the court’s jurisdiction has been engaged, the court still retains a *discretion* to decide whether or not to make the order for specific discovery. A court may refuse to give the order or make it only in part if it is satisfied that ‘discovery is not necessary either for disposing fairly of the cause or matter or for saving costs’: see O 24 r 7 of the Rules and the decision of the Singapore High Court in *Bayerische Hypo- und Vereinsbank AG v Asia Pacific Breweries (Singapore) Pte Ltd and other applications* [2004] 4 SLR(R) 39 (“*Bayerische*”) at [38]).

[emphasis in original]

14 With these principles in mind, I turn now to RA 182.

RA 182

15 As I mentioned at the outset, RA 182 concerns the learned AR's decision to refuse the defendant's application for specific discovery of documents that, broadly speaking, relate to what the defendant says is the quantification of the plaintiff's damages.

The learned AR's decision

16 The learned AR refused specific discovery for the RA 182 Documents for the primary reason that the issue as to the quantum of damages suffered by the plaintiff does not form part of the pleaded issues.

17 The learned AR provided two reasons in support of his decision. First, the learned AR held that the DCC A2 contains a general averment that the plaintiff is not entitled to the reliefs sought but does contain averments regarding the quantum of damages. More specifically, the defendant did not contest the plaintiff's method of quantifying its damages in the DCC A2. Second, the learned AR held that the plaintiff is not precluded from seeking to quantify its damages based on its loss of revenue. Therefore, the defendant can ascertain the plaintiff's loss of revenue based on the documents already disclosed by the plaintiff.¹²

The parties' positions

18 The defendant's position is that the RA 182 Documents are necessary to assess the plaintiff's loss of profit, as opposed to its loss of revenue. This is

¹² Letter from court dated 8 August 2023, Judgment for HC/SUM 1529/2023 and HC/SUM 1536/2023 at [28]–[32].

because the defendant takes issue with the plaintiff's quantification of its damages on the basis of its loss of revenue (the "Revenue Method"). Instead, the defendant argues that the quantification of the plaintiff's damages should be based on its loss of profit (the "Profit Method"). Therefore, the defendant says that he should not be prematurely deprived of the opportunity to rely on the Profit Method as a mode of quantification of damages, as opposed to the Revenue Method.¹³

19 As for the learned AR's view that the defendant did not raise any issue in its pleadings as to how the plaintiff quantifies its damages, the defendant argues that there was no avenue for him to take issue with the Revenue Method. This is because the plaintiff did not plead the Revenue Method in its pleadings. Instead, the plaintiff had simply alleged that it suffered loss and damage as a result of its Gasoline Blending Team's "sharp decline in business". The plaintiff then asked for damages to be assessed without specifying a mode of quantification. As such, the defendant argues that the onus is on the plaintiff to plead the Revenue Method for him to respond accordingly. Moreover, even if the parties' pleadings only contain an averment for damages to be assessed, without specifying the method of quantification, the defendant submits that the court is not precluded from allowing discovery of the RA 182 Documents as they would assist the trial court in fairly disposing of the matter. The defendant cites the High Court decision of *Beckett Pte Ltd v Deutsche Bank AG and Another* [2006] SGHC 26 ("*Beckett*") for this proposition.¹⁴

¹³ Defendant's Written Submissions dated 19 September 2023 ("DWS") at para 59.

¹⁴ DWS at paras 55–62.

20 In response, the plaintiff makes the following points. First, it has already adduced sufficient evidence in respect of its claim for damages. In this regard, the plaintiff has disclosed invoices from its customers to demonstrate the “sharp decline in business”. The plaintiff has also disclosed a table showing the decrease in revenue from these customers based on the invoices. Therefore, there is sufficient evidence to ascertain the plaintiff’s loss of revenue.¹⁵ Second, the defendant has not pleaded the relevance of the Revenue Method and its attempt to seek specific discovery of the documents is a fishing expedition.¹⁶ Third, and in any event, the RA 182 Documents sought are extremely broad, and relevance in relation to the whole category has not been established.¹⁷

My decision: RA 182 is allowed

21 Having considered the parties’ submissions, I allow RA 182 in part for two principal reasons.

The RA 182 Documents are relevant because the plaintiff is entitled only to recovery for loss of profit, which is necessarily calculated by reference to its business costs

22 First, while the defendant has framed his advocated-for Profit Method as being a direct choice against the plaintiff’s preferred Revenue Method, I think the real issue in the present appeal is whether the plaintiff’s case, as pleaded, can be assessed only by the Profit Method, such that I should allow the

¹⁵ Plaintiff’s Written Submissions dated 19 September 2023 (“PWS”) at paras 15–18.

