IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 118

Originating Summons No 945 of 2017

In the matter of section 22 of the Mutual Assistance in Criminal Matters Act (Cap 190A, 2001 Rev Ed)

And

In the matter of Order 90B, rules 2 and 3 of the Rules of Court (Cap 322, Section 80, 2014 Rev Ed)

Between

BSD

… *Applicant*

And

Attorney-General

… *Respondent*

Registrar's Appeal State Courts No 1 of 2018

In the matter of section 22 of the Mutual Assistance in Criminal Matters Act (Cap 190A, 2001 Rev Ed)

And

In the matter of Order 90B, rules 2 and 3 of the Rules of Court (Cap 322, Section 80, 2014 Rev Ed)

Between

BSF

… *Appellant*

And

Attorney-General

… *Respondent*

In the matter of District Court Originating Summons No 141 of 2017

Between

BSF

… *Plaintiff*

And

Attorney-General

… *Defendant*

Registrar's Appeal State Courts No 2 of 2018

In the matter of section 22 of the Mutual Assistance in Criminal Matters Act (Cap 190A, 2001 Rev Ed)

And

In the matter of Order 90B, rules 2 and 3 of the Rules of Court (Cap 322, Section 80, 2014 Rev Ed)

Between

(1) BSH
(2) BSI
(3) BSJ

… *Appellants*

And

Attorney-General

… *Respondent*

In the matter of District Court Originating Summons No 140 of 2017

Between

(1) BSH
(2) BSI
(3) BSJ

… *Applicants*

And

Attorney-General

… *Respondent*

GROUNDS OF DECISION

[Criminal Procedure and Sentencing] — [mutual legal assistance]

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BSD
v
Attorney-General and other matters

[2019] SGHC 118

High Court — Originating Summons No 945 of 2017, Registrar's Appeals
State Courts Nos 1 and 2 of 2018
Chua Lee Ming J
21 August, 25 September 2017, 13 March, 2-3, 6, 23 July 2018

6 May 2019

Chua Lee Ming J:

Introduction

1 The cases before me raised the following questions:

(a) Is a party against whom a production order has been made on an *ex parte* application by the Attorney-General ("the AG") under s 22 of the Mutual Assistance in Criminal Matters Act (Cap 190A, 2001 Rev Ed) ("MACMA") entitled to inspect and take copies of the application, supporting affidavit/s and related court documents, for purposes of considering or filing an application to discharge or vary the production order?

(b) Where the production order has been made on an *ex parte application* by the AG under s 22, MACMA, against a bank or financial institution, is the *holder of the account* affected by the production order entitled to

(i) information relating to the identity of the bank or the financial institution, the application and the order?

(ii) a copy of the order?

(iii) inspect and take copies of the application, supporting affidavit/s and related court documents?

(iv) apply to discharge or vary the production order?

2 With respect to the first question, I decided that the parties against whom production orders have been made were *prima facie* entitled to inspect and take copies of the relevant documents unless it was shown that granting access to the court file would prejudice investigations or subvert the ends of justice. The AG, who was the Respondent in the matters before me, has appealed against these decisions.

3 As for the second question, I decided that the account holder did not have the requisite standing to apply to discharge or vary the production order and hence he was not entitled to the information or documents sought. The account holder has appealed against this decision.

Background

MACMA

4 The MACMA was enacted to facilitate the provision and obtaining of international assistance in criminal matters. The MACMA applies to requests for assistance by foreign countries to Singapore and *vice versa*. The types of assistance that may be requested include "the provision and obtaining of evidence and things": s 3, MACMA.

5 Section 22 deals with applications by the AG for production orders for purposes of any criminal matter in the requesting foreign country ("the Requesting State"). Such applications may be made to the State Courts but applications for an order in relation to any thing in the possession of a financial institution shall be made only to the High Court (s 22(2)). Under O 89B r 2 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the Rules"), the AG's application for production orders under s 22, MACMA, may be made *ex parte*. Section 22(8) provides that applications production orders shall be heard in camera.

6 Section 22(3) provides that the court may make a production order if it is satisfied that the conditions in s 22(4) are fulfilled. These conditions are as follows:

> (a) that there are reasonable grounds for suspecting that a specified person has carried on or benefited from a foreign offence;
>
> (b) that there are reasonable grounds for believing that the thing to which the application relates –

(i) is likely to be of substantial value (whether by itself or together with another thing) to the criminal matter in respect of which the application was made; and

(ii) does not consist of or include items subject to legal privilege; and

(c) that the court is satisfied that it is not contrary to the public interest for the thing to be produced or that access to it be given.

