

QS-First Pte Ltd v Goh Tuan Keong and another
[2018] SGHCR 5

Case Number : Suit No 20 of 2017 (SUM 851 of 2018)
Decision Date : 13 April 2018
Tribunal/Court : High Court
Coram : Tan Teck Ping Karen AR
Counsel Name(s) : Mr Ashok Kumar Rai and Mr Haziq Ika bin Zahidi (Eversheds Harry Elias LLP) for the plaintiff; Mr Ng Huan Yong (Chia Wong LLP) for the first and second defendant.
Parties : QS-First Pte Ltd — Goh Tuan Keong — Yau Sow Shan

Civil Procedure - Discovery of Documents

13 April 2018

Judgment reserved.

Tan Teck Ping Karen AR:

Introduction

1 This is an application by QS-First Pte Ltd (“QS-First”), the plaintiff in the substantive action, for specific discovery of certain documents from Goh Tuan Keong (“Goh”) and Yau Sow Shan (“Shan”), the defendants in the substantive action, under O 24 r 5 of the Rules of Court (“Rules of Court”).

2 The key issue in this application is what is required to be stated in the affidavit of the party from whom discovery is sought which will satisfy and will be in compliance with O 24 r 5 of the Rules of Court.

Background facts

3 The facts that led to this action are disputed. However, the relevant facts for this application are as follows. Leong Siew Loong (“Leong”), Goh and Shan were colleagues in the plaintiff. Leong is the current director of the plaintiff. Goh was a former director of the plaintiff. Shan, who is Goh’s wife, was the former corporate secretary and employee of the plaintiff.

4 QSF-The Enablers Private Limited (“The Enablers”) is alleged to be a subsidiary of the plaintiff. It was incorporated on 21 July 2010 to engage in the business of child / student care services for school going children.

5 In or around the first quarter of 2013, Goh and Shan rented a unit at the Pek Kio Community Centre (“Pek Kio Premises”) and from May 2013, the Pek Kio Premises was used as The Enablers’ office to carry out its business.

6 Goh and Shan also incorporated two other companies, The Enablers II Pte Ltd (“TEII”) and Star Campus Pte Ltd (“SC”). Goh and Shan say that these two companies were incorporated as they felt that if bids could be submitted under different entities, the chances of being awarded contracts to run Student Care Centres would increase. This would also distribute the revenue earned so as to

avoid any company becoming GST-registered with the costs of GST being passed on to the parent of students.

7 On 9 January 2017, Leong with some others took over possession of the Pek Kio Premises. From that date, Goh and Shan say they lost access to the Pek Kio Premises as well as all documents stored there which belonged to The Enablers, TEII and SC. Hence, Goh and Shan filed DC/DC 90/2017 in respect of the alleged trespass onto the Pek Kio Premises. Goh and Shan also filed DC/SUM 346/2017 which was an application for an injunction for, *inter alia*, the restraint of Leong and others from trespassing on the Pek Kio Premises and the return of The Enablers', TEII's and SC's items and documents to Goh and Shan. The Court hearing DC/SUM 346/2017 ordered the return of documents belonging to TEII and SC to Goh and Shan but declined to order the return of the documents belonging to The Enablers. Pursuant to this Order, documents belonging to TEII and SC were returned. Goh and Shan say that they have disclosed all these documents in this action.

8 It is the Plaintiff's case that Goh and Shan were not acting in the best interest of the plaintiff and The Enablers and had breached their duties towards these companies. As a result, this present action was commenced.

The present application

Preliminary observations

9 In the present application, pursuant to O 24 r 5 of the Rules of Court, the plaintiff seeks the discovery and production of 19 categories of documents as set out in Schedule A annexed to this judgment.

10 As submitted by the plaintiff's solicitors, the crux of the plaintiff's case is that TEII, SC and a third company, D'Arc Pte Ltd ("D'Arc") are in direct competition with The Enablers in the business of student / child care services and the documents sought in this application are to show whether these companies were in fact competing with The Enablers.

11 The facts surrounding the operation of D'Arc are disputed. The plaintiff says that Goh is operating D'Arc. This has been denied by Goh.

12 Despite the fact that there are 19 categories of documents sought, by the time this application was fixed for hearing before me, the position of parties in respect of the documents sought had settled into three broad groups:

(a) Group 1: Documents in which the issues of possession, custody or power as well as relevance and necessity are disputed. This is category 4.

