Banque Cantonale de Geneve SA *v* Allen & Gledhill LLP
[2010] SGHC 39

Case Number : Suit No 504 of 2010 (Summons 6428/2009)

Decision Date : 09 February 2010

Tribunal/Court : High Court

Coram : Kathryn Thong AR

Counsel Name(s) : Mr Liew Teck Huat (Global Alliance LLC) for the plaintiff; Ms Cheryl Tan and Ms Li Yuen Ting (Drew & Napier LLC) for the defendant

Parties : Banque Cantonale de Geneve SA — Allen & Gledhill LLP

Civil Procedure

9 February 2010 Judgment reserved.

Kathryn Thong AR:

1 It was once warned that 'Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.' [note: 1] There is much wisdom in this cautious approach. Though metaphors in legal discourse aid the understanding of abstract legal concepts and in this regard, are enabling, paradoxically they are often limiting as well. This is because the imagination is susceptible to falling back on past images and impressions evoked by metaphors- but the metaphorical reality may not be altogether on fours with a particular factual scenario. The impact created by metaphors (especially visually) can cause the mind's eye to become fixated on the metaphorical image instead of the particular factual scenario, thereby ignoring the differences between the factual scenario and the metaphorical reality. When the analysis begins with the metaphor instead of the facts, the analysis is incomplete and may even be inaccurate. Other times, a metaphor may have a neutral quality in the English language but is imbued with a negative essence in legal parlance. When such a metaphor becomes a legal cliché, when it becomes so firmly entrenched in legal argot, there is a danger of unreflectively relying on it as a substitute for rugged legal analysis. One such metaphor is the "frequently exploited" 'fishing'metaphor (*Dante Yap Go v Bank Austria Creditanstalt AG* [2007] SGHC 69 ("*Dante*") at [49]) in discovery applications which is often used by counsel to stigmatize their opponent's case. This metaphor is fraught with problems as Justice Brown in *Goddard v Shoal Harbour Marine Services Ltd. et al* 24 Western Weekly Reports 166 (1958, BCSC) pointedly remarked at p 168 of the judgment:

> It would be easier to deal judicially with contested discovery if one knew to which of the many kinds of sport or commercial fishing the learned judge first use that murky expression had reference ... in at least one sense all proper discovery is fishing.

2 In the summons before me the Plaintiff sought a Further and Better List of Documents ("Further List") after general discovery between parties had been carried out. The Defendant opposed the Summons on the basis that the classes of documents sought were irrelevant to the pleaded issues and that the Plaintiff was essentially embarking on a "fishing expedition".

3 The various classes of documents sought did appear potentially extensive to me. However, simply because the categories of documents sought were wide-ranging did not automatically mean

that the Plaintiff was embarking on a "fishing expedition" as lawyers would interpret the phrase to mean. The pejorative use of the term "fishing" is perhaps unjustified- indeed, there is nothing objectionable about fishing or a fishing expedition- but that is another subject altogether. In legal discourse, I consider the "fishing" metaphor a by-word for the opportunistic use of the discovery process by a party to randomly search for information, usually in the hope that documents which may be beneficial or advantageous in some way to it will surface. Choo Han Teck J when he was a judicial commissioner remarked at [6] of *Thyssen Hunnebeck Singapore Pte Ltd v TTJ Civil Engineering Pte Ltd* [2003] 1 SLR(R) 75 that

> In my view, I would hold that a "fishing expedition" in the context of discovery refers to *the aimless trawling of an unlimited sea*. Where, on the other hand, the party concerned knows a specific and identifiable spot into which he wishes to drop a line (or two), I would not regard that as a "fishing expedition". But I would myself *prefer to approach such applications strictly on the basis of the broader relevancy test*. *That has the advantage of training one's focus directly on the matter at hand, and avoiding the distractions inherent in analogies - even one that has become a term of art, the "fishing expedition*", for example.
>
> [emphasis added]

Indeed, the fishing metaphor used in many a discovery application must be approached with caution if even considered at all. Discovery must always be referable to the criteria of relevance and necessity and to this end, the court will have to delve into the facts of the parties' cases. As the United States Supreme Court in *Hickman v Taylor*. 329 U.S. 495,507 (1947) remarked

> No longer can the time-honored cry of 'fishing' expedition serve to preclude a party from inquiring facts underlying the opponent's case.

The dispute in Suit 504/2009

4 The summons for an order that a Further List be furnished ("the Summons") arose from Suit 504/2009 ("the Suit"). Briefly, the Defendant in the Suit is being sued for breaching certain duties towards its erstwhile client, the Plaintiff.

5 The Plaintiff is a bank incorporated in Switzerland, carrying on banking business there and elsewhere. The Defendant is a limited liability law partnership, carrying on practice as advocates and solicitors in Singapore. [note: 2]

6 The Plaintiff had retained the Defendant to act for it in a dispute it had with the Far Eastern Shipping Co Plc (FESCO). According to the Plaintiff, the Defendant had advised it that it had a good cause of action against FESCO and had sufficient grounds in law and fact to arrest a vessel "VASILY GOLOVNIN" ("the Vessel") should it enter Singapore waters. I shall refer to the arrest of the Vessel as "the admiralty action". Additionally, the Defendant advised that the fact that the Plaintiff had commenced separate proceedings in Lome, Togo and arrested another vessel ("the sister vessel") which arrest was subsequently set aside, did not preclude the Plaintiff from arresting the Vessel in fresh proceedings commenced in Singapore. [note: 3] Eventually, the Vessel was arrested on 18 March 2006. Acting alongside the Plaintiff bank with congruent interests in the Vessel and sister vessel was another bank, Credit Agricole (Suisse) SA ("CAG").

