IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 159

Originating Summons 305 of 2015
(Registrar's Appeals Nos 73 and 88 of 2016)

Between

Success Elegant Trading Limited

… *Appellant*

And

(1) La Dolce Vita Fine Dining Company Limited
(2) La Dolce Vita Fine Dining Group Holdings Limited
(3) Deutsche Bank Aktiengesellschaft

… *Respondents*

In the matter of Order 24 Rule 6(5) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed)

Between

(1) La Dolce Vita Fine Dining Company Limited
(2) La Dolce Vita Fine Dining Group Holdings Limited

… *Plaintiffs*

And

(1) Deutsche Bank Aktiengesellschaft
(2) Success Elegant Trading Limited

… *Defendants*

Originating Summons 307 of 2015
(Registrar's Appeals Nos 72 and 89 of 2016)

Between

Success Elegant Trading Limited

… *Appellant*

And

(1) La Dolce Vita Fine Dining Company Limited
(2) La Dolce Vita Fine Dining Group Holdings Limited
(3) Credit Suisse AG

… *Respondents*

In the matter of Order 24 Rule 6(5) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed)

Between

(1) La Dolce Vita Fine Dining Company Limited
(2) La Dolce Vita Fine Dining Group Holdings Limited

… *Plaintiffs*

And

(1) Credit Suisse AG
(2) Success Elegant Trading Limited

… *Defendants*

GROUNDS OF DECISION

[Civil Procedure] — [Disclosure of documents]

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Success Elegant Trading Limited
v
La Dolce Vita Fine Dining Company Limited and others and another appeal

[2016] SGHC 159

High Court — Originating Summons No 305 of 2015 (Registrar's Appeals Nos 73 and 88 of 2016); Originating Summons No 307 of 2015 (Registrar's Appeals Nos 72 and 89 of 2016)
Andrew Ang SJ
16 March; 5 July 2016

15 August 2016

Andrew Ang SJ

Introduction

1 These were appeals by Success Elegant Trading Limited ("SETL") against the decision of an assistant registrar ("the AR") ordering pre-action discovery against two banks under O 24 r 6(5) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). In Originating Summonses Nos 305 of 2015 ("OS 305") and 307 of 2015 ("OS 307"), the plaintiffs applied for discovery of bank documents pertaining to the bank accounts of SETL ("the second defendant") with Deutsche Bank Aktiengesellschaft ("DB") and Credit Suisse AG ("CS"), respectively. DB and CS were the first defendants in OS 305 and OS 307, respectively.

2 After hearing the parties, the AR ordered disclosure of the following documents within CS's and DB's possession, custody or power relating to any account held in the name of or beneficially owned by Zhang Lan ("Mdm Zhang") and/or SETL and/or any alias known to CS and DB:

(a) the account opening forms and other related documents submitted for the purpose of opening the aforesaid accounts;

(b) bank statements in respect of those accounts setting out all transfers into and/or from the accounts from and including 13 December 2013 to the date of the order; and

(c) remittance slips, payment instructions and SWIFT instructions relating to any transfers above.

3 In addition, the AR ordered that the documents disclosed to the plaintiffs by DB and CS were to be used solely for the purpose of following and tracing the money, and not for any other purpose.

4 At the conclusion of the hearing before me, I dismissed the appeals and affirmed the above order. I now provide detailed grounds of decision.

Background facts

The parties

5 The first and second plaintiffs ("the Plaintiffs") were limited liability companies incorporated in the Cayman Islands.[1] They were majority owned by a private equity group, the CVC Group ("CVC"), which consisted of CVC

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[1] Roy Kuan's 1st affidavit dated 2 April 2015 at para 6.

Capital Partners SICAV-FIS S A and its subsidiaries. The second plaintiff owned 82.7% of La Dolce Vita Fine Dining Holdings Limited ("EquityCo"). EquityCo, which was itself a Cayman Islands special purpose vehicle, wholly owned the first plaintiff.

6 Mdm Zhang was an individual who, although not a party to these proceedings, featured prominently. She was registered as a citizen and resident of St Kitts and Nevis but habitually resided in the People's Republic of China ("PRC"). At the material time, Mdm Zhang wholly owned two British Virgin Island companies, Grand Lan Holdings Group (BVI) Limited ("Founder Holdco") and South Beauty Development Limited ("Management Holdco"). I will refer to Mdm Zhang and these companies collectively as "the Sellers".

7 SETL was a British Virgin Islands company incorporated on 2 January 2014. The parties were in disagreement over the beneficial ownership of SETL. The Plaintiffs took the position that Mdm Zhang owned and continued, up to the time of the hearing, to own SETL beneficially. SETL, on the other hand, took the position that Mdm Zhang no longer had an interest in SETL after 4 June 2014, which was when she transferred the sole share in SETL to Asiatrust Limited ("Asiatrust").[2]

8 DB and CS were foreign companies registered in Singapore as carrying on activities as the Domestic Banking Units of Wholesale Banks in Singapore. It was not disputed that SETL had accounts with both DB and CS.

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[2] See Angela Edith Pope's 2nd affidavit dated 27 May 2015 at para 1 and Judgment of AR at [4].

The acquisition

9 Through a series of transactions from late December 2013 to January 2014, the Plaintiffs acquired shares in a food and beverage business beneficially owned by Mdm Zhang. Certain private equity funds advised by CVC purchased for a sum of US$286,850,887 the equivalent of 82.7% of the issued shares in South Beauty Investment Company Limited ("the Company") from the Sellers.[3] The Company, incorporated in the Cayman Islands, was a holding company of a group of subsidiary companies that owned a well-known chain of restaurants operating in the PRC ("South Beauty Business").[4]

10 The acquisition was carried out in two stages. In the first stage, the first plaintiff purchased all the shares of the Company from Founder Holdco and Management Holdco for a consideration of US$235,066,678. EquityCo thus owned, through the first plaintiff, 100% of the Company. In the second stage, the second plaintiff (who held 69.2% of EquityCo prior to the acquisition) purchased 13.5% of EquityCo from Mdm Zhang (who prior to the acquisition held the remaining shares in EquityCo through nominees) for a consideration of US$51,784,209.[5] The second plaintiff thus held 82.7% of EquityCo, indirectly holding 82.7% of the Company. The first and second stages of the acquisition were governed by a Share Purchasing Agreement dated 9 December 2013 and a Share Sale and Purchase Agreement dated 13 December 2013, respectively.

11 Simplified for our present purposes, the valuation formula for the Company was based on a multiple of 13 times the Company's estimated 2013

3 Roy Kuan's 1st affidavit at para 19(a).

4 Roy Kuan's 1st affidavit at para 19(b).

5 Roy Kuan's first affidavit at para 19(d).

consolidated net profit after tax, which in turn was based on the projected growth rate of the South Beauty business in 2013.[6] The bulk of the purchase price was eventually paid into Mdm Zhang's bank account ("the HK Account") with Bank J Safra Sarasin, Hong Kong Branch ("Bank Sarasin").

Allegations by the Plaintiffs of manipulation

12 According to the Plaintiffs, Mdm Zhang had represented to CVC at a number of face to face meetings prior to the acquisition that, *inter alia*, the South Beauty Business "was a thriving and successful brand, and that it was resistant to the economic and consumption slow-down that was occurring in the PRC during 2013 and beyond".[7] This was in addition to the express indemnities and warranties in the acquisition agreements. The Plaintiffs also averred that the oral representations complemented the information that CVC received from the Company on behalf of Mdm Zhang and that this induced them into recommending the acquisition.