7 In addition, s 22(6) provides that no person is required to produce or make available any thing that he could not be compelled to produce in the criminal proceedings in the Requesting State.

8 Assistance under the MACMA is provided only to a country that has given an undertaking to provide similar assistance to Singapore (see s 16(2)) or to a prescribed country that has entered into an agreement, memorandum of understanding or a treaty with Singapore to provide such similar assistance (see s 17(1)).

9 The Requesting State in the cases before me, had signed an agreement with the Government of the Republic of Singapore concerning mutual legal assistance in criminal matters ("the MLA Agreement"). Article 16(1) of the MLA Agreement provides as follows:

> (1) The Requested State shall keep a request for assistance, the contents of the request and its supporting documentation, and the fact of the granting of such assistance, confidential. If the request cannot be executed without breaching confidentiality, the Requested State shall, before executing the request, so inform the Requesting State which shall then determine the extent to which it wishes the request to be executed.

Registrar's Appeal State Courts No 1 of 2018 ("RAS 1/2018")

10 The AG applied for a production order under s 22, MACMA, against the appellant in RAS 1/2018 ("the RAS1 Appellant"), in the State Courts.[1] On 29 June 2017, the District Court made a production order against the RAS1 Appellant for the production of certain transactional and financial documents.[2]

11 Upon being served with the production order, the RAS1 Appellant applied for leave to inspect and take copies of all documents relating to the AG's application in the State Courts, including the supporting affidavits and the notes of argument recorded in the District Court.[3] On 15 November 2017, the District Court dismissed the application. RAS 1/2018 is the appeal against the District Court's dismissal of the RAS1 Appellant's application to inspect.

Registrar's Appeal State Courts No 2 of 2018 ("RAS 2/2018")

12 The AG also applied, *ex parte*, for production orders against the three appellants in RAS 2/2018 (together, "the RAS2 Appellants").[4] On 29 June 2017, the District Court made productions orders against each of the RAS2 Appellants for production of certain business and financial documents.[5]

13 Upon being served with the production orders, the RAS2 Appellants made a joint application for leave to take copies of all the documents, including the supporting affidavits and notes of evidence, relating to the AG's applications.[6] On 15 November 2017, the District Court dismissed the application. RAS 2/2018 is the appeal by the RAS2 Appellants against the District Court's dismissal of the application.

Originating Summons No 945 of 2017 ("OS 945/2017")

14 OS 945/2017 was a separate application filed in the High Court by the

RAS1 Appellant who had come to learn that the AG had taken out *ex parte* application/s for production order/s against certain bank/s and/or financial institution/s (the "Banks") for documents relating to the RAS1 Appellant's accounts with the Banks.

15 The RAS1 Appellant sought, among other things, the names of the Banks (which it was a customer of) against whom productions orders had been made, and copies of the court documents (including affidavits and notes of arguments) relating to the orders.

RAS 1/2018 and RAS 2/2018

16 The issues in these two appeals were similar. The RAS1 Appellant and RAS2 Appellants (together, "the RAS Appellants") applied to take copies of documents in the Court files, pursuant to O 89B r 3 of the Rules which reads as follows:

> **3.** Notwithstanding Order 60, Rule 4, no person may inspect or take a copy of any document relating to –
>
> (*a*) an application for an order under section 22; or
>
> (*b*) an application to discharge or vary such an order,
>
> without leave of Court.

17 Order 60 rule 4 is a general provision relating to the right to search information and inspect documents filed in the Registry. For present purposes, O 60 r 4 distinguishes between parties to a cause or matter and any other person. Parties to a cause or matter may inspect and take copies of any document filed in that cause or matter without leave of the Registrar whereas all other persons require leave of the Registrar to do so.

18 Where the MACMA is concerned, O 89B r 3 makes it clear that even the person against whom the production order was made, requires leave of the court to inspect and take copies of the court documents. The question before me was what should the test be in deciding whether leave should be granted?

19 The RAS Appellants submitted that leave should be granted to them to inspect the court files unless the AG could show that doing so would prejudice investigations. The RAS Appellants' arguments were straightforward:

(a) Order 89B rule 2(2) of the Rules permitted the RAS Appellants to apply to discharge or vary the production orders made against each of them. Order 89B rule 2(2) reads as follows:

> (2) Where an order under section 22 has been made, the person required to comply with the order may apply to the Court for the order to be discharged or varied, and on hearing such an application, the Court may discharge the order or make such variations to it as the Court thinks fit.

