The Management Corporation Strata Title Plan No 689 v DTZ Debenham Tie Leung (SEA) Pte Ltd and Another
[2008] SGHC 98

Case Number : Suit 208/2007, SUM 1888/2008

Decision Date : 30 June 2008

Tribunal/Court : High Court

Coram : Goh Yi Han AR

Counsel Name(s) : Chen Mei Lin Lynette, Lim Yin Mei Sue-Anne (Harry Elias Partnership) for the plaintiff; Teo Weng Kie, Lorraine Ho (Tan Kok Quan Partnership) for the defendants

Parties : The Management Corporation Strata Title Plan No 689 — DTZ Debenham Tie Leung (SEA) Pte Ltd; DTZ Debenham Tie Leung Property Management Services Pte Ltd

Civil Procedure

30 June 2008 Judgment reserved.

AR Goh Yihan:

Introduction

1 This is an application by DTZ Debenham Tie Leung (SEA) Pte Ltd and DTZ Debenham Tie Leung Property Management Services Pte Ltd for specific discovery of certain documents against Management Corporation Strata Title Plan No 689 under O 24 r 5 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules"). Although the principles governing discovery are relatively uncontroversial and have been, with respect, ably and eloquently discussed by AR Paul Tan in *Dante Yap Go v Bank Austria Creditanstalt AG* [2007] SGHC 69 ("*Dante Yap Go*") (at [16]–[32]), I will articulate the full reasoning for my decision with this judgment as an attempt has been made to resist discovery of certain categories of documents on the ground of litigation privilege, a creature seldom encountered by our courts notwithstanding its antiquity.

Background to the present application

2 The applicants in the present application are the first and second defendants (collectively "the defendants") in the substantive action (*viz*, Suit No 208 of 2007), whereas the respondent is the plaintiff ("the plaintiff"). The plaintiff is the management corporation of a building located at 11 Collyer Quay known as "The Arcade". The plaintiff engaged DTZ Leung Pte Ltd ("DTZ Leung") as the managing agent of The Arcade from 1 April 1991 to 31 March 1997. As part of its contractual duties as managing agent, DTZ Leung stationed its employee, one Loh Wan Wah ("Wilson Loh"), as the Maintenance Supervisor or Complex Manager of The Arcade. The second defendant took over as the managing agent of The Arcade from 1 April 1997 to 6 February 2006 after it was engaged by the plaintiff. The second defendant likewise stationed Wilson Loh, who had then become its employee, at The Arcade as the building's Maintenance Supervisor or Complex Manager. The plaintiff's substantive action against the defendants arises from Wilson Loh's alleged actions in his capacity as Maintenance Supervisor or Complex Manager from 1991 to 2005.

The plaintiff's pleaded case

3 According to the plaintiff's Statement of Claim (Amendment No 1) filed on 15 June 2007, on or about 4 October 2005, it was discovered that a cheque issued by the plaintiff and made payable to the plaintiff's mechanical and electrical sub-contractor was dishonoured by the bank. It was also found that Wilson Loh had disappeared and was no longer contactable. Based on the plaintiff's subsequent investigations, it was discovered that Wilson Loh had misappropriated funds through a series of fraudulent accounts and cheques signed by the plaintiff's cheque signatories. For example, it was pleaded by the plaintiff that its investigations revealed that two conflicting sets of accounts were produced for the years 1997 to 2004. The first set of the accounts had been produced by the plaintiff's auditors while the second set had been produced by Wilson Loh and presented to the plaintiff purporting to be the auditors' accounts. Further, the plaintiff's investigations also showed that Wilson Loh had from time to time in his capacity as the Maintenance Supervisor or Complex Manager of The Arcade fraudulently represented to the plaintiff that various sums totalling $4,767,622.43 had to be paid by the plaintiff to Wilkins Enterprise. Wilkins Enterprise was a sole-proprietorship owned by Wilson Loh and an instrument in his fraudulent scheme. This sum of $4,767,622.43, apart from other consequent disbursements and expenses, formed the main bulk of the plaintiff's claim against the defendants.[note: 1]

4 In the result, the plaintiff commenced the substantive action against the defendants on 2 April 2007. As against the first defendant, the plaintiff claimed that as Wilson Loh had committed the fraudulent acts while he was an employee, servant or agent of DTZ Leung, DTZ Leung should be vicariously liable to the plaintiff for those acts. The plaintiff stated that in the circumstances of this case, the first defendant should be treated the same as DTZ Leung and therefore it is the first defendant who should be vicariously liable for the fraudulent acts of Wilson Loh. The payments made to Wilkins Enterprise when DTZ Leung was the managing agent of The Arcade is stated to be $1,252,819.51.[note: 2]

5 In relation to the second defendant, the plaintiff claimed that the second defendant should be vicariously liable for the fraudulent acts of Wilson Loh while he was the employee, servant or agent of the second defendant. Furthermore, as part of its claim against the second defendant, the plaintiff stated that Wilson Loh misappropriated $1,252,819.51 (being part of the $4,767,622.43 claimed for in total) when DTZ Leung was the managing agent of The Arcade. Accordingly, the second defendant should be vicariously liable for the loss of opportunity to recover the sum of $1,252,819.51 from DTZ Leung since the fraudulent acts took place while Wilson Loh was the employee, servant and/or agent of the second defendant and when the second defendant was the managing agent of The Arcade.

The defendants' pleaded case

6 On their part, the defendants have pleaded four main "defences" (as that term is loosely used), as is evident from the main headings in their Defence (Amendment No 2) filed on 13 August 2007: (a) lack of causation, (b) contributory negligence by the plaintiff, (c) insufficient mitigation of losses and (d) the onset of limitation.

7 In relation to defences (a) and (b), the defendants have averred that Wilson Loh was stationed at The Arcade as Complex Manager and he reported directly to the Chairman and Council Members of the plaintiff's Management Council ("the Management Council") in respect of matters relating to the building. As such, the Management Council, and not the defendants, had control and supervision over Wilson Loh in respect of his fraudulent acts as pleaded by the plaintiff. The defendants have also pleaded that the various payments referred to by the plaintiffs as quantifying their losses were made by cheques signed by the plaintiff's appointed cheque signatories, who were members of the Management Council. Accordingly, those cheque signatories ought to have been aware of the identities of providers of goods or services to the plaintiff, and therefore should have realised that no

payments were due to Wilkins Enterprise. In essence, the plaintiff and/or the Management Council have failed to institute or carry out sufficient safeguards in respect of the plaintiff's accounts, approval, signing or payments by cheques, expenditure and funds. Hence, the alleged losses suffered by the plaintiff were caused (partly or wholly) by the plaintiff and/or members of the Management Council.

8 Apart from defences (c) and (d) (see [6] above), both of which are immaterial for the present application, it was submitted before me that the defendants have also denied the quantum of claim of $4,767,622.43 as pleaded by the plaintiffs. In this regard, counsel for the defendants, Mr Teo Weng Kie ("Mr Teo"), elaborated that the claim quantification of $4,767,622.43 by the plaintiff was based solely on cheque images which it obtained from its bank. These are cheques which were drawn in favour of Wilkins Enterprise. However, Mr Teo said that the defendants do not agree that the cheques were signed by members of the Management Council, and that there was no forgery of signatures on any of the cheques.[note: 3] He pointed to para 20 of the Defence (Amendment No 2) as supposedly containing the defendants' denial of the quantum of claim of $4,767,622.43 as pleaded by the plaintiffs. Paragraph 20 (as amended) states as follows:

> 20. Paragraphs 25 and 26 of the Statement of Claim (Amendment No. 1) are denied. The Defendant avers that such loss of opportunity, if any, which is denied, was caused by the Plaintiff and/or the Plaintiff's Cheque Signatories and/or members of the Plaintiff's Management Council, and the 2nd Defendant repeats the particulars as set out at paragraph 14(a) to (g) above.

In turn, paras 25 and 26 of the Statement of Claim (Amendment No 1), referred to in para 20 of the Defence (Amendment No 2) as reproduced above, provides as follows (as amended):

> 25. This fraudulent concealment [referring to Wilson Loh's concealment of prior frauds or misappropriations] continued until after DTZ Leung was dissolved on 2 May 2000.
>
> 26. As a result of the fraudulent concealment pleaded above, the Plaintiff lost the opportunity to recover the loss of S$1,252,819.51 from DTZ Leung before it was dissolved and has thereby suffered loss and damage.

9 I should also mention that Mr Teo in his reply submissions (tendered at the adjourned hearing of the present application) referred to para 24 of the Defence (Amendment No 2) as showing that the defendants have denied the quantum claimed.[note: 4] Paragraph 24 (as amended) states that:

> Paragraph 30 of the Plaintiff's Statement of Claim (Amendment No 1) is denied. The Defendant further denies that the losses allegedly suffered by the Plaintiff, if any, were caused by the Defendant.

Paragraph 30 of the Statement of Claim (Amendment No 1) alludes to the following:

> Apart from the frauds or misappropriations pleaded above, the Plaintiff avers that the 2nd Defendant failed to properly and promptly administer the affairs of the Plaintiff in breach of the implied terms pleaded in paragraph 9 above. As a result of the [*sic*] this breach, the Plaintiff has also suffered the following loss and damage: …

The "following loss and damage" as pleaded in para 30 (which I have not reproduced) in fact do not relate to the sum of $4,767,622.43 or any part thereof, but instead relate to consequential losses due to the misappropriation of the $4,767,622.43, including penalties for the non-payment of taxes and

utility bills.

10 Reading these paragraphs, I first do not agree with Mr Teo that para 20 of the Defence (Amendment No 2) shows that the defendants have denied the quantum as pleaded by the plaintiff in its Statement of Claim (Amendment No 1). If anything, para 20 of the Defence (Amendment No 2) refers to para 26 of the Statement of Claim (Amendment No 1), which only denies the quantum of $1,252,819.51. Of course, one could say that inasmuch as $1,252,819.51 is part of $4,767,622.43, a denial of a part is a denial of the whole, but that is quite different from Mr Teo's submission that the defendants have with para 20 "denied the quantum of claim as pleaded by the [p]laintiff".[note: 5] Secondly, I also do not agree that para 24 of the Defence (Amendment No 2) in fact denied the quantum of $4,767,622.43 inasmuch as para 30 of the Statement of Claim (Amendment No 1) itself does not refer to $4,767,622.43. If there is a paragraph that substantiated this submission, it ought to have been para 13 of the Defence (Amendment No 2), which states that (as amended):

> 13. Paragraph 20 of the Statement of Claim (Amendment No. 1) is denied.

Paragraph 20 of the Statement of Claim (Amendment No 1) is where the plaintiff has particularised the loss and damage claimed for. However, it is important to note (for reasons apparent later) that this is merely a bare denial of the quantum as particularised by the plaintiff and does not constitute a particular argument as to the correct amount of damages which should be awarded (in the event that liability is established).

The present application

Preliminary observations

11 The above thus sets out the background to the present application, by which the defendants sought the discovery and production of 39 categories of documents as set out in Schedule A annexed to the present application ("Schedule A") pursuant to O 24 r 5 of the Rules. I have set out the specific nature of these categories by way of Appendix A to this judgment but would summarise at this point that they are generally accounting records. Also, for completeness, O 24 r 5, in so far as material, is set out below:

> 5(1) Subject to Rule 7, the Court may at any time, on the application of any party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any document specified or described in the application or any class of document so specified or described is, or has at any time been, in his possession, custody or power, and if not then in his possession, custody or power, when he parted with it and what has become of it.
>
> …
>
> (3) An application for an order under this Rule must be supported by an affidavit stating the belief of the deponent that the party from whom discovery is sought under this Rule has, or at some time had, in his possession, custody or power, the document, or class of document, specified or described in the application and that it falls within one of the following descriptions:
>
> (a) a document on which the party relies or will rely;
>
> (b) a document which could –
>
> (i) adversely affect his own case;

(ii) adversely affect another party's case; or

(iii) support another party's case; and

(c) a document which may lead the party seeking discovery of it to a train of inquiry resulting in his obtaining information which may –

(i) adversely affect his own case;

(ii) adversely affect another party's case; or

(iii) support another party's case.