7 FESCO however succeeded in setting aside the warrant of arrest on 10 July 2006 when the assistant registrar, Ms Ang Ching Pin ("AR Ang") set the arrest aside and struck out the banks' writ of summons on the grounds that there was *inter alia*, material non-disclosure in the affidavits leading to

the warrant of arrest and in submissions made to the court at the *ex parte* hearing. [note: 4] The learned AR Ang however did not award FESCO damages for the arrest of the *Vessel*.

8 The Plaintiff then filed an appeal to a Judge in chambers *vide* RA 214/2006 against AR Ang's decision in setting aside the arrest and striking out the writ of summons. Meanwhile, FESCO filed a cross-appeal against her refusal to award it damages *vide* RA 216/2006. It is the Plaintiff's case that it subsequently categorically instructed the Defendant to withdraw RA 214/2006 but these instructions were disregarded. Instead, the Plaintiff alleges, the Defendant proceeded with the appeal pursuant to CAG's instructions. This is strongly disputed by the Defendant. [note: 5]

9 Both RA 214/2006 and RA 216/2006 were eventually dismissed by Tan Lee Meng J on 31 July 2007. The Plaintiff avers that it did not wish to appeal against Tan J's decision in RA 214/2006. CAG however chose to do so and appealed to the Court of Appeal in CA 109/2007. It was represented by the Defendant. FESCO also appealed against the decision in RA 216/2006 *vide* CA 110/2009 wherein CAG and the Plaintiff were the respondents. Both appeals were heard together. In its judgment, the Court of Appeal noted that the Plaintiff was not pursuing the appeal against the decision in RA 214/2006. [note: 6] On 19 September 2008, the Court of Appeal dismissed CAG's appeal and allowed FESCO's claim for damages arising from the wrongful arrest of the Vessel. FESCO was entitled to costs of both appeals as well as all the costs below in full. [note: 7]

10 The Plaintiff is now suing the Defendant for breach of contract and/or negligence. It contends that as a consequence of its negligence, the Defendant has: (i) caused the Plaintiff to be liable to FESCO for amongst other things, damages for wrongful arrest of the Vessel; (ii) caused the Plaintiff to suffer "reputational loss" as a result of the Court of Appeal decision in CA 109/2007 and CA110/2007 and (iii) that the Plaintiff's confidence in pursuing the primary arbitration of its dispute with FESCO in London has been "shattered" and the Plaintiff has thereby lost an opportunity to pursue the arbitration with "full vigour and to a successful conclusion". It has thus allegedly suffered a loss in being unable to recover its basic claim in the primary dispute. [note: 8]

11 Two reputable English firms, Waterson Hicks ("WH") and Clyde & Co ("C&C") are also in the picture. According to the Defence filed by the Defendant on 9 July 2009, C&C had instructed the Defendant as Singapore counsel on behalf of C&C's client, CAG, in relation to the possible arrest of the Vessel. The Defendant also averred that C&C had informed it that WH and C&C had for sometime been advising the Plaintiff and CAG respectively in relation to their dispute with FESCO. [note: 9] These alleged facts are not admitted by the Plaintiff. [note: 10]

Genesis of the Summons

The court's orders

12 While it may appear indulgent to relate how the Summons came about, it is necessary to explain the eventual costs orders I made. A further and better list of documents is usually sought when based on the list of documents already served, it appears on the face of it that in all probability the opponent has or has had other relevant documents beyond those disclosed (see *Singapore Civil Procedure 2007* (Sweet & Maxwell Asia, 2007) at para 24/5/1) ("*Singapore Civil Procedure 2007*"). Whether such a further list ought to be furnished though, is subject to certain requirements (see [51] below).

13 On 16 December 2009, the Plaintiff took out the Summons. Initially, the Defendant in its letters

to the court and the Plaintiff objected to the Summons on grounds that it was premature and a breach of the court's orders. Other grounds of objection would subsequently be raised at the hearing itself.

14 It turned out that about 4 months before the Summons was taken out, pursuant to Assistant Registrar David Lee's ("AR Lee") orders given at a Pre-Trial Conference ("PTC") on 21 August 2009, the Defendant had filed its list of documents with an affidavit verifying the list ("the Original list"). Though the Plaintiff failed to do the same by 20 November 2009 (which was the deadline set by AR Lee for both parties), it eventually obtained leave to file its list of documents by 3 December 2009. At another PTC on 4 December 2009, AR Lee ordered that parties were to carry out inspection by 11 December 2009, 4.00pm. This was duly done.