13 The Plaintiffs alleged that after the acquisition was completed, they discovered manipulation of the Company's accounting and financial records for the year 2013. This manipulation led to a higher (and false) valuation that induced the Plaintiffs to think that the Company was more profitable than it actually was and to buy into the Company at a price that was grossly and artificially inflated. The Plaintiffs claimed that Mdm Zhang had, amongst others, (a) artificially inflated customer traffic, sales and revenue figures by fictitious booking of diners for expensive meals; and (b) artificially inflated

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6 Roy Kuan's first affidavit at para 19(e) and page 81-82.

7 Roy Kuan's 1st affidavit at para 19(f).

sales and revenue figures by the purchase of a large number of diners' prepaid cards and gifting products.

Commencement of arbitration

14 The acquisition agreements were governed by the laws of Hong Kong and contained an arbitration agreement by which parties agreed to resolve claims arising out of or in connection with the agreements by arbitration in the China International Economic and Trade Arbitration Commission ("CIETAC").[8]

15 Each of the Plaintiffs had commenced arbitration proceedings against the Sellers on 5 March 2015 ("the CIETAC arbitration"). In brief, the claims in the respective Requests for Arbitration pertained to what the Plaintiffs claimed was fraudulent manipulation of the accounting information of the Company, which information was relied on by the Plaintiffs when deciding whether or not to proceed with the acquisition. The Plaintiffs also asserted that the Sellers had breached various warranties in the agreements and made fraudulent misrepresentations in connection with those agreements. The Plaintiffs sought rescission of the acquisition agreements as well as recovery of the monies paid pursuant to those agreements. In the alternative, they prayed for damages caused by Mdm Zhang's fraudulent misrepresentation.

The freezing orders in Hong Kong and Singapore

16 Following an *ex-parte* hearing on 26 February 2015, the High Court of the Hong Kong Special Administrative Region Court of First Instance ("the

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8 See Roy Kuan 1st affidavit at page 277 and 328.

HK High Court") granted the Plaintiffs the following orders against Mdm Zhang and Founder Holdco:

(a) Injunctions restraining them from disposing of their assets worldwide up to the sums of US$51,784,209 and US$235,066,678. These injunctions were granted in support of arbitration proceedings to be commenced in CIETAC. As mentioned above, the arbitration proceedings were commenced shortly after, on 5 March 2015.

(b) Disclosure of information requiring them to disclose all assets, worldwide, in excess of an individual value of HK$500,000.

(c) Disclosure of information against Bank Sarasin in respect of the HK Account.

(d) Evidence preservation orders.[9]

17 On 2 March 2015, three days before the commencement of the CIETAC arbitration, the Plaintiffs obtained orders in Singapore prohibiting Mdm Zhang from disposing of or dealing with or diminishing the value of her assets in Singapore whether in her own name or not and whether solely or jointly owned, up to the sums of US$235,066,678 and US$51,784,209 ("the Singapore Injunctions"). Like the freezing orders obtained in Hong Kong, these orders were granted on an *ex parte* basis. The Singapore Injunctions continued to remain in place as Mdm Zhang had not applied for these orders to be set aside.

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9 Roy Kuan's first affidavit at para 14.

18 Various banks in Singapore were then notified of the Singapore Injunctions. The Plaintiffs, believing that SETL was owned by Mdm Zhang and that SETL had an account with CS ("the CS Account"), sought confirmation of the same from CS on 9 March 2015. On 12 March 2015, solicitors for CS confirmed that steps had been taken to comply with the Singapore Injunctions.[10] On 14 March 2015, the Plaintiffs' solicitors were notified by solicitors for DB that SETL had an account with DB ("the DB Account") and that DB believed that the account was subject to the Singapore Injunctions. Additionally, DB informed the Plaintiffs that measures had been taken to ensure compliance with the Singapore Injunctions.[11]

Documents provided by Bank Sarasin

19 Pursuant to the disclosure orders made by the HK High Court (see [16(c)] above), Bank Sarasin provided various documents to the Plaintiffs on 3 March 2015. Those documents revealed that remittances were made out of Mdm Zhang's HK Account to various third parties, including SETL. The documents showed that over US$285m was transferred out of the HK Account, leaving a balance of approximately US$1.2m.

20 Between 10 March 2014 and 21 July 2014, more than US$110m and the equivalent of US$24,727,409.74 in securities were transferred from Mdm Zhang's HK Account to SETL's CS Account. The breakdown of the transfers was as follows:

Date	Amount (Local Currency)	Amount (approx. US$)
10 March 2014	US$50,000,000	50,000,000

[10] Roy Kuan's first affidavit in OS 307 at page 658.

[11] Roy Kuan's first affidavit at page 617.

14 March 2014	US$2,085,489.46	2,085,489.46
14 March 2014	HK$25,005,896.93	3,224,694.95
17 March 2014	US$24,727,409.74 (in securities)	-
24 March 2014	US$ 60,000,000	60,000,000
21 July 2014	US$ 2,000,000	2,000,000

The present applications for discovery

21 As the Plaintiffs believed that Mdm Zhang had transferred funds out of her HK Account in order to put those funds out of their reach, they filed OS 305 and OS 307, under O 24 r 6(5) of the Rules of Court, for the following purposes:

(a) to identify third parties for the potential commencement of proceedings against them;

(b) to ascertain the full nature of the wrongdoing perpetrated by Mdm Zhang and to enable the Plaintiffs to plead their case properly; and

(c) to trace assets in support of the Plaintiffs' proprietary claim against Mdm Zhang and third parties who have received the monies from her.

The decision of the AR

22 The decision of the AR may be found in *La Dolce Vita Fine Dining Co Ltd and another v Deutsche Bank AG and another and another matter* [2016] SGHCR 3 ("the Judgment"). In the Judgment, the AR identified the following issues:

(a) whether the requirements for obtaining an order for pre-action discovery pursuant to O 24 r 6(5) of the Rules of Court and/or inherent jurisdiction of the court had been satisfied;

(b) whether the Plaintiffs had shown that there was a likely prospect of subsequent proceedings being held in Singapore pursuant to O 24 r 6(5) of the Rules of Court read with para 12 of the First Schedule to the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("the SCJA"); and

(c) whether the requirements under the Banking Act (Cap 19, 2008 Rev Ed) ("the BA") read with s 175 of the Evidence Act (Cap 97, 1997 Rev Ed) ("the EA") for discovery of documents from the respective banks had been satisfied.

23 The AR began by discussing the general principles in relation to pre-action discovery against a non-party, observing that O 24 r 6(5) gave statutory effect to the *Norwich Pharmacal* order, an order traditionally sought to obtain information for the purpose of identifying a potential defendant so that proceedings may be commenced against that person. She also noted that the court retained its inherent jurisdiction to order disclosure from a non-party, citing the High Court decision of *UMCI Ltd v Tokio Marine & Fire Insurance Co (Singapore) Pte Ltd and others* [2006] 4 SLR(R) 95 ("*Tokio Marine*").

24 In the AR's judgment, for the Plaintiffs to succeed they had to show: (a) a facilitation of wrongdoing by the person in possession of information; (b) a "real interest" in ascertaining a "source" by showing an arguable or *prima facie* case of wrongdoing against the person of whom information was sought; and (c) that it was necessary, just and convenient in all the circumstances for such an order to be made.

25 On the first requirement, the AR found that CS had innocently become involved in the wrongdoing because part of the purchase monies had been transferred into the CS Account. While there was no direct evidence of a transfer into the DB Account, the AR noted that there was evidence from the documents disclosed by Bank Sarasin that Mdm Zhang intended to transfer her assets to other jurisdictions in order to put them out of the Plaintiffs' reach. This coupled with the fact that monies were actually transferred into the CS Account made it highly probable that DB too had become involved in the wrongdoing.