¹⁶ PWS at paras 19–22.

¹⁷ PWS at paras 26–27.

defendant’s appeal for discovery of the RA 182 Documents for that assessment to take place.

23 To begin with, the apparent contest between the Profit Method and the Revenue Method relates to how the plaintiff’s *expectation* loss is to be calculated. The plaintiff’s expectation loss, if proven at trial, may be characterised from either the “gross” or “net” points of view. In other words, the plaintiff’s expectation loss may be measured by: (a) its loss of gross profit, which is its profit *before* it deducts its expected expenses, and therefore appears to be the Revenue Method; or (b) its loss of net profit, which is its profit *after* it deducts its expected expenses, which appears to be the Profit Method. Indeed, as the Court of Appeal held in *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal* [2018] 2 SLR 655 (at [125]), a plaintiff’s expectation loss “would encompass the plaintiff’s *total (or gross)* loss – including the expected (or net) *profit* that the plaintiff would have received had there been no breach of contract as well as his expected *expenses*, which he would have recouped if the contract had been performed” [emphasis in original].

24 A helpful illustration of the distinction between the “gross” or “net” points of view was provided by the High Court in *Smile Inc Dental Surgeons Pte Ltd v OP3 International Pte Ltd* [2020] 3 SLR 1234 (“*Smile Inc*”) (at [56]):

A hypothetical scenario aptly demonstrates this. In the hypothetical, an entity owns a shop. The cost of the entity’s permanent staff and its rental is \$8 per month. For expending the fixed expenses of \$8 a month, the entity makes \$10 per month in total revenue, thereby earning a monthly net profit of \$2. If, due to another entity’s breach (eg, defective works), the entity is unable to open its shop for a month, the entity would still have to expend \$8 a month in paying its permanent staff and rental, as such expenses are fixed expenses which do not depend on whether the shop is opened or not. This \$8 would be

wasted fixed expenditure, as the entity would not be able to generate any revenue while its shop is closed due to the other entity's defective works. If the entity is only allowed to claim for its loss of net profit in this case, the entity's claim would be \$2, which would not even cover the entity's wasted fixed expenditure of \$8. Hence, to ensure that the entity is put in the same position as it would have been but for the breach, the damages due to the entity ought to be \$10, being the sum of the entity's net profits and wasted fixed expenditure. This \$10 would be used to offset the entity's wasted fixed expenditure of \$8, leaving the entity with the \$2 net profit which it would have earned but for the other entity's breach.

25 However the plaintiff's expectation loss is characterised, the key concern is ensuring that it is not compensated for loss that it did not actually suffer, or that it is compensated twice over for the same loss (see also the Appellate Division of the High Court decision of *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd and other appeals* [2023] 1 SLR 536 ("*Crescendas*") at [205]). Using the illustration in *Smile Inc*, a plaintiff may claim for loss of its gross profit of \$10, which comprises its net profit of \$2 and wasted expenses of \$8. But a plaintiff may not claim, *eg*, a sum of \$18, comprising its gross profit of \$10 *and* wasted expenses of \$8. This would result in over-compensation because its gross profit of \$10, when broken down, already includes the wasted expenses of \$8 and a net profit of \$2 (see *Crescendas* at [205]).

26 While this distinction appears deceptively clear in theory, it is important to consider whether it is borne out in practice. More specifically, where, as in the present appeal, a defendant has breached a promise not to solicit a plaintiff's clients, the said plaintiff will need to prove its lost business. The measure of damages will depend on what the plaintiff would have done. Whether the plaintiff may claim for wasted expenses depends on whether the plaintiff would *necessarily* incur those expenses regardless of that defendant's alleged breach. In this regard, Richard Arnold J clearly summarised the possible scenarios in

the English High Court decision of *Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd* [2012] EWHC 616 (Ch) (“*Force India*”) (at [424]):

... Where the claimant exploits the confidential information by manufacturing and selling products for profit, and his profits have been diminished as a result of the breach, then he can recover his loss of profit. Where the claimant exploits the confidential information by granting licences to others, and his licence revenue has been diminished as a result of the breach, he can recover the lost revenue. Where the claimant would have “sold” the confidential information but for the breach, he can recover the market value of the information as between a willing seller and a willing buyer. Where the claimant cannot prove he has suffered financial loss in any of these ways, he can recover such sum as would be negotiated between a willing licensor and a willing licensee acting reasonably as at the date of the breach for permission to use the confidential information which has been misused in the manner in which the defendant has used it [*ie, Wrotham Park damages*]. ...