15 Crucially, the learned AR Lee had also ordered at the PTC of 4 December 2009 that:

> (i) parties were to request for specific discovery from the other side no later than 24 December 2009, 4.00pm.
>
> (ii) parties to reply to each other's request for specific discovery no later than 15 January 2010.
>
> If either or both parties are not satisfied with the response, parties to take our specific discovery application no later than 22 January 2010, 4.00pm
>
> …
>
> Leave to write in for earlier [PTC] in the event that parties are able to resolve the issue of further discovery amicably between them (*i.e*. without the need for an application)." [note: 11]

16 Post-inspection, the Plaintiff was dissatisfied with thirteen of the inspected documents. It wrote to the Defendant on 14 December 2009 indicating the nature of the deficiencies and the remedial action to take. Thereafter correspondence flowed between parties from 14 to 23 December with the Defendant endeavouring to address the Plaintiff's concerns. I found that the Plaintiff's tone in its letters was cordial and the Defendant's in its replies, co-operative.

Correspondence between the parties regarding the Summons

17 Unbeknownst to the Defendant, whilst parties were corresponding on the issue of inspection (see [16] above), the Plaintiff had filed the Summons and a supporting affidavit ("the supporting affidavit") on 16 December 2009. Prayer 1 stated that the Defendant was to provide a further and better list of documents verified by affidavit within 3 days of the order to be made; prayer 2 asked for costs of the application to be paid by the Defendant. The supporting affidavit which ran up to 8 pages set out several classes of documents which the Plaintiff averred the Defendant had failed to disclose in the Original list. It bears mention that the Summons and the supporting affidavit were only served on the Defendant five days after the Summons was taken out, *i.e* on 21 December 2009.

18 In response, the Defendant wrote to the Plaintiff on 22 December 2009 that it was "surprised" at the Summons. It highlighted the pertinent orders made by AR Lee (see [15] above) and asserted that the Summons was "premature and in breach of the directions of the Court." [note: 12] It urged the Plaintiff to "please withdraw the application immediately". Additionally it stated that it was reserving its right to ask for indemnity costs.

19 Nothing was heard from the Plaintiff and the following day, the Defendant wrote to the

Registrar of the Supreme Court ("the Registrar") arguing in its letter that the Plaintiff's Summons was misconceived in light of the directions given by AR Lee. It argued that the Plaintiff should have written to it by 24 December 2009, 4.00pm, requesting specific discovery as *per* AR Lee's order and then wait for it to respond by 15 January 2010. Only if the Plaintiff was dissatisfied with the response would it be at liberty to make a specific discovery application by 22 January 2010, 4.00pm. The letter also highlighted that prior to the Summons being taken out, there had been no preceding letter of request and no opportunity for the Defendant to respond to the same.

20 As the hearing of the Summons was slated to take place on 30 December 2009, the Defendant also requested in the said letter that the hearing be postponed to a date after 15 January 2010. This, it submitted, would give it time to take instructions should it wish to file a reply affidavit and respond to the application (notwithstanding that it had previously written to the Plaintiff that it did not propose to "dignify" the Plaintiff's Summons by filing a reply affidavit [note: 13]).

21 In response, the Plaintiff wrote to the Registrar on 23 December 2009 that AR Lee's directions pertained to specific discovery whereas the Summons for a Further List was concerned with general discovery. Hence, it argued, AR Lee's directions had nothing to do with documents which were not disclosed in the filed Original list. Consequently, the Plaintiff's Summons did not breach any timelines.

22 The Plaintiff also harked back to an unless order application [note: 14] brought by the Defendant when the former failed to file its list of documents by 20 November 2009 (see [14] above). Pointing out that it had only one day to respond to the unless order summons then, the Plaintiff retorted that the Defendant presently had more than a week to respond to the Summons. It also pointed out that then, the Defendant had strenuously argued against the Plaintiff's application for an extension of time to file its list of documents. The Plaintiff argued that the Defendant could not now complain "simply because the shoe is now on the other foot".

23 Despite dredging up the "dirt" on the Defendant, the Plaintiff continued in its letter that "in spite of all this, we are prepared to agree to adjourn this application to 8.1.2010…". I found that these unhappy events raised by the Plaintiff were wholly irrelevant to the Summons. More than that, they did not explain, much less justify the Plaintiff's act of filing the Summons without a preceding letter of request. I also noted that while the Plaintiff's letter suggested that the Defendant had acted unreasonably by taking out the unless order summons, a perusal of the litigation history reveals that the Plaintiff had actually been remiss in not informing the Defendant of its inability to meet the 20 November 2009 deadline and not timeously seeking an extension of time. It is also telling that although the application for the unless order was denied and an extension of time granted to it, the Plaintiff was ordered to pay costs to the Defendant. [note: 15]

24 On the eve of the scheduled hearing, *i.e.* 29 December 2009, the Defendant wrote to the Registrar yet again, averring that the Plaintiff's request for the documents allegedly not disclosed should have been brought by way of specific discovery. It also pointed out that AR Lee's directions were geared towards ensuring that parties resolved the issue of specific discovery by correspondence to save time and costs. Rebutting the Plaintiff's assertion that the Summons was for general discovery under Order 24 rule 1 ("O 24 r 1") of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("ROC"), the Defendant rightly pointed out that the Summons itself "plainly state[d] that it [was] made under Order 24 Rules 5 and/or 12 of the Rules of Court" and that the Plaintiff was seeking specific categories of documents. Once again it iterated that the Plaintiff was obliged to have made a request for specific discovery by letter and to await its response before making an application. [note: 16]

25 There was no doubt in my mind before the hearing itself that the Summons was defective at best, confusing at worst. It is indeed a greater ill for a summons to be confusing than defective because in the former, the court and the opponent are unclear as to what the party taking out the Summons is really seeking. As a result, the opponent is placed in an invidious position, being unable to appreciate the case it has to meet.