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

12 Fortunately, the enormity of the number of categories sought can be circumvented by taking a more overall view of the *general* character of these documents, as opposed to their *specific* characteristics. As Mr Teo very helpfully pointed out, the 39 categories of documents can be classified into groups of documents, namely:

(a) Group 1 documents, consisting of those categories of documents which the plaintiff does not claim litigation privilege on, but objects to disclosure. These will be items no (1) to (35) as set out in Schedule A. Within Group 1, two further sub-groups can be discerned:

(i) Group 1(i) documents, consisting of documents originating within the period from the financial year ending 31 March 1990 to the date of 31 December 2005 (both dates inclusive) ("the Pre-2006 Period"); and

(ii) Group 1(ii) documents, consisting of documents originating within the period from 1 January 2006 to the present date (both dates inclusive) ("the Post-2006 Period").

(b) Group 2 documents, consisting of those categories of documents which the plaintiff claims litigation privilege on. These will be items no (36) to (39) as set out in Schedule A.

Taking into account of the two sub-groups, this makes for three groups of documents. I should also mention that counsel for the plaintiff, Ms Lim Yin Mei Sue-Anne ("Ms Lim"), likewise dealt with the present application along the same broad lines, and I acknowledge both parties' effort in making an otherwise very tedious process somewhat less so.

13 Very briefly, as with the three groups of documents identified above (*ie*, Group 1(i), Group 1(ii) and Group 2), the parties' contentions over the discoverability of the 39 categories likewise revolve around three main arguments:

(a) First, with regard to the Group 1(i) documents, the plaintiff is resisting their discovery because they say they do not have these documents. In that respect, the plaintiff has filed an affidavit affirmed by one Mala Arjan Chotrani ("Ms Chotrani") on 23 May 2008 ("the Chotrani affidavit") attesting that it does not have in its possession, custody or power the documents sought to be discovered under Group 1(i), save for those already disclosed. I do not understand the plaintiff to be disputing the relevancy or necessity of these documents.

(b) Secondly, with regard to the Group 1(ii) documents, the plaintiff is resisting their discovery because they are not relevant or necessary for the disposing fairly of the cause or matter or for saving costs. I do not understand the plaintiff to be disputing that it has in its possession, custody or power these documents.

(c) Thirdly, with regard to the Group 2 documents, the plaintiff is resisting their discovery because they are protected by litigation privilege. I do not understand the plaintiff to be disputing that it has in its possession, custody or power these documents *or* that the documents are relevant and necessary for the disposing fairly of the cause or matter or for saving costs.

14 As would be observed, the plaintiff's objections readily conform themselves with the general requirements of a successful discovery application, each building upon another, much like the steps in a staircase, each requirement following from the previous and simultaneously forming the foundation of the next (to use AR Tan's analogy in *Dante Yap Go* at [1]). I should clarify that I am referring to: (a) the *supposed* prerequisite that the documents sought to be discovered be in the possession, custody or power of the party concerned; (b) the requirement that the documents sought to be discovered be relevant and necessary for the disposing fairly of the cause or matter or for saving costs; and (c) the negative (and external) requirement that the documents should not be privileged so as to preclude their discovery and production. As such, in assessing the merits of the present application in relation to the categories of documents sought for, I find it much neater to deal with each Group separately, with the applicable law governing discovery discussed at each step of the way, instead of being set out in full at an initial stage.

Group 1(i) documents

15 I deal first with the Group 1(i) documents, which *general* character has been set out above (at [12]).

The parties' submissions

(1) The defendant's submissions

16 In respect of the Group 1(i) documents, consisting of those originating within the Pre-2006 Period, the defendants submitted that the plaintiff has not disputed that these documents are relevant to the substantive action. However, save for the documents already provided to the defendants, the plaintiff has usually not stated in its Affidavit Verifying the Supplementary List of Documents affirmed by one Jacqueline Siew on 3 March 2008 ("the Siew affidavit") nor the Chotrani affidavit that the documents which were not provided are not in their possession, custody or power, and if not then in their possession, custody or power, *when they parted with it and what has become of it*.

17 As an example, the defendants referred me to the Siew affidavit, pointing out that the deponent would typically refer to broad categories, sometimes incorporating two categories into one, and simply state as follows:

11. Items 14 and 19

(i) In respect of item 14 of the Amended Schedule the Plaintiff will be providing discovery of various documents that fall within the scope of the said items in Schedule 1 of the Supplemental List of Documents.

According to the defendants, item 14 was in relation to various accounting records. Item 19 was in relation to the plaintiff's liabilities to third parties including court documents and correspondence. Perusing Schedule 1 of the Supplemental List of Documents, it was pointed out on behalf of the defendants that apart from some limited documents, only documents from April 2001 were provided, even though the request was for the period 1990 onwards. The deponent was also silent on what has happened to the documents before 2001. As for item 19, what appeared to be a complete set from 1990 to 2006 was provided but nothing was said about the documents from 2007 to 2008.

18 Therefore, the defendants submitted that the plaintiff has not fulfilled its obligation to give discovery. The defendants thus had no option but to file the present application and seek an order that the plaintiff filed a proper affidavit verifying the position on each and every document that the defendants have sought. While the defendants acknowledged that the Chotrani affidavit (filed *after* the present application was filed) states that certain documents from Group 1(i) are no longer in the plaintiff's possession, custody or power, they pointed out that this is somewhat belated and is, in any event, incomplete since the Chotrani affidavit makes no mention of what has happened to those documents which are presently not in the possession, custody or power of the plaintiff. In addition, the defendants also submitted that there are some categories of documents which the plaintiff has the power to call for from third parties who have possession and/or custody of them. The plaintiff has, however, not made any attempt or effort to do so.

(2) The plaintiff's submissions

19 On the other hand, as I have mentioned (at [13]), the plaintiff's contention against the discovery of this Group of documents is that the Chotrani affidavit has already stated that the plaintiff does not have the undisclosed documents in their possession, custody or power. Thus, in the plaintiff's written submissions in the present application, the same assertion that the Chotrani affidavit has adequately provided the status of the Group 1(i) documents is repeated for items no (1) to (35) as set out in Schedule A.

20 In addition, the plaintiff seems to have made a somewhat half-hearted *legal* argument in respect of the Group 1(i) documents. I shall explain why I have described the attempt thus as being "half-hearted". It was first impressed upon me by way of the plaintiff's written submissions that it is a n *"essential" prerequisite* of discovery that the documents requested must exist and be in the possession, custody or power of the other party. In support of this proposition, the plaintiff cited para 25/5/1 of *Singapore Civil Procedure 2007* (Sweet & Maxwell Asia, 2007), the material part of which reads as follows:

> … (1) There is no jurisdiction to make an order under [the English] R.S.C., Order 24, rule 7, for the production of documents unless (a) there is sufficient evidence that the documents exist which the other party has not disclosed; (b) the document or documents relate to matters in issue in the action; *(c) there is sufficient evidence that the document is in the possession, custody or power of the other party*. (2) When it is established that those three prerequisites for jurisdiction do exist, the court has a discretion whether or not to order disclosure. … [emphasis added]

This is actually a verbatim reproduction of the words of Mustill LJ in the English Court of Appeal decision of *Berkeley Administration Inc v McClelland* [1990] FSR 381 ("*Berkeley Administration*") (at 382). I shall term this as "Mustill LJ's *dictum*" for convenience.

21 Accordingly, as I understand the plaintiff's argument to be, the documents requested for must be in the possession, custody or power of the party concerned and if there is evidence to the

contrary, the court has no jurisdiction to even consider whether it wishes to exercise its discretion to allow discovery. The plaintiff's point must have been that, if Mustill LJ's *dictum* in *Berkeley Administration* is correct, then, coupled with the Chotrani affidavit, it could be said that the defendants' present application in relation to the Group 1(i) documents must fail for lack of *jurisdiction* on the part of the court. This is because the court will not go behind the truth of the affidavit at this interlocutory stage even if there is a contentious affidavit pointing in the other direction: see *Soh Lup Chee v Seow Boon Cheng* [2002] 2 SLR 267 at [9], where the High Court opined as such:

> I now revert to the issue that Mr Chong's argument addresses, that is, whether the deponent's affidavit verifying his list of documents shall be regarded as conclusive. I must agree with counsel that generally, such affidavits cannot be contravened by other contentious affidavits and shall not be subject to cross-examination. The reasons for this, as Stuart-Smith LJ pointed out in *Fayed v Lonrho plc* (The Times, 24 June 1993), are plain. Affidavits raised in such circumstances do not address the issues for trial and whether the deponent is truthful or not in respect of the discovery of documents he might still persuade the trial judge of the merits of his case through other evidence. …

22 Yet, in the very same written submissions, the plaintiff then submitted (at [43]) that it was "open" under the Rules for the defendants to take out the present application for an affidavit stating the whereabouts of the documents requested for. The plaintiff then pointed out that the plaintiff has thus far been cooperative and amendable to the requests for documents by the defendants and would have thereby gladly provided an affidavit to the defendants' requirement if only they had asked by way of letter. Indeed, throughout the hearing before me, Ms Lim repeatedly said that the plaintiff would be willing to provide an affidavit in compliance with O 24 r 5 of the Rules (in respect of the Group 1(i) documents) if that is what the defendants need. These repeated concessions, especially the one proclaiming that it was "open" for the defendants to take out this very application in respect of the Group 1(i) documents, appear to take away the wind from beneath the sails of the legal argument that the words in the Chotrani affidavit in fact anchored the court's *jurisdiction* (and not discretion) to allow discovery to the seabed of impossibility.

23 Notwithstanding this less than certain attempt in making this particular submission, I turn now to consider the applicable law, specifically, the effect of Mustill LJ's *dictum* in *Berkeley Administration*.

The applicable law

(1) Distinction between jurisdiction and discretion

24 Before I discuss the effect of Mustill LJ's *dictum* in *Berkeley Administration*, there is perhaps a need to clarify his apparent distinction between "jurisdiction" and "discretion" in his *dictum* (see [20] above). It would be recalled that Mustill LJ spoke of the need for certain prerequisites to be satisfied, failing which the court has no jurisdiction to make an under for specific discovery. He then makes the point that when it is established that there is jurisdiction, the court has a discretion whether or not to order discovery, including when the other party has stated that the documents are not in his power or possession.

25 I think the key to deciphering Mustill LJ's *dictum* in the first instance is to attribute the correct meaning to the terms "jurisdiction" and "discretion". In this respect, while it has been said that "jurisdiction" is a protean word capable of multiple definitions depending on the situation in which it is used, I think Mustill LJ intended to refer to the court's "authority, however derived, to hear and determine a dispute that is brought before it", which in this case is an application for specific discovery (to use the words of Chan Sek Keong J in the High Court decision of *Muhd Munir v Noor*

Hidah [1990] SLR 999 at [19]). This has been termed its "narrow and strict sense". However, the word "jurisdiction" also has a "wider sense", *ie*, the manner in which its power to hear and determine cases *is to be exercised*. This, I think, is what Mustill LJ meant when he referred to "discretion" as being separate and distinct from "jurisdiction".

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

(2) The effect of the *dictum* in *Berkeley Administration*

27 The distinction between jurisdiction and discretion is important because Mustill LJ's *dictum* in *Berkeley Administration* clearly refers to jurisdiction which, as established, refers to the conditions present in O 24 rr 5 and 7. In my view, the operative question must then be: what is the effect of Mustill LJ's *dictum* in *Berkeley Administration* on the law in Singapore? In this regard, I note that a Singapore court has not, to the best of my knowledge, cited or analysed *Berkeley Administration*.