26 On the second requirement, the AR discussed that the traditional *Norwich Pharmacal* order had been extended under the equitable jurisdiction of the court to include orders compelling non-parties to provide documents to assist with the applicant's tracing claim where there was a *prima facie* case of fraud. These orders were known as *Bankers Trust* orders, having been granted in the eponymous case of *Bankers Trust Co v Shapira and others* [1980] 1 WLR 1274 ("the *Bankers Trust* case"). Dealing with the submission by counsel for SETL that the Plaintiffs had merely sought rescission in the CEITAC arbitration as opposed to actually having rescinded the agreements and thus did not have a proprietary claim, the AR held that all the Plaintiffs had to do was to show an arguable case that the agreements may be rescinded due to Mdm Zhang's fraudulent misrepresentation. The AR found that there was *prima facie* evidence of manipulation of the Company's financial records. The Plaintiffs had adduced a report from FTI Consulting that had analysed the Company's 2014 records and documents ("the first FTI report"). This report concluded that there was "pervasive manipulation of South Beauty's transaction sales data between January and April 2014" and that FTI Consulting considered "it highly likely that similar manipulation took place in

2013". Therefore, the AR was satisfied that there was a *prima facie* case of fraud that might entitle the Plaintiffs to rescind the various acquisition agreements.

27 The AR rejected SETL's submission that Mdm Zhang no longer had an interest in it after she transferred her sole share to Asiatrust. The AR agreed with the Plaintiffs that there was sufficient evidence to show that Mdm Zhang still owned SETL beneficially.

28 On the third requirement, the AR pithily observed that disclosure was necessary, just and convenient because the Plaintiffs needed the assistance of the court to obtain information as to the whereabouts of the monies. The documents sought were thus necessary for a tracing claim.

29 In relation to SETL's argument that, in the light of the Court of Appeal decision in *Dorsey James Michael v World Sport Group Pte Ltd* [2014] 2 SLR 208 ("*Dorsey James*"), pre-action discovery orders could not be granted in aid of foreign proceedings, the AR held that there was a sufficient nexus to Singapore in this case for the orders to be made. Both the CS Account and DB Account were in Singapore, which meant that there was a likely prospect that subsequent proceedings may be commenced in Singapore if there were monies in those accounts or if the monies had been transferred to other accounts in Singapore. In any event, even if the court did not have such power under O 24 r 6(5), the AR opined that discovery could still be ordered in aid of foreign proceedings under the court's inherent jurisdiction.

30 In relation to the duty of bank secrecy under s 47 of the BA, the AR noted that an order for disclosure could only be made if the requirements of s 175 of the EA were satisfied. Section 175(1) of the EA read as follows:

> On the application of any party to a legal proceeding, the court or a Judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings.

31 The AR observed that s 175 did not, by itself, confer a party with an independent and substantive right to discovery. Further, referring to the Bruneian High Court case of *Chan Swee Leng v Hong Kong and Shanghai Banking Corp Ltd* [1996] 5 MLJ 133 ("*Chan Swee Leng*"), the AR held that the Plaintiffs had to show that they were parties to a *separate* legal proceeding, other than OS 305 and OS 307.

32 The AR found that the Plaintiffs satisfied s 175 as they were parties to the CIETAC arbitration. Discovery of documents would be for the purposes of the CIETAC arbitration since these documents would assist the Plaintiffs in tracing the funds. This would, in turn, assist in the recovery of any award made in favour of the Plaintiffs in the CIETAC arbitration. The AR disagreed with the submission from counsel for SETL that under the International Arbitration Act (Cap 134A, 2002 Rev Ed) and Art 5 of the Model Law, the court had no power to grant discovery orders to assist international arbitrations whether seated in Singapore or abroad.

33 Having been satisfied that discovery was warranted on the facts, the AR confined her orders (see [2] above) to what was strictly necessary for the Plaintiffs to trace the funds.

Arguments on appeal

SETL's submissions

34 On appeal, counsel for SETL, Mr Edmund Kronenburg ("Mr Kronenburg") raised a variety of arguments as to why the AR had erred.

35 He contended that the requirements for a *Norwich Pharmacal* order had not been satisfied. First, there was no evidence of any "facilitation of wrongdoing" by DB. Unlike the CS Account, the Plaintiffs failed to adduce any evidence of funds being transferred into the DB Account. Secondly, there was no cogent and compelling evidence of wrongdoing or fraud by Mdm Zhang. Thirdly, there was no reason for thinking that the monies in the DB Account or CS Account were the Plaintiffs'. As there was no evidence of fraud, the Plaintiffs had no right to rescind the agreements. Even if rescission was open to the Plaintiffs, they had not rescinded the agreements since they were seeking rescission in the CIETAC arbitration, as opposed to a declaration that they were correct in rescinding the agreements. Furthermore, there existed bars to rescission because *restitutio in integrum* was impossible. More than a year had passed since the acquisition took place and fundamental changes to the business had been made. The first plaintiff and its assets, including South Beauty, were in receivership. The Plaintiffs had not confirmed that South Beauty remained in a state to be restored to Mdm Zhang or that no assets had been disposed of pursuant to the receivership.

36 As there was no strong and cogent evidence of fraud, the Plaintiffs had failed to demonstrate a real interest in ascertaining a source.

37 Moreover, discovery was not necessary, just and convenient. As there was no basis to trace, given that rescission had not yet occurred, there was at present no necessity for the discovery orders to be made. The Plaintiffs had to await the outcome of the CIETAC arbitration before any potential proprietary claim against third parties could be asserted. No tracing could possibly be done unless the Plaintiffs were successful in the CIETAC arbitration, rescission was granted as a remedy, a declaration was made that Mdm Zhang held the monies on trust for the Plaintiffs and the CIETAC tribunal made a

tracing order. Given that there were still so many steps required, tracing could hardly be said to be necessary in all the circumstances.

38 Next, Mr Kronenburg argued that the Plaintiffs had failed to show a likely prospect of subsequent proceedings being brought in Singapore. *Dorsey James* had clearly established that there had to be a Singapore nexus before discovery would be ordered under O 24 r 6(5).

39 Finally, Mr Kronenburg submitted that s 175 of the EA had not been satisfied. The AR was wrong to hold that orders assisting the Plaintiffs to trace the monies would be *for the purpose* of the CIETAC arbitration. Tracing was only relevant to the enforcement of an arbitral award. As an arbitral award is rendered at the conclusion of arbitration proceedings, tracing only becomes relevant after the arbitration has concluded. Therefore, the orders cannot be said to be *for the purpose* of the CIETAC arbitration.

The Plaintiffs' submissions

40 Mr Harpreet Singh SC ("Mr Singh") argued on behalf of the Plaintiffs. He submitted that there was sufficient evidence to make out a *prima facie* case of fraud. He referred to a second FTI Consulting report ("second FTI report"), adduced on appeal, which confirmed the suspicions in the first FTI report with new data obtained in respect of the year 2013.

41 Mr Singh also submitted that it was not necessary for him to show a strong *prima facie* case of fraud to obtain the discovery orders. He submitted that there existed two separate and independent jurisdictions for pre-action discovery – the *Norwich Pharmacal* jurisdiction and the *Bankers Trust* jurisdiction. The discovery orders obtainable under the *Norwich Pharmacal* jurisdiction would not be as extensive as orders made under the *Bankers Trust*

jurisdiction. Because the orders under the *Norwich Pharmacal* jurisdiction were not as intrusive, his clients need only to show a reasonable case of wrongdoing, as opposed to strong *prima facie* evidence of fraud. He submitted that the discovery orders the Plaintiffs sought fell squarely within the *Norwich Pharmacal* jurisdiction. Additionally, he submitted that the requirements of the *Bankers Trust* jurisdiction were satisfied.