As such, the precise method of calculating the expectation loss will depend on the factual situation at hand.

27 In the present case, I find that the plaintiff may claim damages only on the basis of the Profit Method, for two related reasons.

28 First, having regard to the plaintiff’s pleaded case, it appears that the plaintiff has proceeded on the basis of its loss of profits. To begin with, cll 11.2.1 and 11.2.2 of the Employment Agreement provide that, among other things, the defendant is not to “be engaged in the provision of relevant *services* to, for or on behalf of any relevant person” [emphasis added], or to “solicit or attempt to solicit business from any relevant person in connection with the

provision of relevant services”.¹⁸ The plaintiff’s pleaded case is about its inability to provide such services at previous levels owing to the defendant’s alleged breaches of the Employment Agreement. The plaintiff also pleads that its “Gasoline Blending Team has suffered a sharp decline in business”.¹⁹ Given the plaintiff’s focus on its inability to provide services at previous levels, this must be, on balance, quantified based on its loss of profits.

29 Second, and relatedly, the plaintiff is not entitled to claim damages on the basis of the Revenue Method. This is because, unlike what Arnold J stated in *Force India* about loss of *revenue* arising from the reduced grant of licenses, there must certainly be operating expenses in relation to the provision of services. Therefore, if the plaintiff claims damages for this loss only on the basis of its *revenue*, then that would ignore the *expenses* that it would have had to incur in providing those services in the first place. The plaintiff would, in other words, be compensated for expenses that it would have expended even if the defendant had not breached the Employment Agreement. Put differently, regardless of whether the defendant allegedly breached the Employment Agreement, the plaintiff would have to incur a fixed amount of expenses. Allowing the plaintiff to claim damages on the Revenue Method would amount to double recovery, which is impermissible.

30 Accordingly, I am of the view that the plaintiff can claim damages only on the Profit Method, which means that the defendant legitimately must know the plaintiff’s expenses in providing the services which the plaintiff alleges the

¹⁸ 1st Affidavit of Ang Chee Teck dated 14 July 2021 at p 55.

¹⁹ Statement of Claim (Amendment No 2) dated 27 October 2022 at para 10.

volume of which has been affected due to the defendant’s breach. The defendant has therefore *prima facie* established the relevance of the RA 182 Documents.

The defendant has sufficiently pleaded the relevance of the RA 182 Documents

31 However, the learned AR had found that the defendant did not sufficiently plead the relevance of the RA 182 Documents. In so far as the learned AR’s decision was premised on the plaintiff having a choice between the Revenue Method and the Profit Method, it must be the case, in light of my conclusion above, that the plaintiff could only have pleaded the Profit Method as a matter of law. In other words, when the defendant pleaded that the plaintiff “is not entitled to the reliefs sought”, it must be that the defendant has put the Profit Method into issue. Therefore, the defendant has sufficiently pleaded to the relevance of the RA 182 Documents, in so far as they relate to the Profit Method.

32 There is therefore no need for me to comment on the defendant’s argument that *Beckett* stands for a general proposition that “even if the parties’ pleadings only contain an averment for damages to be assessed (without specifying the mode of quantification), ... the [c]ourt is not precluded from allowing discovery of the [RA 182 Documents]”.²⁰ As I understand it, the defendant is arguing that a general averment for damages to be assessed is sufficient to put the mode of quantification into issue. If it were necessary for me to comment on this argument, I would have doubted the relevance of *Beckett*, which concerned the unrelated situation where discovery was allowed despite the trial being bifurcated. Be that as it may, I have some sympathy for

²⁰ DWS at para 60.

the defendant's argument that it cannot be expected to respond to the plaintiff's general pleading for damages without specifying the mode of assessment. Indeed, where a plaintiff has a choice as to the characterisation of damages arising from breach of contract, the plaintiff bears the burden of exercising that choice as a matter of law (see, eg, the High Court decision of *Van Der Horst Engineering Pte Ltd v Rotol Singapore Ltd* [2006] 2 SLR(R) 586, though cf the Appellate Division of the High Court decision of *Liu Shu Ming and another v Koh Chew Chee and another matter* [2023] 1 SLR 1477 at [217]).

