Dante Yap Go v Bank Austria Creditanstalt AG
[2007] SGHC 69

Case Number : Suit 424/2003, SUM 1923/2007

Decision Date : 09 May 2007

Tribunal/Court : High Court

Coram : Paul Tan AR

Counsel Name(s) : Eddee Ng and See Chern Yang (Tan Kok Quan) for the applicant; Tan Xeauwei and Sarala Subramaniam (Allen and Gledhill) for the respondent

Parties : Dante Yap Go — Bank Austria Creditanstalt AG

9 May 2007 Judgment reserved.

Assistant Registrar Mr Paul Tan:

1 Cumbersome at first glance, the rules of civil procedure are an intricate and elegant construction regulating the still adversarial process of civil litigation in the common law world, and certainly, in Singapore. Like steps in a staircase, each rule follows from the previous and simultaneously forms the foundation of the next. Without an appreciation of how each provision in the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules") relates to another as well as to the entire architecture of civil procedure, there will be confusion of principle and inconsistency in application. The present application, being one concerning the discovery of certain documents, serves as a pertinent illustration.

Background to SUM 1923/2007

2 The applicant in SUM 1923/2007, who is also the plaintiff in the substantive action, Suit No. 424 of 2003, opened an account in the Singapore branch of what was then known as Creditanstalt-Bankerverin, the successor-in-title of which is the respondent in this application and the defendant in the main action. This account, referred to as No. 88128 in the Statement of Claim ("the SOC"), was opened *vide* an Account Opening and Custodian Agreement ("the AOCA") dated 3 June 1997. In this AOCA contained clauses defining what constituted a valid instruction that the respondent should carry out. The purpose of this account was to facilitate the provision of private and investment banking services to the applicant. Pursuant to this purpose, a second related document dated 3 June 1997 was entered into by the parties. This was the Discretionary Investment Management Agreement ("the DIMA"), which appointed the respondent as the applicant's investment manager in respect of Account No. 88128. A third document, the Investment Authority Instruction ("the IAI"), also dated 3 June 1997, purported to restrict the discretionary mandate granted by the DIMA to the extent that any purchase or sale of investments must be authorised and that such authorisation was to be given in writing to, *inter alia*, one Winnifred Ching, whom I gather was a relationship manager.

3 In addition to express terms, of which the ones salient to the present application are highlighted above, the SOC also alleged terms that may be implied to the AOCA and the DIMA, which formed the basis of the parties' contractual relationship. On this basis, the applicant alleged that the respondent would exercise reasonable care, skill and diligence in advising the applicant on his investment portfolio and in carrying out the transactions made on the applicant's instructions.

4 The present application concerned an investment on 25 September 1997 in Rossiyskiy Kredit 10.25% Interest Notes ("the Notes") by the respondent on behalf of the applicant purportedly in

violation of any one of the express or implied terms set out above. In so far as the investment breached an express term that any investment required the applicant's authorisation, it was pleaded at paras 22 and 23 of the SOC that the applicant's standing instruction at the material time was to purchase on his behalf only US$ denominated securities of "AAA" credit rating or similar. If true, the Notes did not fall within such an instruction. I also understood the pleading in para 25 of the SOC, with its reference in particular to the IAI, as alleging that the investment was made without the proper authorisation because any instruction to invest in the Notes was not made in writing and therefore invalid. To the extent that the investment breached implied terms, the applicant's case was that the respondent was negligent in investing in the Notes and not thereafter disposing of the same at an appropriate time: see, para 34 of the SOC. In support of this allegation, the following particulars were set out (at para 34(o) to (aa)):

> (o) Failing to take into consideration the poor performance of the Russian economy at the material time;
>
> (p) Failing to investigate and/or properly investigate the financial viability and/or solvency of [the Notes];
>
> (q) Failing to monitor and/or properly monitor the sale price of [the Notes];
>
> (r) Failing to consider the risks involved in the purchase of [the Notes];
>
> (s) Investing in [the Notes] issued by Rossiyskiy Kredit which was a non-credit worthy company at the material time;
>
> (t) Investing in [the Notes] when the same carried a poor and/or non-existent investment rating at the material time;
>
> (u) Engaging in imprudent risk-taking on the [applicant's] behalf;
>
> (v) Failing to sell [the Notes] despite the clear downturn in the Russian economy at the material time;
>
> (w) Continuing to hold [the Notes] despite the clear downturn in the Russian economy at the material time;
>
> (x) Failing to cut investment losses in [the Notes] despite the clear downturn in the Russian economy at the material time;
>
> (y) Failing to advise or negligently advising the [applicant] on the suitability of [the Notes] as investments as prudent private bankers should in accordance with the implied terms averred;
>
> (z) Failing to advise the [applicant] to dispose of the investments in [the Notes] or negligently advising the [applicant] not to dispose of the said investments in the light of the circumstances averred in paragraphs 34(p) to 34(z) herein; and
>
> (aa) Failing to use reasonable skill and care in making the investment in [the Notes].

