Bayerische Hypo- und Vereinsbank AG v Asia Pacific Breweries (Singapore) Pte Ltd and Other Applications
[2004] SGHC 155

Case Number : OS 284/2004, 285/2004, 286/2004, 287/2004, RA 111/2004, 112/2004, 113/2004, 114/2004

Decision Date : 28 July 2004

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Davinder Singh SC and Yarni Loi (Drew and Napier LLC) for appellants; Alvin Yeo SC, Monica Chong and Tan Hsiang Yue (Wong Partership) for respondents in OS 284/2004 (RA 111/2004); Steven Chong SC, Rebecca Chew, Lynette Koh, Lionel Tay and Paul Ng (Rajah and Tann) for respondents in OS 285/2004 (RA 113/2004); Steven Chong SC, Lionel Tan and Paul Ng (Rjah and Tann) for respondents in OS 286/2004 (RA 114/2004); Joseph Ang and Ang Wee Tiong (Tan Kok Quan Partnership) for respondents in OS 287/2004 (RA 112/2004)

Parties : Bayerische Hypo- und Vereinsbank AG — Asia Pacific Breweries (Singapore) Pte Ltd

Civil Procedure – Discovery of documents – Whether sufficient grounds for granting of pre-action discovery existing – Whether pre-action discovery appropriate under circumstances

28 July 2004

Belinda Ang Saw Ean J:

1 These four appeals are by Asia Pacific Breweries (Singapore) Pte Ltd ("APBS"). On 16 April 2004, the assistant registrar ordered APBS to give to the applicants pre-action discovery of four categories of documents as listed in the schedule to her order. The applicants are Bayerische Hypo- und Vereinsbank Aktiengesellschaft ("HVB"), Skandinaviska Enskilda Banken AB ("SEB"), Mizuho Corporate Bank Ltd ("Mizuho") and Sumitomo Mutsui Banking Corporation ("Sumitomo"). APBS is appealing against the whole of the assistant registrar's decision save for the order for disclosure of the employment contract of Chia Teck Leng ("Chia") and its standard terms and conditions of employment. I shall hereafter refer to the applicants collectively as "the banks" and, where necessary, individually by name.

2 The applications for pre-action discovery arose from the relatively uncomplicated fraud perpetrated on the banks by Chia, the former finance manager of APBS. The fraud is considered "mega" because of the size of the loans advanced. Mr Alvin Yeo SC, assisted by Ms Monica Chong and Ms Tan Hsiang Yue, represents HVB. Mr Steven Chong SC is for SEB and Mizuho and he is assisted by Ms Rebecca Chew, Ms Lynette Koh, Mr Lionel Tay and Mr Paul Ng. Mr Joseph Ang together with Mr Ang Wee Tiong act for Sumitomo. Counsel for APBS is Mr Davinder Singh SC and he is assisted by Ms Yarni Loi.

3 Paragraph 12 of the first schedule to the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) empowers the court to order pre-action discovery in accordance with the Rules of Court. The leading local case on this topic is *Kuah Kok Kim v Ernst & Young (a firm)* [1997] 1 SLR 169. In the recent decision of *Beckkett Pte Ltd v Deutsche Bank AG Singapore Branch* [2003] 1 SLR 321, Kan Ting Chiu J observed that the law on pre-action discovery under the Rules of the Supreme Court 1990 (Cap 322, R 5, 1990 Rev Ed) that was considered in *Kuah Kok Kim* had not changed under the Rules of Court 1997 (Cap 322, R 5, 1997 Rev Ed). Similarly, there is no change to the procedural rules for pre-action discovery in the 2004 edition of the Rules of Court, which was

published on 29 February 2004.