42 Mr Singh responded to Mr Kronenburg's submissions on rescission by arguing that proof of an actual entitlement to rescission was not a prerequisite to the grant of the discovery orders. All that was required, at the interlocutory stage, was for him to show that a proprietary claim was *contemplated*. On the bars to rescission, Mr Singh submitted that this court should not prejudge how the CIETAC tribunal would rule on the Plaintiffs claim. Further, only substantial restitution was required in equity. Finally, Mdm Zhang could not rely on the fact that fundamental changes had been made to the business as a bar to restitution, because these changes were attributable to her own fault.

43 Mr Singh, while acknowledging that there was no direct evidence of funds being remitted to the DB Account, submitted that there was sufficient *circumstantial* evidence for such an inference to be drawn. He pointed to the fact that DB itself considered that the account was subject to the terms of the Singapore Injunctions and that SETL had not, up to this point, applied to court for the Singapore Injunctions to be discharged.

44 On SETL's submission that it was no longer owned by Mdm Zhang, Mr Singh contended that this was an irrelevant fact given that the Plaintiffs were entitled to seek disclosure from any third parties to whom Mdm Zhang may have dissipated her assets, as these third parties were potentially liable to account to the Plaintiffs as constructive trustees. Mr Singh also submitted that

in any event, the evidence unequivocally showed that SETL was still owned by Mdm Zhang beneficially.

45 Mr Singh next argued that the jurisdictional objections raised by SETL were not relevant. There was no reason why *Norwich Pharmacal* orders could not be granted in aid of foreign proceedings. Section 175 of the EA was also satisfied because OS 305 and OS 307 constituted "legal proceedings" within the meaning of s 175.

The various applications on appeal

46 Before I set out the issues that fell for determination, I should highlight various other applications that had the effect, whether intended or not, of protracting the hearing of the appeal. OS 305 and OS 307 were commenced on 6 April 2015 with only DB and CS named as defendants in the respective originating summonses. On 24 April 2015, SETL filed summonses for leave to intervene in the proceedings. On 2 June 2015, leave was granted and SETL was named as the second defendant in both OS 305 and OS 307. The hearings on the substantive merits were held before the AR over five days from October 2015 to February 2015. The AR rendered her decision on 26 February 2016. Three days later, SETL filed a summons for a stay of execution. Subsequently, they filed the present appeals.

47 On 16 March 2016, the hearing of the appeals against the AR's decision to order discovery commenced. Surprisingly, before I began hearing the appeals, counsel for Mdm Zhang appeared, having filed two summonses for leave to intervene in the proceedings. According to her counsel, the AR had made certain findings that cast aspersions on Mdm Zhang necessitating the applications. The Plaintiffs objected on the basis that Mdm Zhang had no

locus given that no relief had been sought against her and that she had almost a year to seek leave to intervene. Counsel for Mdm Zhang then, most peculiarly, submitted that I should defer making a decision on whether leave to intervene should be granted and in the meantime allow him to sit quietly by. I roundly rejected this submission and dismissed the applications for leave to intervene.

48 Mr Kronenburg then sought leave to adduce further evidence on appeal. He sought to adduce six volumes of evidence, including Mdm Zhang's affidavit affirming that she had no interest in SETL. Of all the evidence Mr Kronenburg sought to adduce, I only allowed those parts which were relevant to the issues in dispute. That included the text of Mdm Zhang's affidavit, the text of the defences filed in the CIETAC arbitration, an expert report controverting the findings of the first FTI report ("the Mazars Report") and exhibits explaining why Mdm Zhang had no beneficial interest in SETL. It was only after this that the hearing of the appeals commenced. However, parties did not conclude their submissions so the matter had to be adjourned.

49 On 18 March 2016, the AR declined to stay the execution of her orders pending appeal. SETL appealed her decision and the matter came before me on an urgent basis on 23 March 2016. I allowed the appeals and granted a stay of execution pending the resolution of the appeals before me.

50 On 10 May 2016, parties attended before me with the Plaintiffs now seeking leave to adduce further evidence in response to the Mazars Report. In particular, the Plaintiffs sought to adduce the second FTI report. I allowed their application since it was only right that they be given an opportunity to respond to the Mazars report.

51 The hearing of the appeals then resumed on 5 July 2016. Before I could hear the substantive merits of the case, I had to rule on an application by SETL for production of documents for inspection. SETL sought production of all the documents referred to in the affidavit annexing the second FTI report. I dismissed the application since, in my judgment, it was not necessary to the final analysis of whether a *prima facie* case of fraud had been established. I had made it clear to the parties at several hearings that the question of fraud was not one that I had to try. I was also critical of their conduct of the proceedings, given that the matter had still not been concluded 14 months after it had been commenced. The hearing of the appeals then resumed and I rendered my decision, dismissing the appeals at the conclusion of the hearing.

Issues

52 The issues which fell for determination can broadly be characterised as follows:

(a) whether the requirements for pre-action discovery under O 24 r 6(5) of the Rules of Court had been satisfied; and

(b) whether there existed jurisdictional bars to the grant of pre-action discovery.

My decision

The jurisdiction of the court to grant pre-action disclosure

53 The parties were in broad agreement on the requirements that had to be satisfied before pre-action discovery would be granted under O 24 r 6(5). Essentially, the Plaintiffs had to show that:

(a) DB and CS had facilitated wrongdoing;

(b) there was wrongdoing on the part of Mdm Zhang; and

(c) disclosure was necessary, just and convenient.

54 These requirements were drawn from the Court of Appeal's decision in *Dorsey James*. As parties were aligned and the AR approached the matter in a similar manner, I adopted this framework. On the second requirement, I noted Mr Singh's submissions on the two separate jurisdictions – the *Norwich Pharmacal* jurisdiction and the *Bankers Trust* jurisdiction (see [41] above). It was not necessary for me to decide the point because there was, in my judgment, sufficiently strong and cogent evidence to establish a *prima facie* case of fraud (see [59]–[65] below).

55 I should, however, highlight that Mr Singh did not elaborate on whether the two jurisdictions he referred to were inherent in O 24 r 6(5) or hailed from the inherent jurisdiction of the court (see *Tokio Marine*). If it indeed stemmed from O 24 r 6(5), I should point out that none of this was apparent from the words of that rule. O 24 r 6(5) read as follows:

> An order for the discovery of documents before the commencement of proceedings or for the discovery of documents by a person who is not a party to the proceedings may be made by the Court for the purpose of or with a view to identifying possible parties to any proceedings in such circumstances where the Court thinks it just to make such an order, and on such terms as it thinks just.

56 The only criterion made express in O 24 r 6(5) was that it was "just" for such a discovery order to be made. O 24 r 6 was subject to O 24 r 7, which imported a requirement of necessity. As the Court of Appeal explained in *Dorsey James*, the prescribed test then becomes one of "justness underpinned by 'necessity'" (at [33]). The Court of Appeal in *Dorsey James* also explained that O 26A r 1(5) was meant to be a codification of the Court's *Norwich*

Pharmacal jurisdiction (see [24] and [28]). The extent (if any) to which recourse may be had to the inherent jurisdiction of the court for an order for pre-action disclosure (see *Tokio Marine*) and how this interacts with the provisions in the Rules of Court on pre-action disclosure and para 12 of the First Schedule to the SCJA will have to be considered at an appropriate time. For the time being, it sufficed for me to proceed on the basis that if the requirements at [53] above were satisfied, then the Plaintiffs would be entitled to succeed under O 24 r 6(5). In other words, if those requirements were satisfied then disclosure would clearly meet the prescribed test of justness underpinned by necessity.