(b) It was necessary for the RAS Appellants to have access to the court papers to consider whether they should make any application to discharge or vary the production orders that had been made against them. Otherwise, the statutory right to apply to vary or discharge the production order would be rendered nugatory.

20 The RAS Appellants submitted[7] that the right to be heard must carry with it the right to know the case and the evidence given or statements made against the person exercising that right: *Mustafa Ahunbay v Public Prosecutor* [2015] 2 SLR 903 at [71], citing *B Surinder Singh Kanda v Government of the Federation of Malaya* [1962] AC 322 (at 337).

21 The RAS Appellants also referred me to *United States of America v. Beach* [1999] M.J.No. 56 ("*Beach*"), a decision of the Manitoba Court of Appeal concerning production orders under s 18 of Canada's Mutual Legal Assistance in Criminal Matters Act, R.S.C. 1985, c. 30 ("Canada's Mutual Assistance Act"). In that case, the United States Department of Justice requested assistance from the Government of Canada in the investigation of a crime alleged to have occurred in Oklahoma. An *ex parte* application requiring the respondents to testify and produce documents was made and granted pursuant to Canada's Mutual Assistance Act. Shortly after, a further order was made prohibiting access to the court file and to any information relating to the United States' request for assistance. The respondents applied to vary the order prohibiting access to the court file and related information. Essentially, the respondents sought disclosure of all the materials. However, the court permitted disclosure of only the two orders made.

22 On appeal, the Manitoba Court of Appeal observed as follows, at [11] – [12]:

> 11 A person affected by an ex parte order or warrant is ordinarily entitled to apply to set it aside. In order to succeed, the party affected will ordinarily be required to show that there are valid grounds for doing so. One such ground is that the criteria for making the order were not met.
>
> 12 It is customary for a person affected by an order or warrant to be allowed to review the evidence or information filed in support of the application to obtain it. This enables the person affected where appropriate, to challenge the evidence or information or show that such evidence or information does not meet the criteria for the making of the order or issuing the warrant. It is rare indeed that a party affected by an order or warrant may be denied access to such evidence of information.

23 The Manitoba Court of Appeal in *Beach* accepted that the common law right of inspection can be abrogated by express provisions in legislation, and

that it could be denied when the ends of justice would be subverted by disclosure (at [15]—[16]). The Court went on to hold that Canada's Mutual Assistance Act contained no provision for non-disclosure (at [17]). However, the Court did not grant access to the court file because it found that more information had been filed than was required to obtain the order. Instead, the Court set aside the order to testify and produce documents without prejudice to an application being made on more limited material (at [23]).

24 In the present case, the Deputy AG ("DAG"), appearing on behalf of the AG, contended that under O 89B r 3, leave to inspect and take copies of the court documents should not be granted unless the RAS Appellants could demonstrate that there had been a flaw in the procedure. The DAG submitted that the need to review the documents in order to decide whether to apply to discharge or vary the production orders was not sufficient reason to grant leave.[8] The DAG relied on two Hong Kong cases – *Apple Daily Ltd v Commissioner of the Independent Commission Against Corruption (No 2)* [2000] 1 HKLRD 647 ("*Apple Daily*") and *Chan Mei Yiu Paddy & anor v Secretary for Justice & ors* [2007] 4 HKC 224 ("*Chan Mei Yiu*").

25 *Apple Daily* concerned, among other things, a search warrant obtained under the Hong Kong Prevention of Bribery Ordinance (Cap 201) (1971) ("POBO"). The warrant was issued pursuant to an *ex parte* application under O 119 r 4 of the Hong Kong Rules of the High Court (Cap 4) (1998) ("HKROC"). An application to set aside the warrant was dismissed. On appeal, a preliminary issue was whether the applicant should have been allowed to inspect the affidavit supporting the application for the search warrant. The Hong Kong Court of Appeal held (at 663C) that public interest immunity applied to the affidavit and it could not be revealed so long as the investigation in aid of

which the warrants were sought continued. However, the Court also discussed O 119 r 5 of the HKROC.

