Drydocks World LLC (formerly known as Dubai Drydocks World LLC) *v* Tan Boy Tee [2010] SGHC 248

Case Number	: Originating Summons No 387 of 2010
Decision Date	: 25 August 2010
Tribunal/Court	: High Court
Coram	: Lai Siu Chiu J
Counsel Name(s)	: Ang Cheng Hock SC, Ramesh Selvaraj and Jacqueline Lee (Allen & Gledhill LLP) for the plaintiff; Davinder Singh SC, Jaikanth Shankar, Alecia Quah and Alexander Lee (Drew & Napier LLC) for the defendant.
Parties	: Drydocks World LLC (formerly known as Dubai Drydocks World LLC) — Tan Boy Tee

Civil Procedure

Contract

25 August 2010

Lai Siu Chiu J :

The background

1 In this Originating Summons ("OS"), Drydocks World LLC ("the plaintiff") sued Tan Boy Tee ("the defendant") for allegedly breaching the terms in particular cl 2.2.1(i)), of a Deed of Undertaking dated 29 October 2007, relating to the defendant's sale to the plaintiff of his majority shareholdings in a listed company (since delisted) known as Labroy Marine Limited ("LML").

2 The plaintiff had also applied by way of Summons No 2207 of 2010 ("the Application") to convert the OS to a writ of summons and for the court to order timelines for the filing of pleadings.

3 Both the OS and the Application came up for hearing before this Court. After hearing the parties' lengthy arguments and submissions, I dismissed with costs the Application as well as the OS. My dismissal of the OS was however without prejudice to the plaintiff's right to commence a writ action against the defendant based on cl 2.2.1(i) of the Deed and without prejudice to the defendant's right to raise objections to the new cause of action.

4 Both parties were dissatisfied with and have appealed against my orders. The plaintiff filed its notice of appeal in Civil Appeal No 103 of 2010 while the defendant's appeal was filed in Civil Appeal No 107 of 2010.

The facts

(i) The parties and background

5 The plaintiff is a company incorporated in Dubai, United Arab Emirates on 23 May 2007. It is in the shipbuilding, rig building, ship repair and FPSO (Floating Production, Storage, Offtake) conversion business. It is the holding company of two entities, Drydocks World – Dubai LLC and Drydocks World –

Southeast Asia Pte Limited. Before 17 December 2007, the plaintiff was known as Dubai Drydocks World LLC.

6 The defendant was the founder and Executive Chairman of LML. He was also the director of LML from around 14 April 1980 to around 28 December 2007, and directly and indirectly held 58.6% of its shares.

7 LML was a public limited liability company, which was incorporated in Singapore in 14 April 1980 and whose shares were publicly traded on the main board of the Singapore Exchange Securities Trading Limited ("SGX"). Its principal activities were the owning and chartering of tankers, tug boats and barges. The principal activities of the subsidiaries of LML included (i) the owning, chartering and operating of tugboats, barges, cargo vessels, tankers, bulk carriers etc, (ii) building, conversion, fabrication of rigs, FPSO, offshore structures and ocean-going vessels and (iii) the repair of ships, tankers and other ocean-going vessels etc.

(ii) The Deed of Undertaking

8 On or about 4 January 2008, the plaintiff acquired the defendant's 58.60% shareholding in LML pursuant to a voluntary conditional cash offer it had made earlier (the "VCC offer").

9 In consideration of the VCC offer, the defendant had, on 29 October 2007, issued a Deed of Undertaking (the "Deed") to the plaintiff in which he gave various warranties. The plaintiff sued the defendant in a separate suit (Suit No 1083 of 2009) *inter alia* for breaches of clauses 2.2.1(iii) and 2.1.3 of the Deed, The OS was only concerned with the alleged breach of cl 2.2.1(i) of the Deed. For ease of reference, I set out cl 2.2.1 in its entirety:

> 2.2.1: I hereby undertake that I will not for a period of three years from the date the Offer becomes or is declared unconditional in all respects:
>
> (i) engage, be employed or be ***interested directly or indirectly*** in any business ***within the Restricted Territories*** which is ***similar to or competing with*** the business of any Group Company.
>
> (ii) carry on for my own account either alone or in partnership or be concerned as a director in any company engaged or about to be engaged in any business within the Restricted Territories which is similar to or competing with the business of any Group Company;
>
> (iii) assist with technical advice any person, firm or company engaged or about to be engaged in any business within the Restricted Territories which is similar to or competing with the business of any Group Company; or
>
> (iv) solicit in the Restricted Territories in competition with the business of the Company the custom of any person, firm or company, who, at any time during the period I held any shares in the Company, was a customer of any Group Company.
>
> [emphasis added]

10 The "Restricted Territories" was defined in cl 2.2.2 of the Deed to include Singapore. "Group Company" was defined in cl 1.3.2(i) to refer to LML and/or any of its subsidiaries or associated companies.

11 The plaintiff subsequently acquired the rest of the shares in LML and LML was delisted from SGX. LML is currently known as Labroy Marine Pte Ltd and is wholly owned by Drydocks World - Southeast Asia Pte Limited, which was incorporated in Singapore on 25 March 2008. LML remains a marine construction and engineering group with core businesses in shipbuilding, repair offshore rig-construction and shipping.

(iii) The OML shares placement exercise

12 The public listed Otto Marine Limited ("OML") is an offshore marine group engaged in shipbuilding and ship chartering, as well as ship repair and conversion services for a range of vessels including offshore support vessels, ocean-going tugs, car ferries, general cargo ships and others. On 4 February 2010, OML announced that it had issued and allotted 220m placement shares at $0.432 per share (the "Placement Shares"). The defendant's alleged participation in the placement exercise was the subject of the plaintiff's complaint in the OS.

13 According to the plaintiff, its attention was drawn on or around 8 February 2010 to a media release by OML dated 4 February 2010 (the "Media Release") published on the websites of OML and SGX. The Media Release stated that OML had successfully raised $95m upon the placement of 220m new shares in the capital of OML at $0.432 per share, and that "[p]rominent businessmen Mr Tan Boy Tee and Mr Tan Kim Seng have participated in the placement". The Media Release also quoted Mr Lee Kok Wah ("Lee"), the Group Managing Director of OML, as follows:

> We are pleased that marine and offshore veterans like Mr B.T. Tan and Mr K.S. Tan have recognised the huge growth potential of Otto Marine and have decided to take significant stakes in the placement. The bulk of the newly raised proceeds will fund the growth of our Specialised Offshore Services business, which we are confident will soon rival our shipbuilding and ship chartering businesses.

14 The plaintiff made arrangements with M&C Services Pte Limited ("M&C"), the share registrar of OML, to inspect OML's share register. On 4 March 2010, Ms Nadiawati Abdul Wahab, a secretary with Drydocks World – Southeast Asia Pte Limited, inspected the share register of OML as updated at 28 February 2010. She was not able to identify the defendant's name or his identification number in the register. Believing therefore that it was likely that the defendant had participated in the placement through nominees, the plaintiff filed an application for pre-action discovery and interrogatories against OML on 18 March 2010 (in Originating Summons No 289 of 2010) and obtained an order thereto on 26 March 2010.

15 On 1 April 2010, Lee filed an affidavit to furnish Answers to the Interrogatories served on OML. Lee's statements in his Answers were the cause of the dispute between the plaintiff and defendant in the Application. The plaintiff had relied heavily on para 10 of Lee's affidavit where he said

> I recall that sometime between 26 January 2010 and 4 February 2010 [closure of placement] Tan Da Peng, the Institutional Sales Manager of Kim Eng Securities Pte Ltd told me over the phone that Tan Boy Tee is taking up 11,000,000 (eleven million) Placement Shares."

However, Tan Da Peng ("Tan"), in his first affidavit filed on 12 May 2010 on the defendant's behalf disputed the above paragraph in Lee's affidavit – Tan asserted that he never suggested to Lee or to

anyone else that the defendant would be taking up any of the placement shares.