The scope of discovery should be reduced

33 Despite my conclusion that the defendant has established the *prima facie* relevance of the RA 182 Documents, and that the defendant has sufficiently pleaded to this relevance, it remains to be considered if the scope of the RA 182 Documents is too broad. For convenience, I set out the categories sought once again:

- (a) documents and/or correspondence (internal or otherwise) evincing costs associated with the provision of the Relevant Services for the period of February 2021 to 23 October 2021, including and not limited to profit and loss statements specific to the department which the defendant was formerly part of, ledgers, and department communications; and
- (b) documents evincing any difference (for the period of February 2021 to 24 April 2021; and 24 April 2021 to 23 October 2021) in costs associated with the provision of the Relevant Services.

34 In my view, it is not clear how the category referred to in [33(b)] is relevant to the determination of the plaintiff's expenses that it would have incurred in providing the Relevant Services. For one, it is not clear why the starting date of February 2021 is chosen, when the defendant had allegedly breached the Employment Contract on 24 April 2021. There does not appear to be any connection between February 2021 to any of the material dates in question. Further, I also do not see the relevance of the *difference* in costs associated with the provision of the Relevant Services. If discovery is ordered of the category referred to in [33(a)], then the defendant would be able to calculate the costs for the provision of the Relevant Services. There is no further need for the documents in the category referred to in [33(b)]. As such, I affirm the learned AR's decision not to allow discovery of the documents in the category referred to in [33(b)].

35 As for the documents in the category referred to in [33(a)], I acknowledge the plaintiff's concern that these may contain "confidential personal information relating to the [p]laintiff's employees' salaries and office rent".²¹ However, if, as I have concluded above, the plaintiff's expenses in the provision of the Relevant Services are relevant, then it is inevitable that the plaintiff will need to disclose information about salaries and rent. However, in so far as there are confidentiality concerns, the plaintiff can seek to redact parts of the documents prior to disclosure but yet not deprive the defendant of the information he requires. I therefore order the disclosure of the documents in the category referred to in [33(a)] without any qualification. It is up to the plaintiff to seek further orders in respect of these documents if it requires.

²¹ PWS at para 26.

36 For the reasons given above, I therefore allow RA 182 in part.

RA 183

37 I turn now to RA 183, which concerns the learned AR’s decision to allow the plaintiff’s application for specific discovery of documents and/or correspondence between the defendant and each of the customers relating to and/or evidencing that the defendant had offered to provide and/or provided the customers with the sale or supply of Relevant Services during the Restricted Period, in so far as those documents post-date 16 July 2021, being the date of filing of the writ for this Suit.

The learned AR’s decision

38 Because the parties agreed that the documents between 24 April 2021 and 16 July 2021 are relevant, the only contention before the learned AR was the relevance of the documents between 17 July 2021 and 24 October 2021. The learned AR held that they were relevant. This was because it was implicit in the plaintiff’s pleadings that “the cause of action for breach of cl 11.2.2 in respect of all of the [plaintiff’s customers] would have accrued when the [w]rit was filed on 16 July 2021, and any fresh offers made after 16 July 2021 would merely be further instances of a single, continuing breach of cl 11.2.2” [emphasis in original omitted]. Further, for infringing services provided before 16 July 2021, any services provided after 16 July 2021 “would necessarily be further instances of a single continuing breach of cl 11.2.2”.²²

²² Letter from court dated 8 August 2023, Judgment for HC/SUM 1529/2023 and HC/SUM 1536/2023 at [25].