Hearing on 30 December 2009

26 I denied the Defendant's request for an adjournment and the hearing proceeded on 30 December 2009. Counsel for the Plaintiff, Mr Liew, conceded that the Summons should have cited O 24 r 1 and not Order 24 rule 5 ("O 24 r 5") of the ROC. This notwithstanding, he strenuously argued that the Summons was clearly pursuant to general discovery and that the Plaintiff was entitled to a Further List. Ms Cheryl Tan, counsel for the Defendant, indicated that she was seeking an adjournment of the hearing and argued that the application was one for specific discovery with the result that AR Lee's orders had been ignored. Both parties essentially rehashed the arguments raised in their letters to each other and the Court (see [16]-[23] above).

27 When I queried Mr Liew why the Summons was taken out without a request, he explained that there was no time to do so as the situation was urgent, there being an impending deadline of 15 January 2010 by which time parties had to have made requests for specific discovery. The irony of this submission would not have been lost on anyone- how could there have been time to take out the Summons and depose an affidavit but none to write a letter to the Defendant, especially when correspondence was already ongoing between the parties (see [16] above)? Further, the Summons was only served on the Defendant five days after it was filed. One would have thought that given the alleged urgency of the situation, the Plaintiff would have timeously served the Defendant with the Summons and supporting affidavit. 16 December 2009 was a Wednesday and the Plaintiff had a*t least* 2 full working days before the weekend to serve the papers.

28 I pressed Mr Liew further for the reasons(s) behind taking out the Summons. He averred that the documents missing from the Original list were documents common to both parties. If such documents could be omitted, he submitted, it was uncertain whether documents not common to parties had been disclosed. In the circumstances, the Plaintiff had to seek recourse from the court to have the documents produced. By this, the Plaintiff was in my view effectively submitting that the Defendant would have denied the Plaintiff's request for a Further List had it been made. To confirm my understanding, I asked Mr Liew if he was suggesting that the Defendant had displayed a pattern of conduct that convinced him that the latter would have been difficult if the Plaintiff had requested a Further List by way of letter, thereby impelling the Plaintiff to take out the Summons. Mr Liew confirmed this was so.

29 I rejected Mr Liew's submission that the application was so urgent that it warranted taking out the Summons without the courtesy of a letter to the Defendant. To begin with, the urgency was in a sense self-perceived and self-inflicted- the timelines set by AR David Lee were certainly not immutable. In fact, the Plaintiff itself must have known this when it referred to AR Lee's directions as "*guidelines* aimed at facilitating a quick and speedy discovery process" [emphasis added]. [note: 17] In the spirit of an expeditious resolution of the discovery process, it must have been understood by the Plaintiff (and the Defendant for that matter) that the timelines were not meant to be inflexible. The court would certainly not begrudge parties a re-fixing of timelines if it was justifiable.

30 Next, the Plaintiff's conduct subsequent to the taking out of the Summons was at odds with its position that the application was urgent for it had served the Defendant with the Summons and supporting affidavit only 5 days after filing them. The Plaintiff had also in fact somewhat undermined

its stance when it represented that it was prepared to have the hearing adjourned to 8 January 2010.

31 I must add too that I was not convinced by Mr Liew's contention that the Defendant had been difficult and would be unyielding if the Plaintiff had made a request. This was speculative and further, there was little basis on the evidence before me to infer any obdurate conduct on the Defendant's part. Besides, parties had been corresponding when the Summons was taken out. It would not have taken much for the Plaintiff to inquire about the missing documents. In the circumstances, I was of the view that the Plaintiff had been perfunctory in taking out the Summons.

32 Mr Liew pointed out that there were no express rule providing that an application for a further and better list should be preceded by a letter of request to the opposing party (unlike an application for further and better particulars). I agree. But even so, this lacuna (for lack of a better word) should not and does not give rise to a license for the Plaintiff to take out a Summons against the Defendant in this manner. Where rules fail to prescribe, the dictates of common courtesy and common sense *continue* to operate in their full vigour to oil the cogs of the adversarial process.

33 In the present case, I could see no justification for the Plaintiff to take out the Summons without a preceding letter of request. In fact, it is plain from that part of AR Lee's orders where he stated:

> Leave to write in for earlier [PTC] in the event that parties are able to resolve the issue of further discovery amicably between them (*i.e.* without the need for an application)." [note: 18]

that it was expected that parties would at least *attempt* to resolve matters of further discovery amicably. While this direction read in its context might be read as pertaining only to specific discovery, its spirit must have also been intended to apply to general discovery. It would indeed be a logically incoherent and inconsistent position to adopt if the direction was construed as strictly pertaining to specific discovery and not to general discovery. Besides, construing the phrase 'further discovery' broadly, it would encompass a further and better list under general discovery.