57 Further, as the Plaintiffs were seeking to obtain information to trace funds, I proceeded on the basis that they had to show a *prima facie* case of fraud and good ground for thinking that the money in the CS Account and DB Account was the Plaintiffs' money (see the *Bankers Trust* case at 1282 per Lord Denning MR). The second of these requirements could properly be subsumed as part of the inquiry as to whether there was a facilitation of wrongdoing by either DB or CS (requirement (a) at [53] above). In the *Bankers Trust* case, the English Court of Appeal was satisfied as to this requirement as there was strong *prima facie* evidence of fraud on the part of two men who presented cheques to the plaintiff bank which credited large sums of money to the defendant bank (at 1279 and 1283). As there was good ground for thinking that the money in the defendant bank was the plaintiff bank's money, wide ranging disclosure orders were made.

58 It thus was logical for me to decide the question of *prima facie* evidence of fraud before turning to whether there was facilitation of wrongdoing by DB or CS (*ie*, whether there was good ground for thinking that the money in DB and CS was the Plaintiffs' money).

Prima facie case of fraud

59 SETL submitted that there was no cogent and compelling evidence sufficient to constitute a *prima facie* case of fraud against Mdm Zhang. Before the AR, the Plaintiffs relied on the first FTI report which relied on data in respect of sales in 2014 to extrapolate that it was highly likely that manipulation also occurred in 2013, which was the material time since the acquisition agreements were entered into in late 2013. It could have been argued that such extrapolation was purely speculative and therefore not cogent and compelling evidence.

60 Such an argument had been put to bed by the second FTI report. To recapitulate, SETL obtained leave of court to file the Mazars Report, which sought to controvert certain findings of the first FTI report. The Plaintiffs then obtained leave to file the second FTI report. The second FTI report was based on "point of sale" ("POS") data from individual restaurants of South Beauty for the year 2013. The data was derived from the computerised till systems within the restaurants and contains detailed records of transaction information.[12] Representatives of the Plaintiffs had, on 27 and 28 February 2015, raided the Beijing Headquarters of South Beauty to obtain the POS information for 2013. In addition, Total Assessment Report ("TAR") spreadsheets were discovered.

61 The second FTI report concluded that "the financial information on South Beauty that was relied on by the Claimants and their advisors prior to the Acquisition was subject to fraudulent manipulation and overstatement [and] [t]his manipulation is unambiguously documented in the TAR spreadsheets, and is also visible in the POS [Point of Sale] data and GLs

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12 See Roy Kuan's 5th Affidavit at para 8.

[General Ledgers]". It suffices for me to highlight a few findings of the second FTI report:

> (a) In relation to account transactions, there were *over a thousand falsified transactions* charged to accounts to increase recorded sales activity. A closer examination revealed implausible (if not impossible) transactions. Examples include a group of 5,000 diners recorded as having eaten on 27 September 2013 at the Beijing Financial street branch (which had a seating capacity of 382). The group ordered duck breasts, vegetables, pork, chicken and three bowls of rice for which they paid in cash. The group was also recorded as having placed orders for 15,000 other dishes (including 450 orders of each of 18 different dishes) but this was charged to account and not settled immediately. As a result, a total of RMB689,085 was billed but only RMB150 was paid in cash with the remaining amount charged to account. The time between the opening of the table and the bill being paid was recorded as merely 55 minutes (inconsistent with a restaurant business where such a large order is made). On the following day an almost identical transaction occurred and this time 20 minutes elapsed between the opening of the table and the bill being settled. Further, the report observed a low correlation (19%) between inventory consumed (for cooking) and meals sold to customers.[13]
>
> (b) Account transactions were recorded to highly unusual and falsified client accounts, including client accounts in the names of employees of the restaurant.[14] These client accounts were generally

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13 Page 155 of Roy Kuan's fifth affidavit, FTI Report at para 3.39.

14 Page 142 of Roy Kuan's fifth affidavit, FTI Report at para 2.7 and

settled in bulk, either by a small number of credit cards wholly unrelated to the transaction or by bank transfers. For example, a client account was in the name of an employee and eight different credit cards were used to carry out a total of 45 separate payments to settle the outstanding balance in that account, which stood at RMB1,857,112.[15] On top of this, there were a number of examples where one credit card was used to settle multiple client accounts.

(c) The manner in which the accounts were settled suggested that the fraudulent transactions charged to accounts were settled using South Beauty's own funds previously transferred to a related party. In this way, funds appear to have been circulated around so as to make it seem that legitimate sales were occurring.[16]

(d) The TAR spreadsheets obtained in the raid showed that South Beauty's management precisely documented the scope of the fraud. The TAR spreadsheets summarised adjustments made to South Beauty's restaurant level income. This information showed upward adjustments made to the restaurant level income. The adjustments were labelled in the documents as "*falsifications*" thus revealing the fraud. The second FTI report noted that the TAR speadsheets reconciled with the unusual transactions charged to accounts and the other irregularities they had previously identified. The TAR spreadsheets also reconciled with the income statements and General Ledger provided by South Beauty to the Plaintiffs. In addition, the largest revenue "uplift" was in mid-2013 during the negotiations for the

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15 Page 167 of Roy Kuan's fifth affidavit at para 4.25 of the FTI Report.

16 Page 184 of Roy Kuan's fifth affidavit and para 4.74 of FTI Report.

acquisition. By way of an example, the Beijing Financial Street restaurant's TAR in January 2013 showed a revenue adjustment of RMB1,453,456 while the irregularities identified by the report (which include receivables in the form of accounts in an employee's own name and website transactions) also amounted to RMB1,453,465. This showed a precise documentation of the uplift and the manipulation done by the management.[17] The explanatory notes in the TAR for adjustments included certain of the following statements (translated from Chinese) which confirmed falsification:

(i) "this month the company falsified revenue";

(ii) "falsify increase in income for current month";

(iii) "falsify income";

(iv) "falsify costs"; and

(v) "increase revenue".

62 Mr Kronenburg submitted that no weight should be given to the second FTI report because the Plaintiffs did not produce for inspection the primary documents relied on by FTI Consulting. I rejected this submission. The second FTI report was detailed and spanned some 64 pages (with the addition of four appendices which brought it up to a total of 113 pages). All the information that SETL required in order to respond to the second FTI report was set out in that report. Mr Kronenburg submitted that there was no way of verifying if the data relied on had been falsified. His submissions would have been persuasive if I were tasked with trying the issue of fraud. However, given that I had to determine the question of fraud only on a *prima facie* level and that Mr

[17] Second FTI Report at para 5.19

Kronenburg had not raised any reasonable ground to doubt the affirmation of the Plaintiffs' representative in his affidavit that this data was genuine, I was satisfied that weight could be given to the second FTI report.

63 Mr Kronenburg also submitted that it was only FTI Consulting which concluded that there was fraud. He reasoned along the following line: The auditors of South Beauty in 2013 returned a clean report. KPMG who audited the company's account in 2014 recorded in their report that there were "unusual findings on South Beauty's sales transactions, costs of sales, expense items, and unexplained material related party transactions in both 2013 and 2014".[18] However, KMPG qualified that their report was incomplete and the audit was still in progress.[19] KMPG added a caveat that their report should not be relied upon for any other purpose. Despite this, FTI Consulting relied on the KPMG report. For this reason, Mr Kronenburg said that the second FTI report was unreliable.

64 I had no hesitation in rejecting these submissions. The qualifications in the KPMG report were expressly for the purposes of disclaiming any liability that may arise from a third party's reliance on the report. This did not mean that the findings in the KPMG report, while based on an incomplete audit, were not reliable. On the contrary, the findings of the KPMG report, while not stating unequivocally that there was fraud, noted unusual transactions. This was broadly in line with the second FTI report. The clean audit return in 2013 therefore did not leave much of an impression on me given the second FTI report and the KPMG report which noted unusual transactions in both 2013 and 2014. The same can be said of the Mazars Report, which only responded

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18 Roy Kuan's 5th affidavit at page 90.