The parties' positions

39 The defendant's position is that the defendant's alleged fresh offers of Relevant Services to the customers *after* 16 July 2021 is not relevant to the parties' pleaded cases in the Suit. This is because the plaintiff's pleadings do not state whether each alleged transaction between the defendant and each customer had taken place before or after 16 July 2021, let alone that all of the transactions had taken place before 16 July 2021. Therefore, any post-16 July 2021 offer would constitute fresh breaches of the Employment Agreement and would be irrelevant to the Suit. The defendant therefore disagrees with the learned AR's view that it is "implicit" in the plaintiff's pleaded case that the causes in action in respect of all of the customers had accrued before 16 July 2021.²³

40 In response, the plaintiff maintains that the RA 183 Documents are relevant to the Suit because they will shed light on the circumstances of the defendant's communications with the plaintiff's customers during the Restricted Period. The plaintiff argues that the defendant misunderstands the law on the relevance of matters occurring post-writ. In this regard, the plaintiff submits that facts occurring after the issuance of the writ can be relied on in support of a cause of action that existed at the date of the writ. Thus, post-writ conduct is relevant as further instances of a single continuing breach. In the present case, the plaintiff relies on the learned AR's finding that it was "implicit" in its pleadings that the defendant had already offered or made offers

²³ DWS at paras 34–37.

to provide infringing services to all of the plaintiff's customers before 16 July 2021.²⁴

My decision: RA 183 is allowed

41 Having considered the parties' submissions, I allow RA 183 for the following reasons.

Causes of action that accrued only after the date of the writ are not relevant

42 The starting point is that a party cannot amend his pleadings to include a cause of action that did not exist at the date when the writ was filed (see the High Court decision of *Saga Foodstuffs Manufacturing (Pte) Ltd v Best Food Pte Ltd* [1994] 1 SLR(R) 505 at [9(b)]). The parties do not dispute that facts occurring after the issuance of the writ can be relied on only in support of a cause of action that existed at the date of the writ. This is made clear by O 18 r 9 of the ROC 2014, which provide that “[s]ubject to [r]ules 7(1), 10 and 15(2), a party may in any pleading plead any matter which has arisen at any time, whether before or since the issue of the writ”. In this regard, O 18 r 15(2) provides that “[a] statement of claim must not contain any allegation or claim in respect of a cause of action unless that cause of action is mentioned in the writ”. This must mean that a party's pleadings may only contain causes of action mentioned in the writ. The crux of RA 183 is whether the defendant's alleged breaches of the Employment Agreement after the date of the writ are to be taken as giving rise to new causes of action.

²⁴ PWS at paras 32–33.

43 This therefore requires a consideration of when a cause of action for a breach of contract materialises. In a related context, in the High Court of Australia decision of *Larking v Great Western (Nepean) Gravel Ltd* (1940) 64 CLR 221, Owen Dixon J explained the difference between a continuing breach and a breach once-and-for-all (at 236):

If a covenantor undertakes that he will do a definite act and omits to do it within the time allowed for the purpose, he has broken his covenant finally and his continued failure to do the act is nothing but a failure to remedy his past breach and not the commission of any further breach of his covenant. His duty is not considered as persisting and, so to speak, being for ever renewed until he actually does that which he promised. On the other hand, if his covenant is to maintain a state or condition of affairs, as, for instance, maintaining a building in repair, keeping the insurance of a life on foot, or affording a particular kind of lateral or vertical support to a tenement, *then a further breach arises in every successive moment of time during which the state or condition is not as promised*, during which, to pursue the examples, the building is out of repair, the life uninsured, or the particular support unprovided.

[emphasis added]

The relevance of this passage lies in Dixon J’s explanation that there is a difference between the obligation to do a definite act (being a “once-and-for-all” breach) and the obligation to maintain a state of affairs (being a continuing breach). Where a breach is a continuing breach, “a further breach arises in every successive moment of time during which the state or condition is not as promised” (at 236). This means that every further breach of the same contractual term constitutes a fresh cause of action that can independently sustain a claim for breach of contract. This must follow from the trite principle that the commission of two independent breaches each confers an independent right to terminate the performance of a contract (see, *eg*, the House of Lords decision of *Maclaine v Gatty* [1921] 1 AC 376 at 387).