28 Notwithstanding the lack of local judicial notice of *Berkeley Administration*, I note that the two leading textbooks on civil procedure in Singapore, *viz*, *Singapore Civil Procedure 2007* and *Singapore Court Practice 2006*, both cite *Berkeley Administration* as apparently representing the law in Singapore in relation to discovery. Even to this general point, however, there remains a caveat: Prof Pinsler in *Singapore Court Practice 2006* reminds us (at para 24/5/2) of the need to modify "Mustill LJ's pronouncement… for Singapore's purposes". He explains that O 24 r 7 of the English Rules of the Supreme Court (as cited in *Berkeley Administration*) was in the same terms as the former O 24 r 7 of the Rules. However, in the current Rules, r 7 has been replaced by r 5 which contains different criteria for the scope of discovery. Whereas the former r 7 required the documents to "relate to one or more of the matters in question in the action", the position under the current Rules is that the documents must come within one of the categories of r 5(3). Therefore, Prof Pinsler suggests that para 1(b) of Mustill LJ's pronouncement in *Berkeley Administration* should be qualified accordingly in the context of Singapore.

29 With respect, I think that the plaintiff's argument on the jurisdiction of the court is based on a misunderstanding of the distinction between "jurisdiction" and "discretion". The starting point must be that the jurisdiction that Mustill LJ spoke of must *correspond* to the conditions in O 24 r 5 in so far as it is the fulfillment of these conditions that confer jurisdiction (or authority). The preliminary point I make is that, if this is correct, then I cannot see why Mustill LJ's *dictum* is regarded as being *fully* representative of such conditions. Examining O 24 r 5 in detail, one notes immediately that r 5(1) states that it is subject to r 7, which itself (as will be seen) prescribes the requirement of "necessity". Nowhere in Mustill LJ's *dictum* is there a prerequisite of "necessity" before the court can make an order under O 24 r 7 of the English Rules of the Supreme Court (corresponding materially to our O 24 r 5). Surely if the requirement of "necessity" is not fulfilled, the court is not otherwise imbued with the "authority" (the meaning of jurisdiction) to make an order for specific discovery? As such, I would wholly agree with Prof Pinsler that Mustill LJ's *dictum* must be modified to suit the local context and must not be cited as though it is wholly representative of *our* law.

30 However, in response to the plaintiff's instant argument, I think that Mustill LJ's requirement that "there is sufficient evidence that the document is in the possession, custody or power of the other party" can be found on the face of O 24 r 5(3). Rule 5(3) requires, *inter alia*, that:

> An application for an order under this Rule *must be supported by an affidavit stating the belief of the deponent that the party from whom discovery is sought under this Rule has, or at some time had, in his possession, custody or power*, the document, or class of document, specified or described in the application… [emphasis added]

The italicised part seems to correspond to Mustill LJ's direction that there must be "sufficient evidence that the document is in the possession, custody or power of the other party". Given that we are merely at the interlocutory stage, such that the truth of affidavits are generally not questioned, I think a deposition in an affidavit to the effect required by Mustill LJ (as reflected in O 24 r 5(3)) would constitute "sufficient" evidence. This would mean that if the affidavit in support of the application were not in order, the court would not have the jurisdiction (or authority) to make an order for discovery. However, where the affidavit is in order (so as to constitute "sufficient evidence"), and the other party states on oath that he does not have the documents concerned, then I think that the court nonetheless retains the *jurisdiction* to make an order for discovery. In my view, this would be the correct reading of Mustill LJ's *dictum*.

31 I think that what the plaintiff should have argued is that, if the other party from whom discovery is sought states on oath that he does not have the documents concerned, then that could be a matter taken into consideration by the court in exercising its *discretion* to order discovery. This must be the case since the defendants have in their affidavits filed in support of the present application stated directly or indirectly that they believe the documents concerned to be in the possession, custody or power of the plaintiff; this means that the court has the *jurisdiction* since the prerequisite requirement of "sufficient evidence" (see [20] above) has been fulfilled. Therein exists the misunderstanding of the distinction between "jurisdiction" and "discretion". In fact, this distinction is clearly borne out when Mustill LJ said (at 382–383):

> … (5) It is not an answer to an assertion that documents falling within a particular category are disclosable that no such documents are in the other party's possession or power, *although if this information has already been conveyed on oath in the course of the proceedings this would furnish a reason why, in the exercise of the court's discretion, it might well not make an empty order*. [emphasis added]

32 In my view, the fact that the party from whom discovery is sought states on oath that he does not have the document in his possession, custody or power in no way affects the condition precedent to conferring jurisdiction, but is instead a factor which would defeat the application for discovery *notwithstanding* that the conditions in O 24 rr 5 and 7 have been fulfilled and *jurisdiction conferred*. This is a matter of *discretion*. Jurisdiction and discretion are not the same. Indeed, I find support for this conclusion in *Disclosure* (Sweet & Maxwell, 3rd ed, 2007) at para 8.19, where the learned authors write:

> The court may dispense with disclosure in the exercise of its *discretion* where no issue arises in the action in relation to which relevant documents are likely to exist. Even if the respondent says he has no documents of the category requested, this is not in itself an answer to an otherwise *proper request*, though a statement to that effect on oath (or verified by a statement or truth) may be a reason why, *in the exercise of the court's discretion*, it should not make the order [citing Mustill LJ's *dictum* in *Berkeley Administration*]. [emphasis added; footnotes omitted]

The expression "proper request" must refer to the conditions precedent conferring jurisdiction, whereas the exercise of discretion is clearly a separate matter.

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

Analysis

34 In view of my conclusion as to the law, I would reject at the outset the plaintiff's argument that the court is without *jurisdiction* to make an order under O 24 r 5 of the Rules merely because the Chotrani affidavit states that the plaintiff does not have in its possession, custody or power the Group 1(i) documents concerned. However, that is not the end of the matter as even though I am possessed of *jurisdiction*, I still have to decide how to exercise my *discretion*. In response to this, I accept Mr Teo's submission before me that the Chotrani affidavit is insufficient; specifically, it does not address what has happened to these documents or, at the very least, does not depose to whether the plaintiff knows what has happened to these documents.

35 In any event, as I have mentioned above, Ms Lim for the defendants made the point repeatedly before me that the defendants would be willing to provide such an affidavit in full compliance with O 24 r 5 of the Rules in respect of the Group 1(i) documents. True it may well be that the defendants could have written to the plaintiff to ask for such an affidavit without making the present application, but what the plaintiff would have or not have done in those circumstances is pure conjecture at this stage. There is an application before the court, and the court must resolve it in accordance with the law if the parties are unable to come to an out-of-court agreement. For my part, I do not think that the Chotrani affidavit is sufficient. I am also convinced, although the point was not contested by the plaintiff, that the Group 1(i) documents are relevant and necessary in the substantive action. In my judgment (and in the exercise of my discretion), I therefore allow the discovery and production of the Group 1(i) documents pursuant to the terms prayed for in the present application. For the avoidance of doubt, the Group 1(i) documents refer to items no (1) to (35) of Schedule A (as annexed to the present application) which originate within the Pre-2006 Period.

Group 1(ii) documents

36 I turn now to the Group 1(ii) documents, which *general* character has been set out above (at [12]).

The parties' submissions

(1) The defendant's submissions

37 In respect of the Group 1(ii) documents, consisting of those originating within the Post-2006 Period, the defendants submitted that the plaintiff has not disputed that these documents are in their possession, custody or power. However, the plaintiff's objection is that the discovery of these documents is irrelevant to the issues pleaded in the substantive action and the discovery of the same

is not necessary for disposing fairly of the cause or matter or for saving costs.

38 To this the defendants made one general objection based on three specific arguments: the "cut-off" date of 1 January 2006 for the purposes of relevancy and necessity is arbitrary and "of no moment" from an accounting and legal standpoint. The specific arguments are these. First, the alleged fraudulent acts apparently ceased on 4 October 2005. If the plaintiff is relying on the periods during which the cheques to Wilkins Enterprise were issued (from 5 September 1994 to 4 October 2005) to determine relevance, then the plaintiff has not explained why 1 January 2006, instead of 4 October 2005, is being used as a "cut-off" date. More pertinently, it is evident from the documents already provided to the defendants that the financial year for the plaintiff ends on 31 March annually. As such, all documents in relation to the financial period ending 31 March 2006 are clearly relevant since the plaintiff has alleged that the alleged misappropriations by Wilson Loh had ceased on 4 October 2005. Thus, if the plaintiff was relying on the period during which the cheques in question were issued, the "cut-off" date should be 31 March 2006, the last day of the financial year during which the last allegedly fraudulent cheque was drawn. Finally, a perusal of the Siew affidavit shows that the plaintiff has provided documents for the Post-2006 Period, although I note that the examples cited to me do not extend beyond February 2006. These submissions related only to those categories of documents requested for until 31 March 2006.

39 However, the dates of many of the Group 1(ii) documents in fact extended beyond 31 March 2006, with many of the requests stated in terms of documents dated "31 March 2008" or "to date". In his submissions before me, Mr Teo additionally referred to the English Court of Appeal decision of *Marshall v Goulston Discount (Northern) Ltd* [1966] 3 WLR 599. In that case, the issue was whether a party was a moneylender. The court held that discovery must be given of documents that post-dated the transaction in question, as well as those which pre-dated the transaction. Mr Teo appeared to be suggesting that, as a general proposition of law, discovery of documents dated post the transaction in question can be relevant. However, such a broad proposition does not automatically mean that *all* post-dated documents are relevant. Relevance is a question which *might* be answered by the date of documents, but that itself does not resolve into the broad proposition that *all* post-dated documents are relevant. Each case must be judged on its own facts. In fairness, Mr Teo obviously recognised this, since he dealt extensively with the relevance of the Group 1(ii) documents dated not only post 31 December 2005 but also post 31 March 2006 both in his written submissions and before me.

40 Although extensive arguments were mounted before me, there is no need for me to set them out in full here. It suffices to cite a few examples of Mr Teo's contentions in this respect since the core relevancy submitted by him was that the Group 1(ii) documents, *especially* those dated post 31 March 2006, are relevant to the issue of the correctness of the quantum of damages as quantified by the plaintiff. In essence, the defendants' forensic accountant has stated that a feature of the plaintiff's allegations is that the purported quantum of the alleged fraud was very simply derived from the sum of cheques made out to Wilkins Enterprise. The quantum of damages was not derived from the general accounting records of the plaintiff. In the defendant's forensic accountant's view, there are significant difficulties with this approach. The sole reliance on cheque images may not be a reliable method of quantification. It is as such desirable to consider the detailed accounting records in order to arrive at the quantum of the plaintiff's actual losses. Significantly, the sum of the cheques does not take into account possible payments on behalf of the plaintiff by Wilson Loh or of repayments on his part. Variations between the sum of the cheques and the accounting records may signify that the cheques do not reflect the true quantum of the alleged fraud. Three examples were raised as to how the Group 1(ii) documents would be relevant in assisting the forensic accountants to advise the defendants and their solicitors:

(a) Identifying any payments made to contractors by Wilson Loh or Wilkins Enterprise in order

to manage the cash flow of the plaintiff in any of the following situations: (i) a legitimate debt to a contractor has been created through normal trade and this debt is used to disguise a payment to Wilkins Enterprise; (ii) money has been paid to Wilkins Enterprise without the use of a legitimate debt to disguise it; and (iii) temporary "kiting" of funds by Wilson Loh. It was specifically pointed out to me that the statutory auditors' report after the discovery of Wilson Loh's misappropriations for the period 1 April 2004 to 31 March 2005 showed that these auditors were unable to account for a large receipt of a round figure of $160,000 and this could be evidence that Wilson Loh was managing the cash flow of the plaintiff in the way suggested above.

(b) Identifying any payments made into the plaintiff's bank accounts by Wilson Loh or Wilkins Enterprise in order to generally manage the cash flow of the plaintiff. In this respect, records of the most up to date accounts may permit identification of other accounts or sources of payments. Likewise, bank correspondence may reveal the identity of closed accounts which may have furnished the funds.

(c) Identifying any payments as above or other anomalies by carrying out a "variance analysis". The financial statements for the financial years ending 31 March 2007 and 31 March 2008 should be an accurate reflection of the plaintiff's financial position after the alleged fraud. They can therefore be used as a control or basis for comparison with the previous financial statements. Any anomalies may be indicative of potential differences between the true financial position and the sum of the cheques paid to Wilkins Enterprise.

41 As such, the Group 1(ii) documents are relevant, either directly or indirectly (in that they would lead to train of inquiry), under O 24 r 5 of the Rules.