19 *Ibid* at page 86.

to the first FTI report. It did nothing to affect the credibility of the second FTI report.

65 In the premises, I was satisfied that there was indeed strong and cogent evidence of a *prima facie* case of fraudulent manipulation by Mdm Zhang in the lead up to the acquisition. I now turn to discuss whether DB and CS had become involved in the wrongdoing, even if completely innocent.

Facilitation of wrongdoing

66 As explained at [57] above, in the context of *Bankers Trust* orders, which were aimed at assisting an applicant in a potential tracing claim, the applicant would have to show good ground for thinking that the money in the bank accounts were the applicant's money. This brings to the fore the vexed issue whether one retains beneficial ownership in the monies which had been taken from it by fraud. I should, however, caution that the discussion that is to follow is made in the context of a pre-action discovery application and all the Plaintiffs had to show was that there was an *arguable* case that the money in the DB Account and the CS Account was its own money. I did not have to rule definitively that the Plaintiffs had an equitable interest in the monies in the DB Account and the CS Account.

67 The starting point was that contracts tainted by fraud were voidable and not void (*Reese River Silver Mining Company Limited v Smith* (1869) LR 4 HL 64). In the *Bankers Trust* case, Lord Denning proceeded on the premise that there was a good ground for thinking that money in a defendant bank's account was the applicant's money in circumstances where the customer of the defendant bank had obtained the money by fraud (at 1282). Therefore, if there was no arguable case that property acquired by fraud somehow revested in the

party defrauded, it would be hard to see how the *Bankers Trust* orders could have been justified in that case itself. This was highlighted by Rimer J in *Shalson and others v Russo and others* [2005] 1 Ch 281 ("*Shalson v Russo*"), a case which I derived much assistance from.

68 In *Shalson v Russo*, Rimer J squarely confronted the issue of property acquired by fraud. He considered the authorities such as *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 ("*Westdeutsche*") where Lord Browne-Wilkinson, citing the *Bankers Trust* case, opined that money acquired by fraud was held on constructive trust. Rimer J observed that the reasoning in *Westdeutsche* was problematic. He then considered the authorities "supporting the proposition that, upon rescission of a contract for fraudulent misrepresentation, the beneficial title which passed to the representor under the contract revests in the representee". As Rimer J described it, "[t]he representee then enjoys a sufficient proprietary title to enable him to trace, follow and recover what, by virtue of such revesting, can be regarded as having always been in equity his own property." Millet J had explained in *Lonrho Plc Fayed (No 2)* [1992] 1 WLR 1 at 12 that the beneficial interest in the property is treated as having remained vested in the representee throughout, at least to the extent necessary to support a tracing claim. Subsequently, Millet J opined that property revested on an old-fashioned institutional resulting trust (*El Ajou v Dollar Land Holdings plc and another* [1993] 3 All ER 717 at 734).

69 Rimer J then reconciled this line of authorities with the Privy Council decision of In *re Goldcorp Exchange Ltd (in receivership)* [1995] 1 AC 74 where Lord Mustill, writing for the board, explained that rescission merely entitled one to a personal right to recover monies paid under a contract and not any sort of proprietary right in respect of those monies. Rimer J concluded that

the position was that property would revest in the representee unless third parties had obtained an interest in the property while it was the unencumbered property of the representor (*ie*, prior to any rescission by the representee). But in cases where no third party rights had intervened, the representee would be able upon rescission to assert a proprietary right sufficient to support a tracing claim (at [126]).

70 Importantly for our purposes, Rimer J held that property revested in the representee upon the implied rescission of the contract (at [127]). This segued neatly into Mr Kronenburg's submission that the Plaintiffs had not rescinded the contract. It was noteworthy that Mr Kronenburg did not submit that third party rights had intervened preventing the Plaintiffs from arguing that they had a sufficient proprietary right to support a tracing claim. He instead argued that the Plaintiffs had left it to the CIETAC tribunal to order rescission. He said that it was telling that the Plaintiffs sought in the arbitration an order for rescission instead of a *declaration that they were correct* in rescinding the acquisition agreements. This submission seemed to me to elevate form over substance. In any case, there was clearly no merit to this submission. Mr Kronenburg placed reliance on the following passage in Dominic O'Sullivan *et al*, *The Law on Rescission* (Oxford University Press, 2008) at para 11.19 ("*O'Sullivan*"):

> If a writ or pleading does not demonstrate an unequivocal intention to avoid the contract, as where a claimant vendor seeks to recover both the property transferred and the price payable, it would not be effective as an election to rescind.

71 In my view, reliance on this passage was misplaced because it simply stood for the proposition that one could not blow hot and cold at the same time – the election to rescind had to be unequivocal. The fact that the Plaintiffs prayed for an order for rescission as opposed to some form of declaratory

relief was immaterial. What was important was that no intention to affirm the contracts had been conveyed. SETL accepted that rescission could be effective by communication (*Car and Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525). In *Shalson v Russo*, the plaintiff claimed restitutionary relief without asking for rescission or a declaration that they had rescinded the contract. Rimer J nevertheless accepted the plaintiff's counsel's submission that the mere making of the claims amounted to an implied rescission of the contracts. He reasoned that there was no evidence that the plaintiff had unequivocally affirmed the loan contracts since discovering the fraud and he accepted that the claims made (which were consistent only with an implied rescission) did evince a sufficient intention to rescind the contracts (at [120]).

72 In the present case, it did not seem to me that the Plaintiffs were blowing hot and cold and not evincing an unequivocal intention to rescind the acquisition agreements. In the CIETAC arbitration, it sought return of the monies paid, or alternatively, an indemnity for losses suffered. It did not evince an intention to retain South Beauty (which was the situation described in *O'Sullivan* as being ineffective to effect a rescission (see [70] above)). In addition, it did not in any way affirm the acquisition agreements after discovery of the alleged fraud. The Plaintiffs' claim for return of the purchase price paid was only consistent with an intention to rescind the agreements.

73 It was also convenient at this point to deal with Mr Kronenburg's submission that rescission was not available as a remedy because *restitutio in integrum* was impossible (see [35] above).

74 In my judgment, these submissions were without merit. Complete restitution was not necessary and it was trite that in equity, restitution need only be substantial. I derived some assistance from the following passage in

O'Sullivan when it came to effecting restitution upon a sale of a business (at para 18.87):

> Where an interest in a business has been sold it may be incapable of return if *the basic nature of the business has changed in the interim.* Thus *restitutio in integrum* was said to be impossible in Northern Bank Finance v Charlton, a decision of the Supreme Court of Eire, where the company in question had changed from one operating licensed premises to substantially a property holding company. The English case of Thomas Witter Ltd v TBP Industries is similar, although the changes said in that case to preclude rescission were not so fundamental. The fact a business has failed may preclude rescission, but not where the failure was due to an inherent vice that existed at the time of the sale, and especially not where the misrepresentation related to that vice [citing *Adam v Newbigging* (1888) 13 App Cas 308 and *Senanayake v Cheng* [1965] AC 63 (PC—Singapore)].
>
> [emphasis added]

75 Therefore, even though assets of the business might have been disposed of, as long as the fundamental nature of the business had not changed, rescission would not be barred. There was no evidence before me that this was indeed the case. Moreover even if the business had failed, it was arguable that this was a result of the alleged fraudulent misrepresentation and falsification of accounts perpetrated by South Beauty's management before the sale of the business. If the fraud was in any way causative of the first plaintiff now being in receivership, I did not think that Mdm Zhang could rely on that fact to resist rescission. If she could, it would be akin to allowing a fraudster to profit from his or her own fraud.