4 The requirements of O 24 r 6(3) as guided by the decision of *Kuah Kok Kim* are that the application for pre-action discovery be supported by an affidavit setting out the grounds for the application, the material facts pertaining to the intended action and whether the person against whom the order is sought is likely to be a party to subsequent proceedings. The tests of "possession, custody or power" and "relevance" remain applicable for the purposes of pre-action discovery. The criterion of the rule is intended to ensure that the application for pre-action discovery is not brought frivolously or without justification. Lai Kew Chai J, in delivering the judgment of the Court of Appeal in *Kuah Kok Kim,* [3] *supra,* at [59], said that the court's duty is to ensure that the application is not frivolous or speculative and that the applicant is not on a fishing expedition. That duty was adopted and applied by Choo Han Teck JC (as he then was) in *Ng Giok Oh v Sajjad Akhtar* [2003] 1 SLR 375.

5 Once the court is satisfied, based on an assessment of the formal evidence before the court, that the criteria of the rule are met, the next consideration is whether discovery is necessary either for disposing fairly of the cause or matter or for saving costs. As was pointed out by Chao Hick Tin JA in *Tan Chin Seng v Raffles Town Club Pte Ltd* [2002] 3 SLR 345 at [15], O 24 r 7 is an overriding principle of discovery in respect of an application made either under rr 1, 5 or 6.

Are there grounds for seeking pre-action discovery?

6 As the facts of the four appeals are substantially the same, in order to illustrate and understand the appeals it is convenient to first set out in brief the facts that are not in dispute. Chia was finance manager from 20 January 1999 until his arrest in September 2003. He was appointed Senior Manager, Group Finance, of the holding company, Asia Pacific Breweries Ltd ("APBL"), on 14 July 2003. Over a period of four years, the banks extended loans of various amounts purportedly to APBS. Chia deceived the banks into thinking that the borrower was APBS by forging the signatures of the directors of the company on various resolutions. The resolutions purportedly signified the company's acceptance of the loans, authorisation of Chia to sign the loan documentation, and the appointment of Chia as the sole authorised signatory for the loans. He also forged the drawdown instructions. By his deceptions, Chia obtained close to S$120m of the banks' money. He was eventually charged on 4 September 2003 for, *inter alia*, forging documents and cheating the four banks to obtain banking facilities in APBS's name. He pleaded guilty to the charges on 2 April 2004.

7 In the order of chronology of the loans granted, I begin with SEB's story. Chong Chin Fah, Asia Head of Operations and Finance at SEB, deposed in her affidavit of 5 March 2004 that in February 1999, a bank account was opened with SEB in the name of APBS. Thereafter, banking facilities were made available to APBS from February 1999 to August 2002 ("the SEB Facilities"). As at 27 February 2004, the total amount due under the SEB Facilities was US$25,852,538.61. At all material times, SEB dealt with Chia as regards the SEB Facilities.

8 Paul Chew Cheong Soon ("Chew"), Vice-President in the offshore corporate banking department of Sumitomo, confirmed that in July 2000 his bank, then known as The Sakura Bank Limited, offered various credit facilities which APBS accepted on 19 July 2000. Further short-term credit facilities were granted to APBS in July 2001. This July 2001 facility was supplemented by another facility letter on 8 July 2002. I will henceforth refer to the various banking facilities as "the Sumitomo Facilities". On 5 June 2003, Sumitomo disbursed S$5m to an account in the name of APBS held with SEB. On 29 July 2003, another S$5m was disbursed to the same account. At all material times, Sumitomo's dealings with APBS in respect of the Sumitomo Facilities were largely conducted through Chia. As at 2 March 2004, the total amount due under the Sumitomo Facilities was S$10,158,483.90.

9 Tetsuya Kaneko ("Kaneko"), Joint General Manager of Mizuho, deposed that some time in July or August 2000, Mizuho made available various banking facilities ("the Mizuho Facilities") to APBS. The Mizuho Facilities were renewed from time to time, purportedly at the request of APBS. As at 27 January 2004, the total amount due under the Mizuho Facilities was US$8,109,470.98. At all material times, Mizuho dealt with Chia as regards the Mizuho Facilities.