(2) The plaintiff's submissions

42 The plaintiff chose not to draw any further distinction within the Group 1(ii) documents, preferring to deal with them fully, *ie*, all post 31 December 2005. Its position is *all* of the Group 1(ii) documents are irrelevant to the issues pleaded in the substantive action. Alternatively, these documents are not necessary for the fair disposal of the cause or matter, or saving costs.

43 The plaintiff's arguments in this regard was that the defendants have not pleaded in the Defence (Amendment No 2) that monies may have been or were paid by Wilson Loh and/or Wilkins Enterprise to contractors to manage the cash flow of the plaintiff, or that payments had been made into the bank accounts of the plaintiff by Wilson Loh and/or Wilkins Enterprise. As such, the defendant's request for the Group 1(ii) documents is not relevant to the issues pleaded. It was said that the defendants' forensic accountant's "speculations or averments" that monies may have been or were paid by Wilson Loh and/or Wilkins Enterprise to the plaintiff's contractors or bank accounts clearly have taken the plaintiff by surprise as this was the first time that such arguments have been raised. It was also said that the defendants are merely fishing for documents in order to substantiate their speculations regarding Wilson Loh's use of the monies.

44 Having set out the parties' submissions, I now turn to the applicable law.

The applicable law

45 As I have alluded to at the outset of this judgment, the applicable law governing discovery has been very helpfully set out by AR Tan in *Dante Yap Go*, and this has made my task in outlining the applicable law much easier. As AR Tan put it in *Dante Yap Go* (at [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.

(1) Relevance

(A) REASONABLE NEXUS BETWEEN DOCUMENTS SOUGHT TO BE DISCOVERED AND THE PLEADED CASES

46 Turning first to the requirement of relevancy, there are two types of relevance in the Rules, *viz*, direct and indirect relevance. Both may be differently described but they are united in that, direct or indirect, relevance is ultimately decided with reference to the pleadings of any given case. Relevance described in a vacuum is of little assistance; anything, in such a characterisation, can be relevant. Indeed, the word "relevance" itself demands one to ask the question: "(Direct or indirect) relevant to *what*?" To answer that, I can do no better but to repeat what AR Tan said in *Dante Yap Go* (at [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. [emphasis in original]

47 AR Tan held that (at [21]), in so far as *direct* relevance is concerned, it should be obvious as a matter of *principle* that there is an inextricable link between discovery and the trial, which is the sharp point at which all interlocutory processes converge. He put it as such (*id*):

> … 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. …

48 In addition, AR Tan also found support for his proposition in the *historical* nature of the discovery process. He held (at [23]) that, in the past, discovery was part of the pleadings. While in modern litigation these various processes are split up, that does not detract from the fact that these seemingly disparate regimes are part of one indivisible whole. AR Tan also found (at [24]) support in the *case law* for the proposition that there must be shown a relationship between the pleadings and the documents sought to be discovered. In his view, this was explicitly accepted in the Court of Appeal decision of *Tan Chin Seng & Ors v Raffles Town Club Pte Ltd* [2002] 3 SLR 345 ("*Tan Chin Seng*") at [19]:

> 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).

In a similar vein, AR Tan also alluded to Sundaresh Menon JC's decision in *UMCI Ltd v Tokio Marine & Fire Insurance Co (Singapore) Pte Ltd and Others* [2006] 4 SLR 95 as correctly interpreting *Tan Chin Seng* as standing for this premise. Menon JC had said (at [71]):

> [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]

49 Finally, AR Tan pointed out (at [27]) that, 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. [emphasis added]

50 In my view, AR Tan's articulation of the proposition that there is to be a reasonable nexus between documents sought to be discovered and the pleaded cases serves as the bedrock underpinning the very determination of discovery. As will be seen, whether a document is characterised as being directly or indirectly relevant, the pleadings form the ultimate basis upon which the court can determine relevancy: see also *Disclosure* at para 5.12.

(B) DIRECT AND INDIRECT RELEVANCE

51 As I mentioned earlier, under the Rules, there are both direct and indirect relevance. In relation to the former, the Rules describe directly 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.

52 The question of direct relevance can be very easily dealt with if one has regard to AR Tan's proposition in *Dante Yap Go* that there is to be a reasonable nexus between documents sought to be discovered and the pleaded cases. In the present application, I understand that the defendants are seeking to question the issue of the quantum of the plaintiff's claimed damages and it must follow that only the second of these definitions of direct relevance is of concern here.

53 As for indirect 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 discoverable. In that sense, *indirectly* relevant documents may be discovered, although the bedrock principle stated by AR Tan in *Dante Yap Go* nonetheless applies to condition discovery. In this regard, the principles in relation to indirectly relevant documents have been comprehensively dealt with by AR Tan in *Dante Yap Go*, and I set out his holdings in full (at [29]–[31]):

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*…

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.

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.

[original emphasis in italics, emphasis in bold italics]

(2) Necessity for disposing fairly of the cause or matter or for saving costs

54 As for the second requirement of disposing the matter fairly or for saving costs, it is clear from O 24 r 5(1) set out above that it is subject to r 7, described by the Court of Appeal in *Tan Chin Seng* as prescribing "an overriding principle" (at [15]). Rule 7 provides:

> 7 On the hearing of an application for an order under Rule 1, 5 or 6, the Court may, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, dismiss or, as the case may be, adjourn the application and shall in any case refuse to make such an order if and so far as *it is of opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs*. [emphasis added]

55 Thus, in *Bayerische Hypo-und Vereinsbank AG v Asia Pacific Breweries (Singapore) Pte Ltd* [2004] 4 SLR 39, Belinda Ang J said (at [37]–[38]):

> … The ultimate test is whether discovery is necessary for disposing fairly of the proceedings or for saving costs. An assertion that the documents are relevant will not be good enough. Equally, an assertion that the documents are necessary because they are relevant will not be enough. Obviously, if a 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". …
>
> 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. …

More recently, Tay Yong Kwang J in *Ting Kang Chung John v Teo Hee Lai Building Construction Pte Ltd* [2008] SGHC 54 (at [14]) also repeated that the overriding principle in discovery is that it must be either for disposing fairly of the cause or matter or for saving costs.

56 The above thus covers briefly the well-litigated law on the two general requirements of the

discovery regime. I turn now to analyse the present application in relation to the Group 1(ii) documents.

Analysis

(1) Group 1(ii) documents dated between 1 January 2006 and 31 March 2006 (both dates inclusive)

57 I will deal first with the Group 1(ii) documents dated between 1 January 2006 and 31 March 2006 (both dates inclusive). In relation to the plaintiff's "cut-off" date of 1 January 2006, I agree with the defendants that this is an arbitrary date. There are more plausible dates, such as the date by which the plaintiff is sure Wilson Loh's fraudulent acts had ceased (that is, when he disappeared and his earlier fraudulent acts were discovered) *or* the end of the financial year 2006, *ie*, 31 March 2006. 1 January 2006, apart from being the start of a new year, has no reasonable and logical connection to the issues pleaded in the substantive action. In any event, Ms Lim for the defendants did not attempt to explain the significance of 1 January 2006, save to imply that because Wilson Loh's fraudulent acts ceased in 2005, the post-2006 documents are not relevant.

58 However, while I am of the view that 31 March 2006 is not an acceptable "cut-off" date, the onus still remains with the defendants to convince me that the Group 1(ii) documents are relevant and necessary. In relation to such documents dated between 1 January 2006 and 31 March 2006 (both dates inclusive), I am of the view that they are relevant and necessary and an order for their discovery ought to be made. First, the guiding principle is that of relevance, which is in turn founded upon the pleaded cases. As I summarised above (at [6]–[7]), the defendants' case is built upon four main "defences", namely, (a) lack of causation, (b) contributory negligence by the plaintiff, (c) insufficient mitigation of losses and (d) the onset of limitation. The documents sought to be discovered must be either directly or indirectly relevant in relation to these pleaded defences.

59 As the defendants have pointed out, it is evident from the documents already provided to the defendants that the financial year for the plaintiff ends on 31 March annually. As such, all documents in relation to the financial period ending 31 March 2006 are clearly relevant since the plaintiff has alleged that the fraudulent acts by Wilson Loh had ceased on 4 October 2005, which was *within* the financial year ending 31 March 2006. These documents would help the defendants paint a more complete picture of the plaintiff's financial state in the final year in which Wilson Loh misappropriated the monies, and enable them to advance their pleaded defences of either (a) lack of causation or (b) contributory negligence by the plaintiff. Although Wilson Loh's fraudulent acts had ceased the very latest in October 2005, it does not mean that relevance (direct or indirect) stops with that date. In fact, I think that the defendants are entitled to know the full state of the final financial year in which Wilson Loh's fraudulent acts took place. In any event, I also note that the plaintiff has in fact provided documents for the period between 1 January 2006 and 31 March 2006 (both dates inclusive), an implicit acknowledgement that not only is the "cut-off" date of 1 January 2006 illogical, but also that, *at the very least*, the documents emanating from the final financial year during which Wilson Loh's fraudulent acts took place are somewhat relevant to the substantive action.

60 I appreciate the plaintiff's objections in relation to the insufficiency of the defendants' pleaded case. Indeed, as will be seen later, I accept the plaintiff's objection in this regard in relation to the Group 1(ii) documents dated from 1 April 2006 to date (both dates inclusive). However, at least for the Group 1(ii) documents dated between 1 January 2006 and 31 March 2006 (both dates inclusive), I do not think that the relevance of these documents is solely founded on a dispute as to the quantum of damages claimed by the plaintiff. As I have explained, the defendants' pleaded defences of causation and contributory negligence require them, in my view, to have a complete picture of the

final financial year during which Wilson Loh carried out his fraudulent acts.

61 For completeness, I should also say that I am convinced that the Group 1(ii) documents dated between 1 January 2006 and 31 March 2006 (both dates inclusive) are necessary either for disposing fairly of the cause or matter or for saving costs. For these reasons, I allow the discovery and production of the Group 1(ii) documents dated between 1 January 2006 and 31 March 2006 (both dates inclusive) pursuant to the terms prayed for in the present application. For the avoidance of doubt, the Group 1(ii) documents refer to items no (1) to (35) of Schedule A (as annexed to the present application) which originate within the Post-2006 Period.

(2) Group 1(ii) documents dated from 1 April 2006 to date (both dates inclusive)

62 As for the Group 1(ii) documents dated from 1 April 2006 to date (both dates inclusive), I am of the view that they are not relevant. In this respect, the defendants' contention was that these documents would enable them to ascertain the true quantum of damages claimed by the plaintiff. However, I am not convinced by the defendants' submissions before me that they had pleaded a specific argument in furtherance of their bare denial of the quantum of damages claimed by the plaintiff. As I have stated above (at [10]), I do not think that either of the two paragraphs in the Defence (Amendment No 2) pointed out by the defendants (*viz*, paras 20 and 24) amounted to a denial of the quantum of damages claimed by the plaintiff or, more specifically, the amount allegedly misappropriated by Wilson Loh. The correct paragraph, as the plaintiff pointed out, ought to be para 13 of the Defence (Amendment No 2). Paragraph 13 makes a bare denial of the particularised loss and damage claimed for by the plaintiff, including the sum of $4,767,622.43 allegedly misappropriated by Wilson Loh.