34 AR Lee's directions aside, it appears that the accepted and even expected practice when documents are believed to have been omitted from a list of documents is for an informal inquiry to be made before invoking the formal processes of the Court. At paragraph 24/1/5 of *Singapore Civil Procedure 2007*, the learned editors point out that

> The responsibility of solicitors extends further than this to an independent duty to give proper discovery. This duty includes having a sufficient understanding of the case to know which documents to look for and to appreciate which documents are relevant. There is also a positive duty to review thoroughly an opponent's list, to ***consider whether there might be other relevant documents that have not been disclosed, and to make an inquiry about any such documents*** . The failure to fulfil these responsibilities might be such a dereliction of duty as to justify a costs order under O 59 r 8.
>
> [emphasis added]

The thrust of the above passage is that solicitors are under a duty to not only give proper discovery, they also have to ensure that the opponent has done likewise by disclosing all relevant documents. Of import to me here is the italicised portion that an "inquiry" is to be made of documents missing from an opponent's list. It is painfully obvious that the party or person to whom the inquiry must be directed is the opponent or opponent's counsel. It certainly is not the court.

35 In O'Hare & Browne's *Civil Litigation* (14th ed., 2009, Sweet & Maxwell) the learned authors at paragraph 30.022 remarked the following:

> When you receive your opponent's list you should check not only to see what documents you will wish to inspect but also to ensure that it is complete…But what can you do if you suspect that your opponent will not, or has not, made proper disclosure in accordance with the court order or is objecting to produce for inspection documents you have a right to inspect? *The first step will usually be to raise this matter in correspondence*. Otherwise, if you still believe that the disclosure of documents…is inadequate, you can make an application to the court for specific disclosure. [emphasis added]

(In the United Kingdom ("UK"), the term 'disclosure' is used instead of 'discovery')

36 To belabour the point, this sentiment is also echoed in another text authored by Craig Osborne in *Civil Litigation* (Blackstone Press Limited, 2000, 8th ed). At p 259 of his book, Osborne avers that when disclosure has been undertaken and 'there is a document or class of document whose existence had been anticipated and which is believed to be relevant to the issues, but the opponent does not include it in his list' that

> The first step with this, as with all such queries, is simply to raise the matter in letter form and see what the response is.
>
> …
>
> …if an unsatisfactory response or no response is received a party should apply for specific disclosure of the documents in question…

37 As is the situation locally, there is no rule in the UK that requires preceding letter of requests to be written to an opponent for full disclosure should a party be dissatisfied with the disclosed list of documents. Yet such a practice is endorsed, encouraged and even expected. As such, I find that the Plaintiff's suggestion that the Defendant was nitpicking on "procedural minutiae" [note: 19] in protesting that a letter of request was not given to it was woefully misplaced. While I would not go so far as to suggest that every application for a further and better list of documents *must* be preceded by a letter of request, such a practice is indeed salutary in facilitating the expeditious resolution of one's discovery obligations and I would add, in preserving the cordial relations (or whatever is left of it) between parties. Each case however turns upon its own unique facts; where as in the present case the Plaintiff had no compelling reason(s) or convincing basis to take out the Summons in the manner and circumstances that it did, little if any, indulgence should be given.

38 Earlier, I described the Plaintiff's application as 'perfunctory'. This was borne out in other aspects of the application. Perusing the supporting affidavit, I noted that the classes of documents the Plaintiff submitted it was seeking were those, which amongst other things, "may lead the Plaintiffs' [*sic*] on a train of inquiry resulting in information which may adversely affect the Defendant's case". [note: 20] Now it is well-established that documents which may lead parties to a "train of inquiry" can only be discovered pursuant to specific discovery under O 24 r 5. The provision speaks for itself and case law has established this (see [41] and [42] below). General discovery on the other hand, which is governed by O 24 r 1 provides only for discovery of documents which (i) the party relies or will rely on; (ii) documents which could adversely affect his own case; adversely affect another party's case or support another party's case. It is a narrower scope of inquiry.

39 I observed too that a supporting affidavit is not usually filed in such an application for a further and better list of documents (whereas one is required for specific discovery). I accepted Mr Liew's point that this did not mean that the Plaintiff was precluded from filing a supporting affidavit. Yet, examining the application holistically, I felt that the application was confusing. It did not matter to me that Plaintiff's counsel was not confused- Mr Liew was adamant that the Summons was for general discovery. What was pertinent was that the Summons and affidavit when read together presented a confused picture to the court. As adverted to earlier, this is a very unsatisfactory state of affairs (see [25]) above.

40 In the premises, I did not think it out of order to grant the Defendant an adjournment of the hearing. The Defendant was entitled to know the case it had to meet and having undoubtedly been taken by surprise as well, I believed it had to be given adequate time to respond to the application. There would be no prejudice caused to either party by virtue of the adjournment. I decided that the hearing could be adjourned to 15 January 2010. However I did not make any finding as to whether the application was one for general or specific discovery. Ms Tan then suggested that the Plaintiff amend its Summons and the affidavit. She further ventured that the Defendant be given up to 15 January 2010 to file a reply affidavit, notwithstanding its earlier remarks (see [20] above). I ordered that a reply affidavit be filed by 15 January 2010 and the hearing for the Summons was adjourned to 18 January 2010.