76 There were two more related issues in relation to whether DB and CS had become involved in the wrongdoing. First, was the fact that there was no evidence of a transfer of monies into the DB Account and second, was SETL's assertion that Mdm Zhang no longer had an interest in it.

77 On the first of these issues, there was clear evidence of a transfer from Mdm Zhang's HK Bank Account to the CS Account. No such evidence existed in relation to the DB Account. Mr Kronenburg submitted that the AR made logical leaps in holding that it was highly probable that DB had become involved in the wrongdoing (at [45] of the Judgment). In my view, there was circumstantial evidence which pointed to the fact that there could possibly have been a transfer from the CS Account to the DB Account. In brief, these were:

(a) DB automatically froze the DB Account when it was notified of the Singapore Injunctions, which were only directed against Mdm Zhang. These injunctions were obtained after Mdm Zhang transferred her interest in SETL. SETL did not protest the fact that the DB Account had been frozen. If no monies linked to Mdm Zhang had come into that account, I would have expected SETL to apply to set aside the Singapore Injunctions in respect of the DB Account. This did not happen.

(b) The Singapore Injunctions were obtained in March 2015. From March 2014 to July 2014 a sum in excess of US$100m was transferred into the CS Account (see [20] above). Almost a year had elapsed from the first transfer of US$50,000,000 to the time of the injunctions. Moreover, even on SETL's case, Mdm Zhang had control over SETL at least until 4 June 2014. Only the last sum of US$2,000,000 was remitted after Mdm Zhang apparently transferred her interest in SETL to Asiatrust. Even then, as will be explained in greater detail below (see [79] below), Mdm Zhang appeared to have regarded SETL as belonging to her despite the apparent transfer to Asiatrust. She thus had control over SETL's accounts for a period significant enough to

transfer monies out of the CS Account, while it was not subject to any injunction.

(c) Correspondence from Mdm Zhang's relationship manager in Bank Sarasin, Janet Luk, to her supervisor alluded to the fact that Mdm Zhang desired to put the purchase monies out of the Plaintiffs' reach. I set out the relevant emails to show that it was not a fanciful possibility that monies would be transferred out of the CS Account. The first was an email dated 13 March 2014 (after the first transfer of USD 50,000,000) from Janet Luk[20]:

> Dear Ken,
>
> Client insisted to cust-out the assets to the *BVI company* ac first as chasing by her lawyer, and as indicated by the client her lawyer will *further transfer the assets other structure*. My understanding is it is not only for tax planning purpose, but *her lawyer is helping her to ease the concern on the with-recourse term of her business sold to an PE*.
>
> According to client, "after structure is well established, assets would be *re-allocated*".
>
> …
>
> [emphasis added]

Reading the above email, the "BVI company" referred to was most probably SETL, which was a company incorporated in the British Virgin Islands. Further, there was talk of a *further* transfer once the money was transferred to the "BVI company". Even the motive for the transfer was revealed in the email. Mdm Zhang wished to have the money transferred to put it out of reach in case the "PE" (which most probably was CVC) attempted to claw it back. While this email was not written by Mdm Zhang herself, it was written by Bank Sarasin's

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[20] Roy Kuan's first affidavit in OS 307 at page 579.

relationship manager and I thus see no reason for the information to have been fabricated. The above email was then forwarded by the recipient on 13 March 2014 to Edmond Michaan, the Global CEO of Bank Safra Sarasin, with the following message:

> Dear Edmond,
>
> I'm sorry I don't have good news on Janet's case.
>
> You will see from Janet's email below that client has confirmed that the assets should be transferred out to CS *first*…
>
> [emphasis added]

This email again shows that the transfer to the CS Account was meant to be but a step in the process of moving the funds.

78 Considering all these three circumstances together, namely, the fact that SETL did not challenge the injunction over the DB account, the large sums of money transferred into the CS account with significant time for Mdm Zhang who was in control of SETL to effect further transfers out of the CS Account and the fact that there was a clear intention on her part to set up a structure such that the Plaintiffs could not reach those monies, there was to my mind a good arguable case that monies may have been transferred from the CS Account to the DB Account. This led to the conclusion that the Plaintiffs had shown good grounds for thinking the monies in the DB Account were their monies.

79 On the second of the issues raised at [76] above – that SETL was no longer owned by Mdm Zhang – I regarded this as a red herring. Even if SETL was not owned by Mdm Zhang, the Plaintiffs would be entitled to trace the monies into the accounts unless SETL was a *bona fide* purchaser for value. There was no evidence that SETL provided any consideration for the transfers.

It was at all times a mere volunteer. In any event, there was *prima facie* evidence before the court that Mdm Zhang regarded SETL as her company even after she apparently transferred her sole share to Asiatrust on 4 June 2014. As the AR noted in her Judgment (at [64(a)(ii)]), it was recorded in the remittance instruction form for the 21 July 2014 transfer, that Mdm Zhang stated that her relationship with SETL was that "Success Elegant Trading Ltd is owned by [Mdm Zhang]".[21] Also, no reasons were given as to why Mdm Zhang would transfer some US$2m into SETL's bank account after she had apparently divested her interest. It was therefore arguable that Mdm Zhang still owned SETL beneficially.

80 To conclude this part, I held that there were good grounds for thinking that monies in both the CS Account and the DB Account belonged to the Plaintiffs and that both CS and DB had innocently been involved in wrongdoing.

Just, necessary and convenient

81 The third requirement was that disclosure be just, necessary and convenient. The AR explained why, in her judgment, this requirement was satisfied (at [71] of the Judgment):

> 71 In my view it is necessary and just to order the disclosure of these documents from the banks. [Mdm Zhang] has stated her intention to transfer the funds out of reach of the plaintiffs and has taken steps to transfer the funds to other bank account. Without the court's assistance, the plaintiffs would not know or would not know any information as to what happened to the funds. It is clear that the documents sought are necessary for the plaintiffs to trace the funds.

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[21] Roy Kuan's first affidavit in OS 307 at page 573

82 I was in complete agreement with the AR. Mdm Zhang had made it clear that she wished to set up a structure to put the monies out of the Plaintiffs' reach. Furthermore, the last transfer into the CS Account was made in July 2014 and the Singapore Injunctions were obtained in March 2015. There was significant time for the assets to be dissipated. The accounts might have been frozen but the Plaintiffs would require information to attempt to trace and freeze monies (if any) which had been transferred out of the accounts prior to the grant of the Singapore Injunctions. All in all, it was clearly just and necessary for the disclosure orders to be made.

83 I turn now to the jurisdictional objections raised by SETL.

Jurisdictional objections

Proceedings in Singapore

84 SETL argued that *Dorsey James* made clear that the court's powers to order pre-action discovery did not extend to ordering discovery in aid of foreign proceedings. I set out the relevant passage in *Dorsey James*:

> 68 Pre-action interrogatories can only be ordered in relation to intended proceedings in a Singapore court. The High Court's jurisdiction to order interrogatories is derived from s 18(2) of the SCJA, which states that the High Court shall have the powers set out in the First Schedule to the SCJA. Paragraph 12 of the First Schedule, once again reads as follows:
>
> > Power before or after any *proceedings* are commenced to order discovery of facts or documents by any party to the *proceedings* or by any other person in such a manner as may be prescribed by the Rules of Court. [emphasis in original]
>
> 69 The term "proceedings" as used in para 12 of the First Schedule must refer to proceedings before the Singapore courts… As such, considering WSG's vague allegations of Dorsey's wrongdoing, the sheer uncertainty of where this alleged wrongdoing took place is a strong factor which weighs

> *against* the ordering of pre-action interrogatories as the court's powers do not extend to interrogatories in aid of proceedings beyond Singapore.