16 Based on Lee's Answers to the Interrogatories, the plaintiff formed the view that the defendant had acquired the shares in OML through his son Thomas Tan Soon Seng ("Thomas") as nominee; it commenced the OS on that premise. The defendant's case was that the premise was not correct – Thomas acquired the shares in his own name, paying for it with monies from a joint account he held with his twin brother Terry, and had disposed of the shares on or about 14 February 2010, well before the plaintiff's first letter of demand dated 4 March 2010.

17 The defendant and Thomas, in their respective affidavits filed on 12 May 2010, both denied the accuracy of the Media Release insofar as it suggested the defendant's participation in the placement exercise. The defendant gave his version of Thomas's participation in the placement exercise as set out below.

18 On or about 25 January 2010, Tan who is/was the Senior Vice President of Institutional Sales of Kim Eng Securities had informed Sebastian Heng ("Heng"), the financial advisor to Thomas that OML would be entering into a placement agreement with Kim Eng Securities as placement agent, to procure subscriptions for 220m new ordinary shares in OML. Tan asked Heng if any of the latter's clients would be interested to participate. Heng informed Thomas on the same day of Tan's offer and Thomas indicated that he wanted to acquire 11m shares in OML. Heng then conveyed Thomas' interest in the placement exercise to Tan. Sometime around 26 January 2010, Tan contacted Lee. I have already highlighted that the parties' dispute revolved around what Tan said during that telephone conversation with Lee.

19 Tan maintained that he did not at any point speak to Thomas or the defendant directly (which both Thomas and the defendant confirmed in their respective affidavits). The plaintiff did not challenge this. Neither did it challenge the defendant's evidence that Thomas had signed the placement application form and paid for the shares by way of a cheque drawn from an account he jointly held with his brother. The plaintiff also did not challenge the defendant's claim that Thomas had disposed of the shares by the time the plaintiff issued its first letter of demand to the defendant

(iv) Correspondence leading up to the OS

20 On 5 March 2010, the plaintiff delivered its letter dated 4 March 2010 to the defendant wherein it demanded, inter alia, that the defendant dispose of his stake in OML and any indirect interest he may have in OML, within five working days from the date of the letter.

21 The defendant responded by a letter dated 11 March 2010 denying making the acquisition or owning the shares in question.

22 On 11 March 2010, the plaintiff's solicitors wrote to the defendant's solicitors to state, *inter alia*, that it had been brought to the plaintiff's attention that the defendant had acquired a significant interest in OML through his participation in the issuance of 220m new shares by OML. The defendant's solicitors responded the next day denying the allegation.

23 The plaintiff commenced the OS on 21 April 2010 seeking the following reliefs:

(a) a declaration that the defendant had breached cl 2.2.1(i) of the Deed and

(b) an order that the defendant furnish an account of, and pay to the plaintiff, the profits (if any) accruing to the defendant from the disposal of the Placement Shares, or alternatively,

damages to be assessed.

24 After the defendant had filed four affidavits on 12 May 2010, the plaintiff filed the Application on 19 May 2010 to convert the OS to a writ of summons.

The arguments

(i) The plaintiff's submissions

25 The plaintiff submitted that the defendant had breached cl 2.2.1(i) of the Deed by acquiring the Placement Shares through Thomas as a nominee, and it was clear that the funds raised from the placement exercise would be used to fund the growth of OML, the businesses of which were "similar to or in competition with" LML and/or its subsidiaries or associated companies.

26 I will highlight the plaintiff's submissions on the Application later.

(ii) The defendant's submissions

27 The defendant submitted that:

(a) the plaintiff's claim relied entirely on inadmissible hearsay evidence and should therefore be dismissed *in limine*.

(b) even if the plaintiff's evidence was admitted, it was insufficient to prove the only claim the plaintiff was making, *viz*, that the defendant breached the Deed by acquiring the Placement Shares through a nomineeship arrangement.

(c) even assuming the defendant did acquire the Placement Shares through Thomas as his nominee, cl 2.2.1(i) was unenforceable as a restraint of trade clause.

(d) even if cl 2.2.1(i) was enforceable, it had not been breached because the object and purpose of the undertaking in cl 2.2.1(i) was not intended to apply to the case in question.