26 Order 119 r 5(1) of the HKROC provided that the application, affidavit, information and all other documents relating to the application shall be treated as confidential and be placed in a packet and sealed. Order 119 rule 5(2) provided that the packet shall not be opened or have its contents removed or copied "except by order of a judge". The Hong Kong Court of Appeal cited with approval the decision in a previous unreported case in *Application for an order under O 119 r 5(2) of the Rules of the High Court* (HCMP 1/1998) (at 661G–662E) that

> The rationale underlying O.119 r.5 is the recognition that orders made under [Pt.III of the POBO] are investigative tools, and the documents relating to applications for such orders need to be kept confidential in order to preserve the integrity of the investigation. …For these reasons, it is plain that O.119 r.5(2) contemplates that non-accessibility to the documents relating to an application under [Pt.III of the POBO] should be the norm.
>
> However, the words "except by order of a judge" in O.119 r.5(2) show that the Court has the power to disapply the requirements of O.119 r.5(2). It is therefore recognised that there may be particular cases where access to the documents should be permitted. In my view, the requirements of O.119 r.5(2) will not usually be disapplied on general grounds – for example, on the ground that the person to whom the notice is addressed needs to see the documents so that he can obtain informed advice about his legal position,…or so that he can make an informed decision as to whether to apply for the revocation or variation of the order,…[or so that he can satisfy himself that the pre-conditions for the making of the order have been met.] Those grounds could be relied upon in almost every case**.** If the requirements of O.119 r.5(2) could be regularly be disapplied on any of those grounds, the norm of non-accessibility to the documents would be seriously eroded. General grounds of this kind, of course, cannot be ignored, but what is required is an examination of the particular facts to determine whether departure from the norm is justified in any particular case.

The Court went on to hold (at 662E) that there were no grounds in that case which might justify a departure from the norm.

27 *Chan Mei Yiu* concerned an application for judicial review of the magistrate's decision to issue search warrants under the Hong Kong Mutual Legal Assistance in Criminal Matters Ordinance (Cap 525) (1997) ("HK MLACMO"). In the course of the judicial review proceedings, the applicants sought discovery of the Italian prosecutor's letter of request to the Hong Kong authorities, and the information that had been presented to the Hong Kong magistrate for the purposes of obtaining the search warrants ("the supplementary information"). The facts showed that the Italian prosecutor had sent similar letters of request to the authorities in California and Ireland relating to the same set of offences which were the subject of the letter of request to Hong Kong.

28 The Hong Kong Court of First Instance was of the view that there were arguable inconsistencies, misstatements and omissions in the letter of request to the Californian authorities, and noted that there were allegations of "seriously misleading" matters in the Irish proceedings. The Court further noted there was no reason to suggest that the letter of request to Hong Kong significantly differed from those to California and Ireland (*ie*, in terms of the possible inconsistencies and alleged misleading matters). However, the Court refused the application for discovery for the following reasons (at [32] – [35]):

(a) Redaction was not possible and there was a real danger that comprehensive disclosure would be potentially detrimental to the proper course of the investigation.

(b) The information that the applicants had already obtained from the Californian and Irish proceedings (including the letters of request) as to the alleged misrepresentations, omissions, and material non-disclosure were sufficient to enable the applicants to present their case even in the absence of the Hong Kong letter of request itself.

29 The DAG referred me to the following observations by the Court in *Chan Mei Yiu* at [9]:

> In the normal run of cases, in the absence of evidence to the contrary, it is likely that there will be nothing to establish that the legislative scheme has not been properly followed…A mere assertion by an applicant that he suspects that there may have been a relevant flaw in the procedure will not be sufficient to entitle him to an order for discovery in relation to the letters of request, or the information placed before the magistrate. But where there is evidence that tends to indicate that there has been some relevant flaw in the procedure, the court will be more likely to grant an order for discovery of the documents."

30 The DAG argued that[9]

(a) similar to the position in Hong Kong, there is a need for confidentiality under the MACMA and pointed out that under s 22(8), applications for production orders were to be heard *in camera*; and

(b) it was because of this need for confidentiality that O 89B r 3 created an exception to O 60 r 4 and required all persons (including the person required to comply with a production order) to obtain leave of court to inspect the court file.

31 I agreed with the RAS Appellants that the statutory right to challenge the production orders would be meaningless if they were not even allowed to inspect the court papers. How else could they even begin to consider whether they had any grounds to challenge the production orders?

32 I noted that the Court of Appeal pointed out in *Re Section 22 of the Mutual Assistance in Criminal Matters Act* [2009] 1 SLR(R) 283 ("*Re Section 22*") (at [15]), under the MACMA, a request for assistance is subject to two levels of checks, first by the AG and second by the Minister for Law, both of whom are charged with statutory duties to ensure that any such request must satisfy the statutory requirements before assistance can be given. However, both the AG and the Minister, as with the court hearing the application for the production order, would have only one side of the story. In making an application to discharge or vary the production order, the applicant puts forth his side of the story. Clearly, he must have access to the court documents for this purpose.