(A) INSUFFICIENCY IN PLEADINGS

63 I do not agree with the defendants that this bare denial (which, in any event, they did not refer me to) meant that they could thereby mount an extensive discovery against the plaintiff to enable them to disprove the *manner* in which the plaintiff came to quantifying the alleged loss and damage. As with all legal documents, one must read para 13 of the Defence (Amendment No 2) in its proper context: see for this proposition in the area of contractual interpretation the *very* recent Court of Appeal decision of *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] SGCA 27. In the context of a defence which pleads four main "defences", this denial of the quantum of damages claimed by the plaintiff must mean that the *reason* for denial was *not* with the *manner* in which the quantum was calculated but, *rather*, with the plaintiff's causes of action which *led* to the quantum so pleaded. There is subtle but important distinction between the two, which is implicit in the distinction between liability and damage. It is trite law that liability must be separately proved from damage. Liability leads to damage, and so any attack on liability would be an indirect challenge on damage. But the manner in which damage is challenged here is indirect in so far as if one can disprove liability, it must follow that damage is either completely disproved or partially so. However, even when liability is proved, damage still needs to be separately proved. Here a separate challenge can be made to damage, regardless of what the case was in relation to liability. The challenge on damage here is direct and is usually founded on the principle that the plaintiff must prove his actual loss. This is what I mean by the *manner* in which damage (or, more specifically, its quantum) is calculated. I should also note that the distinction between liability and damage is not a bright and clear one, and some have seen causation as being part of "damage". However, for the purposes of the present distinction, an attack on causation, even if causation belongs to the realm of "damage", is not a *direct* attack on the *quantum* of damages.

64 In my view, reading para 13 of the Defence (Amendment No 2) in its proper context, the

defendants have merely pleaded an *indirect* attack on the quantum of damages claimed by the plaintiff in so far as it is founded on a *direct* attack on liability, *viz*, by way of the "defences" based on causation and contributory negligence. I do not think that such a denial opens the door to a wide scope of discovery pertaining to a direct challenge to damage. I find support in this conclusion in case law and policy.

65 First, case law. In *Emjay Enterprises Pte Ltd v Skylift Consolidator (Pte) Ltd* [2006] 2 SLR 268 ("*Emjay*"), the plaintiff had obtained interlocutory judgment against the defendant for breach of contract, with damages to be assessed. In the circumstances, the exception clause in question had not figured with regard to the issue of liability. However, at the stage of the assessment of damages, the defendant sought to introduce the exception clause and rely on a defence founded on it. Such a defence had never been pleaded. The plaintiff objected to the introduction of this clause on the basis that the exception clause had not been pleaded. It argued that as such a clause was relevant to the issue of liability, it ought to have been pleaded at the liability stage. From the foregoing, the High Court ruled that there were two issues to be decided: first, whether the so-called exception clause went to liability or damages. This determined whether such a clause could be introduced without being pleaded pursuant to O 18 r 13(4) of the Rules. The second issue was whether O 18 r 13(4) applied to facts such as those in *Emray*.

66 In the event, Andrew Phang Boon Leong J decided that the so-called exception clause in question went towards liability and hence could not be introduced without being pleaded. However, the learned judge went on to observe that *even if* the exception clause went towards damages, O 18 r 3(4) would not have permitted the defendant to argue, without more, that issues relating to the assessment of damages need not be pleaded. He put it as such (at [31]):

> In any event, I find that O 18 r 13(4) does not permit a defendant to argue, without more, that issues as the assessment of damages need not be pleaded. They merely permit the defendant concerned to argue that any allegation as to, *inter alia*, the amount of damages put forward by the plaintiff is deemed to have been traversed. *The onus on the defendant to specifically plead a specific argument (such as that proffered in the instant case) remains*. [emphasis added]

67 Indeed, Phang J also accepted (at [33]) as correct the position adopted by the English Court of Appeal in *Plato Films Ltd v Speidel* [1961] AC 1090 that notwithstanding the then English equivalent of our O 18 r 13(4), the then English equivalent of our O 18 r 8 (relating to any pleading subsequent to a Statement of Claim) ought to prevail. Order 18 r 8 provides as follows:

> (1) A party must in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality —
>
> (*a*) which he alleges makes any claim or defence of the opposite party not maintainable;
>
> (*b*) which, if not specifically pleaded, might take the opposite party by surprise; or
>
> (*c*) which raises issues of fact not arising out of the preceding pleading.

Finally, Phang J also quoted with approval observations by Prof Pinsler in *Singapore Court Practice 2005* (LexisNexis, 2005) to the effect that despite O 18 r 13(4), it is very common practice for an allegation of damage to be traversed in the form of a denial or non-admission and this is a very welcome practice as it enables the plaintiff to know the case he will have to meet. Indeed, Prof Pinsler also points to O 18 r 8(1)(*b*), which requires matters to be pleaded if otherwise they

would take a party by surprise. He finally noted that if the defendant intends to raise matters which affect damage, they must be specifically pleaded, referring to O 18 r 8(1)(*a*) and (*b*).

68 Although the defendants tried to distinguish *Emray* on the facts, I am of the view that the significance of *Emray* is not so much in its facts but in the *generally applicable* principle of law which it supports. In my judgment, the effect of *Emray* is to mandate the defendant to plead specifically the reasons why he disagrees with, for example, the *manner* in which the quantum of damages claimed is calculated. If there is merely a bare denial then the effect of such a denial must be read in the context of the rest of the defence. Where the defence pleads other matters amounting to an indirect attack on damage (as discussed above), then it will not be open to the defendant to later say that he was in fact *also* mounting a *direct* challenge to the quantum of damages claimed as well inasmuch as he was disputing the *manner* in which such quantum was calculated. Given that the extent of discovery (as conditioned by relevance) is governed ultimately by the pleaded cases, the effect of *Emray* is that discovery will be limited to documents related to an *indirect* challenge on the quantum claimed (by way of a direct attack on liability) *if* the specific argument as to the disagreement about the *manner* in which the quantum of damages claimed is calculated is not pleaded.

69 Indeed, in *Disclosure* at para 5.21, the learned authors gave some examples of the operation of this proposition. For example, in *Dunn v British Coal Corporation* [1993] ICR 591, which concerned an industrial accident, the plaintiff sued the defendant for damages for, *inter alia*, continuing loss of earnings until his normal retirement age due to neck injuries sustained. The plaintiff consented to discovery of any medical records related to his neck, including any pre-existing complaints, but refused to anything more extensive. In the event, the English Court of Appeal allowed the discovery of *all* medical records. Stuart-Smith LJ stated (at 597–598):

> In my opinion the documents in question are relevant to the second broader issue which I have defined, *whether or not they actually contain information that leads to the conclusion that the employee would not, but for the accident, have worked until normal retiring age*. The employee must prove that the loss of future earnings or earning capacity was caused by the accident. The onus is on him. *Strictly speaking therefore he must prove that he is in normal health and does not suffer from any condition which might cut short his working life*. In the absence of evidence to the contrary, this is usually not contested by defendants at trial. But the claim for damages is in issue on the pleadings, and documents which show that the employee has never suffered anything more serious than an attack of influenza are relevant to this issue, just as much as documents which show that he is suffering from some condition or disease which is likely to cut short his working life. [emphasis added]

70 From the passage reproduced, one can see that the attack on the quantum of damages was an *indirect* one in so far as it depended on the issue of causation. It is unclear from the judgment whether causation was specifically pleaded, but from the tenor of the judgment and the importance attributed to this issue, one would justifiably suppose that it was. If so, this lends strength to my conclusion above that a direct attack on quantum of damages by a bare denial in the pleadings, without more, would be insufficient for the discovery of an extensive scope of documents relating to the *manner* by which such quantum was calculated. Similarly, in *Calvet v Tomkies* [1963] 1 WLR 1397, the English Court of Appeal held that in a libel action where no special damage was alleged, the defendant was not entitled to discovery as to the income of the plaintiff. This is simply an application of the principle that relevance in discovery must relate to pleadings, and that in so far as quantum of damages is concerned, if the challenge is to the manner by which it is calculated, that must likewise be pleaded.

71 Secondly, from a policy point of view, I think that this conclusion is aptly justified. If the *bare* denial of the quantum of damages claimed can open the door to an extensive discovery for documents relating to the *manner* in which such quantum was reached, discovery would never end. The logic of such a proposition can even be extended such that every single bare denial, even if not relating to damages, can be used to support an extensive discovery process even though the pleadings were not so specific or extensive. I can hardly think that would fulfil the purpose of discovery to enable a party to acquire information which he does not have concerning the issues *in the suit* so that he can effectively prepare and present his case for trial *if such discovery was in fact necessary for disposing fairly of the proceedings or for saving costs*: see *Singapore Court Practice 2006* at para 24/1/1 and O 24 r 7 of the Rules.

72 Returning to the present application, I therefore agree with the plaintiff that the defendants have not sufficiently pleaded the problems it now alleges exist in the plaintiff's manner of calculating the quantum of damages claimed for. Given that the relevance of the Group 1(ii) documents dated from 1 April 2006 to date (both dates inclusive) was stated by the defendants to be in their utility towards challenging the manner in which the quantum of damages was calculated by the plaintiff, *coupled* with my finding that the challenge towards the manner of calculating such quantum was not sufficiently pleaded by the defendants, I conclude that these documents are *not* relevant for the issues in the substantive action. The defendants of course attempted the argument that these documents, if not directly relevant, would be indirectly so, but they have not explained how relevant documents in the sense of those documents consonant with their pleadings will be unearthed. Accordingly, I also do not accept that the Group 1(ii) documents dated from 1 April 2006 to date (both dates inclusive) would be indirectly relevant.

73 For completeness, I should also add that I reject the defendants' submission that they are being put in a position whereby they cannot plead what they do not know and therefore should be allowed discovery of the documents concerned. They have attempted to convince me that subsequent investigations revealed that Wilson Loh's misappropriations for the period 1 April 2004 to 31 March 2005 showed that a large receipt of a round figure of $160,000 was unaccounted for and this could be evidence that Wilson Loh was managing the cash flow of the plaintiff in the way they suggested, leading to problems with the manner in which the quantum of damages claimed was calculated. If this is so, then I do not see why the defendants cannot amend their pleadings to reflect their new-found suspicions based, as it were, on concrete facts, before seeking discovery of the relevant documents. Indeed, it must be remembered that the courts will not allow wide-ranging discovery if the party's sole purpose is to fish for possible defences: see *British Leyland Motor v Wyatt Interpart* [1979] FSR 39.

74 For these reasons, I disallow discovery and production of the Group 1(ii) documents dated from 1 April 2006 to date (both dates inclusive) pursuant to the terms prayed for in the present application. For the avoidance of doubt, the Group 1(ii) documents refer to items no (1) to (35) of Schedule A (as annexed to the present application) which originate within the Post-2006 Period.

(B) DEFENDANTS' PURPOSE NONETHELESS MET

75 In any event, I note that *even if* I were to agree with the defendants that their challenge in relation to the quantum of damages claimed by the plaintiff were sufficiently pleaded, the discovery and production of the Group 1(ii) documents dated between 1 January 2006 and 31 March 2006 (both dates inclusive) would be sufficient for them to meet two of three examples cited by their forensic accountant to enable the latter to advise the defendants and their solicitors (see [40] above).

76 First, in relation to the identification of any payments made to contractors by Wilson Loh or

Wilkins Enterprise in order to manage the cash flow of the plaintiff, it is not disputed that Wilson Loh disappeared around October 2005 after his fraudulent acts were discovered. Therefore, he could not have "managed" the cash flow of the plaintiff in the way claimed by the defendants *after* the financial year ending 31 March 2006. Accordingly, the Group 1(ii) documents I have ordered to be discovered and produced would in fact be sufficient for the defendants' forensic accountant to achieve the aforesaid identification. Secondly, in relation to the identification of any payments made into the plaintiff's bank accounts by Wilson Loh or Wilkins Enterprise in order to generally manage the cash flow of the plaintiff, I can hardly think that Wilson Loh or Wilkins Enterprise would still be making payments into the plaintiff's bank account *after* Wilson Loh was exposed and disappeared in 2005.

77 Accordingly, I think that with the documents discovered and produced up to the end of the financial year 2006 (ending on 31 March 2006), the defendants actually would have fulfilled two of the three purposes they advanced to convince me to order discovery and production of *all* Group 1(ii) documents up to the present date. I acknowledge that the third example of "variance analysis" may not be readily realised simply by the provision of documents up to 31 March 2006 but since I have disagreed with the defendants as to the relevancy of such documents to dispute the quantum of damages claimed by the plaintiff, that is of no consequence to my decision.