(b) Group 2: Documents in which only the issue of whether the defendants had possession, custody or power is disputed. This would be all the other categories except for categories 2, 4 and 8.

(c) Group 3: The only issue is that of costs. I will not deal with this group in this judgment as parties have agreed that this may be dealt with in the round when costs of this application is determined. This would be Category 2 and 8.

13 As each group deals with different aspects of the law on discovery, I will discuss the relevant law in the course of the analysis of each group.

14 As this is an application for discovery under O 24 r 5 of the Rules of Court, it would be appropriate to start by stating the material provisions of this rule:

5(1) Subject to Rule 7, the Court may at any time, on the application of any party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any document specified or described in the application or any class of document so specified or described is, or has at any time been in his possession, custody or power, and if not then in his possession, custody or power, when he parted with it and what has become of it.

...

(3) An application for an order under this Rule must be supported by an affidavit stating the belief of the deponent that the party from whom discovery is sought under this Rule has, or at some time had, in his possession, custody or power, the document, or class of documents, specified or described in the application and that it falls within one of the following descriptions:

- (a) a document which the party relies or will rely;
- (b) a document which could –
 - (i) adversely affect his own case;
 - (ii) adversely affect another party's case; or
 - (iii) support another party's case;
- (c) a document which may lead the party seeking discovery of it to a train of inquiry resulting in his obtaining information which may –
 - (i) adversely affect his own case;
 - (ii) adversely affect another party's case; or
 - (iii) support another party's case.

(4) An order under this Rule shall not be made in any cause or matter in respect of any party before an order under Rule 1 has first been obtained in respect of that party, unless, in the opinion of the Court, the order is necessary or desirable.

Group 1 documents

15 There is only one category in which both the issue of possession, custody or power as well as relevance and necessity are disputed. This is category 4. The documents sought in this category relate to the transfer of staff from the plaintiff to TEII and/or SC.

Plaintiff's submissions

16 In its supporting affidavit, the plaintiff states that it intends to rely on these documents for its case that the defendants, in breach of their duties to the plaintiff and The Enablers, recruited staff from The Enablers to work for TEII, SC and D'Arc. The basis for this is that the plaintiff has discovered that there are at least 5 former employees of The Enablers who were subsequently

employed to work for TEII. The plaintiff learnt of this when it discovered offers of employment from TEII to these staff.

17 The plaintiff submits that these documents will lead to a train of inquiry and would show how the defendants had failed to act in the best interest of the plaintiff and The Enablers. Reference was made to paragraph 16b and 16e of the Statement of Claim to support the discovery of these documents.

Defendants' submissions

18 The defendants' position is simple. They say that there is no transfer of staff and so they never had possession, custody or power of these documents. They also say that the allegation of transfer of staff is not pleaded in the Statement of Claim. Therefore, this category should not be allowed.

Analysis

19 The plaintiff submitted that the documents sought in Category 4 may be discovered as the documents are both directly relevant and indirectly relevant.

Direct relevance

20 It was held in *Dante Yap Go v Bank Austria Creditanstalt AG* [2007] SGHC 69 ("*Dante Yap*") at [28] that a party seeking documents on the basis that it is directly relevant has to demonstrate a nexus between the pleaded causes of action and the documents they wish to discover. As was observed by Sundaresh Menon JC (as he then was) in *UMCI Ltd v Tokio Marine & Fire Insurance Co (Singapore) Pte Ltd and Others* [2006] 4 SLR 95 at [71] in respect of *Tan Chin Seng & Ors v Raffles Town Club Pte Ltd* [2002] 3 SLR 345 ("*Tan Chin Seng*"):

[Tan Chin Seng] affirms the importance of considering the relevance of documents sought in discovery *by reference to the pleaded issues*. Where discovery is sought in relation to an issue not raised in the pleadings, then it may well constitute a fishing exercise.

[emphasis added]

Indirect relevance

21 Under O 24 r 5(3)(c), a document which may lead the party seeking discovery of it to a train of inquiry resulting in his obtaining information which may adversely affect or support the cases of the parties is permissible. However, a party seeking discovery on this basis cannot hope to get an order in his favour *unless* the train of inquiry will itself lead to discovery of *directly* relevant document as per *Dante Yap* at [30].