33 The DAG submitted that reading O 89B r 3 restrictively (see [24] above) would not render the right under O 89B r 2(2) to challenge production orders otiose. The DAG reasoned that a person required to comply with a production order may apply to discharge or vary the order on the ground that he is unable to comply with the order. and the DAG argued that for this purpose, access to the court documents would not be required.[10] That is true. However, that is not the only ground for a challenge under O 89B r 2(2). Section 22(3), MACMA, requires the court to be satisfied that the conditions in subsection (4) are fulfilled before it makes a production order. A person required to comply with a production order may challenge the order on the ground that any one or more of the conditions have not been fulfilled.

34 The conditions in s 22(4), MACMA, are as follows:

> (*a*) that there are reasonable grounds for suspecting that a specified person has carried on or benefited from a foreign offence;
>
> (*b*) that there are reasonable grounds for believing that the thing to which the application relates –

> (i) is likely to be of substantial value to the criminal matter in respect of which the application was made; and
>
> (ii) does not consist of or include items subject to legal privilege; and
>
> (*c*) that the court is satisfied that it is not contrary to public interest for the thing to be produced or that access to it be given.

35 In my view, the RAS Appellants could not possibly even consider challenging the production orders without having access to the application, the supporting affidavit and any submissions made to the court in respect of the application. I found myself unable to agree with the reasoning in *Apple Daily* and *Chan Mei Yiu*. In my view, the approaches taken in both these cases would render the RAS Appellants' statutory right under O 89B r 2(2) to challenge the production orders made against them, an illusory one.

36 The Court in *Apple Daily* said that non-accessibility was the norm and that making an informed decision whether to challenge or vary the production order was not a sufficient reason for departing from the norm. It is difficult to see what other reason might suffice and the Court in *Apple Daily* gave no indication as to what might suffice for the Court to depart from the norm.

37 In *Chan Mei Yiu*, the Court required evidence of some flaw in the procedure for purposes of an application to inspect the court file. This seemed to conflate an application to inspect with an application to challenge the order. It seemed to me that a flaw in the procedure was more relevant for purposes of challenging the order made. Besides, without having access to the court documents, how was an applicant to obtain evidence of any flaws in the procedure? In the context of the present case, without access to the court file,

how would the RAS Appellants know whether there is any basis to challenge the alleged fulfilment of the conditions in s 22(4), MACMA?

38 The decision in *Chan Mei Yiu* should also be read in the context of the facts of the case. The court was influenced by the fact that the applicants had sufficient information (obtained from the Californian and Irish proceedings) to "enable justice to be done in [that] particular case" (at [33]). The Court found that the extent of the information was such that the applicants were not deprived of the means of proper presentation of their case. The Court suggested (at [34]) that, since arguable inconsistencies had already arisen on the information, the applicants could make their case and it would then be *on the Hong Kong authorities to put forth the Hong Kong letter of request to answer the inferences that arise from the evidence*. In my view, these observations by the Court in fact also demonstrated the necessity for the applicants to have sufficient information to enable them to challenge the orders made against them.

39 The decision whether to grant leave under O 89B r 3 involves a balancing exercise between the applicant's need to have access to the court documents and the reasons for not granting access. I accepted that this balancing exercise had to be carried out with the purposes of the MACMA in mind. In my view, the approach taken in *Beach* was fair and just.

40 It is true that the requirement for leave of court under O 89B r 3 means that a person against whom a production order has been made, does not have an absolute right to inspect the court file. However, I agreed with the RAS Appellants that such a person is *prima facie* entitled to inspect and take copies of the documents in the court file unless it can be shown that granting access to the court file would prejudice investigations or, as the Court in *Beach* put it, subvert the ends of justice. It seemed to me that the leave requirement under O

89B r 3 recognises the fact that the production orders are made in aid of criminal investigations in the Requesting State and that the right to inspect may need to be restricted if it might otherwise prejudice those investigations. In my view, the leave requirement allows the Requesting State (through the AG) to object (where appropriate) on the ground that access to the court papers (or some of the court papers) would prejudice the criminal investigations.