Group 2 documents

78 Having dealt with the Group 1 documents, I now turn my attention to the Group 2 documents. The general character of the Group 2 documents has been set out above (at [12]). Essentially, I do not understand the plaintiff to be disputing the relevance or necessity of these documents. Neither do I discern the plaintiff to be denying that it does not have these documents in its possession, custody or power. It, however, submitted that these documents are protected by litigation privilege in that the dominant purpose for which the documents were created was for intended litigation.

79 Before I deal with the parties' submissions, I should point out that at the adjourned hearing before me, Ms Lim for the plaintiff applied to tender a new affidavit by Ms Chotrani (affirmed on 25 June 2008) in aid of her case in respect of litigation privilege. As expected, Mr Teo for the defendants strongly objected to this application, although he later stated candidly that he has had time to take instructions from his client and had, in fact, prepared a reply affidavit in response should the court decide to allow the plaintiff to tender the new affidavit by Ms Chotrani. Assured by the fact that the defendants had time to respond to this new affidavit and would therefore not be unduly prejudiced, I allowed Ms Lim to tender the new affidavit. Needless to say, I also allowed Mr Teo to tender the reply affidavit.

The parties' submissions

80 It is trite law that the burden lies squarely on the party claiming privilege to prove that the documents concerned are indeed protected by privilege: see *Brink's Inc v Singapore Airlines* [1998] 2 SLR 657 ("*Brink's Inc*") at 660. As such, it is for the plaintiff to convince me that the Group 2 documents are protected by litigation privilege. I shall therefore outline its arguments first.

(1) The plaintiff's submissions

81 In relation to items no (36) to (38) of Schedule A, which are documents prepared by or in connection with the plaintiff's forensic accountant, the plaintiff submitted that these documents were prepared under circumstances which led to the establishment of litigation privilege.

82 In this connection, the second defendant convened an emergency meeting on 4 October 2005,

during which it informed the Council Members of the Managing Council of several facts that eventually led the plaintiff to uncover the fraudulent acts of Wilson Loh. On 6 October 2005, the plaintiff engaged Messrs Harry Elias Partnership ("HEP") to advise it. HEP then engaged an independent forensic accountant on the instructions of the plaintiff on 10 October 2005. The plaintiff then gave three reasons why litigation was reasonably contemplated at the time when the report by the forensic accountant was commissioned:

(a) First, it can be seen that the prospect of litigation was imminent at the time when the report by the plaintiff's forensic accountant was commissioned in the notice to subsidiary proprietors dated 18 October 2005.

(b) Secondly, from the minutes of the emergency meeting on 4 October 2005, it is evident that the plaintiff would have been aware of the vast sums of money that could have been lost as a result of the fraudulent acts of Wilson Loh. Given the extent of the losses suffered by the plaintiff, there was a reasonable prospect of litigation at the time of commissioning the plaintiff's forensic accountant.

(c) Thirdly, in the course of investigations, correspondence between the plaintiff's solicitors and the second defendant's solicitors at that time were exchanged. Much of these correspondences as early as October 2005 were marked "without prejudice" and this therefore showed that litigation was contemplated.

83 As for the "dominant purpose" test, it was submitted that the report prepared by the plaintiff's forensic accountant would shed light on the quantum of losses suffered and would likewise aid in ascertaining the financial impact of the fraud on the plaintiff and would be relevant for litigation as well.

84 In relation to item no (39) of Schedule A, which are communications between the plaintiff and the relevant police or governmental authorities, it was submitted that these were likewise protected by litigation privilege since the dominant purpose of these communications were for intended litigation.

(2) The defendants' submissions

85 In response, the defendants first pointed out that the plaintiff has done no more than to make a bare assertion of privilege. This was the position *before* the admission of the new affidavit by Ms Chotrani. However, in response to this new affidavit, the defendants pointed out that she was not a Council Member at the time of the discovery of the fraud, nor at the time the plaintiff's forensic accountant was appointed on 14 October 2005. Indeed, Ms Chotrani does not claim to have been privy to any discussion or decision-making process within the plaintiff, let alone the Managing Council, regarding the appointment of the forensic accountant and the reasons for it. Accordingly, it was submitted that the plaintiff has not advanced any evidence of any discussions amongst any of the relevant persons touching on the appointment of the forensic accountant.

86 Notwithstanding this, the defendants additionally submitted that the objective evidence clearly shows that there was either no reasonable contemplation of litigation or that the dominant purpose behind the preparation of the documents sought to be discovered was not in anticipation of litigation:

(a) There was no intimation of a claim by the plaintiff, nor any reasonable contemplation of litigation. There is no suggestion or evidence to show that it was going to take legal action around 13 October 2005, the date of the police report. Mr Teo also suggested that although there was a "mere" possibility of litigation, this was not the same as a "reasonable" prospect of

litigation and that, in any event, the *possible* litigation was not clearly stated to have been against the defendants.

(b) There were other purposes for the appointment of the plaintiff's forensic accountant: one of the main reasons for their engagement was to assist the relevant government authorities to establish the circumstances in relation to the possible losses suffered by the plaintiff.

87 As for item no (39) in Schedule A, the defendants submitted that these documents clearly cannot be for the dominant purpose of litigation.

88 Having set out the parties' submissions, I now turn to the applicable law.

The applicable law

(1) General principles of litigation privilege

89 As Prof Pinsler writes in *Singapore Court Practice 2006* at p 632, the law recognises that although certain documents may be relevant to the issues and, therefore, a necessary part of the evidence, a higher priority demands that they should not be produced for inspection. This higher priority is often referred to as a "privilege" upon which the party relies to avoid production. Legal professional privilege is one example. Legal professional privilege is in turn found in two principle forms: legal advice privilege and litigation privilege. It is the latter form that is of concern in the present application. This particular privilege ensures that the advocate and solicitor can prepare his case effectively and free from interference. This ensures the same objectives as legal advice privilege by not obliging the advocate to disclose all the information which he obtains from third parties for the purpose of the litigation: see also the Canadian Supreme Court decision of *Minister of Justice v Sheldon Blank (Attorney General of Ontario, The Advocates' Society and Information Commissioner of Canada (Interveners))* [2006] SCC 39 ("*Minister of Justice*") at [31].

90 In the recent Court of Appeal decision of *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2007] 2 SLR 367 ("*Skandinaviska*"), it was held (at [34] and [67]) that litigation privilege is statutorily recognised by s 131 of the Evidence Act (Cap 97, 1997 Rev Ed) ("EA") even though it is of common law origin (see also Chin Tet Yung, "Extending the Scope of Legal Advice Privilege" (2007) 19 SAcLJ 133). Section 131 provides as follows:

> 131. *No one* shall be *compelled* to disclose to the court *any confidential communication* which has taken place *between him and his legal professional adviser unless* he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but no others. [emphasis added]

The Court of Appeal held that (at [34]):

> It should also be noted that since s 131 is expressed to operate in the broader context of court proceedings where the client might offer himself as a witness, in which case he may be compelled to disclose any communication the court deems necessary, *it also extends the area of legal advice privilege to the domain of litigation privilege*. That this is the intention of s 131 is made clear by the reference to the use of the expression "legal professional adviser" who need not necessarily be an advocate or solicitor. When s 131 was enacted, the legal profession in Singapore did not have any advocates or solicitors, but English barristers and solicitors and also

what were then known as law agents and also pleaders, who might not even be legally qualified. *But litigation privilege was applied to all legal advisers involved in assisting their respective clients in litigation*. [emphasis added]

Accordingly, the Court of Appeal later stated that s 2(2) of the EA would confirm the applicability of litigation privilege at common law in the local context as there is no inconsistency between litigation privilege at common law and ss 128 and 131 of the EA read together (see also *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR 239 at [116]–[124] and *Lee Chez Kee v PP* [2008] SGCA 20 at [116] for the relationship between the common law and the EA).

(2) The requirements of litigation privilege

91 In *Skandinaviska*, it was additionally held that there are two basic and closely related requirements before litigation privilege can be claimed: (a) there must have been a reasonable prospect of litigation; and (b) the dominant purpose of the document in question is for pending or contemplated litigation.

(A) REASONABLE PROSPECT OF LITIGATION

92 For the first requirement of a reasonable prospect of litigation, the Court of Appeal in *Skandinaviska* has, with respect, dealt with the issue in some detail and it suffices for me to reproduce what it has said (at [70], [71] and [73]):

> Turning to the basic principles or requirements of litigation privilege, the threshold question is whether litigation must have been contemplated. This is only logical and commonsensical, for if litigation was not even contemplated to begin with, how could any party invoke litigation privilege in the first instance? This is a question of fact. The question is: At the time the client sought legal advice or consulted his lawyer, did he have the prospect of litigation in mind? To determine his state of mind, we would need to know the circumstances in which legal advice was sought. In this respect, we are of the view that Taylor LJ's concept of a legal context in *Balabel* (although originally expounded in the context of legal advice privilege) is appropriate for this purpose. Was, in other words, the legal context in the present case one in which litigation was contemplated?
>
> For this purpose, the generally accepted criterion is that of a "*reasonable prospect*" of litigation (see also, for example, *per* Lord Carswell in *Three Rivers No 6* ([24] *supra* at [83]) and *per* Rix J (as he then was) in the English High Court decision of *Hellenic Mutual War Risks Association (Bermuda) Ltd and General Contractors Importing and Services Enterprises v Harrison (The "Sagheera")* [1997] 1 Lloyd's Rep 160 at 166, as well as *Phipson on Evidence* ([38] *supra* at para 23-85) and *Singapore Civil Procedure 2003* (Sweet & Maxwell Asia, 2003) at para 24/3/15).
>
> …
>
> Adopting the general sense of the above passage, it is clear that there is no requirement that the chance of litigation must be higher than 50% (although as it was once thought that there must be a virtual certainty: see *Collins v London General Omnibus Company* (1893) 68 LT 831, a standard/threshold which was too high and unrealistic). We are content to accept that the test of a "*reasonable prospect*" of litigation is sufficient to raise the privilege.

93 I would only add that the "reasonable prospect" requirement is usually stated secondarily to the "dominant purpose" test in decided cases. I therefore see some utility characterising this first requirement as a *factual* requirement since it is really encompassed within the "dominant purpose"

test (discussed below). Indeed, in his earlier formulation of the "reasonable prospect" requirement, Bray put the test this way (see *The Principles and Practice of Discovery* (Legal Books, Reprint of 1885 ed, 1985) ("*Bray*") at p 408):

> There must be some *definite* prospect of litigation and not a mere vague anticipation of it. [emphasis added]

94 This must be read in the context of the more general proposition put forth in *Bray* (at p 405):

> (b) As to Documents or Communications [having reference to or connection with Litigation then existing or anticipated] which are Privileged.
>
> Such a document to be privileged must … have come into existence or been … prepared, if a document, or passed, if an oral communication, after litigation commenced or in view of anticipated … litigation, …, either for the purpose of obtaining evidence to be used in such litigation, or information which might lead to the obtaining of such evidence… or information as the evidence which could be obtained… or in order to supply the proof to be inserted in the brief… or as materials or information for the brief… or under the advise or direction of the solicitor for the purpose of enabling him to conduct the litigation or advise his client in reference thereto… for the purpose of giving advice or obtaining evidence in reference to existing or contemplated litigation… or at his instance and for his use for such purpose… or for the purpose of being submitted to him for such purpose.

95 As can be seen, the state of the common law in the 19th century (as summarised in *Bray*) was that there had to be a *definite* prospect of litigation and the document must have come into existence for one of several purposes, all connected with litigation. In the modern equivalent of the test, there now has to be a *reasonable* prospect of litigation, but the document concerned must have come into existence for the *dominant* purpose of litigation. Viewed this way, it can be seen that the "dominant" requirement is (pardon the pun) *dominant* in both transmutations of the same test. In the older version, the "dominant" requirement is premised on litigation being definite; any document coming into existence under such circumstances for one of several purposes connected to litigation *must* therefore be prepared for the *dominant* purpose of litigation. In the modern version, the "dominant" requirement comes at the tail-end of the test: there need only to have been a reasonable prospect of litigation but because this does not guarantee that all resulting documents would be for the *dominant* purpose of litigation, there is a separate requirement of "dominant purpose". In other words, "dominant purpose" is always the conditioning factor. This is also in line with the aims of privilege, in protecting documents only so far as necessary to give effect to the greater public interest that all relevant documents be revealed and made available (see *per* Lord Edmund-Davies in *Waugh v British Railways Board* [1980] AC 521 ("*Waugh*") at 543).