(e) in any event, the plaintiff was not entitled to the relief it sought, *viz*, an account of profits. Assuming cl 2.2.1(i) was breached, the plaintiff was only entitled to damages.

28 As with the plaintiff's submissions, I will deal with the defendant's submissions on the Application later.

The decision

The Application

29 I will first give the reasons for my dismissal of the Application which was made under O 28 r 8 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules").Order 28 r 8(1) of the Rules states:

> Where, in the case of a cause or matter begun by originating summons, it appears to the Court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that pleadings shall be delivered or that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof.

30 The plaintiff made the Application on the following grounds:

(a) Material disputes of fact had arisen in the parties' affidavits filed in this action, which made it wholly inappropriate for the matter to continue as an OS;

(b) The material disputes of fact were not likely to be resolved by mere reference to affidavits and/or documents; and

(c) The defendant had made various factual allegations in his affidavits for which the plaintiff required general and/or specific discovery so that all material facts could be placed before the Court.

31 The "material disputes of fact" that allegedly required further investigation fell into four main areas:

(a) The monies with which Thomas paid for the Placement Shares

(b) The disposal of Thomas' shares in OML

(c) The Media Release of 4 February 2010

(d) Lee's evidence.

The monies with which Thomas paid for the Placement Shares

32 While the plaintiff did not dispute the fact that Thomas paid for the shares out of a bank account held jointly by him and his brother (the "Joint Account"), it questioned where the monies in the Joint Account came from. The plaintiff relied heavily on this bank account as the source of many of the "unanswered questions" to which, it argued, the Court required answers before it could decide on the issues in the proceedings. In particular, the plaintiff questioned what professions Thomas and his brother were in when the Joint Account came to be opened. The plaintiff further requested for specific discovery of "all documents of any description, including but not limited to bank statements in relation to the joint account", for the period from January 2010 to May 2010.

33 I found that the questions relating to the monies in the Joint Account were not "material disputes of fact" nor giving rise to the need for specific discovery. The plaintiff's submissions were essentially premised on the assertion that a 29 or 30-year-old man cannot in two days find $4.8m to buy 11m shares – indeed, counsel for the plaintiff raised this question at the hearing. I agree that while it was unusual, that was hardly sufficient grounds for sustaining a writ action. If that was the plaintiff's submission, the onus was on the plaintiff to adduce the evidence. It was not for the Court to order specific discovery so that the plaintiff might obtain answers to its questions.

34 The Court of Appeal had in *Tan Chin Seng and others v Raffles Town Club Pte Ltd* [2002] 2 SLR(R) 465 ("*Tan Chin Seng*") held that the "discovery process should not be allowed to 'fish a cause of action', and that "where an allegation is not pleaded, seeking discovery of a document to

back up such an allegation constitutes fishing". In my view, that comment applied with equal force to this case, where the plaintiff had not pleaded that the defendant provided the monies in the Joint Account to acquire the Placement Shares.

35 I accepted the defendant's submission that the plaintiff's request for "all documents of any description" was an attempt to fish for evidence to found a cause of action. The closest the plaintiff got to pleading a positive fact rather than merely asking questions about the joint account was when, in his oral submissions before me, counsel for the plaintiff asserted that the defendant in para 5 of his affidavit of 24 May 2010 did not deny that he was the source of funds of the Joint Account. I found that to be straining the evidence as the defendant had, in that paragraph, merely stated that he did not in the period January 2010 to May 2010 (in respect of which the plaintiff requested specific discovery of bank documents), transfer any monies to the Joint Account, in connection with Thomas' acquisition of the Placement Shares.

36 Even if the court was to find as a fact that the defendant transferred funds to the Joint Account for other purposes, as counsel for the plaintiff asserted, that would be irrelevant to this action. I thus declined to make that finding.

37 Therefore, I found that the questions relating to the monies in the Joint Account were not "material disputes of fact" nor did they give rise to the need for specific discovery.