10 Peter Vassiliou ("Vassiliou"), Managing Director and Head of Risk Management (Asia) of HVB, deposed that HVB entered into an agreement dated 21 March 2003 to grant a three-year amortising term loan of US$30m ("the HVB Facility"). The loan was in the name of APBS. On 25 March 2003, HVB disbursed the sum of US$30m to an account of APBS held with SEB. The first repayment of the principal instalment of US$5m plus interest was due on 25 September 2003. On or about 16 June 2003, HVB entered into an arrangement for sub-participation in the HVB Facility by Landesbank Baden-Württemberg ("LBBW"). LBBW participated in the HVB Facility to the sum of US$20m. The settlement date for the sub-participation by LBBW was 29 August 2003.

11 The banks say they were completely unaware of Chia's deceptions. As far as they were concerned, Chia was authorised to act on behalf of APBS. At all material times, there existed a banker-customer relationship and, therefore, APBS is liable for the outstanding loans. The banks have suggested a number of causes of action against APBS: breach of contract and vicarious liability for the deceit of Chia. They are also considering the possibility of restitutionary claims. The issues that are likely to arise in the intended actions against APBS, as identified by the banks, are:

(a) Chia's authority, actual or ostensible, as finance manager of APBS to enter into loan agreements with the banks and, as such, whether APBS is contractually bound by them.

(b) On the issue of vicarious liability for the deceit of Chia, whether the connection between his duties and the wrongful acts (as detailed in the various charges against Chia) is sufficiently close to regard the wrongful acts constituting the tort of deceit which was practised on the banks as within the scope of his employment as finance manager of APBS or as having been committed by him while acting in the ordinary course of business of APBS.

(c) The flow of funds disbursed by the banks pursuant to drawdown notices.

12 Related to the issues above are the extent or scope of Chia's authority and responsibilities in respect of finance matters at APBS and APBL, and the extent or state of APBS's and APBL's knowledge and supervision of Chia's activities in relation to the banking facilities.

13 According to the schedule to the assistant registrar's order, the documents to which the banks sought and succeeded in obtaining pre-action discovery are as follows:

Documents relating to the employment of Chia Teck Leng ["category 1"]

(1) Employment contract of Chia, indicating job scope and responsibilities of Chia as the finance manager of APBS.

(2) Standard terms and conditions of employment relating to Chia's employment.

(3) All appraisals or reviews of Chia's performance from the commencement of his employment at APBS and/or APBL to 3 September 2003.

(4) All documents (including emails) relating to Chia's role and/or scope of responsibility for

finance matters at APBL and APBS, including

(i) personnel file(s), internal memoranda, notes and/or correspondence between any director or employee of APBS and/or APBL relating to Chia's responsibilities for finance matters, and any official announcement by APBS or APBL of the same;

(ii) all emails and computer files sent from and received at Chia's office email account relating to bank accounts and/or banking facilities.

It is to be understood that item (4) above refers only to documents which set or go towards the altering of Chia's authority in relation to his responsibilities for finance matters.

(5) Organisation charts of APBS and APBL.

(6) List of bank accounts and/or banking facilities for which Chia was a signatory (either solely or jointly with others) or which he had authority to operate (either solely or jointly with others), and in the case where Chia was a joint signatory or where he had authority to operate the bank accounts jointly with others, a list of the other signatories or co-signatories for such bank accounts and/or banking facilities.

(7) Documents relating to fax/mail handling procedures, including list of persons who shared or used the same fax machine as Chia.

Documents relating to bank accounts and loans of APBS ["category 2"]

(1) All documents setting out or containing the procedures of APBS for opening and operating bank accounts and/or applying for banking facilities, including documents stating the internal approval process and requirements for opening and operating bank accounts and/or banking facilities (including the number of signatories required on each bank account/banking facility) from January 1999 to 3 September 2003.

(2) All account opening documents, loan agreements, facility letters, standard terms and conditions, board resolutions and other documents in relation to the loans taken out by APBS, limited to only those loans and/or facilities where Chia was a signatory, for the period from January 1999 to 3 September 2003.

(3) All bank statements, debit and credit advices and other documents (including correspondence) evidencing all transactions on all bank accounts, limited to only those accounts where Chia was a signatory in the period January 1999 to 3 September 2003.