41 The DAG submitted that the question whether disclosure would prejudice investigations was a question for the Requesting State and that this question should not have to be determined by a Singapore court.[11] I disagreed. It was the DAG's own submission that one of the grounds upon which a production order could be challenged was bad faith. In the context of the MACMA, that would include bad faith on the part of the Requesting State. I saw no reason why a Singapore court could not deal with the question of prejudice to investigations in the Requesting State if it could deal with an allegation that the Requesting State had acted in bad faith in making the request for assistance.

42 There was nothing before me to suggest that granting leave to the RAS Appellants would prejudice the criminal investigations in the Requesting State. I was therefore inclined to grant leave. However, as the Requesting State had only authorised the disclosure of what was necessary to obtain the production orders, the RAS Appellants and the DAG agreed that the Requesting State should first be given an opportunity to determine the extent to which it wishes its request to be executed. It will be recalled that under Article 16(1) of the MLA Agreement, if the request cannot be executed without breaching confidentiality, the Requested State shall, before executing the request, so inform the Requesting State which shall then determine the extent to which it wishes the request to be executed (see [9] above).

43 Accordingly, I adjourned RAS 1/2018 and RAS 2/2018 to enable the AG to obtain the Requesting State's decision on this.

44 For completeness, I should address two points made by the District Judge ("DJ") when dismissing the applications by the RAS Appellants to inspect the court file and take copies of the documents. First, the DJ expressed the view that an application under O 89B r 2 to "discharge" a production order refers to an application to discharge an order that had been complied with or rendered nugatory.[12] The DJ drew a distinction between discharging an order and setting aside an order. In my view, the distinction was not justified. In the context of O 89B r 2(2), discharging a production order had the same effect as setting aside the order. It was clear that O 89B r 2(2) permits the party required to comply with a production order, to apply to render the whole order of no effect so that he does not have to comply with it.

45 Second, the DJ was of the view that it was unnecessary for the RAS Appellants to have sight of the court documents for purposes of filing applications to discharge or vary the production orders because the production orders had previously been varied without the RAS Appellants having had sight of the court documents.[13] I disagreed with the DJ's view. The production orders required the RAS Appellants to produce the documents described in the orders, by 23 August 2017. The orders in question were varied to state that the AG shall not disclose the documents or their contents to any other party including the Requesting State, pending the final disposal of applications to discharge the production orders, if filed within a prescribed deadline. The applications to vary the orders were intended to preserve the status quo and were consented to by the AG. Clearly, these applications did not require the RAS Appellants to have had sight of the court documents and therefore were not valid reasons to refuse leave to inspect and take copies of the court documents.

OS 945/2017

46 As stated earlier, this was a separate application filed in the High Court by the RAS1 Appellant under O 89B r 3, seeking, among other things, the names of the Bank/s (which it was a customer of) against whom production order/s had been made ("the Bank production orders"), and copies of the court documents (including affidavits and notes of arguments) relating to the orders.

47 At the outset, it must be noted that the RAS1 Appellant had no basis to inspect and take copies of the court documents relating to the Bank production orders unless it had the requisite standing to apply to discharge or vary the orders.

48 Order 89B rule 2(2) provides that "the person required to comply" with the production order may apply to court for the production order to be discharged or varied. However, the RAS1 Appellant was not the person who was required to comply with the Bank production orders. The Banks were the ones required to comply with the orders.

49 The RAS1 Appellant submitted that[14]

(a) Order 89B rule 2(2) is an enabling provision and it does not say that only the person required to comply, can apply to discharge or vary the production order; and

(b) it had the requisite standing to apply to discharge or vary the Bank production orders under O 32 r 6 of the Rules and the common law.

50 Order 32 rule 6 provides that the court may "set aside an order made *ex parte*". The RAS1 Appellant submitted that O 32 r 6 permits not just the party against whom the order was served, but also affected third parties, to apply to set aside an order made *ex parte*: *Singapore Civil Procedure 2017* vol 1 (Foo Chee Hock gen ed) (Sweet & Maxwell, 2017) at para 32/6/5; *Chan Lung Kien v Chan Shwe Ching* [2018] 4 SLR 208 at [11]. The RAS1 Appellant argued that the banks would have no interest in challenging any production order issued against them.