22 I note that the plaintiff relies on paragraph 16b and 16e of the Statement of Claim in support of the discovery of this category. Paragraph 16b pleads that the defendants have failed to act in the best interest of the plaintiff by engaging in outside business without the disclosure or written permissions of the plaintiff and/or The Enablers. Paragraph 16e pleads that TEII and SC are companies, like The Enablers, in the business of student / child care services. When the plaintiff was queried as to how the documents sought connect with the pleadings, the plaintiff's counsel submitted that the crux of the plaintiff's case is whether TEII and/or SC are businesses which are competing with The Enabler. He pointed out that the documents would show the scope of work and what the staff were employed to do. It was submitted that if the documents show that the staff were

employed in the same capacity in both The Enablers and TEII and/or SC, then it would help in the understanding of the business of TEII and/or SC and whether they are competing with The Enablers.

23 I note that there is nothing in paragraphs 16b and 16e of the Statement of Claim which state that the defendants have failed to act in the best interest of the plaintiff and/or The Enablers by transferring staff from The Enablers to TEII and/or SC. Since this has not been pleaded, the documents sought in Category 4 does not connect to and is not directly relevant to any of the pleaded facts. It also does not lead to documents which are directly relevant. Therefore, for these reasons, I am of view that the documents sought in Category 4 are not relevant, directly or indirectly, and discovery of the same is not allowed.

Group 2 documents

24 In the categories that fall under this group, there is no dispute as to relevance or necessity. The only dispute is the issue of whether the defendants have or had possession, custody or power over the documents sought.

The applicable law

25 *The Management Corporation Strata Title Plan No 689 v DTZ Debenham Tie Leung (SEA) Pte Ltd and Anor* [2008] SGHC 98 (“DTZ”) stated that there are two elements, jurisdiction and discretion, that have to be satisfied before an order for specific discovery is made under O 24 r 5. As stated by DTZ at [26]:

The distinction between jurisdiction and discretion is also supported by a plain reading of O 24 r 5(1) of the Rules. This provides, *inter alia*, that “... the court *may*... on the application of any party to a cause or matter.. make [the order for discovery]” [emphasis added]. As Prof Pinsler SC notes in *Singapore Court Practice 2006* (LexisNexis, 2006) at para 24/5/2, the party seeking discovery does not become automatically entitled to it on the fulfilment of the conditions in rr 5 and 7 as the court has a discretion over and above the conditions to ensure that discovery and its extent are fully justified. Hence the word “may” in r 5(1). As such, the fulfilment of the conditions is a condition precedent to the court possessing the *jurisdiction* to order discovery; however, even after the conditions are fulfilled and the court is thereby imbued with jurisdiction, it still retains a *discretion* to refuse discovery uninhibited by the express wording of the Rules.

26 First, the court must have *jurisdiction* to deal with the matter. In other words, there must be sufficient evidence that the document sought is in the possession, custody or power of the other party. The basis for this may be found in O 24 r 5(3) which states:

(3) An application for an order under this Rules *must be supported by an affidavit stating the belief of the deponent that the party from whom discovery is sought under this Rule has, or at some time had, in his possession, custody or power, the document, or class of documents, specified or described in the application...*

[emphasis added]

27 As the discovery application is an interlocutory application, the court in DTZ at [30] expressed the view that a deposition in an affidavit to the effect that the document is in the possession, custody or power of the other party would constitute “sufficient evidence”:

... Given that we are merely at the interlocutory stage, such that the truth of affidavits are

generally not questioned, I think that a deposition in an affidavit to the effect [that the document is in the possession, custody or power of the other party] would constitute "sufficient" evidence... where the affidavit is in order (so as to constitute "sufficient evidence"), and the other party states on oath that he does not have the documents concerned, then ... the court nonetheless retains the *jurisdiction* to make an order for discovery...

28 Having been seized with jurisdiction, the second element is *discretion*. When the party from whom discovery is sought states on oath that he does not have the document in his possession, custody or power, the court would then have to exercise its discretion to consider whether the reply given by this party has satisfied the requirements of O 24 r5(1) and no order for specific discovery should be made. As was stated in *DTZ* at [33]:

As to the exercise of the court's discretion, if the purpose of an order made under O 24 r 5 is to compel the other party to make an affidavit in the terms as stated in r 5(1), then it is arguable that if the other party makes an affidavit on such terms in response to the application, the purpose of O24 r 5 would be fulfilled. There would be no further reason to make the order under O 24 r 5 (1) since its purpose has already been fulfilled. However, the situation would be different if the affidavit does not fully meet the requirements prescribed under O 24 r 5. This is because the other party might well say that he does not have possession, custody or power of the document concerned, but that does not answer the question of what happened to the documents, as required under O 24 r 5. In that case, the purpose of O 24 r 5 would still be operative.