(4) All documents and communications, including internal memoranda, between Chia and the management or any other director or employee of APBS or APBL relating to authorised bank accounts and loans of APBS, limited to only those accounts and/or loans where Chia was a signatory from January 1999 to 3 September 2003.

(5) All documents, papers and reports of all internal audits carried out by APBS and/or APBL on the finance department of APBS from 1999 to 2003.

(6) All documents relating to reviews or audits (including special audits) carried out on APBS's internal controls and procedures of APBS's finance department by APBS or APBL or external auditors from 1999 to 2003.

(7) Monthly company general ledger accounts for bank accounts operated, limited to the general ledgers for bank accounts for which Chia was a signatory, including records relating to receipt of funds by APBS into company bank accounts, details of the disbursement of funds, and liabilities of APBS.

(8) Details of liabilities recorded and reported in financial results including statutory and management accounts.

(9) Management and directors' reports by APBS to APBL from 1999 to 2003.

(10) Audit management letters in respect of APBS from 1999 to 2003.

Other Relevant Documents ["category 3"]

(1) Any report(s) (including drafts) from or authorised by the special committee comprising of Lee Yong Siang, Goh Yong Hong and David Hazelwood set up by APBL to oversee investigations, including draft report(s) from PricewaterhouseCoopers in the possession, custody or power of APBS; and APBS are at liberty to produce cleaned-up copies of each and every draft.

Fraud Policies and/or Control Plan ["category 4"]

(1) Documents relating to fraud policies and procedures and/or fraud control plan (either finalised or in draft form) which may have existed before and after September 2003).

(2) Documents relating to responsibility for the management of any such policy and/or plan.

(3) Documents relating to the capturing and management of information/reporting of suspected fraud or unethical conduct by staff.

14 The banks' argument is that the documents are relevant as they relate to the issues identified above. In appointing Chia as finance manager with responsibility for all financial, accounting and bookkeeping matters in the company, APBS held out to all third parties including the banks that Chia had authority to do all acts required in the scope of that position, which is the most senior finance position in APBS. Questions as to whether APBS knew or should have known about Chia's dealings with the banks such that APBS should be held liable in contract or in tort for Chia's acts necessarily require some examination of APBS's internal organisation and how it conducted its affairs, in particular, the precise scope of Chia's responsibilities for finance matters, his role within the organisation, whom he reported to, and how he was allowed to operate. In examining Chia's authority, it will be necessary to look at how Chia actually carried out his duties as finance manager, his dealings with banks on behalf of APBS, and the way he operated bank accounts or handled banking transactions on behalf of APBS. This will entail looking at the sort of documents the banks listed in their applications. Mr Chong and Mr Ang advanced essentially the same submissions as Mr Yeo.

15 The contrary position taken by APBS is that the company had not at any time accepted the loans, in that Chia never had the authority to act on behalf of APBS. The acts complained of were not performed or had not occurred in the course of his employment. At any rate, the company never had any knowledge of the loans. As such the accounts in the name of APBS were unauthorised and APBS is not liable for the outstanding loans.

16 APBS resisted the application for an array of reasons. It argued that the requirements of O 24 r 6(3) were not satisfied and none of the purposes of O 24 r 7 was likely to be achieved. The banks'

request was a "roving inquisition rather than a focussed enquiry in relation to a particular ingredient of a potential cause of action". Besides attacking the relevance of the documents sought, APBS raised privilege against disclosure in respect of the documents in category 3.