96 In other words, where there is a dominant purpose of litigation (in respect of the purpose of the documents), it must be that litigation was reasonably contemplated. The first requirement is thus a facet, although not a direct copy, of the latter, with the consequence that the "reasonable prospect of litigation" test serves no independent value on its own as a *legal* requirement. There is, of course, some authority for the distinction between a factual and legal characterisation in relation to the stages in the test for duty of care: see *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100, later explained and refined in *Ngiam Kong Seng v Lim Chiew Hock* [2008] SGCA 23. The *practical* effect of such a classification would be for parties to quickly converge on the point which is the weakest of the party seeking privilege. If the privilege is almost doomed to fail, then the point of attack would be the reasonable prospect of litigation requirement, since it would almost always be fulfilled in marginally meritorious cases.

(B) "DOMINANT PURPOSE" TEST

97 As I have said, the "dominant purpose" test is at the forefront of the legal analysis pertaining to litigation privilege. This requires that the *dominant* purpose for which legal advice had been sought and obtained be in anticipation or contemplation of litigation. But what does "dominant purpose" mean? In *Waugh*, the wife of an employee of the Railways Board, who had died in a train accident, applied for disclosure of the investigation report that had been prepared in the aftermath of the accident. The House of Lords held that the report had a dual purpose: to determine the cause of the incident and for submission to the Board's solicitors in anticipation of litigation. As these purposes were equal in rank, the privilege did not apply. In so doing, Lord Edmund-Davies put it as such (at 543–544):

> Adopting that approach, I would certainly deny a claim to privilege when litigation was merely one of several purposes of equal or similar importance intended to be served by the material sought to be withheld from disclosure, and a fortiori where it was merely a minor purpose. On the other hand, I consider that it would be going too far to adopt the "*sole* purpose" test applied by the majority in *Grant v. Downs*,which has been adopted in no United Kingdom decision nor, as far as we are aware, elsewhere in the Commonwealth. Its adoption would deny privilege even to material whose outstanding purpose is to serve litigation, simply because another and very minor purpose was also being served. But, inasmuch as the *only* basis of the claim to privilege in such cases as the present one is that the material in question was brought into existence for use in legal proceedings, it is surely right to insist that, before the claim is conceded or upheld, such a purpose must be shown to have played a paramount part. Which phrase or epithet should be selected to designate this is a matter of individual judgment. Lord Denning M.R., as we have seen, favoured adoption of the phrase employed in the Law Reform Committee's Sixteenth Report, viz., "material which came into existence …*wholly or mainly*" for the purpose of litigation (para 17). "Wholly" I personally would reject for the same reason as I dislike "solely," but "mainly" is nearer what I regard as the preferable test. Even so, it lacks the element of clear paramountcy which should, as I think, be the touchstone. After considerable deliberation, I have finally come down in favour of the test propounded by Barwick C.J. in *Grant v. Downs*, 135 C.L.R. 674, in the following words, at p 677:
>
> > "Having considered the decisions, the writings and the various aspects of the public interest which claim attention, I have come to the conclusion that the court should state the relevant principle as follows: a document which was produced or brought into existence either with the *dominant* purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection." (Italics added.)
>
> *Dominant* purpose, then, in my judgment, should now be declared by this House to be the touchstone. It is less stringent a test than "sole" purpose, for, as Barwick C.J. added, 135 C.L.R. 674, 677:
>
> > "… the fact that the person … had in mind other uses of the document will not preclude that document being accorded privilege, if it were produced with the requisite dominant purpose."
>
> [emphasis in origin]

98 In *Skandinaviska*, the Court of Appeal interpreted this key holding in *Waugh* as follows (at [75]):

> In the leading House of Lords decision of *Waugh v British Railways Board* [1980] AC 521 ("*Waugh*"), the House held that if the *dominant* purpose for which legal advice had been sought and obtained was for anticipation or contemplation of litigation, then the advice concerned would be protected by litigation privilege. In arriving at this legal proposition, the House endorsed and adopted the *minority* view expressed by Barwick CJ in the Australian High Court decision of *Grant v Downs* (1976) 135 CLR 674.

99 It is clear that, semantics aside, the court will have to take an objective view of the facts in deciding the dominant purpose for which a document was created. Often, as pointed out in *Disclosure* at p 305, it is the intention of the employer of the creator that will be the relevant one. Each case must be assessed on its facts.

(C) AN ADDITIONAL REQUIREMENT?

100 Although the Court of Appeal in *Skandinaviska* referred to only two requirements, a High Court decision has apparently introduced a *third* requirement. As Prof Pinsler pointed out in "New Twists in Legal Professional Privilege" (2002) 14 SAcLJ 195 (at p 200), in *The Patraikos No 2* [2001] 4 SLR 308, which involved an application for the discovery of particular documents, the High Court relied on the English High Court case of *Secretary of State for Trade of Industry v Baker* [1998] WLR 667 for the following observation of Sir Richard Scott VC (at 675):

> ... documents brought into being by solicitors for the purposes of litigation were afforded privilege because of the light they might cast on the client's instructions to the solicitor or the solicitor's advice to the client regarding the conduct of the case or on the client's prospects.
>
> There was no general privilege that attached to documents brought into existence for the purposes of litigation independent of the need to keep inviolate communications between client and legal adviser. If documents for which privilege was sought did not relate in some fashion to communications between client and legal adviser, there was no element of public interest that could override the ordinary rights of discovery and no privilege.

101 Applying this principle to the facts, the High Court in *The Patraikos No 2* ruled that litigation privilege did not extend to the documents in question as they did not *reveal the nature of the communications between lawyer and client*. However, this additional requirement (as italicised) was never applied by the Court of Appeal in *Brink's Inc*, which had been decided *prior* to *The Patraikos No 2*. Given that the latest Court of Appeal decision in *Skandinaviska* made no reference to this additional requirement, it must be the case that it is not required and I therefore say no more about it.

Analysis

(1) Items no (36) to (38) of Schedule A

(A) REASONABLE PROSPECT OF LITIGATION

102 Turning first to items no (36) to (38) of Schedule A, I think that there was in fact a reasonable prospect of litigation. I say this bearing in mind that the Court of Appeal in *Skandinaviska* directed (at [73]) that there is *no* requirement that the chance of litigation must be higher than 50%. Inasmuch as I have thought of this first requirement as a *factual* (and threshold) one, I do not think that it serves any legal purpose in attributing to it a standard which is at once both too onerous and

unrealistic. Its purpose is simply to filter out *completely* unmeritorious cases; the "dominant purpose" test, as discussed, is the operative *legal* test which guides the court *substantively* in deciding whether or not to find litigation privilege.

103 In this respect, I accept that there was a reasonable prospect of litigation at the time the report from the plaintiff's forensic accountant (along with other documents sought under items no (36) to (38)) was commissioned in the notice to the subsidiary proprietors dated 18 October 2005. Most pertinently, this notice provided, *inter alia*, as follows:

> … [HEP] has advised the [plaintiff] to make a report with the Commercial Affairs Department and to engage an independent auditor to investigate the [plaintiff's] accounts to determine whether any monies have been lost and if so, who the culprits are. *Thereafter, [the plaintiff] should seek recovery of any of its loss, including any legal and independent audit fees, and if necessary would commence appropriate legal proceedings*. [emphasis added]

104 Including the above, the following facts are evident from the notice:

(a) The Council Members had engaged HEP on 6 October 2005 to advise the plaintiff on this matter and to protect the interests of the plaintiff.

(b) HEP had advised the Council Members of the Management Council to engage an independent auditor to investigate into the plaintiff's accounts to determine whether any monies had been lost and if so who the culprits were. Thereafter, the plaintiff should seek recovery of any of its loss, including any legal and independent audit fees, and if necessary, would commence appropriate legal proceedings.

(c) Thereafter, the then Chairman of the Management Council, proceeded to file a police report on behalf of the plaintiff on 13 October 2005, wherein it was stated that the plaintiff suspected Wilson Loh to have "misappropriated S$3m or more from the [plaintiff's] bank accounts". It also stated in this police report that the plaintiff's lawyers had engaged forensic accountants.

(d) Pursuant to the advice of HEP, the Council Members formally engaged the present forensic accountants of the plaintiff, who commenced work on 18 October 2005. The forensic accountants were in fact engaged by HEP on 14 October 2005.

105 In my judgment, the words of the notice dated 18 October 2005 speak for themselves. It stated that, *if necessary*, legal proceedings should be commenced. I think that there was really a reasonable prospect of litigation, taking into further account the fact that the monies lost were, as the plaintiff believed then, to be in the region of $3m. The large amount of monies, coupled with the plaintiff's belief that Wilson Loh had "misappropriated" such monies, surely would have created a climate whereby the *reasonable* prospect of litigation was contemplated. Certainly, the engagement of HEP to provide legal advice would add to such a climate.

106 Mr Teo for the defendants attempted to convince me that the facts of the present case were unlike those in *Skandinaviska*, and thereby there was no reasonable prospect of litigation. He emphasised that, in that case, by the time the forensic accountant was appointed two days after the discovery of the fraud, the letters of demand had already started to come in, the first day being after the appointment. There was thus clear evidence that before the forensic accountant in that case even commenced work, litigation had become *more* than a reasonable prospect; indeed it was imminent. By the time the solicitors and the forensic accountant had come together to work in that case, the prospect of litigation had gone beyond a reasonable prospect and had become a reality.

The need to get the best legal advice to mount the best defence in court would have been foremost in the context of that case.

107 To my mind, *Skandinaviska* is easily distinguishable. The central holding by the Court of Appeal on the requirement of a reasonable prospect of litigation was that the facts showed that there was, in fact, not *merely* a reasonable prospect, but a most definite prospect. This means that the facts in *Skandinaviska* are of no assistance towards determining whether there is a reasonable prospect of litigation, since they have been held to be indicative of a higher standard.

108 Mr Teo additionally attempted to convince me that the terms of the notice dated 18 October 2005, *viz*, "[the plaintiff] should seek recovery", was couched in tentative terms. As such, it is not affirmative and does not confirm that recovery proceedings will be undertaken. There was no affirmative intimation of a claim to any specific person, hinting perhaps that the defendants did not know that they would be sued until they were served the writ of summons pursuant to the substantive action on 5 April 2007.

109 In my view, this objection can be shortly taken. First, the test is a *reasonable* prospect of litigation, not an affirmative or definite prospect. Tentative language does not mean not reasonably prospective. Secondly, there is no need for a specific defendant to have been reasonably contemplated. The learned authors of *Disclosure* state at para 11.38 that the "contemplated" litigation need not be the *particular* litigation in which the disclosure is being sought, but may be of other litigation, involving different parties and subject matter (see further *Bray* at p 409, in turn citing, *inter alia*, *Bullock & Co v Corry & Co* (1878) 3 QBD 356).

110 As I have said, the requirement of a reasonable prospect of litigation is merely a factual (and threshold) one. As such, it should be applied reasonably, bearing in mind that the main governing test is the requirement of "dominant purpose". For the reasons above, therefore, I find that there was a reasonable prospect of litigation as required; the remaining (and more important) question is whether the "dominant purpose" test is met.

(B) "DOMINANT PURPOSE" TEST

111 Indeed, it is on the "dominant purpose" test that I find for the defendants. I do not think that it could scarcely be said that items (36) to (38) of Schedule A were brought into existence for the dominant purpose of litigation. In this respect, I accept the defendants' argument that the notice dated 18 October 2005 showed that there were other (even more dominant) purposes for the creation of these documents.