51 The RAS1 Appellant also relied on the common law principle that an affected party has the right to apply to discharge or vary an order of court especially if the order was obtained *ex parte*. The RAS1 Appellant relied on the rule of statutory interpretation that Parliament will not be taken to have abrogated rights at common law unless that is made express or is to be implied as a matter of necessity: see *Goldring Timothy Nicholas and others v Public Prosecutor* [2013] 3 SLR 487 at [51].[15]

52 In my view, O 89B r 2(2) is clear. Only the person required to comply with the production order may apply to discharge or vary the order. It therefore displaces the common law principle relied upon by the RAS1 Appellant. Further, as O 89B r 2(2) is a provision that applies specifically to production orders made *ex parte* under the MACMA, it also displaces O 32 r 6 which is a provision of general application: see *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [40].

53 The RAS Appellants argued that the use of the word "may" in O 89B r 2(2) meant that an application to discharge or vary a production order was not restricted to the person required to comply with the production order. I disagreed. The use of the word "may" simply meant that the person required to

comply with the production order had an option whether to make the application or not. It did not imply that any person could apply for discharge or variation.

54 Mr Zhuang WenXiong, who appeared as young *amicus curiae*, submitted that a production order under the MACMA against a bank or financial institution had the effect of piercing banking secrecy.[16] Therefore, he argued, an account holder should have standing to apply to set aside or vary a production order that has been made against a bank or financial institution in connection with his accounts. However, it was clear that compliance with a production order would not breach banking secrecy. I did not see why the issuance of a production order under the MACMA against a bank should therefore mean that the account holder must have standing to challenge the order, when O 89B r 2(2) does not give the account holder such a right.

55 Mr Zhuang also submitted that in practice, banks may not always be incentivised to challenge production orders issued against them.[17] That may be so. However, the fact of the matter remained that statutorily, O 89B r 2(2) has made it clear that only the person required to comply with the production order may apply to discharge or vary it.

56 Mr Zhuang further submitted that the Rules regulate procedure and cannot confer substantive rights.[18] That is correct as a general principle. However, in the present case, O 89B r 2(2) was enacted pursuant to s 23(7) of the MACMA, which expressly states that the Rules may provide for the discharge and variation of production orders. In my view, O 89B r 2(2) should be given its full effect. I noted also that there is nothing in the MACMA that can be said to be inconsistent with O 89B r 2(2).

57 Moreover, the interpretation that I have given to O 89 r 2(2) was also consistent with the fact that applications for productions orders under the MACMA have to do with criminal matters. The investigating agency must be free to carry out its investigations and seek evidence or information from anyone who might possess such evidence or information. I could not see any reason why any other person (including the target of the investigations and, where the information relates to bank accounts, the account holder) should be entitled to information as to who the investigating agency has approached in the course of its investigations, much less what evidence or information has been obtained from those persons.

58 For the above reasons, I concluded that the RAS1 Appellant had no standing to challenge the Bank production orders. It followed that there was no reason why it should be provided with the information sought or be given access to the court documents relating to the Bank production orders. Accordingly, I dismissed the application.

Public interest immunity and s 125 of the Evidence Act

59 Submissions were made on the applicability of public interest immunity, whether under s 125 of the Evidence Act (Cap 97, 1997 Rev Ed) ("the EA") or common law. Section 125 of the EA provides as follows:

> **Evidence as to affairs of State**
>
> **125.** No one shall be permitted to produce any unpublished official records relating to affairs of State, or to give any evidence derived therefrom, except with the permission of the officer at the head of the Department concerned, who shall give or withholds such permissions as he thinks fit, subject, however, to the control of the Minister.

60 The AG's basis for asserting public interest immunity was Article 16(1) of the MLA Agreement (see [9] above). The DAG also relied on *Re Section 22*,

in which the Court of Appeal observed (at [26]) that Article 16(1) requires the AG not to disclose the request from the requesting country even if the court were to insist on disclosure.

61 During oral submissions, the DAG acknowledged that the law as it stands in Singapore is that evidence contained in affidavits fall outside the scope of the EA since s 2(1) of the EA states that Parts I, II and III the EA shall not apply to "affidavits presented to any court": *HT SRL v Wee Shuo Woon* [2016] 2 SLR 442 at [16]. Section 125 falls within Part III of the EA. However, the DAG argued that public interest immunity under the common law would still apply.