Analysis

Category 1

29 Under Category 1, the plaintiff is seeking documents in relation to the bids made by D'Arc for contracts to set up and/or operate student care centres.

30 As mentioned at [11] above, the facts in respect of D'Arc are disputed.

31 In the affidavit filed in support of this application, the plaintiff says that the defendants operate D'Arc because the mobile number and email address of Goh is listed in the GeBiz company profile of D'Arc. Further, D'Arc is a competitor of The Enablers as it has placed at least 44 tender bids in 2017 for the set up and operation of student care centres in primary schools. The GeBiz profile and the Accounting and Corporate Regulatory Authority ("ACRA") business profile of D'Arc both indicate that D'Arc is involved in student care services.

32 The defendants do not admit that they operate D'Arc. In the reply affidavit, Goh denies that he owns D'Arc. He says that D'Arc is owned by his university friend, Mr Tan Eng Kwang Harry ("Harry"). Harry knew that Goh had experience with running child care centres and had ask Goh for assistance in the building of an electronic management system that would help in the management of school-based student care centres. Hence, Goh says that the documents owned by D'Arc are not his to disclose as he does not have possession, custody or power over these documents.

33 In my view, the fact that D'Arc was engaged in the set up and operation of student care centres is not material to the question of whether the court has jurisdiction under O24 r 5(3) as it does not show whether the defendants have or had possession, custody or power over the documents. In order for the court to have jurisdiction to make an order under O 24 r 5(3), the plaintiff has to show sufficient evidence that the defendants have or at some time had possession, custody or power over these documents from D'Arc. The only material fact on which the plaintiff base their belief

that the defendants have possession, custody or power of the document from D'Arc is the fact that Goh's mobile number and email address are listed in the GeBiz company profile of D'Arc.

34 It is noted that the plaintiffs are seeking discovery from the defendants i.e. both Goh and Shan. In my view, a distinction has to be drawn between Goh and Shan. It is only Goh's mobile number and email address that is stated in the GeBiz company profile of D'Arc. In fact, I note that in paragraph 16(o) of the Statement of Claim, the case which the plaintiff pleads is that it is Goh who is operating D'Arc. There is nothing to connect Shan to D'Arc.

35 When I asked plaintiff's counsel for the basis on which the plaintiff was seeking the documents from D'Arc from Shan, a very startling statement was made. The plaintiff's counsel stated that Goh and Shan are husband and wife and due to this relationship, Shan is taken to have possession, custody or power over these documents. I know of no case or authority which state that a person is taken to have possession, custody or power over documents merely because the person is the spouse of another person who is alleged to have possession, custody or power over the requested documents. Therefore, this basis for alleging that Shan has possession, custody or power over the documents from D'Arc is rejected as being total unmeritorious.

36 The plaintiff's alternative basis for saying Shan has possession, custody or power over the documents from D'Arc is that since Goh and Shan are directors of two other competing companies, TEII and SC, then there would be a similar pattern for D'Arc. I observe that this was not stated in the supporting affidavit filed by the plaintiff and is a submission made by the plaintiff's solicitor with no factual basis. As such, this argument is also rejected.

37 For the above reasons, I am of the view that no order for specific discovery is to be made for Shan to disclose any of the documents from D'Arc sought in category 1.

38 I now turn to Goh. It is clear that he has some connection to D'Arc as his mobile number and email address are stated in the GeBiz company profile of D'Arc. The issue here is whether this would be "sufficient evidence" to show that Goh has or had possession, custody or power over the documents from D'Arc.

39 The plaintiff rely on *DTZ* at [30] (see [27] above) to state that all that is required for the court to have jurisdiction under O 24 r 5 is for the plaintiff to file an affidavit stating the belief that the defendants have possession, custody or power over the documents and the court would not question this affidavit since this is at the interlocutory stage.

40 However, in my view, the mere fact that a statement is made on affidavit that Goh has possession, custody or power over the document is not by itself sufficient evidence to found the court's jurisdiction under O 24 r 5. The court will have to analyse the evidence submitted to determine whether the party from whom discovery is sought does, at the prima facie level, has or had possession, custody or power over the documents which are sought.