112 First, the appointment of the plaintiff's forensic accountant was stated in the same paragraph in the notice dated 18 October 2005 as the reference to the report to the Commercial Affairs Department (see [103] above). The then Chairman of the Managing Council had on the advice of her solicitors filed a police report which stated that its solicitors had engaged forensic accountants to draft a report of their findings to the police. A simple reading of the notice as well as the statement in the police report shows that the notice was meant to convey that the engagement of forensic accountants and the notification to the police were related. This means that an important reason of the appointment of the plaintiff's forensic accountant was to assist the police and to find out what exactly happened. It is also obvious from the content of the notice that the plaintiff was seeking mainly to reassure the subsidiary proprietors that many things were being done, which explains the last paragraph of the notice, which reads:

> As you will note although it has only been a week since the Council Members were informed by

> DTZ of the uncontactable Building Manager and discrepancies in the accounts, much have been done to protect the [plaintiff's] interests in this matter. The Council Members will continue to resolve this matter diligently and shall keep you informed of further developments.

Therefore, even though litigation against as yet unknown parties was a reasonable prospect (for the reasons stated earlier), it was certainly not the dominant purpose for the creation of the documents concerned.

113 Secondly, and indeed, the first evidence of the potential civil claim against the defendants was discussed was in the annual report of the 21st Council Management Council. These minutes were presented to the Annual General Meeting ("AGM") only at the 22nd AGM which took place on 11 July 2006 and subsequently discussed then. This was nine months and one week after the discovery of Wilson Loh's misappropriations on 4 October 2005 and the appointment of the plaintiff's forensic accountant a few days after. A perusal of the minutes of the 22nd AGM on 11 July 2006 shows that the subsidiary proprietors only agreed to commence proceedings that day, many months after the appointment of the plaintiff's forensic accountant. This was when litigation had passed from being a reasonable prospect to an almost definite prospect. As such, any document created before this time could not be said to have come into existence for the *dominant* purpose of litigation.

114 Thirdly, it is also clear that one of (more) important purposes of the forensic accountant's report by the plaintiff was to assist the statutory auditors to properly reflect the true financial position of the plaintiff. In the minutes of the 21st AGM held on 28 December 2005, a couple of months after the discovery of Wilson Loh's misappropriations, one of the subsidiary proprietors asked whether any adjustments to the audited accounts to the financial year ending 31 March 2005 had to be made. The plaintiff's solicitors replied that the forensic accountant was still investigating and that the auditors had highlighted that further adjustments had to be made pending the outcome of the investigation. Thus, the appointment of the plaintiff's forensic accountant was to ensure the subsidiary proprietors were assured that the accounting records of the plaintiff would be put in order. This, to my mind, was an even more important purpose than the reasonable prospect of litigation. The plaintiff really wanted to find out what was happening after Wilson Loh disappeared and its cheque dishonoured. In any event, it cannot be said that the documents concerned were created for the dominant purpose of litigation.

115 For the reasons above, I therefore find that there is no litigation privilege attached to items no (36) to (38) of Schedule A. As I am otherwise convinced that these documents are relevant and necessary for the issues in the substantive action (which, in any case, have not been contested by the plaintiff), I allow discovery and production of items no (36) to (38) of Schedule A pursuant to the terms prayed for in the present application.

(2) Item no (39) of Schedule A

116 As for item no (39) of Schedule A, the plaintiff has made a bare assertion as to litigation privilege and have provided no particulars of the same. In my view, these documents, being communications between the plaintiff and the relevant police or governmental authorities (including but not limited to the Commercial Affairs Department), could not have been created for the dominant purpose of litigation. I therefore also allow discovery and production of item no (39) of Schedule A pursuant to the terms prayed for in the present application.

Conclusion

117 In summary, the orders I make are as follows:

(a) I allow the discovery and production of the Group 1(i) documents pursuant to the terms prayed for in the present application. For the avoidance of doubt, the Group 1(i) documents refer to items no (1) to (35) of Schedule A (as annexed to the present application) which originate within the Pre-2006 Period.

(b) I allow the discovery and production of the Group 1(ii) documents dated between 1 January 2006 and 31 March 2006 (both dates inclusive) pursuant to the terms prayed for in the present application. For the avoidance of doubt, the Group 1(ii) documents refer to items no (1) to (35) of Schedule A (as annexed to the present application) which originate within the Post-2006 Period.

(c) I disallow discovery and production of the Group 1(ii) documents dated from 1 April 2006 to date (both dates inclusive) pursuant to the terms prayed for in the present application. For the avoidance of doubt, the Group 1(ii) documents refer to items no (1) to (35) of Schedule A (as annexed to the present application) which originate within the Post-2006 Period.

(d) I allow discovery and production of the Group 2 documents. For the avoidance of doubt, the Group 2 documents refer to items no (36) to (39) of Schedule A (as annexed to the present application).

118 In closing, I should also record my gratitude to counsel not only for their extensive assistance in the present application but also for understanding the reason behind the inflexibility of my schedule and coming back thrice in five workdays to complete arguments (*ie*, 24 and 26 June 2008) and for the delivery of this judgment (*ie*, 30 June 2008). While it has been stated innumerably that counsel should bow not only to the court but its schedule (and timelines), I think that such guidelines (and whatever attendant benefits they generate) can only be implemented and enjoyed with the cooperation of counsel, who too operate under their own schedule (and timelines). This is perhaps why the court quite literally *returns* counsel's physical bow as part of custom and tradition. And this is why it is to *counsel's* accommodation, past and present, that I remain grateful for.

119 The parties are invited to address me on the issue of costs.

Appendix A

(1) All notices and minutes of any Extraordinary General meeting of the Council in which any discussion of financial controls and responsibilities, expenditure of MCST funds, or Wilson Loh or his employment were discussed from the years 1990 to date, save for the Notice of the Extraordinary General Meeting of the Council held on 22 March 2002;

(2) All monthly Balance Sheets and Profit and Loss Accounts of the Plaintiff for the period:

i. financial years ending 31 March 1990 to 31 March 2001 (both years inclusive) ; and

ii. financial years ending 31 March 2005 to 31 March 2008 (both years inclusive).

(3) Any Internal Management Reports (including but not limited to Balance Sheet and Profit and Loss Accounts, management accounts and budgets) from the financial years ending 31 March 1990 to 31 March 2008 (both years inclusive) which are different from that which was presented to the Council, its members and/or to the subsidiary proprietors;

(4) All records of contracts between Tony Oei & Company (or any other Auditor appointed by or on

behalf of the Plaintiff) and the Plaintiff (or anyone acting on behalf of the Plaintiff including Wilson Loh), for the financial years ending 31 March 1992 to 31 March 2006 (both years inclusive);

(5) All records of contracts between Tony Oei & Company (or any other Auditor appointed by or on behalf of the Plaintiff) and any other person/entity, which was copied to the Plaintiff or its representative for the financial years ending 31 March 1990 to 31 March 2006 (both years inclusive);

(6) All written communications and documentary evidence of oral communications (including but not limited to correspondence, e-mails, faxes, letters, notes, internal memoranda, reports and minutes of any meetings) between the Plaintiff and Tony Oei & Company (or any other Auditor(s) appointed by or on behalf of the Plaintiff for the period of the financial years ending 31 March 1990 to 31 March 2006, both years inclusive) for the period 1 August 2004 to date;

(7) All written communications and documentary evidence of oral communications (including but not limited to correspondence, e-mails, faxes, letters, notes, internal memoranda, reports and minutes of any meetings) between Tony Oei & Company (or any other Auditor appointed by or on behalf of the Plaintiff for the period of the financial years ending 31 March 1990 to 31 March 2006, both years inclusive) and any other person which was copied to the Plaintiff for the period 1 January 1990 to date;

(8) All audit working papers (including documents and papers created or obtained) during all audits (both interim and final) carried out for the periods:

i. financial year ending 31 March 1990 to 31 March 1997 (both years inclusive); and

ii. financial year ending 31 March 2006 to 31 March 2008 (both years inclusive);

(9) Monthly Trial Balances for the periods:

i. from January 1990 to March 2001 (both months inclusive);

ii. October 2003; and

iii. from July 2005 to date;

(10) Monthly Balance Sheets for the periods:

i. from January 1990 to March 2001 (both months inclusive); and

ii. July 2005 to date;

(11) Monthly Profit and Loss Accounts for the periods:

i. from January 1990 to March 2001 (both months inclusive); and

ii. July 2005 to date;

(12) Bank Reconciliation Statements for the periods:

i. from January 1990 to March 2001 (both months inclusive); and

ii. December 2005 to date;

(13) General Bank/Cash Ledgers for the period from the financial year ending 31 March 1990 to 31 March 2008;

(14) General Ledger listing for the periods:

i. from January 1990 to March 2001 (both months inclusive); and

ii. July 2005 to date;

(15) Petty Cash Payment Vouchers (including supporting documentation) File for the periods:

i. financial years ending 31 March 1990 to 31 March 2000; and

ii. financial years ending 31 March 2007 to date;

(16) Bank Payment Vouchers (including supporting documentation) File for financial year ending 31 March 1990 to date;

(17) Journal Vouchers (including supporting documentation) File for financial year ending 31 March 1990 to date;

(18) "Detailed Funds Analysis Report" for the periods from:

i. January 1990 to March 2001 (both months inclusive); and

ii. July 2005 to date;

(19) Debtors Agreement for the financial year ending 31 March 1990 to date;

(20) Pricing List for the financial year ending 31 March 1990 to date;

(21) Sales Ledger transaction listing by Debtor for financial year ending 31 March 1990 to date;

(22) "Detailed Aged Trial Balance Report" for the periods:

i. from January 1990 to March 2001 (both months inclusive);

ii. May 2003; and

iii. July 2005 to date;

(23) Invoices File for financial year ending 31 March 1990 to date;

(24) Delivery Orders file for financial year ending 31 March 1990 to date;

(25) Credit Notes File for financial year ending 31 March 1990 to date;

(26) List of Creditors for financial year ending 31 March 1990 to date;

(27) Creditors Agreement for financial years ending 31 March 1990 to date;

(28) Purchase Ledger transaction listing by Creditors for financial year ending 31 March 1990 to date;

(29) Accounts Payable Listing for financial year ending 31 March 1990 to date;

(30) Purchase Requisition and Purchase Order File for financial year ending 31 March 1990 to date;

(31) Suppliers' invoices and delivery orders for the period:

i. 1990 to 2000 (both years inclusive); and

ii. 2007 to date;

(32) Creditors Ageing Report for financial year ending 31 March 1990 to date;

(33) Fixed Assets list (including invoices supporting the fixed assets) for financial year ending 31 March 1990 to date;

(34) All fixed deposit statements issued from the periods:

i. January 1990 to December 199 1 (both months inclusive); and

ii. November 2005 to date;

(35) All correspondence between the Plaintiff and any bank or financial institution for the periods:

i. from 1 January 1990 to December 1991 (both months inclusive); and

ii. December 2005 to date;

(36) The reports and draft reports of the forensic accountant(s) and/or any forensic auditing consultant(s) (hereinafter referred to as "the said forensic accountant(s)") engaged by or on behalf of the Plaintiff in relation to the matters which are the subject matter of this action;

(37) All documents provided to the said forensic accountant(s) by the Plaintiff or any other party for the purpose of their investigation;

(38) All written communications and documentary evidence of oral communications (including but not limited to correspondence, e-mails, faxes, letters, notes, internal memoranda, reports and minutes of any meetings) among the said forensic accountant(s) on the one hand and anyone or all of the following parties:

i. the Plaintiffs Council, or its members;

ii. the subsidiary proprietors of the Plaintiff;

iii. the Plaintiffs solicitors; and/or

iv. any other person

in relation to the investigation of the said forensic accountant(s);

(39) All written communications and documentary evidence of oral communications (including but not limited to correspondence, e-mails, faxes, letters, notes, internal memoranda, reports and minutes of any meetings) between the Plaintiff (and/or its agents including but not limited to the Plaintiff's

solicitors) on the one hand and the relevant police or governmental authorities (including but not limited to the Commercial Affairs Department) in relation to the matters which are the subject matter of this action.

[note: 1]See Statement of Claim (Amendment No 1) at [20].

[note: 2]*Ibid*. at [30].

[note: 3]See also the defendants' Written Submissions at [20].

[note: 4]See the defendants' reply submissions at [6].

[note: 5]See the defendants' Written Submissions at [20].