44 Thus, in the English High Court decision of *AMT Futures Ltd v Boursal and others* [2018] 3 WLR 358, a broker sued its former clients for breaching a jurisdiction clause, by which the parties had submitted to the exclusive jurisdiction of the English courts. In particular, the jurisdiction clause contained an implied undertaking not to begin proceedings other than in the agreed forum, *ie*, the English courts. In this context, the court found that the former clients had breached the jurisdiction clause by commencing proceedings in Germany against the broker. Each of the former clients' further act in pursuance of their claim in Germany constituted a "further and independent breach". The court held that (at [43]):

... it is a fundamental characteristic of "successive breaches" that they are independent of one another. In my judgment, each further act done by the applicants in pursuance of the German Claims is capable of having amounted to a further, and independent, breach of clause 33. Those further steps were not "necessary and direct consequences" of the commencement of the German Claims, as Mr Wright submitted. On the contrary, they were separate steps taken by the applicants, who could at any time have brought (and could still bring) the German Claims to an end.

In essence, where the contractual term obliges a party to maintain a state of affairs, every breach of the same term in a contract would constitute a successive breach that is independent of earlier breaches of the same term. The latter breaches cannot be regarded as "continuing" breaches of the same term. More importantly, for present purposes, each breach would give rise to a fresh cause of action.

45 Accordingly, in the present case, every alleged transaction which the defendant entered into with a customer would be a "successive breach" that is independent of its former breaches. Therefore, any offer to a customer that is allegedly made *after* 16 July 2021 would constitute fresh breaches of the

Employment Agreement. These would not have existed at the time of the writ. They would need to be claimed in a separate action that is commenced after the date of breach. This conclusion is supported by the English High Court decision of *Eshelby v Federated European Bank Ltd* [1932] 1 KB 254, where the plaintiff had issued his writ to claim payment of one instalment of money under the contract. Crucially, after the issue of the writ, the defendant there defaulted in paying a *further* instalment under the same contract. The plaintiff tried to amend his pleading to claim for the second instalment in the same action. The court held that he could not do so. This is because the non-payment of the second instalment was a separate cause of action that did not exist at the time when the writ was issued. It would need to be claimed in a separate action.

46 In as much as the plaintiff here relies on the Singapore International Commercial Court decision of *DyStar Global Holdings (Singapore) Pte Ltd v Kiri Industries Ltd and others and another suit* [2018] 5 SLR 1, I find that is misplaced. In so far as it is relevant, that case involved a minority shareholder starting proceedings against a co-investor and majority shareholder for oppressive conduct. The court found that, given that the minority shareholder was able to establish oppressive conduct by a shareholder as at the date of the writ, the post-writ conduct could be relied on as evidence of oppressive conduct continuing beyond the date of the writ. Such conduct could also be relevant for determining the appropriate relief. In essence, the cause of action for oppression had materialised at the first instance of oppression, and further instances of oppressive conduct could be relied on as *evidence* of oppressive conduct. This is quite different from the situation where a successive breach of the same term constitutes a new cause of action.

*Post-writ breaches in the present case are successive breaches of cl 11 of the
Employment Agreement*

47 Coming to the facts of the present case, it is important to bear in mind the term that the defendant allegedly breached. For convenience, I set out cll 11.2.1 and 11.2.2 of the Employment Agreement once again:²⁵

11.2 During the course of and as a consequence of the Employee's employment by the Company he will have access to and acquire knowledge of confidential information. He will also have regular dealings with and establish relationships with relevant persons. In order to protect the Company's interests the Employee agrees that he will not without the company's written consent, directly or indirectly (in any capacity) and whether for yourself or on behalf of anyone else, for a period of six months commencing on the date on which the Employee's employment ends,:

11.2.1 be engaged in the provision of relevant services to, for or on behalf of any relevant person;

11.2.2 solicit or attempt to solicit business from any relevant person in connection with the provision of relevant services

...

48 Crucially, cl 11.1 defines "relevant person" in the following terms:²⁶

"Relevant Person" shall mean any person, firm, company or other organization and any prospective person, firm, company or other organization with whom the company or any other company in the Intertek Group or in respect of whom the Employee had managerial responsibility in either case during the last 12 months of employment.

49 Accordingly, it is clear from a plain reading of cl 11 that each time the defendant is alleged to have approached a "relevant person", he would have

²⁵ 1st Affidavit of Ang Chee Teck dated 14 July 2021 at p 55.

²⁶ 1st Affidavit of Ang Chee Teck dated 14 July 2021 at p 55.

breached cl 11 afresh. It cannot be said that each of the defendant's alleged successive breaches is somehow a "continuation" of his earlier breach of cl 11. This does not cohere with the basic contractual doctrine that would give the plaintiff a fresh right of termination with respect to every new breach.