The disposal of Thomas' shares in OML

38 The plaintiff submitted that Thomas' evidence that he had sold his shares in OML on or about 14 February 2010 directly contradicted the evidence of Lee which suggested that the said shares were disposed of on 10 March 2010. In my view, this point was easily disposed of as a misreading of Lee's evidence which, at para 9 of his affidavit, was that, "*As of* 10 March 2010, these shares have been disposed of by Thomas Tan Soon Seng." There was thus no inconsistency with Thomas' evidence. In any case, I did not see how the date of disposal of the shares was, as the plaintiff submitted, one of the material issues in these proceedings, *viz* relevant to the defendant's alleged breach of cl 2.2.1(i) of the Deed through the acquisition of the Placement Shares.

39 As the date of disposal of Thomas' shares in OML was not a material dispute of fact, then contrary to the plaintiff's submission, it would not be necessary to have discovery of *all* documents evidencing the sale of the shares in question.

The Media Release of 4 February 2010

40 The plaintiff relied heavily upon the fact that the Media Release expressly mentioned the defendant as having participated in the placement exercise. The plaintiff highlighted that s 199 of the Securities and Futures Act (Cap 289, 2006 Rev Ed) made it an offence for any person to make a false and misleading statement which, amongst other things, was likely to induce other persons to subscribe for securities. The plaintiff thus questioned how a Media Release like that could have been made if its contents were not true, and further questioned why neither the defendant nor Thomas had sought to clarify OML's announcement, but only in their affidavits "belatedly" challenged the accuracy of the announcement.

41 While I agreed that the Media Release must have caused concern to the plaintiff, whether it was capable of giving rise of a "material dispute of fact" or even of sustaining the OS in the first place, was an entirely separate question. I found that it was not for two reasons.

42 First, the Media Release (insofar as it quoted Lee) was appended to the affidavit of Robert Normand ("Normand") a director of the plaintiff and was inadmissible as hearsay evidence. Order 41 r 5 of the Rules provides that, unless one of the relevant exceptions operates, an affidavit "may contain only such facts as the deponent is able of his own knowledge to prove". One exception is that an affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief, if the deponent states the sources and ground of such information (see O 41 r 5(2)).

43 The High Court of Singapore had previously affirmed that for the purposes of O 41 r 5(2), only those applications which did not decide the rights of the parties can be considered interlocutory (*The Ocean Jade* [1991] 1 SLR(R) 354). I thus accepted the defendant's submission that the OS was not interlocutory because the plaintiff was seeking final relief that required deciding the rights of the parties. Thus, hearsay evidence was inadmissible in the proceedings.

44 I noted that the plaintiff did not challenge the defendant's submissions in this regard. Its only response to the defendant's arguments on hearsay insofar as it applied to Lee's evidence was, that it was all the more reason that the OS should be converted to a writ so that Lee could be subpoenaed to give evidence. I will deal with Lee's evidence at greater length below. For present purposes, I noted that the plaintiff's argument did not address the defendant's submissions either on the law relating to the inadmissibility of hearsay evidence or its application to the Media Release. Further, the Media Release, not being based on Normand's personal knowledge, was hardly admissible as evidence. I further accepted the defendant's submission that the proposition that matters contained in newspapers do not constitute proof of the contents therein (see ***Sarkar's Law of Evidence*** (16th Ed, Wadhwa and Company Naghpur, 2007) (Vol 1) at pp 1215 and 1370) applied equally to media releases.

45 More importantly, the plaintiff's arguments did not reveal any disputes of fact. Like its earlier submissions on the monies in the Joint Account, the plaintiff's arguments essentially dissolved into a question to which it wanted an answer – why did the defendant not take steps to clarify that the Media Release was incorrect? That was not a dispute of fact, much less a dispute of fact that arose from the affidavits filed on 12 May 2010 on behalf of the defendant. Surely the plaintiff already knew by the time they took out the OS that the defendant had not taken steps to clarify the accuracy of the Media Release. In any case, was there a duty on the part of defendant to correct the Media Release when he had nothing to do with OML? This was on the assumption that the defendant was aware of the Media Release in the first place, on which there was no evidence.

Lee's evidence

46 I turn now to the last area of evidence that was the subject of the plaintiff's submissions with regard to the Application. The plaintiff highlighted the conflict between Lee's evidence and Tan's as to whether Tan had suggested to Lee that the defendant would be taking up some of the shares. In my view, this was the only area in which the plaintiff properly characterised a dispute of fact rather than merely posing questions. I will deal with it at some length. Ultimately however, I found that this conflict in evidence was insufficient for me to grant the Application.