5 In addition, the applicant pleaded that the advice rendered to the applicant that the Notes were a safe investment and that he should not dispose of them was negligent. In support, the applicant referred to paras 34(p) to (s) of the SOC (set out above) and that the applicant had failed to take into account the impact of the decline in the Russian economy at the material time.

6 The respondent's answer to whether authorisation was given to purchase the Notes was that the applicant had authorised Ms Cheng, on the telephone, the investment in the Notes: see para 22(k) of the Defence. Having done so, the respondent could not thereafter dispose of the Notes unless authorised by the applicant: see para 29 of the Defence. The respondent also bluntly denied the applicant's further allegations of breaches of implied contractual obligations in relation to the investment itself and the advice given on the investment, and put the applicant to strict proof thereof: see paras 30 and 31 of the Defence.

The Discovery Application

7 By way of SUM 1923 of 2007, the applicant sought discovery of the following:

(a) Documents evidencing the total number of the Notes owned by the respondent from July 1997 to 25 September 1997;

(b) Documents evidencing the date on which the respondent bought the Notes and the price at which it bought the Notes; and

(c) Documents evidencing the date on which the respondent sold the Notes and the price at which it sold the Notes.

8 The central basis for the application was that the documents requested establish or will lead to other documents establishing that the respondent desired to "get rid of [the Notes] at the material time and did so by onselling the same to [the applicant]": see para 9 of the affidavit dated 3 May 2007 filed in support of SUM 1923/2006 ("the Supporting Affidavit"). Specifically, it was averred that:

(a) Knowing the number of shares held by the respondent at the time the applicant opened their account will show if and to what extent the respondent would be motivated to sell its own investments in the Notes (see para 10 of the Supporting Affidavit); and

(b) Knowing the date on and price at which the Notes were bought by the respondent and sold would show if and to what extent the latter was trying to palm off a bad investment on its part to the applicant (see para 11 of the Supporting Affidavit).

9 It was, in turn, submitted by the applicant's counsel, Mr Eddee Ng, that evidence of the respondent's ulterior motives in investing in the Notes on the applicant's behalf was relevant to whether:

(a) the Notes were invested in accordance with the necessary authorisation by the applicant; and/or

(b) the respondent had been negligent in its advice in relation the soundness of the investment; and/or

(c) the respondent had been negligent in investing in these Notes on behalf of the applicant.

10 It was also contended by Mr Ng that, in the alternative, the documents sought to be discovered would at least be indirectly relevant in that it would lead to a train of inquiry, permitted under O 24 r 5(3)(*c*) of the Rules.

11 Objecting to the application, counsel for the respondent, Ms Tan Xeauwei, submitted that the documents sought to be discovered were not relevant to the applicant's substantive claims, as they were currently pleaded. Moreover, it was argued that even under O 24 r 5(3)(*c*), a train of inquiry must itself lead to the discovery of directly relevant documents. This, Ms Tan stressed, was not the case.

A preliminary issue

12 I should first address a threshold issue that Ms Tan raised in submission. Her argument was that the application should not be allowed because the applicants were, at bottom, merely discovering documents for the purpose of discrediting the respondent's witnesses. If *Thorpe v Chief Constable of Greater Manchester Police* [1989] 1 WLR 665 ("*Thorpe*") is correct, Ms Tan argued that it should follow that this application should not be allowed from the outset.

13 In *Thorpe*, the applicant for discovery wanted documents relating to *previous* criminal convictions or adjudications of guilt in disciplinary proceedings against the police witnesses who had arrested him. The English Court of Appeal found that the true purpose in seeking the documents in question was to tarnish the witnesses' credibility. It was in this context that, at 669, Dillon LJ remarked that:

> [A] court should not order discovery, or interrogatories which are a form of discovery, on matters which would go solely to cross-examination as to credit. I think that Walton J. was right, in *George Ballantine & Son Ltd v F.E.R. Dixon & Son Ltd* [1974] 1 WLR 1125 to deduce that limitation from the judgment of A.L. Smith L.J. in particular in *Kennedy v Dodson* [1985] 1 Ch 334, although the actual decision in George Ballantine & Son Ltd. v. F.E.R. Dixon & Son Ltd. is better put on the different ground that the discovery sought was in itself oppressive. It would indeed be an impossible situation in my view if discovery had to be given of every document, not relevant to the actual issues in the action, which might open up a line of inquiry for cross-examination of the litigant *solely* as to credit.
>
> [emphasis added]

Echoing similar sentiments, Neill LJ in the same case explained the rationale for the principle, as follows (at 673):

> The reason for this limitation on discovery is plain. Discovery in an action would become gravely oppressive and time-consuming if there were an obligation on a party to disclose any document which might provide material for cross-examination as to his credit-worthiness as a witness. The present practice is a salutary one which helps to keep discovery within reasonable and sensible bounds.