Hearing on 18 January 2010

41 At this hearing, the Plaintiff sought leave to amend its Summons. However, it did not remove the offending "train of inquiry" phrase in its supporting affidavit. Ms Tan objected to the amendment, arguing that the Summons clearly stood as an application for specific discovery. She submitted however, that should the court allow the amendment, the Plaintiff could not rely on the "train of inquiry" limb. This was moot. Indeed, general discovery does not afford the wider scope of discovery available under O 24 r 5 which allows documents that may lead to a train of inquiry to be discovered. This has been the law since 2000 [note: 21], when the terminology 'relating to matters in question in the action' in the former O 24 r 1(1) and such similar language in the other rules of Order 24 was removed. The advent of the new rules meant that the scope of discovery under O 24 r 1 was narrowed to the categories enumerated under it. Specific discovery under O 24 r 5, however, permits the discovery of documents which would lead to a train of inquiry, thereby affording a wider scope of discovery in the event that general discovery was inadequate.

42 As the Court of Appeal observed in *Tan Chin Seng v Raffles Town Club* [2002] 2 SLR(R) 465 at [17] and [19]:

> Documents which were required to be discovered under the concept of 'train of inquiry' are no longer discoverable under the present O 24 r 1. However, this is not to say that the concept of 'train of inquiry' has been removed from the Rules. It has reappeared in r 5 which relates to the discovery of specific documents.

I allowed the amendment and the hearing proceeded on the basis that the Summons was an application for general discovery.

43 The classes of documents sought and/or alleged to be missing by the Plaintiff were the following [note: 22]:

(i) at least 9 separate emails exchanged between lawyers of the Defendant law firm, C&C and

WH and a "pivotal" email sent by the Defendant to WH reporting on the Court of Appeal's decision in CA 109/2007 and CA 110/2007;

(ii) correspondence between the Defendant and C&C (Singapore and the UK) and CAG;

(iii) Court attendance notes of all hearings (inter partes and ex-parte);

(iv) Non-court attendance notes;

(v) Internal notes and memoranda flowing between the lawyers of the Defendant law firm.

Mr Liew iterated at the hearing that the classes of documents enumerated above were merely examples of the Defendant's failure to disclose relevant documents and should not be taken as being exhaustive of all relevant documents that were undisclosed by the Defendant. His refrain was that if documents (such as the emails) which were *common* to both the Plaintiff and Defendant were not disclosed in the Original list, there could be no certainty that relevant documents which were *not common* to both parties, had likewise been undisclosed in the Original List. It simply could not know what other relevant documents there were if the Defendant was indeed withholding certain pivotal documents.

44 Disputing the relevance of these classes of documents, Ms Tan argued that it had disclosed all relevant documents and had even disclosed those which were not relevant. To the extent that the Defendant had gone further by disclosing documents which were not relevant, Ms Tan argued that it should not be criticized or construed to have fallen short of its discovery obligations. It also submitted that the classes of documents sought had to be relevant to the Plaintiff's pleadings.

45 Para 24/1/7 of *Singapore Civil Procedure 2007* states that

> Relevance will be determined by reference to the pleadings. However, the relevance of an issue cannot be dictated by a party unilaterally simply by placing its in his pleadings.

The passage goes on to add that the pleadings must be in relation to the subject matter of the dispute.

46 In my view, most documents generated between a plaintiff and defendant and related parties might be said to have some connection even if tenuous to a dispute and are thus broadly speaking, relevant to the matter at hand. But it cannot be that every single document with an iota of relevance has to be disclosed- apart from the logistical nightmare it may present, it encourages lawyers to be indiscriminating (which is antithetical to the practice of their craft) and certainly does little to assist the court. The test of relevance thus cannot be the be-all and end-all of discovery. Rather, it is necessity that is the focal point in both general and specific discovery. This principle is enshrined in O 24 r 7 and has been judicially expressed by Belinda Ang J in her observations in *Bayerische Hypo- und Vereinsbank AG v Asia Pacific Breweries* (Singapore) Pte Ltd [2004] 4 SLR(R) 39 at [37]-[38]:

> 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 docment 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.

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 of cause before proceedings are commenced or for "saving costs".

Hence, if the documents sought are relevant but not necessary for the fair adjudication of the dispute or to save costs, the court will not order discovery of such documents. Necessity is the key to discovery (see also *Ting Kang Chung John v Teo Hee Lai Building Construction Pte Ltd* [2008] SGHC 54).

Whether the classes of documents sought were relevant

47 I now return to the classes of documents sought.

The emails

The nine emails (see [43] above) were sent by the solicitor from the Defendant law firm having charge of the Plaintiff's admiralty action to solicitors at C&C and WH. I found that the contents of these emails pertained to housekeeping matters such as the drafting of affidavits and administrative queries; they were irrelevant to the pleadings (although Ms Tan submitted that the Defendant was prepared to file a list of these emails despite disputing their relevancy).

48 As for the tenth alleged "pivotal" email from the Defendant to WH explaining the Court of Appeal decision, Mr Liew submitted at the hearing that this email was potentially powerful for the Plaintiff as it would allow it to compare the advice given in this email with the advice the Defendant had rendered before the admiralty action commenced. I did not think that this email was relevant to the pleaded case either. The Plaintiff's pleaded case is that the "cumulative conduct" [note: 23] of the Defendant in advising the Plaintiff to commence the admiralty action to arrest the Vessel was a breach of contract and/or negligence. I did not see how the afore-mentioned email was relevant much less necessary, especially when it was an explanation of the Court of Appeal decision to WH.