41 In the present scenario, the only evidence which has been presented to support the position that Goh has possession, custody or power over the documents from D'Arc is that his mobile number and email address are on the GeBiz company profile of D'Arc. However, what is the significance of this and how does this show that Goh has or had possession, custody or power over the documents from D'Arc? No explanation was given by the plaintiff on this. The importance of ensuring a party who is ordered to provide discovery does have possession, custody or power over the document is underscored by O 24 r 16 of the Rules of Court. O 24 r 16 provides that if a party fails to comply with an order to discover any document pursuant to an order, the Court may make an order that the

action is dismissed or defence struck out and judgment entered accordingly. The dire consequence of not complying with a discovery order underlines the importance of ensuring a party who is to disclose a document does or did have possession, custody or power over the said document.

42 As such, as no explanation has been given as to the reason Goh is said to have possession, custody or power over the documents from D'Arc arising from his contact details being stated in the GBiz company profile of D'Arc, I am of the view that insufficient evidence has been provided to show that Goh has possession, custody or power of the D'Arc documents. Accordingly, the court's jurisdiction to order discovery under O 24 r 5 in respect of Goh for category 1 has not been invoked and so no order for discovery will be made.

Categories 3, 5, 6, 7, 9, 18 and 19

43 The defendants' position stated in the reply affidavit is that they have disclosed all the documents that fall under these categories which are in their possession, custody or power. While they previously had possession, custody or power over the documents under these categories, these documents are all located at the Pek Kio Premises and they lost possession, custody or power over these documents when Leong took over possession of the Pek Kio Premises.

44 The plaintiff did not file any response affidavit to rebut the defendants' position. The plaintiff's solicitor does not appear to dispute the defendants' statements that they had but have since lost possession, custody or power over these documents. The issue which the plaintiff's solicitor raised is that the reply affidavit from the defendant does not satisfy the requirements of O 24 r 5(1). It was submitted that Form 37 requires the defendants to enumerate in a list of documents all the documents which they say are no longer in their possession, custody or power.

45 First, I would emphasise that this is an application made pursuant to O 24 r 5. The requirement under O 24 r 5(1) is that the party who is to disclose the documents is to "*to make an affidavit stating whether any document specified or described in the application or any class of document so specified or described is, or has at any time been, in his possession, custody or power, and if not then in his possession, custody or power, when he parted with it and what has become of it.*" Once the party has file an affidavit stating this, then there is no further reason for the court to exercise its discretion and make any order under O 24 r 5(1). See *DTZ* at [33] (at [28] above).

46 There is no requirement under O 24 r 5 for a party giving discovery to file a list of documents in Form 37 as submitted by Plaintiff's counsel. Form 37 is the list of documents which a party is to file pursuant to an order made under O 24 r 1.

47 The relevant provisions of O 24 r 1 and 3 are:

1 —(1) Subject to this Rule and Rules 2 and 7, the Court may at any time order any party to a cause or matter (whether begun by writ, originating summons or otherwise) to give discovery by making and serving on any other party a list of the documents which are or have been in his possession, custody or power, and may at the same time or subsequently also order him to make and file an affidavit verifying such a list and to serve a copy thereof on the other party.

...

3.—(1) A list of documents made in compliance with an order under Rule 1 must be in Form 37, and must enumerate the documents in a convenient order and as shortly as possible but describing each of them or, in the case of bundles of documents of the same nature, each

bundle, sufficiently to enable it to be identified.

Therefore, it is clear that Form 37 relates only to an order for discovery made pursuant to O 24 r 1 and not an order for discovery under O 24 r 5.

48 In any event, I am of the view that it would be unreasonable to require a party filing an affidavit in compliance with O 24 r 5(1) to enumerate all the documents which the party says he has lost possession, custody or power over. For example, in category 6, the plaintiff seeks discovery of cheque books and/or cheque stubs in respect of bank accounts held with various banks. The defendants have stated on affidavit that they had but no longer have possession, custody or power over these documents as the documents are at the Pek Kio Premises and they lost possession, custody or power over these documents when Leong took over this premises. The plaintiff is not satisfied with this answer and says that the defendants should list the cheque numbers of all the cheques they say they have lost possession, custody or power over. In my view, this is an unreasonable and untenable position for the plaintiff to take. Since the defendants no longer have possession, custody or power over these document, they would not be able to give any details as to the cheque numbers, cheque books or cheque stubs.