14 This reasoning persuaded the Court of Appeal in *Tan Chin Seng & Ors v Raffles Town Club Pte Ltd* [2002] 3 SLR 345 ("*Tan Chin Seng*") at [19], 352, which adopted the principle articulated in *Thorpe*.

15 But there was a difference that rendered *Thorpe* inapplicable to the facts of this application. Here, the documents sought were not solely – if at all – for the purpose of discrediting or impugning the character of the respondent's witnesses. Rather, if as the applicant said they did, the documents establish material circumstances that bear on its pleaded causes of action. In any event, I was not satisfied that the *only* purpose of the applicant in seeking discovery was to obtain evidence to impugn the character or credibility of the respondent's witnesses. Accordingly, the application was not so

easily dismissed and I must turn my attention to the assessment of the discovery application proper.

Principles governing discovery

16 Discovery is one of the most powerful ploughshares – and swords – at the disposal of litigants. When not abused, the process is absolutely essential to a litigant's preparation for trial. Discovery allows litigants to gain access to evidence that is material to their case or the case of the opposing side that the latter may be in the possession, care or custody of. Ensuring that parties are allowed discovery, when justified, must be a fundamental tenet of prosessural justice and fairness. Even from a systemic point of view, discovery is also vital to the efficient running of the litigation process – for once a party realises that particular issues are unsupportable by the evidence, he may drop them, amend his pleadings accordingly and narrow the scope of the trial. He may even attempt to reach a settlement of the matter with the opposing party. Yet, discovery applications continue to be a source of bitter distraction and needless acrimony precisely because the boundaries of discovery remain somewhat flexible. Therefore, parties, whether intentionally or not, will invariably seek discovery on matters that are ultimately proven to be wholly irrelevant or unnecessary. When cases are complex, the documents sought to be discovered may be extremely extensive and may therefore cause undue oppression to the party that has to produce these documents. To that extent it is not unusual to find a party facing a discovery application vigorously opposing it.

17 In order to keep the good in and the bad out, the discovery regime erects two principal barriers that must be satisfied before discovery is ordered. First, the documents must be relevant; and second, even if relevance is proven, discovery must be necessary either for disposing fairly of the cause or matter or for saving costs. I now turn to elaborate these principles.

What is relevant for discovery

Direct relevance

18 Discovery under the Rules is managed at two different stages. General discovery is governed by O 24 r 1, while an order for specific discovery is made under O 24 r 5. Under both regimes, which mirror each other, two definitions of *direct* relevance are inherent in the Rules, which describes relevant documents as:

(a) documents on which the party relies or will rely; and/or

(b) documents which could adversely affect one's case, another party's case or support another party's case.

19 The present application concerned only the second of these definitions of direct relevance since there was no allegation by the applicant that the respondent intended to rely on the documents sought to be discovered (see, further, Jeffrey Pinsler ed, *Singapore Court Practice* (Singapore: Lexis Nexis, 2006) at para 24/1/14). Much effort was therefore spent on refining what the Rules mean by a document that could adversely affect one's case, another party's case or support another party's case.

20 In my view, the Rules demand that there must be a demonstrable nexus between the documents sought to be discovered to the *pleaded* cases of the relevant parties to the main action; and I find resonance for this proposition in principle, history, case law and policy.

21 As a matter of principle, it should be obvious that, as alluded to earlier, there is an

inextricable link between discovery and the trial, which is the sharp point at which all interlocutory processes converge. As such, what is a directly relevant document for the purpose of discovery must be a directly relevant document for trial, and *vice versa*. In turn, what is a directly relevant document for trial depends on what has been pleaded by the parties to that trial. Pleadings are, after all, the architectural blueprint based on which the entire litigation paradigm is constructed. This uncontroversial point was made by GP Selvam JC (as he then was), where in *Multi-Pak Singapore Pte Ltd (in receivership) v Intraco Ltd and Others* [1992] 2 SLR 793 ("*Intraco*"), he observed that (at [22], 799):

> By O 18 r 7 a party is required to set out in his pleading all material facts on which he relies for his claim or defence. Order 18 r 15(1) provides that a statement of claim must state specifically the relief or remedy which the plaintiffs claim. The object of these rules is two-fold:
>
> (a) to ensure that the plaintiffs have a legally sustainable claim and thereby eliminate frivolous and baseless actions; and
>
> (b) to inform the opponent in advance of the case he has to meet when the case comes on for trial so that justice can be done to both sides expeditiously and smoothly. It is a requirement of essential justice that an opponent is given adequate opportunity to prepare and present his view of the cause.