50 Additionally, I respectfully disagree with the learned AR's distinction between: (a) a fresh offer to provide infringing service to the plaintiff's customers made *after* 16 July 2021; and (b) the provision of infringing services to the plaintiff's customers that had started *before* 16 July 2021 and continued *after* 16 July 2021. In my view, the distinction is simply between breaches of contract before and after the date of the writ, being 16 July 2021. Therefore, the plaintiff should have pleaded breaches of contract that had taken place after 16 July 2021 in a fresh action. For this reason alone, I allow RA 183 and hold that the plaintiff is not entitled to the RA 183 Documents that post-dated 16 July 2021 as they are not relevant to the Suit.

51 For completeness, and while it is not necessary for me to do so because parties did not raise this in their submissions, I recognise that cl 11.1 defines "relevant person" in broad terms, in that it does not refer to distinct customers as different relevant persons. Be that as it may, I do not think that it is plausible to interpret "relevant person" as referring to the entire group of customers allegedly approached by the defendant, such that the defendant's breach of cl 11 would have been continuing. It is trite that when interpreting contracts, due consideration ought to be given to the commercial purpose of the transaction or provision, and more narrowly, to why a particular obligation was undertaken (see the Court of Appeal decision of *Leiman, Ricardo and another v Noble Resources Ltd and another* [2020] 2 SLR 386 at [60]). Given that cl 11 was intended to prevent the defendant from using the plaintiff's confidential

information and business relationships acquired during employment by the plaintiff for the benefit of himself or his future employment, I do not think that it would have been a commercially sensible outcome for the parties to have intended cl 11.1 to be so broad as to refer to the entire group of customers allegedly approached by the defendant. Nevertheless, I stress that this was not a live issue before me.

The plaintiff's pleadings do not make clear that its causes in action in respect of all of the customers had accrued before 16 July 2021

52 While it is not necessary for me to do so, I also respectfully disagree with the learned AR that it was “implicit” in the plaintiff’s pleadings that the defendant had already offered or made offers to provide infringing services to all of the plaintiff’s customers before 16 July 2021:²⁷

... However, it is implicit in Intertek’s pleaded case that Haidir had *already* offered or made offers to provide infringing services to all of the Intertek Customers *before* 16 July 2021. This is because Intertek’s claim in Suit 616 is for Haidir’s breach of cl 11.2.2 in the Restricted Period, *ie*, between 24 April 2021 to 24 October 2021. In other words, the cause of action for breach of cl 11.2.2 in respect of *all* of the Intertek Customers would have accrued when the Writ was filed on 16 July 2021, and any fresh offers made *after* 16 July 2021 would merely be further instances of a single, continuing breach of cl 11.2.2. ...

[emphasis in original]

53 Even if it were open to the plaintiff as a matter of law to argue that breaches after 16 July 2021 were instances of a single, continuing breach of cl 11, nowhere in SOC A2 did the plaintiff plead that the breaches had accrued as of the date of the writ. The learned AR does not explain why it was “implicit”

²⁷ Letter from court dated 8 August 2023, Judgment for HC/SUM 1529/2023 and HC/SUM 1536/2023 at [25].

that this was so. I can only surmise that this was because the plaintiff had filed the writ on 16 July 2021, which the learned AR took to imply that the plaintiff pleaded that all offers that the defendant made were with respect to a single breach that had occurred before that date. If this was the learned AR's reasoning, I would respectfully disagree because this absolves the plaintiff from having to plead its case with utmost clarity. Further, it cannot be that it is implied from the date of filing a writ that a plaintiff intended to plead that all instances of default were a continuation of the original default.

54 For the reasons I have given, I therefore allow RA 183.

Conclusion

55 In sum, I allow RA 182 in part and allow RA 183 in full.

56 Unless the parties are able to agree on the appropriate costs orders for both the appeals and the proceedings below, they are to tender written submissions no longer than ten pages, within 14 days of this decision.

Goh Yihan
Judge of the High Court

Tan May Lian Felicia, Uday Duggal, Goh Enchi Jeanne and
Ang Kai Le (TSMP Law Corporation) for the plaintiff;
Boey Swee Siang, Lin Yuankai, Toh Yunyuan Selina and
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