62 The RAS Appellants submitted that common law public interest immunity is not part of the law of Singapore since s 2(2) of the EA has repealed all rules which are not saved by statute and which are inconsistent with the provisions of the Evidence Act. According to the RAS Appellants, common law public interest immunity is inconsistent with s 125 in two aspects. First, unlike s 125, common law public interest immunity cannot be waived. Second, common law public interest immunity involves a balancing exercise between different public interests where the court determines that the document falls in a recognised class protected by common law public interest immunity. In contrast, under s 125, it is the relevant head of department who decides whether to invoke s 125.[19] The RAS Appellants referred to *Re Siah Mooi Guat* [1988] 2 SLR(R) 165 in which the High Court held (at [36]) that it is for the Minister, not the court, to decide whether it is in the public interest that information should be disclosed. The RAS Appellants relied on *SP Gupta v Union of India and another* (1981) Supp SCC 87 (a decision of the Indian Supreme Court) and *Halsbury's Laws of Singapore* vol 10(2) (LexisNexis, 2016 Reissue) at para

120.420, for its submission that common law public interest immunity is inconsistent with s 125 of the EA.

63 Mr Zhuang supported the RAS Appellants' submission that common law public interest immunity is inconsistent with s 125 of the EA and ought not to apply in Singapore.

64 I was inclined to agree with the RAS Appellants and Mr Zhuang that common law public interest immunity does not apply in Singapore. However, it was not necessary for me to deal with the issue of public interest immunity, whether under s 125 or the common law. In my view, the issue of public interest immunity did not arise in the present case. The assertion of public interest immunity was based on Article 16(1) of the MLA Agreement. Article 16(1) contemplates the possibility that the Requesting State's request cannot be executed without breaching confidentiality. In such event, Article 16(1) understandably does not require the AG to both execute the request and still maintain confidentiality. Instead, Article 16(1) provides that the AG is to inform the Requesting State that the request cannot be executed without breaching confidentiality. The Requesting State then has to determine the extent to which it wishes the request to be executed. To the extent that the Requesting State wishes its request to be executed, it would necessarily have to consent to disclosure of such information as would be necessary for its request to be executed. Alternatively, the Requesting State may decide to not proceed with its request. If the Requesting State gives its consent to disclosure, no question of public interest immunity would arise. If the Requesting State decides to not proceed with its request, the matter comes to an end.

Conclusion

65 For the reasons stated above, I allowed the appeals in RAS 1/2018 and RAS 2/2018 subject however to the Requesting State's decision whether it wishes the AG to proceed further to execute its request. As for OS 945/2017, I dismissed the application on the ground that the RAS1 Appellant lacked the requisite standing.

66 As for costs, the parties agreed that there would be no order as to costs, and I so ordered.

Chua Lee Ming
Judge

Davinder Singh SC, Jaikanth Shankar, Navin Thevar, Derrick Teo, and Teo Li Fang (Drew & Napier LLC) for the first applicant; Jason Chan Tai-Hui, Edward Kwok, and Evangeline Oh (Allen & Gledhill LLP) for the second to fourth applicants; Hri Kumar Nair SC, Shivani Retnam, James Low, Kexian Ng, and Zhang Hong Chuan (Attorney-General's Chambers (International Affairs Division)) for the respondent; Zhuang WenXiong (Rajah & Tann Singapore LLP) Young *Amicus Curiae*.

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[1] DC/OSS 103 of 2017; Applicants' Bundle of Documents in RAS 2/2018 ("BOD"), tab

5 pp 74–75.

2 BOD, tab 5 pp 50–52.

3 DC/OSS 141 of 2017.

4 DC/OSS 104 of 2017; DC/OSS 105 of 2017 and DC/OSS 106 of 2017; BOD, tab 5 pp 76–81.

5 BOD, tab 5 pp 54–55, 57–58 and 60–61.

6 DC/OSS 141 of 2017; BOD, tab 4.

7 Plaintiff's Reply Submissions for HC/OS 945/2017 ("RAS1 Appellant's Submissions"), dated 27 November 2017, at paras 100–101.

8 Attorney-General's Submissions ("AG's Submissions"), dated 20 February 2018, at paras 38 and 64.

9 AG's Submissions, at paras 39, 78–79.

10 Notes of Argument, 3 July 2018, at 3:24–25.

11 Notes of Argument, 3 July 2018, at 9:12–14.

12 BOD, tab 13, at pp 4C–5A.

13 BOD, tab 13, at pp 4B and 5B.

14 RAS1 Appellant's Submissions, at paras 16–24 and 53.

15 RAS1 Appellant's Submissions, at para 51.

16 *Amicus Curiae*'s Submissions ("YAC's Submissions"), dated 5 March 2017, at para 36.

17 YAC's Submissions, at para 40.

18 YAC's Submissions, at para 12.

19 RAS1 Appellant's Submissions, at para 181.