22 It must follow that a failure to plead may result in (see, *Intraco* at [24], 800):

> (a) An application by the opponent to strike out the pleading on the ground that it discloses no reasonable cause of action or defence; and/or
>
> (b) *The party in default being precluded from presenting a case, leading evidence or cross-examining the opponents' witnesses on the point omitted from* the pleadings; and/or
>
> (c) A court not making a finding or giving a decision based on facts not pleaded and a finding or decision so made will be set aside.

23 This connection between pleadings, discovery of evidence and the trial is also reinforced by the historical development of discovery. Briefly, discovery originated as a principle of equity in the ecclesiastical courts and the Court of Chancery in England. It was only until the 19th Century that the common law courts would be given statutory power to compel discovery. What is pertinent is that in the Court of Chancery, discovery was part of the pleadings. The plaintiff's bill would comprise a stating part, a charging part and an interrogating part. It was in the charging part that a plaintiff would set out the evidence, including extracts from relevant documents. A defendant desiring to obtain discovery against the plaintiff had to file a cross bill. While in modern litigation, these various processes are split up due to the growing enormity of cases, and thus the infeasibility of giving discovery simultaneous with one's pleadings, that does not detract from the fact that these seemingly disparate regimes are part of one indivisible whole.

24 Case law also supports the proposition that there must be shown a relationship between the pleadings and the documents sought to be discovered. This was explicitly accepted in the Court of Appeal decision in *Tan Chin Seng* at [19], 352:

> When an allegation is not pleaded, seeking discovery of a document to back up such an allegation constitutes fishing: *Marks & Spencer plc v Granada TV* (unreported, 8 April 1997).

More recently, in *UMCI Ltd v Tokio Marine & Fire Insurance Co (Singapore) Pte Ltd and Others* [2006] 4 SLR 95, at [71], Sundaresh Menon JC interpreted – and correctly, in my view – *Tan Chin Seng* as standing for this central premise:

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

25 Reference may also be made to the leading decision in *Wright Norman and Another v Oversea-Chinese Banking Corp Ltd and Another Appeal* [1992] 2 SLR 710. Although much of the decision in that case was in relation to interrogatories, the same principles apply to discovery. In that case, the Court of Appeal, at [15], 718 approved the reasoning of Chao Hick Tin JC (as he then was) that discoverable documents must bear a relationship to the pleaded particulars and causes of action:

> As I have pointed out above, the [applicants] have not set out any specific particulars of negligence. If they had particularized specific instances of negligence, then interrogatories could be raised on those specific particulars of negligence. Without particulars, they cannot interrogate.

26 The need for definition of the issues in the substantive action between the parties is also why the courts are often reluctant, although they have the discretion to do so, to order discovery prior the commencement of any action and any pleadings: see, *R.H.M. Foods Ltd and Another v Bovril Ltd* [1982] 1 WLR 661 at 665.

27 Finally, as a matter of policy, there is much to commend in requiring a party seeking discovery to relate that discovery to the pleaded issues. This prevents endless foraging of evidence that may not at all be pertinent to the trial and which may eventually be disallowed from being heard (see [21(b)] above). While a cynic may suggest that all this will do is to encourage wide-ranging and excessive pleadings, that is not likely to be the case given that the courts may order costs thrown away if the pleadings are amended because they are found to be baseless. It may order wasted costs against the solicitor personally if he is found to have engaged in such vexatious conduct. Pleadings can also be struck out and the appropriate costs ordered. Such a litigant may also lose his entitlement to costs even if he wins at trial. This again is another illustration of the interconnectedness of the various provisions in the Rules.

28 On the basis of the reasons above, parties seeking discovery must demonstrate a nexus between the pleaded causes of action and the documents they want discovered. In fact, under O 24 r 6, which governs discovery against a non-party, a supporting affidavit must be filed describing:

> [T]he documents in respect of which the order is sought *and show, if practicable by reference to any pleading served or intended to be served in the proceedings, that the documents are relevant to an issue arising or likely to arise out of the claim made or likely to be made in the proceedings* or the identity of the likely parties to the proceedings, or both…
>
> [emphasis]

A fortiori, when discovery is sought against another party to the action, and where pleadings have defined the ambit of the contest, the relevance of a discovery should be determined by reference to the pleadings.