17 Mr Davinder Singh SC says there are deficiencies in the *prima facie* case advanced by the plaintiffs. In short, the affidavits are deficient as to content. For instance, the banks have not identified the ingredients of each potential cause of action and the affidavits do not set out why any particular document is needed to enable the banks to decide if any potential cause of action or ingredient of that cause of action is viable. The banks, so the argument goes, are required to show on affidavit that the documents required are "necessary" to enable them to formulate their cause of action and make an informed decision whether to sue. That, Mr Singh submits, in a pre-action discovery application, is the purport of O 24 r 7. I do not agree that the threshold of O 24 r 6(3) is that high. Mr Singh's proposition seeks to rewrite O 24 r 6(3) and also r 7. It is erroneous to compress the two rules and to read them with their structure altered in the way counsel has done. I shall elaborate on this point below when I touch on O 24 r 7. At this stage, the court is not concerned with the merits of the case. What an applicant for pre-action discovery has to do is to set out the substance of the applicant's claim to enable the potential defendant to know the essence of the complaint against him. The applicant has only to state the grounds for the application and state the material facts to explain why pre-action disclosure is required. "Material facts" under O 24 r 6(3)(a) is not to be understood as referring to important facts sufficient to constitute the ingredients of a cause of action: see *Kuah Kok Kim,* [3] *supra*, at [34].

18 The banks gathered from documents provided voluntarily by APBS that between December 2000 and October 2002 sums totalling S$45m were transferred from APBS's OCBC account to the SEB account. Additionally, further sums totalling S$8m were transferred from the OCBC account to a Citibank account in the name of APBS. Although Chia had forged the schedule of fixed deposits purportedly with Citibank and had deceived APBS into believing that the transfer of funds from OCBC was to maintain the fixed deposit with Citibank, nonetheless, APBS must, as Mr Chong submits, have been fully aware of the Citibank account since late 1999. Mr Chong argues that it is inexplicable for APBS to claim they were unaware of these significant transfers of funds to and from these "unauthorised" accounts. SEB does not accept APBS's denial of any knowledge of the SEB account.

19 Chew deposed that Sumitomo does not accept APBS's position and Sumitomo is therefore seeking pre-action discovery so that it will know whether it has viable or good claims against the company. Kaneko deposed that the disclosure of documents requested would assist in confirming the banker-customer relationship that it says exists between Mizuho and APBS. The objective of the pre-action discovery is to obtain documents to show the scope of Chia's authority within the organisation.

20 HVB also states categorically that it does not accept APBS's position that APBS had no knowledge of Chia's fraudulent activities, or that Chia was unauthorised. Mr Yeo's conclusion in his written submissions is as follows:

> In the light of APBS's disavowal of the bank account held in its name and the HVB Facility, its denial of Chia's authority in relation to the HVB Facility, and of any knowledge whatsoever of Chia's activities, it is necessary for HVB to obtain pre-action discovery against APBS for documents that will be relevant to HVB's potential claims against APBS and/or other parties.

21 In the statement of facts in the criminal proceedings against Chia, it was stated that investigations by Commercial Affairs Department ("CAD") revealed that Chia perpetrated the fraud on the banks without the knowledge of APBS. Between March and July 2003, Chia gave written instructions to the banks to make withdrawals amounting to about S$117.1m. Investigations also

established that the moneys drawn were channelled into the SEB account. A substantial amount of the moneys was then transferred to Chia's personal bank accounts maintained with DBS Bank Limited. Chia, in his mitigation plea, said that he approached SEB between 20 and 25 January 1999 to discuss the possibility of setting up a banking relationship between APBS and SEB. That was soon after he joined APBS. He resorted to the dishonest course of action in desperation because of his gambling debts. He said that he did not at any time "hold himself out as the person who pulled the strings at APBS". He was in fact surprised when the banking facilities were granted. Apart from SEB which he approached, the other three banks made cold-calls to him.

22 The banks argue that they are not bound by what is contained in the statement of facts. That may be their stance but, in so far as APBS is concerned, the investigations by CAD, the statement of facts and Chia's mitigation plea support its case. The charges, convictions, statement of facts and record of proceedings, which includes the mitigation plea, are admissible evidence in any civil proceedings: see s 45A of the Evidence Act (Cap 97, 1997 Rev Ed).

23 Can it be said in these circumstances that the banks have established a reasonable basis for their requests for pre-action discovery? It is convenient to mention Lai J's caution in *Kuah Kok Kim*, [3] *supra*, at [50]:

> [T]here must be some grounds for seeking pre-action discovery, bearing in mind that the provision should not be used for fishing expeditions, and that the normal course is to get "ordinary discovery" after commencement of proceedings.