47 In the first place, the earlier findings on the inadmissibility of hearsay evidence applied equally to Lee's evidence. Like the Media Release, Lee's recollection of the conversation he had with Tan was not within Normand's personal knowledge. The plaintiff argued that if that was the case, it was all the more reason for the OS to be converted into a writ so that Lee could be subpoenaed to testify. However, there was nothing in Normand's affidavit to suggest that Lee had been asked to file an affidavit on behalf of the plaintiff and had refused. If (as counsel for the plaintiff argued), the plaintiff

could have subpoenaed Lee had it filed a writ, it begged the question why the plaintiff failed to do so in the first place instead of appending Lee's evidence to Normand's affidavit and then relying on Lee's evidence to assert a material dispute of fact arising from the affidavits filed to support the defendant.

48 Further, even if Lee was subpoenaed to give evidence of his conversation with Tan, that evidence would still be hearsay evidence on another level – Tan's alleged statement would still be hearsay evidence. While the plaintiff could rely on Lee's evidence to prove that Tan made the alleged statement, it could *not* prove that Tan's statement was in fact true unless Tan was called to testify.

49 Had Lee's evidence been admissible, it would still be insufficient to give rise to a dispute of fact material enough for the court to exercise its discretion to convert the OS to a writ action. I did not think it necessary to dismiss Lee's evidence entirely as "completely speculative and equivocal", as the defendant argued. Nevertheless, two aspects of Lee's evidence, in my view, weighed against a finding that the relevant statements gave rise to a material dispute of fact.

50 First, I noted that paras 10 and 11 of Lee's affidavit (in answer to Question 3 of the Interrogatories) on which the plaintiff naturally placed great reliance, were the only two paragraphs in which he alluded to the defendant's participation in the placement exercise. In every other Answer, he referred exclusively to Thomas' participation, even though all the Interrogatories posed by the plaintiff were premised on the defendant' participation. For example:

> **Question 1: The manner in which *Tan Boy Tee* (NRIC No. S0529014G) participated in the placement**
>
> **Answer**
>
> 6. On 26 January 2010, the Defendant entered into a Placement Agreement with Kim Eng Securities Pte Ltd (the Placement Agent) to procure subscriptions for up to 220,000,000 (two hundred and twenty million) new ordinary shares (Placement Shares) in the Defendant.
>
> 7. *Thomas Tan Soo Seng*, the son of Tan Boy Tee ("TBT"), participated in the placement by completing and delivering the application form and accepting to purchase 11,000,000 (eleven million) Placement Shares for a total consideration of S$4, 803, 869.75.
>
> [emphasis added]

And again:-

> **Question 2: What is the "significant stake" that *TBT* has taken in the placement?**
>
> **Answer**
>
> 8. The purchase of *Thomas Tan Soo Seng* represents 5% of the total Placement Shares offered and taken up, and, in my view, this represents a significant stake in the placement.
>
> 9. As of 10 March 2010, these shares have been disposed of by *Thomas Tan Soo Seng*.
>
> [emphasis added]

And then at question 4:

> **How much funds were raised by *TBT*'s participation in the placement?**
>
> **Answer**
>
> 12 A sum of S$4, 803, 869.75 was received by the participation of *Thomas Tan Soo Seng* in the placement.
>
> [emphasis added]

51 Second, I found that Lee's evidence, taken at its highest evidential value, merely meant that:

(a) Lee recalled that Tan told him over the telephone that the defendant was taking up the Placement Shares;

(b) he did not recall if Tan mentioned whether the Placement Shares would be taken up in Thomas' name; and

(c) he did recall that Tan informed him that he would approach the defendant on the placement.