Indirect relevance

29 So much for direct relevance. Under O 24 r 5(3)(*c*), a document which may lead the party seeking discovery of it to a train of inquiry resulting in his obtaining information which may adversely affect or support the cases of the parties is permissible. In that sense, *indirectly* relevant documents may be discovered. This is our modern variation of the holding in the *locus classicus* that is *Compagnie Financiere Et Commerciale Du Pacifique v Peruvian Guano* (1882) 11 QBD 55 at 62-63:

> A document can properly be said to contain information which may enable the party [requiring discovery] to advance his case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, *which may have either of these two consequences*…
>
> [emphasis added]

30 The italicised phrase is critical. A party seeking discovery on the basis of O 24 r 5(3)(*c*) cannot hope to get an order in his favour *unless* the train of inquiry will itself lead to the discovery of *directly* relevant documents, as defined in the preceding paragraphs. This much is clear from *Tan Chin Seng* at [35], 355-256, albeit in slightly different terminology:

> While the principle on 'train of inquiry' is incorporated in r 5, *it is nevertheless necessary for the applicant party to show in what way the requested document may lead to a relevant document*. For example, in *Jones v Richards* (1885) 15 QBD 439 the court allowed interrogation of the defendant as to whether or not he was the writer of a letter (which was not in issue) in order to prove that he was the writer of a libellious letter which was the subject of the proceedings. *The plaintiffs here did not attempt to show any such linkage other than stating baldly that there could be a train of inquiry*. It was clear that the plaintiffs just wanted the specified documents (as ordered by the assistant registrar), and not that the discovery of those documents (which we ruled to be irrelevant) might lead to relevant documents. That was not their position. In modern litigation, discovery must be kept under proper control.
>
> [emphasis added]

31 Once again, there must be still be shown a connection between what is discovered and the ultimate end-point, which is the pleadings that in turn control what are pertinent to the trial. The reasons for this are similar to those articulated above in relation to the definition of direct relevance.

Discovery must be necessary either for disposing fairly of the cause or matter or for saving costs

32 Not much controversy arose in respect of this principle in the present application, for reasons that will become obvious. As such, it is sufficient to highlight a decision of Belinda Ang Saw Ean J in which she neatly encapsulated the underlying concerns expressed by this principle (see, *Bayerische Hypo-und Vereinsbank AG v Asia Pacific Breweries (Singapore) Pte Ltd* [2004] 4 SLR 39 ("*Bayerische*") at [37] and [38]):

> The ultimate test is whether discovery is necessary for disposing fairly of the proceedings or for saving costs. An assertion that the documents are relevant will not be good enough. Equally, an assertion that the documents are necessary because they are relevant will not be enough. Obviously, if a document is not relevant, it cannot be necessary for disposing of the cause or matter. On the other hand, documents may be relevant to a case without being necessary to it. The word used in O 24 r 7 is "necessary" and not "desirable" or "relevant". It is the common

experience of lawyers and the court that often many documents are produced because they are relevant, but only very few of them are of use.

The court is, by O 24 r 7, concerned with the discretion to refuse disclosure of a document unless the necessity for disclosure is clearly demonstrated. In a way, it calls for an exercise in considering and selecting documents or some parts of them. The wider the range of documents requested the more difficult it is for the court to decide whether the documents are necessary for "disposing fairly" of the matter or cause before proceedings are commenced or for "saving costs".

Assessment of the application

33 As stated above, this application was brought on two foot-holds: the first was that the documents sought to be discovered would be directly relevant; and second that even if not, they would set off a train of inquiry. I should preface my discussion with the observation that there was a certain amount of conflation between these two arguments in the applicant's submission and I will return to this after assessing the merits of the application on the two bases of relevance separately.

Whether documents sought to be discovered directly relevant

34 It will be recalled that the pivot of the applicant's submission before me was that the documents were directly relevant in that they could or would establish that the respondent had an ulterior motive in investing in the Notes on the applicant's behalf. When I asked Mr Ng whether the allegation that the respondent was acting with this motive in mind appeared in the pleadings of the parties, he candidly conceded (and quite correctly) that it did not.

35 In so far as the claim that the investment was unauthorised was concerned, the allegation was pleaded on the basis that (a) the standing instruction was to invest only in US$ denominated securities of AAA credit rating or similar; and (b) that any instruction to invest in the Notes was not in writing and therefore invalid. No reference was made to any ulterior motive. As for the allegation that the investment was negligent, the applicant's pleaded case referred to paragraphs 34(o) to (aa) of the SOC but, as can clearly be seen from [4] above, none of them related to any ulterior motive on the part of the respondent.

36 In fact, as I understood the applicant's position in the main action, it had alleged that notwithstanding the alleged absence of authorisation, or negligence in investing in the Notes, the applicant continued to hold the Notes on the advice of Ms Cheng: see para 36 of the SOC. Therefore, it appeared that the real crux of the applicant's pleaded case was whether *this* advice was negligent. In this regard, reference was made to the particulars in para 34(p) to (s); and as indicated above, these did not show that ulterior motive was a material fact supporting the cause of action pleaded.