The applicant there obtained his own valuation report that showed a significant disparity when compared with the valuation of the respondents. With his own valuation report, the applicant was able to establish a reasonable basis for pre-action discovery.

24 In the present case, after distilling what is said in the various affidavits, the basis put forward by the banks for seeking pre-action discovery is their disbelief that APBS had no knowledge of the unauthorised accounts as termed by APBS, that the loans were unauthorised as Chia acted without authority, and that APBS were unaware of Chia's activities. Arising from that, the banks cannot and do not accept APBS's position which contrasts with their own belief, based, *inter alia*, on their bank documents, that there exists a banker-customer relationship. The loans were extended to APBS as a named borrower and Chia acted for and on behalf of APBS in his dealings with the banks.

25 It seems to me that the banks are not constrained from starting proceedings without pre-action discovery. From their contentions, it is obvious that the banks have taken a view as to whether they have a case that APBS is responsible for the loans and whether to plead a case. It has not been said anywhere in the affidavits or in submissions by counsel that without pre-action discovery the banks are unable to plead a case. This is unlike the case of an applicant who is unable to plead a case as he does not yet know whether he has a viable claim against the opponents, and needs pre-action discovery to fill the void or gaps in his knowledge. That is the nature (and I should add, function) of pre-action discovery, and the rule is there to assist him to search for the answer: *per* Lai J in *Kuah Kok Kim*, [3] *supra*, at [31].

26 It is plain that the banks simply do not believe anything that APBS has said. In my judgment, a disbelief of APBS's position itself cannot be a sufficient reason for seeking pre-action discovery. Otherwise, it will result in pre-action disclosure being applied for as a matter of course. That is not what the procedure is intended for. Invariably, cases that make their way to court are founded on a mutual disbelief of each other's perception of things, and a face-off is a situation common in any dispute before the commencement of proceedings. I have already pointed out in [4] that the criterion

of O 24 r 6(3) is intended to ensure that the application for pre-action discovery is not brought frivolously or without justification.

27 A corollary to the banks' disbelief of anything that APBS has said is that the banks want the documents to search through in the hope that something useful will turn up, so as to enable them to controvert what APBS has said in correspondence and on oath in the affidavits of Tay Kok Chye ("Tay") deposed on behalf of APBS. This is not a legitimate excuse for seeking pre-action discovery. It is clear that disclosure will not be ordered for the purposes of a "fishing" or a speculative exercise. Mr Davinder Singh has pointed out that the banks are seeking discovery of all of the company's financial, accounting and internal records, including working papers and drafts, over a period of four years from January 1999 to 2003.

28 In these circumstances, my conclusion is that it is inappropriate to make an order for pre-action discovery at this stage. The banks will have to seek discovery of the categories of documents required in the normal course after commencement of proceedings.

Order 24 rule 7

29 Having reached the conclusion that the banks have not provided a reasonable ground for the application, there is no need to consider the issues of relevance and privilege in respect of each of the categories of documents ordered to be disclosed. But I will say this. Even if the documents (or some of them or some parts of them) are relevant, I am not satisfied on the material before me that disclosure in the sense of producing the documents or any of them is in the least necessary for disposing fairly of the issues in the intended actions or for saving costs.

30 Mr Chong contends that O 24 r 7 is satisfied in this case for the following reasons:

(a) As the documents are discoverable after the commencement of litigation, there are costs savings for APBS as the costs of complying with the discovery order will be paid by the banks.

(b) If the documents clearly show that the banks have no case against APBS the banks may decide not to commence proceedings against APBS, thereby resulting in a fair disposal of the matter and savings of costs.

(c) Disclosure will assist in defining the various heads of claim. The parties will then be in a better position to restrict the issues for consideration by the court. This in turn will result in savings in time and costs.