52 I found that such evidence was not sufficient to suggest that the defendant acquired the shares through Thomas as his nominee, which was the gravamen of the plaintiff's entire case. For example, if Tan already knew that the defendant had already decided to take up the Placement Shares, why would Tan need to "approach" the defendant on the placement? Neither did the evidence prove in any way that after Tan had presumably approached the defendant, the defendant *did* take up the shares through a nominee. Further, even if it was assumed that Lee's recollection was correct, it merely meant that Tan, assumed for whatever reason that it was the defendant who wanted the shares and thus told Lee so. Given that Tan had already deposed in his first affidavit (dated 12 May 2010) that he never at any point spoke to the defendant or Thomas and the plaintiff did not challenge his statements, any assumptions Tan may have made regarding who wanted the shares did not go towards proving the fact that the defendant was indeed the beneficial owner of the shares.

53 Considering Lee's evidence in its entirety and within the context of the Interrogatories that were administered to him, I found that while he contradicted the first affidavit of Tan on its face, the contradiction did not give rise to a dispute of fact that was sufficiently material in itself to justify converting the OS to a writ action. This was on the assumption that Tan's statement to Lee was admissible in the first place which I had held earlier it was not.

Specific discovery of certain documents

54 As far as the Application was concerned, there only remains for me to address the plaintiff's request for specific discovery of documents not already dealt with above. The plaintiff requested for the following two categories of documents:

(a) All documents of any description, including but not limited to emails and memoranda (including telephone memos), relating to the communications between Lee and Tan; Tan and Heng; Heng and Thomas; Thomas and Terry Tan (his brother); and Thomas and the defendant, in the period from around 25 January 2010 to around 10 March 2010; and

(b) All documents of any description including but not limited to bank statements in relation to the joint account of Thomas and Terry Tan for the period from January 2010 to May 2010.

55 I have already addressed the second category of documents. The first category of documents similarly fell within the prohibition against using the discovery process to "fish" for a cause of action (*Tan Chin Seng*). Documents for which specific discovery is sought must be relevant to the pleaded issues and must be "necessary either for disposing fairly of the cause or matter or for saving costs" (O 24 r 7 of the Rules and see *Tan Chin Seng*). Without the plaintiff linking the documents requested to any specific pleadings, I found it difficult to see the basis on which the plaintiff sought such wide-ranging discovery of all communications between and among all the various persons. In any case, the evidence of the defendant, Thomas, Tan and Heng in their affidavits filed on 24 May 2010, was that they did not possess any documents of the relevant categories.

56 For the reasons set out above, I dismissed the Application.

The OS

57 I now turn to my dismissal of the OS. The OS was premised entirely on the allegation that the defendant had acquired the Placement Shares through a nominee. It would be clear from my decision on the Application that I found that this allegation was not substantiated on the documentary evidence. The plaintiff's allegation relied solely on the Media Release and on Lee's Answers to Interrogatories, both of which were hearsay evidence. Even if it was admissible as evidence, I found Lee's Answers, taken in their entirety, too equivocal in the context of the Interrogatories posed to him and did not advance the plaintiff's case that the defendant had acquired the Placement Shares.

58 Consequently, it was not necessary for me to make a decision on the parties' submissions on 1) the enforceability of cl 2.2.1(i) of the Deed; 2) the proper construction of cl 2.2.1(i) of the Deed; and 3) whether the plaintiff would be entitled in any case to an account of profits or only to damages.

59 As I made no findings on any of the substantive issues raised in the OS, there was in my view no question of issue estoppel arising from my decision. There is authority from the New South Wales Court of Appeal to the effect that an estoppel arises from a finding that a certain fact was not established (*Egri v DRG Australia Ltd* (1998) 19 NSWLR 600), but the High Court of Australia has cast doubt on the proposition that the mere failure to discharge the requisite onus of proof gives rise to an issue estoppel (*Kuligowski v Metrobus* (2004) 220 CLR 363 at 385- 386). In any case, our Court of Appeal affirmed in *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [2009] 1 SLR(R) 875 at [82] to [83] that where an issue has not been decided on the merits, it is incapable of being the subject of an estoppel.

Conclusion

60 Consequently, my dismissal of the OS was without prejudice to the plaintiff's right to commence a writ action against the defendant based on cl 2.2.1(i) of the Deed and without prejudice to the defendant's right to raise objections to the new cause of action and I so directed.