37 The issue of ulterior motive – if indeed as relevant and important to the applicant's case as it asserted it was – ought to have been pleaded with some specificity. To suggest that the respondent deliberately sold the Notes to the applicant knowing that it was a bad investment is akin to alleging fraud, which must be pleaded: see O 18 r 8(1) of the Rules. At the very least, the failure to plead such an allegation would take a reasonable defendant by surprise, contrary to O 18 r 8(1)(*b*). This was especially so when the applicant's pleaded case rested on a breach of express and implied contractual terms *simpliciter*. After all, contractual breaches are strict in liability and proof of an intention to breach is unnecessary. Moreover, the particulars supporting the pleaded causes of action (as detailed above at [4] and [5]) did not in any way, shape or form hint that a material supporting fact was that of the respondent's intention, bad faith or fraud in investing in these Notes for the

applicant. Indeed, even were it not necessary to plead the allegation of ulterior motive, it was patent that nothing in the parties' cases to date would suggest that the respondent's motive would be an important issue for trial. This was why it was readily acknowledged by Mr Ng that even if we took a broader compass, the respondent's ulterior motive had not even been raised in any of the Affidavits-in-Chief that have been filed to date. If the evidence of the applicant's own witnesses did not allege any ulterior motive on the part of the respondent, on what basis can this court order discovery relating it?

38 In spite of the hurdle presented by the absence of pleadings in relation to the respondent's ulterior, Mr Ng nonetheless urged that the issue of motive was relevant in a broader, more contextual way: if it could be shown that the respondent was attempting to dump bad investments on the applicant, this might be a platform on which the trial judge might infer that the respondent had an incentive to dump bad investments without authority and negligently. This, of course, did not address the objection that this position was not pleaded. To say that something is relevant is to beg the question: relevant to what? As held above, discovery must be relevant to the parties' cases *as pleaded*. Nevertheless, taking the applicant's submission as it was, it was still far from obvious that the documents sought would have the effect that the applicant contended they did.

39 First, the relevance of motive to whether the respondent obtained the requisite authorisation was really a non-starter. Even if the documents did demonstrate that the respondent harboured nefarious intentions when it invested in the Notes for the applicant, does this prove that the investment in the Notes was not authorised? In my judgment, it does not. It is only logical that even if the respondent thought it was palming off what it thought was a bad investment, the applicant may still have authorised it. After all, it was the applicant's own pleaded case that it was never made known to the applicant that the Notes were a bad investment. Here, it is apposite to refer to *Tan Chin Seng* again, and in particular, to [20], 352 to [22], 353 of the grounds of decision. There, the plaintiffs were suing for breach of representations and/or contract; and discovery of certain classes of documents was sought on the basis that they would establish whether these representations were true at the time they were made such that the defendants could never have intended to fulfil the representations. The Court of Appeal emphatically disallowed discovery here, even though one might have thought that an intention not fulfil a contract at the outset might conceivably be a basis on which to infer that a breach had occurred subsequently. In my view, it must be obvious why the decision is correct. If discovery could be allowed of every "background fact", it would lead to endless and oppressive discovery.

40 An analogy may be drawn to the common practice not to allow discovery of a party's conduct on previous but similar situations if it would merely show that that party would have been *inclined* to act in a certain way at the material time: see, among others, *Thorpe* at 670 (per Dillon LJ) and 674 (per Neill LJ). This is not to suggest that background or circumstantial information can never be discovered; only that they need to be directly relevant to the matters in issue. For instance, when the documents sought would pass muster under the exclusionary rules of similar fact evidence, such documents may be discovered: *Board v Thomas Hedley & Co* [1951] 1 All ER 431. Similarly, in *Tan Chin Seng* itself, the Court of Appeal held as follows (at [25], 353):

> Another argument put forward by the plaintiffs was that the documents… formed the factual matrix, or surrounding circumstances, which the court could take into account in construing the representations. But evidence as to the factual background must be restricted to the circumstances 'known to the parties at or before the date of the contract': see *Prenn v Simmonds* [1971] 3 All ER 237; [1971] 1 WLR 1381. The documents requested were not known to the plaintiffs before, or at the time, they applied to become members of the club.

Clearly, had the background information been directly relevant to the resolution of the legal and factual matrix in play, discovery of the said documents would have been ordered. But this is not the situation presented in this application. Similar to *Tan Chin Seng*, the evidence that the applicant sought to lead did not bear on the ultimate issues to be determined at trial.

41 Secondly, the direct relevance of motive to the issue of negligent investment and/or advice was also tenuous at best. Establishing that the respondent had an ulterior motive in on-selling a bad investment to the applicant would show that there was deliberation and intent. Intentionally bad investments or advice is a very different kettle of fish from negligent investments or advice. In fact, not only is proof of intention *irrelevant* to a claim in negligence, it is *inconsistent*.