85 The AR held, correctly in my view, that the above passage, though made in the context of pre-action interrogatories, applied just as well to pre-action discovery. However, the AR held that *Dorsey James* could be distinguished because in the present case there was a clear nexus to Singapore. Given that both the DB Account and the CS Account were in Singapore, there was a real possibility of proceedings being commenced in Singapore, especially if there were monies remaining in the CS Account and DB Account or there were monies which had been transferred from these accounts to other accounts located in Singapore. There was thus, in her judgment, a likely prospect of subsequent proceedings being commenced in Singapore. I agreed with her.

86 This made it unnecessary for me to decide if the AR was right in holding that even if the court's jurisdiction under O 24 r 6(5) did not extend to granting the orders sought, due to para 12 of the SCJA, the orders could still be made under the inherent jurisdiction of the court. As I had mentioned earlier (see [56] above), the precise scope of the inherent jurisdiction of the court to order pre-action disclosure and how it interacted with the Rules of Court would have to be considered at an appropriate time.

The duty of bank secrecy

87 The final objection raised by SETL was that the disclosure orders were directed at banks, which were subject to the duty of bank secrecy under s 47 of the BA. The Plaintiffs had to show that disclosure in this case was permitted by the Third Schedule of the BA. One of the situations where disclosure was permitted was where it was necessary to comply with an order of the Supreme

Court or Judge thereof pursuant to the powers under Part IV of the Evidence Act. The Plaintiffs submitted that s 175 of the EA applied (see [30] above).

88 The AR referred to the case of *Chan Swee Leng* for the proposition that there had to be *separate* independent legal proceedings, apart from OS 305 and OS 307 (at [93]-[94] of her Judgment). She then went on to hold that the CIETAC arbitration could constitute *separate* independent legal proceedings for the purposes of s 175 (at [96] of her Judgment).

89 It was unnecessary for me to decide if the AR was correct in holding that the CIETAC arbitration allowed the Plaintiffs to satisfy s 175 because in my view she fell into error when she held that OS 305 and OS 307 did not constitute "legal proceeding" within the meaning of s 175. It should be highlighted that on the face of it, s 175 did not expressly state that there had to be a *separate* legal proceeding. This requirement was gleaned from *Chan Swee Leng*.

90 In *Chan Swee Leng*, Roberts CJ of the Bruneian High Court considered s 7 of the Brunei's Bankers' Book (Evidence) Act, which is *in pari materia* with s 175 of the EA. There, the plaintiff had sought an order for inspection of bank books in order to ascertain the whereabouts of "missing" bank drafts. Roberts CJ had the opportunity to consider what "legal proceeding" meant within the meaning of s 7. He stated unequivocally that he had "no doubt that the wide terms of this definition will include an originating summons or motion taken out under the Brunei Rules of the High Court 1990 ('the BRHC') or otherwise." He then went on to state:

> Although s 7 of the Act is not in terms restricted to other legal proceedings, I have no doubt that this is the object of the Act. It is to enable parties, who would otherwise not be able to do so, to inspect the books of the bank and take copies of them.

> *The Act is not intended to provide an alternative method of discovery for a litigant who seeks to bring legal proceedings against the bank itself.*
>
> Where the bank is itself a defendant, there is provision for an order for discovery to be made under the BHCR [Brunei Rules of High Court]. Section 7 is not to be used to enable any party to those proceedings to inspect the defendant`s books, in order to provide evidence such as will justify proceeding against the bank.
>
> *In summary, the applicant, before an order is made in his favour under s 7 of the Act for the inspection of a ledger kept by the bank, must first show that he is a party to separate legal proceedings.*
>
> [emphasis added]

91 If one followed the reasoning of Roberts CJ carefully, he reached his conclusion that the applicant *must first show that he is a party to separate legal proceedings* (which the AR applied), because he reasoned that the Bankers' Act was not meant to confer an independent and alternative right for discovery against banks. Therefore, an applicant had to first show that he had a right to disclosure of the documents. Pertinently, Roberts CJ was not in *Chan Swee Leng* considering a case in which an application for pre-action disclosure had been made. Robert CJ's decision should thus be read as holding that a party had to establish a substantive right to obtain disclosure before an order would be made under the Bankers' Act.

92 Therefore, if a party could demonstrate a substantive right to the documents, without relying on s 175 of the EA, an order could be made under s 175 for disclosure. The "legal proceeding" in s 175 would refer to the very application for disclosure, in which the applicant demonstrates a right to discovery independent of s 175. In fact, any reliance on s 175 alone for disclosure would be misconceived since that section did not provide an independent right to inspection of bankers' books where none existed. As the

Court of Appeal explained in *Wee Soon Kim Anthony v UBS AG* [2003] 2 SLR(R) 91:

> 19 We must also stress that Part IV does not expand a party's right of discovery. Whether a party may inspect the bank account of another person is subject to his right to discovery. In *South Staffordshire Tramways Co v Ebbsmith* [1895] 2 QB 669, the Court of Appeal, in considering the equivalent provisions in the English *Bankers' Books Evidence Act, 1879*, held that an order for inspection would only be made if the litigant was entitled to the information under his right to discovery. Similarly, in *R v Bono* [1913] 29 TLR 635, the court refused to grant to a defendant in a libel action an order to inspect the plaintiff's bank account on the ground that the 1879 Act was not intended to accord to a litigant greater facilities for discovery than what would be allowed under normal discovery principles.

From this passage, it could readily be seen that s 175 was not meant to confer an independent right of discovery. As the AR herself put it, Part IV "relates only to *how* evidence is to be provided by the banks…" (at [91] of the Judgment). If this was the case, s 175 should also, concomitantly, not be read as abrogating whatever substantive rights a party might have to discovery. By requiring an *independent* set of legal proceedings before pre-action disclosure was granted, banks would be generally exempt from pre-action disclosure orders unless there was an on-going separate legal proceeding. I did not think s 175 was meant to have that effect given that it was enacted to ease *how* evidence of bankers' books would be adduced in court.

93 Therefore, I held that s 175 should be interpreted purposively such that OS 305 and OS 307 each constituted "legal proceeding" within the meaning of s 175. There was no additional requirement of a *separate* legal proceeding. Further, the phrase "for any of the purposes of such proceedings" as it appeared in s 175 would include the purpose of tracing and following monies which was the very *raison d'etre* of the applications. In the light of this

finding, I did not have to consider if the CIETAC arbitration constituted a "legal proceeding" within the meaning of s 175.

Conclusion

94 For all the reasons expressed above, I dismissed SETL's appeals and affirmed the orders of the AR (see [2] above).

95 As for costs, the AR had ordered that each party bear their own costs. The Plaintiffs filed separate Registrar's Appeals against the costs orders of the AR. In my view, there was no reason for costs not to follow the event, either in the appeals or in the hearing below. I thus allowed the Plaintiffs' appeals against the costs orders of the AR and granted the Plaintiffs costs here and below, to be taxed if not agreed.

Andrew Ang
Senior Judge

Edmund Kronenburg, Grace Loke and Jeslyn Tan (Braddell Brothers LLP) for the appellant;
Harpreet Singh, S.C., Paul Sandosham, Tan Mingfen, Jerald Foo and Elsa Goh (Cavenagh Law LLP) for the first and second respondents;
Tan Xeauwei and Benjamin Koh Zhen-Xi (Allen & Gledhill LLP) for the third respondent in Registrar's Appeals Nos 73 and 88 of 2016;
Chua Sui Tong and Daniel Chan (WongPartnership LLP) for the third respondent in Registrar's Appeals Nos 72 and 89 of 2016.