Correspondence between the Defendants and C&C and CAG

49 The Plaintiff argued in its affidavit that it was "less than clear" whether all the relevant documents in this class had been disclosed in the Original list. In response, the Defendant averred that this request was fishing expedition. It asserted that all relevant correspondence between CAG and itself (which was not copied to the Plaintiffs and/or WH) had already been disclosed. Insofar as there was any advice from the Defendant which was communicated to C&C and subsequently shared with or conveyed to the Plaintiff and/or WH, it submitted that these had also already been specifically pleaded by the Defendant and the relevant correspondence had been disclosed. It further submitted that even if there were undisclosed, relevant documents in this category (which it denied), such documents would belong to CAG whose consent would be required for copies of these documents to be released. Ms Tan submitted that an application for specific discovery would need to be made if this was disputed by the Plaintiff.

50 In *Soh Lup Chee & Ors v Seow Boon Cheng & Anor* [2002] 1 SLR(R) 604 ("*Soh Lup Chee*") at [9], the High Court remarked that generally, affidavits verifying lists of documents could not be

contravened by other contentious affidavits and shall not be subjected to cross-examination. It iterated the general principle that where the court is satisfied from the documents produced that other documents must exist, the party must either produce them or explain on oath what has become of them. It ruled at [11] of its judgment however that the case before it was an exception as the party from whom discovery was sought had "amply demonstrated, through their counsel, the numerous obvious omissions of documents that must surely exist, or to be more precise have existed." Such was not the case before me.

51 It must be borne in mind that

> …a party was and is entitled to apply for further and better list, where it appears on the face of the list already served…or on the face of disclosed documents…or an admission that in all probability the party has or had other relevant documents beyond those disclosed. For the purpose of such an application no affidavit is required.

(para 24/5/1 of *Singapore Civil Procedure 2007*)

Also,

> An order may be made for a further and better list of documents where it appears (1) from the list itself, or (2) from the documents referred to in it, or (3) from admissions made either in the pleadings of the party making discovery or otherwise, that the party making discovery has or had other relevant documents in his possession, custody or power (*Global Energy (Asia) Pte Ltd v McGraw-Hill Cos. Inc. (t/a Platt's)* [2001[SGHC 247…)

(para 24/1/12 of *Singapore Civil Procedure 2007*)

I did not think that any of the above limbs had been fulfilled. It did not appear to me from the Original list or the documents referred in it, nor were there any admissions, that there were relevant documents in this category undisclosed by the Defendant.

52 Mr Liew also highlighted the case of *British Association of Glass Bottle Manufacturers v Nettlefold* [1912] 1 KB 369 ("*Glass Bottle*") which was cited in *Soh Lup Chee*. In *Glass Bottle*, Farwell LJ remarked that the Court could draw inferences that a document in a list implied the existence of a source document. For example, a balance sheet would imply the existence of account books. It naturally followed that if the balance sheet was relevant, then so would the account books. *Glass Bottle* is however not analogous to the present category of documents as there are no such source documents which can or have been identified. Any inference drawn that there has to be more undisclosed relevant correspondence would be mere speculation which this court would be loathe to engage in. There is no basis for me to think that the Defendant has not fulfilled these discovery obligations under this category.

Court Attendance Notes

53 In its supporting affidavit, the Plaintiff in regard to this class of documents simply asserted that it did not know if all attendance notes of all hearings had been disclosed. The Defendant submitted that it had already voluntarily disclosed court attendances notes and emails in its Original list, even though not all were relevant to the issues in the action. It averred that it had already been generous in giving discovery by disclosing in its Original list documents which were not relevant to the issue.

54 At this juncture, I would point out that first, such a position generates confusion. I concurred

with Mr Liew that the Plaintiff cannot vacillate in this manner by disclosing documents which it said were not relevant and then insisting on withholding documents for the same reason, *i.e*. that they were not relevant. It is a logically inconsistent and untenable position to adopt. Second, generosity of disclosure is wholly irrelevant in discovery. The bedrock requirement as I have discussed earlier, is necessity. Simply because a party considers itself as having been generous does not mean that further disclosure is never warranted. One must be "generous" with the right type of documents. I hasten to add though, that generosity in discovery is to be desired only insofar as the party giving discovery is not withholding any documents which are relevant and necessary for the fair resolution of the dispute or for saving costs.

55 For completeness, I would point out that the Plaintiff cannot now or later apply to have the supposedly irrelevant documents removed from the Original list unless they are privileged (*Ser Kim Koi and another v Fulton William Merrell and others* [2008] 2 SLR(R)1063). For now, these alleged irrelevant documents must be presumed to be relevant (see also Chapter XXIIA Part 9 para [542] of *Civil Practice in Singapore and Malaysia*, Jeffrey Pinsler SC (Lexis Nexis, 2009)) ("*Civil Practice*"). Indeed, a list of documents verified by affidavit is taken to be conclusive and the documents listed therein presumed to be relevant:

> …the court will assume against the party making the list, at least until the contrary is shown, that the documents in the list are all relevant and liable to production.