42 One final point on direct relevance should be mentioned. Mr Ng submitted that there was very little direct evidence on the pleaded issues, and in particular *vis-à-vis* the applicant's claim that authorisation had not been given for the investment. This was because the Defence had purported that authorisation was given orally. This meant that it became all the more vital to discover background information from which inferences as to the pleaded issues could be drawn. There is a logical difficulty in this submission, which is that the amount of evidence that a party has been able to muster has absolutely no bearing on the relevance of further evidence that is sought. Put another way, if the further evidence sought is irrelevant, it must be so regardless whether the seeking party has a strong or weak case to begin with. In the circumstances, the assertion that the main action or the issues therein boil down to a word-against-word contest does not affect the relevance of the documents that the applicant wants discovered.

Whether documents sought to be discovered indirectly relevant

43 Mr Ng however pressed his application further: even if these documents sought were not directly relevant, they would be indirectly relevant in that they might lead to a train of inquiry. But this train that the applicant wants this court to order the respondent to board will still stop one station shy of where the applicant needs to go. Mr Ng did not seek to suggest that the train will soon depart from Station Ulterior Motive and that it is making its way on a different track to Station Unauthorised Transaction or Station Negligent Investment or even Station Negligent Advice. On the contrary, it was implied (though perhaps not in so many words) that the documents sought to be discovered will lead to yet *more* documents relating to the respondent's *motives*. As it is clear from the analysis above ([29] to [31]), the courts will not order discovery on the basis that it will provoke a train of inquiry if the train's ultimate destination is not directly relevant to the pleaded cases. Given my conclusion as to the irrelevance of motive to any pleaded issues in the main action, it was my judgment that the respondent must not be taken on this ride.

44 It was brought to my attention that there had been a somewhat similar application in respect of SUM 3788/2006 by the same applicant in the same suit seeking discovery of a confirmation ticket evidencing who held legal title to the Notes prior to its investment on the applicant's behalf ("the Ticket"). According to Mr Ng, the same arguments in relation to the relevance of motive was put before Assistant Registrar Kenneth Yap, which were accepted and affirmed on appeal to Lee Sieu Kin J. Therefore, Mr Ng urged that notwithstanding that I was not bound by the decision in SUM 3788/2006, I should follow its reasoning.

45 I need not express any decided opinion as to the merits of the decision in SUM 3788/2006 because even if I accepted Mr Ng's interpretation of it, the applicant is still a long way from home. Instead, the decision *reinforced* my judgment that the present discovery application should not be allowed. Before AR Yap, Mr Ng submitted that discovery of the Ticket should be given on the basis that it would lead to a train of inquiry that would adversely affect the respondent's case: see page 2

of the certified transcript. Mr Ng also argued at page 4 of the certified transcript that the Ticket would become "a basis for cross-examination as to motive, which becomes a relevant issue. The train of inquiry does not need to result in further discovery proceedings." Somewhat ironically, the present application was brought largely on the basis of the Ticket, *ie*, having determined that the brokerage arm of the respondent was the legal owner of the Notes at the material time, the applicant was seeking *further* discovery to investigate the motives of the respondent in investing in the Notes for the applicant.

46 Given the argument raised and accepted in SUM 3788/2006, which was that *the Ticket* would provoke a train of inquiry, two questions arose. The first was whether the Ticket, having now been discovered, assisted the applicant? And secondly, if it did not, should it be the basis on which yet further and presumably better discovery was ordered? As to the first question, the Ticket clearly did not materially affect the parties' cases since there would be no need for any more discovery if that were the case. Furthermore, the fact that the brokerage arm of the respondent was the legal owner of the Notes prior to the investment did not materially prove or disprove any party's case. As I understood Ms Tan on this point, the brokerage arm of the respondent would – of course – have had to be the legal owner of the Notes since they could not otherwise have sold or invested or transferred the Notes to the applicant.

47 The answer to the second question must also be in the negative. Nothing on the face of the Ticket suggested any foul play by the respondent. If anything, the Ticket showed that the applicant paid less than the nominal value of the Notes for 10.25% interest that will mature on 29 September 2000. Moreover, although this point was not raised by the parties, it was also pertinent that the Ticket indicated no accrued interest as of the settlement date. Presumably, this contradicted the applicant's theory that the respondent had itself invested in these Notes and then tried to offload them subsequently.

48 In short, having previously been allowed discovery in SUM 3788/2006 on the promise that evidence relating to the facts in issue could be uncovered, we have found that promise to have been a mirage, and as such there was no basis on which this court should order further discovery. In other words, even if I assumed that the respondent's motives were relevant, there was no basis on which I could suppose that the present discovery could lead to information that would support or affect the parties' cases.