49 It should also be noted that O 24 r 3(1) provides that apart from listing the documents individually, the documents of the same nature may also be listed as bundle of documents provided the bundle is sufficiently identified. As such, it would be sufficient for the defendants to refer to cheque books and/or cheque stubs as this clearly identifies the documents sought. The defendants are not required to provide a list of all the cheques with the cheque numbers that they had possession, custody or power over.

50 For the above reasons, no order for discovery is made for categories 3, 5, 6, 7, 9, 18 and 19.

Category 10 and 11

51 This category is in relation to documents recording purchases from Amway (Singapore) Pte Ltd and Amway (Malaysia) Sdn Bhd (collectively "Amway") from the plaintiff company and authorisation given for these purchases.

52 The plaintiff says that they believe that the defendants have possession, custody or power over these documents as the plaintiff had embarked on a training and consultancy project with Amway in or around 2002. These documents are required to show the defendants caused the plaintiff to wrongly purchased items from Amway.

53 The defendants' response is that in the letter of request, the plaintiff has sought documents under these categories from *The Enablers* but in this application, the plaintiff is now seeking documents from the *plaintiff*. In any event, the defendants' position is that they no longer have possession, custody or power over these documents as these documents would be at the plaintiff's registered office. As Goh has been removed as a director of the plaintiff since 7 September 2017, he is no longer allowed access to the registered office of the plaintiff and so does not have access to these documents.

54 The plaintiff is dissatisfied with this answer and say that the defendants need to state either they never had possession, custody or power over the documents, or if they did, what happened to the documents. It is noted that the plaintiff did not file any reply affidavit to dispute Goh's statement that he no longer has access to the plaintiff's premises and so no longer has possession, custody or power over these documents.

55 In my view, the defendants have clearly states that they had possession, custody or power over the documents. They have also clearly stated how they lost possession, custody or power and the reasons they are not able to disclose these documents. Therefore, the defendants have complied with O 24 r 5(1) and no order will be made for the disclosure of documents under categories 10 and 11.

Category 12 and 13

56 For documents under category 12, the defendants confirm they will file a supplementary list of documents. Therefore, nothing more needs to be said.

57 For the documents under category 13, the defendants acknowledged that they did not deal with this specifically in their reply affidavit. As such, the defendants will be ordered to file an affidavit that complies with O 24 r 5(1) for this category.

Category 14 and 15

58 For the documents under these categories, the defendants say that they have already disclosed all documents in the supplementary list of documents filed on 27 June 2017. However, the plaintiff notes that the defendants' response to the letter of request dated 4 August 2017 was that they will endeavour to file a supplementary list of documents. Therefore, the plaintiff says that there could be additional documents which have not been disclosed which are in the defendants' possession, custody or power

59 I agree with the plaintiff. Since the defendants' reply in August 2017 implies that there may be some other documents which have not been disclosed in the earlier list of documents filed in June 2017, the defendants are to file an affidavit that complies with O 24 r 5(1) for category 14 and 15.

Category 16 and 17

60 The defendants' response to these categories is simply that they do not have these documents in their possession, custody or power. The plaintiff say that this is insufficient as it does not comply with O 24 r 5(1). If the defendants never had these documents, they should state so. If not, they should state when they lost possession, custody or power over the documents.

61 I agree with the plaintiff. In other categories, the defendants have stated on affidavit that they never had the documents. If that is the position here for these documents, the defendants should likewise state they never had the documents. If they did and have since lost possession, custody or power, this should also be stated on affidavit together with information on when they parted with the documents and what has happened to them. Therefore, the defendants are also to file an affidavit that complies with O 24 r 5(1) for categories 16 and 17.

Conclusion

62 In summary, I make the following orders :

- (a) Pursuant to O 24 r 5(1), the defendants are to file an affidavit stating whether they have or at any time had in their possession, custody or power the documents in categories 13, 14, 15, 16 and 17, and if the documents have been but are now not in their possession, custody or power, stating when they parted with the same and what has become of the same.

(b) The defendants are to file a supplemental list of documents and affidavit verifying the said supplemental list of documents in respect of documents in category 12.

63 I will hear parties on the issue of costs.

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