(para 24/3/1 of *Singapore Civil Procedure 2007*)

There is no practical purpose served in disclosing irrelevant documents and as the above extracts show it is pointless for the Defendant to now say that it has disclosed irrelevant documents.

56 The Defendant has identified a Court Attendance Note dated 3 August 2006 which was not disclosed in its Original list. This note related to an appeal hearing before Tan Lee Meng J. The Defendant disputed its relevance to the pleaded issues but I express a contrary view. Court attendance notes where the Plaintiff was represented by the Defendant will be relevant and necessary insofar as they evinced the Defendant's conduct of the dispute before the court.

Non-Court Attendance Notes

57 Documents sought under this class were "attendance notes of meetings, telephone conversations, *etc* between the Defendants and Clyde & Co (Singapore and UK) and Waterson Hicks." The Plaintiff averred that as these documents would "show what the Defendants were told and what they advised, they are relevant". Save for two attendance notes involving WH or the Plaintiff dated 13 June 2006 and 29 September 2006 respectively, the Defendant submitted that none of its other attendance notes involved WH or the Plaintiff and these notes were thus not disclosed. It further argued that these two attendance notes related to two telephone calls which had occurred *after* the arrest of the ship and hence did not relate to the "cumulative conduct of the Defendants in advising the Plaintiff to commence the admiralty action."

58 I have seen the afore-mentioned attendance notes and believe that they are relevant and necessary for the fair adjudication of the suit. In my view, the "cumulative conduct" of the Defendant in advising the Plaintiff to proceed with the admiralty action cannot be construed to refer only to the advice given at the initial stage, *i.e*. when the Plaintiff was advised to proceed with the admiralty action. It also extends to the Defendant's conduct subsequent to the rendering of such advice. However, where a document and its content are so far removed from the subject matter of the dispute, it is unlikely to be relevant at least for the purposes of an application under general

discovery. Whether a document is far removed from the crux of the dispute is a matter of discretion for the Court. I find that the two non-court attendance notes were discoverable. Any other non-court attendance notes involving the Defendant and Plaintiff and/or WH would also be discoverable.

Internal Notes and Memoranda

59 Written communications between various lawyers of the Defendant firm in the form of memoranda or emails were sought as well. The Plaintiff's basis for the disclosure of such documents was that these documents were relevant in showing "what the Defendants knew, how strong they believed the Plaintiff's case was, their internal discussion, what their respective views were etcetera." Suffice to say, I do not see any "demonstrable nexus" (*Dante* at [20] and [28]) between the Defendant's subjective state of mind and the Plaintiff's pleaded case for the purposes of O 24 r 1. I concur with the Defendant's submission that the Defendant's privately held views and beliefs as to the strength of the Plaintiff's case was not an issue on the pleadings. What is relevant is the advice rendered to the Plaintiff at the material time, not the ruminations of the Defendant's solicitors.

Conclusion

60 In sum, I am of the view that the following classes of documents: (i) court attendance notes where the Defendant had acted for the Plaintiff and (ii) non-court attendance notes generated between the Defendant, Plaintiff and/or WH, are relevant to the pleaded case and necessary for the fair resolution of the dispute.

61 I hereby order that a further and better list of documents verified by affidavit be furnished to the Plaintiff in respect of (i) and (ii) within 7 days of my order. Each party is to bear its own costs. It remains for me to thank Mr Liew and Ms Tan for their efforts and spirited submissions.

[note: 1] *Per* Judge Benjamin Cardozo in Berkey v Third Ave.Ry.Co., 244 N.Y. 84, 94 (1926).

[note: 2] Statement of Claim ("SOC") filed 10 June 2009 at paras 2 and 3

[note: 3] SOC at para 6

[note: 4] *Ibid*. at paras 7- 10

[note: 5] Defence filed on 9 July 2009 at paras 35-40

[note: 6] [6] of The "Vasily Golovnin" [2008] 4 SLR(R) 994

[note: 7] *Ibid*. at [152]

[note: 8] SOC, para [27]-[29]

[note: 9] Defence at paras 3 and 4

[note: 10] Reply filed on 14 August 2009, at paras 2 and 3

[note: 11] Notes of Evidence in SUM No 6071/2009, 4 December 2009 at p 2

[note: 12] Defendant's Letter to Plaintiff dated 22 December 2009

[note: 13] Defendant's letter to Plaintiff dated 23 December 2009, at para 8

[note: 14] *Vide* SUM 6044/2009

[note: 15] SUM 6044/2009 and SUM 6070/2009

[note: 16] Defendant's letter to Plaintiff dated 29 December 2009 at paras 4 and 6

[note: 17] Plaintiff's letter to the Defendant dated 23 December 2009, at para 2

[note: 18] Notes of Evidence in SUM No 6071/2009, 4 December 2009 at p 2

[note: 19] Plaintiff's letter to the Defendant dated 23 December 2009, at para 10

[note: 20] The supporting affidavit, at para 29

[note: 21] Rules of Court (Amendment No.2) Rules 1999

[note: 22] Affidavit at paras 13, 23-27

[note: 23] SOC at para 26