49 In this regard, I need only to recall the words of Coleman J in *O Co v M Co* [1996] 2 Lloyd's Rep 347 at 351 – and adopted by Tan Lee Meng J in *Banque Cantonale Vaudoise v Fujitrans (Singapore) Pte Ltd* [2007] 1 SLR 570 at [10] – that discovery is not meant to require parties to "turn out the contents of their filing systems on the off-chance that something might show up." To extend the frequently-exploited fishing metaphor, the party applying for discovery must not only mark out a specific and identifiable spot into which he wishes to drop a line (see *Thyssen Hunnebeck Singapore v TTJ Civil Engineering* [2003] 1 SLR 73 at [6]), he must know that there is fish at that spot. Even at this late stage, the applicant has not matched its conviction that the respondent had acted with an ulterior motive with an amendment of its pleadings.

50 Finally, it will be recalled that I had prefaced my assessment of the merits of the application with the observation that there was some confusion in the applicant's submission before me. When I sought Mr Ng's views as to the direct relevance of the respondent's motive, he clarified that he was justifying the application on the basis that it would provoke a train of inquiry. But when I asked Mr Ng where this train was headed, his answer was that it would prove the ulterior motives of the respondent, which were relevant. With respect, this logical-slight-of-hand simply confuses the two distinct bases for allowing discovery. To paraphrase Antonin Scalia J's remarks in *Austin v Mich.*

Chamber of Commerce (1990) 494 US 652 at 685:

> When the vessel labelled ["direct relevance"] begins to founder under weight too great to be logically sustained, the argumentation jumps to the good ship ["train of inquiry"]; and when that in turn begins to go down, it returns to ["direct relevance"]. Thus hopping back and forth between the two, the argumentation may survive but makes no headway towards port, where its conclusion waits in vain.

Whether documents sought to be discovered necessary either for disposing fairly of the matter or for saving costs

51 Given my judgment that the documents sought were not directly or indirectly relevant such as to lead to a chain of inquiry, it followed that discovery was not necessary for the fair disposal of the applicant's substantive claim against the respondent or indeed for saving costs: see *Bayerische* at [37], cited above at [32].

Conclusion

52 To summarise, I dismissed the application on the grounds that:

(a) The documents sought to be discovered would only demonstrate, at best, the motive of the respondent in investing in the shares;

(b) This was not directly relevant to any of the pleaded issues;

(c) Even under the broader scope of discovery allowed where discovery would lead to a "train of inquiry", the inquiry must ultimately relate back to an issue that is pleaded. Here, the inquiry would only serve to churn the discovery of more documents pertaining to the respondent's motive; and

(d) In any event, even were I to suppose that motive was relevant, there was no basis on which the applicant could allege an ulterior motive on the respondent's part – even if I took into consideration the Ticket indicating that the respondent held the Notes prior to its investment for the applicant.

Costs

53 A brief word is necessary in the light of the parties' submissions on costs. There was no dispute that having successfully attacked the application, the respondent was entitled to costs. The question was quantum. On this, Ms Tan proposed that it was relevant to take into account the following:

(a) The application was taken out extremely late in the day; barely a week before trial on the main action was to commence;

(b) The application was based, if at all, on the Ticket which confirmed that the respondent's brokerage arm held legal title of the Notes at the material time. This Ticket was discovered more than 7 months ago. There was no reason why the application was so late;

(c) The application required counsel to appear in court twice: once to argue the merits and another (because I had reserved judgment on the merits of the application) to receive judgment and argue on costs; and

(d) The application was filed on 5.30 pm on 3 May 2007 and according to O 62 r 8, this is considered service on the next day. This meant that service defective because O 32 r 3 requires summonses to be served two clear days before it is to be heard.

54 In response, it was argued that the reason the application was filed so late was because it was based on the AEIC of one of the respondent's experts, Dr Michael Potyka, which was affirmed only on 28 March 2007. I did not accept this explanation. A perusal of the Supporting Affidavit revealed that Dr Potyka's evidence only served to *confirm* that the Notes were held by an arm of the respondent. The Ticket itself made that clear. Even if Dr Potyka's evidence was necessary, this did not explain the six weeks between the date of Dr Potyka's AEIC and the date of the filing of the summons – especially since the applicant himself had applied for liberty to set the matter down for trial on 3 May 2007, the same day the present application was filed.

55 In the premises, considering the conduct of the applicant both in filing the application this late and in short-serving it in violation of the Rules, together with the fact that the respondent was successful in what was a substantial application, I awarded costs in the amount of $2000 payable to the respondent.

Coda

56 If, as I have held, discovery must relate to pleadings, one practical way of assisting the courts in making this determination is to state in the summons or the supporting affidavit the specific pleadings to which the documents sought to be discovered pertain. This is so even if the application is brought on the basis that it would lead to a train of inquiry; in such an event, it would still be helpful to indicate where that train was bound *vis-à-vis* the pleaded issues.

Application dismissed; costs fixed at $2000 inclusive of disbursements.