31 Kaneko, in his second affidavit, deposed that the documents requested will assist in disposing fairly of the cause of action and save costs "for the simple reason that these documents/classes of documents [will] enable [Mizuho] to ascertain the precise scope of the intended heads of claim against [APBS]". He elaborates at para 17:

> This would necessarily assist [Mizuho] in crafting heads of claim in any statement of claim against [APBS] which are prima facie substantiable [*sic*] and valid, thereby defining and restricting the issues for consideration by the Court and indeed, by [APBS]. This process would undoubtedly help to save time and costs for the Court and the parties to the litigation.

32 In my view that reasoning cannot be sustained in this instance. First, the nature of the loss complained of is clear enough without needing further disclosure to clarify it or enable the banks to

put forward a case as to their loss. Second, the broad potential issues between the parties are clear enough.

33 The representatives of the other three banks in their respective affidavits dealt with the relevance of the documents but say nothing about their necessity. This is despite Tay having stated in his affidavit that the banks have not explained or shown why pre-action discovery of some or all of the documents sought is necessary for disposing fairly of the cause or matter or for savings costs.

34 Mr Yeo submits that the scope of documents sought cannot be regarded as excessive or oppressive given the nature of the issues that will arise or are likely to arise out of the claims. All of the documents sought are clearly relevant and inextricably linked to those issues or likely issues, and allowing discovery of such documents will assist in disposing of the cause or matter fairly, and/or saving costs.

35 Mr Ang submits that the documents sought are relevant and the pre-action discovery is necessary in disposing the cause or matter fairly and/or saving costs.

36 Mr Chong acknowledges that the documents sought may be wide-ranging in nature, but he argues that they are necessarily so because of the magnitude of the fraud, the unusual features of this case, the length of time involved and Chia's position in the company. So long as the banks can demonstrate the relevance of the documents requested to an issue likely to arise in a potential cause of action, these documents, he argues, should be disclosed even if the disclosure may be wide-ranging.

37 The banks are seeking an order for pre-action discovery as in listing and production of documents. Whilst O 24 r 7 deals with discovery, orders for production of documents are covered under O 24 r 13. The ultimate test is whether discovery is necessary for disposing fairly of the proceedings or for saving costs. An assertion that the documents are relevant will not be good enough. Equally, an assertion that the documents are necessary because they are relevant will not be enough. Obviously, if a document is not relevant, it cannot be necessary for disposing of the cause or matter. On the other hand, documents may be relevant to a case without being necessary to it. The word used in O 24 r 7 is "necessary" and not "desirable" or "relevant". It is the common experience of lawyers and the court that often many documents are produced because they are relevant, but only very few of them are of use. To illustrate, part of the e-mail correspondence between HVB's representatives and one Teresa Lim of APBS that was referred to in the affidavit of Philip Armstrong, a director of HVB, filed on 6 April 2004, revealed nothing more than the senders arranging a luncheon.

38 The court is, by O 24 r 7, concerned with the discretion to refuse disclosure of a document unless the necessity for disclosure is clearly demonstrated. In a way, it calls for an exercise in considering and selecting documents or some parts of them. The wider the range of documents requested the more difficult it is for the court to decide whether the documents are necessary for "disposing fairly" of the matter or cause before proceedings are commenced or for "saving costs". As necessity for disclosure was not demonstrated in the present case (the banks having concentrated on the relevancy of the documents), the applications cannot be upheld.

39 As was previously stated, there were investigations by CAD and documents were put in evidence in open court in the criminal proceedings against Chia, the contents of which can thus be said to have entered the public domain. Voluntary discovery of a limited nature was given. HVB obtained documents from SEB on where its money went. In my view, in these circumstances any disclosure now is likely to increase costs unnecessarily rather than save costs.

Result

40 For those reasons, save for the assistant registrar's decision on costs below, the appeals are allowed with costs to be taxed if not agreed. In not disturbing the costs order below, I had regard to the position taken below by counsel for APBS on some documents that led the assistant registrar to believe that APBS had no genuine doubt that the banks were entitled to their disclosure.