Ser Kim Koi and Another v Fulton William Merrell and Others
[2008] SGHC 23

Case Number	: Suit 427/2006, RA 306/2007, 319/2007, 320/2007, 321/2007, 322/2007, 323/2007, 324/2007
Decision Date	: 13 February 2008
Tribunal/Court	: High Court
Coram	: Judith Prakash J
Counsel Name(s)	: Philip Jeyaretnam SC, Ajinderpal Singh and Jay Lee (Rodyk & Davidson LLP) for the plaintiffs; Khoo Boo Jin and Tan Hsuan Boon (Wee Swee Teow & Co) for the first defendant; Chua Sui Tong and Janice Goh (WongPartnership LLP) for the second to fourth defendants; Moiz Sithawalla and Yeo Boon Tat (Tan Rajah & Cheah) for the fifth defendant
Parties	: Ser Kim Koi; Ser Song Cheh — Fulton William Merrell; Anurag Mathur; Stephen King Chang-Min; Thio Shen Yi; Metalform Asia Pte Ltd

Civil Procedure – Discovery of documents – Whether parties allowed to amend list of documents filed for discovery purposes to delete items – Whether documents protected by litigation privilege – Order 20 r 8(1) Rules of Court (Cap 322, R 5, 2006 Rev Ed)

13 February 2008

Judith Prakash J:

Background

1 The numerous Registrar's Appeals in this suit that came for hearing before me in November 2007 all involved issues relating to discovery of documents by the first and fifth defendants in this action.

2 What had happened was that the first defendant, who is the Chief Executive Officer of the fifth defendant (sometimes hereafter "the Company"), and the Company had filed their respective (but identical) supplementary lists of documents on 8 August 2007. The plaintiffs, two individuals who are also directors of the Company, asked the first defendant to give them copies of the documents described in the lists. The first defendant refused to do so. The stand taken by him and the Company was that they had inadvertently included in the lists documents that were not in fact discoverable. Subsequently, the Company too refused to allow the plaintiffs to inspect 1006 of the 1651 documents on the lists.

3 On 28 August 2007, the plaintiffs filed an application to compel inspection and production of the documents. The first and fifth defendants then filed applications for leave to amend their supplementary lists by deleting the documents they objected to produce. The stand taken by the defendants was that these documents were privileged or did not fall within the orders for discovery that had been made against them. On 15 October 2007, Assistant Registrar Mr Chew Chin Yee allowed the defendants' application to amend their supplementary lists by deleting the documents listed as S/Nos 49,74, 81,86,88,97,104-106,139,168,170-173,178,189 and 442. The assistant registrar disallowed the remaining amendments sought by the defendants.

4 Both the plaintiffs and the defendants appealed against the assistant registrar's decision. After hearing the appeals, I decided:

(a) item 49 was privileged;

(b) item 442 had to be disclosed;

(c) the other 16 items enumerated in [3] above were privileged; and

(d) I would have to determine whether the other 258 documents should be produced for inspection as the plaintiffs demanded and for that purpose the documents would first be inspected by a solicitor from the plaintiff's solicitors' office to wean out the obviously irrelevant documents and thereafter I would consider the relevancy of each of the remaining documents. [Note: The appeal in respect of these documents has not yet been completed.]

The defendants have appealed against decision (b) while the plaintiffs have appealed against decision (c). I therefore give my reasons for the same below.

General issue: amendment of list of documents

5 The first and fifth defendants' applications were taken out for leave to amend their lists of documents by deleting documents which they considered to be either privileged or irrelevant to the issues in dispute. The issue that arose was whether a party who has filed a list of documents to comply with his discovery obligations can thereafter be permitted to amend that list to delete some or all of the items described in it.

6 The plaintiffs' submission was that the applications were highly irregular as parties did not take out applications to amend their lists. There was no locally reported decision on this issue. Where documents of peripheral or even no ultimate relevance had been, by mistake, included in the list of documents, they would normally be left in the list and parties simply would not rely on them at trial.

7 The plaintiffs had, however, come across two English cases in which the court had allowed parties to amend their lists of documents to exclude certain documents. In both these cases, however, the documents that were excluded were privileged documents. These cases were the English Court of Appeal case of *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 1 W.L.R. 1027 ("*Guinness Peat*") and the High Court decision in *C.H. Beazer (Commercial & Industrial) Ltd. v R.M. Smith Ltd* [1984] 1 Const LJ 196 ("*CH Beazer*"). In the latter case, Judge Newey, Q.C., allowed the plaintiffs to amend their list of documents by moving certain documents from part 1 to part 2 because the plaintiffs' solicitors had made a genuine mistake and no prejudice had been suffered by the defendants as the defendants had not yet seen the documents.

8 The first defendant, for his part, submitted that a party may correct any defect or error in his list of documents pursuant to O 20 r 8(1) of the Rules of Court (2006 Rev Ed) ("the Rules") which provides that for the purpose of correcting any defect in any proceedings, the court may either of its own motion or on the application of any party order any document in the proceedings to be amended. The first defendant relied on the following passage from *Disclosure* by Matthews & Malek (3rd Ed, 2000) at para 5.25:

> There is no provision in the CPR for the amendment of a List of Documents without leave. However, until inspection has taken place the party providing the List may correct it by notifying the other side of the error. Thus where privileged documents have been erroneously listed in the first part instead of the second part of the List, the party may notify the other side of the mistake prior to inspection giving grounds why production is objected to. If necessary, the Court will give leave to amend the List.

9 The first defendant emphasised that in this case, inspection had not taken place and therefore the court was still in a position to give leave to amend the list to correct errors. Noting that the text *Disclosure* had stated that after inspection had taken place, it would, as a general rule, be too late to correct the error, he submitted that the rationale for allowing corrections to the list of documents appears to be based on the principle that the law should not encourage litigants or their solicitors to take advantage of obvious mistakes made in the course of the process of discovery. In the course of submissions, counsel also referred to *Guinness Peat* and the decision of Hoffmann J in *Re Briamore Manufacturing Ltd (In Liquidation)* [1986] 1 W.L.R. 1429 ("*Briamore*"). The latter case was cited for the proposition that until inspection has taken place "there must be a right to correct the list, even if only by notifying the other side that there are documents which the litigant objects to produce" (at p 1431). It should also be noted that *CH Beazer* and *Guinness Peat* were the cases relied on by the authors of *Disclosure* for their statement of principle cited in [8] above.

10 Having considered the authorities and the textbook, it is plain that the court does have power to allow the amendment of a list of documents under O 20 r 8(1) and that that power is usually exercised when the applicant has by mistake entered privileged documents in part 1 of Schedule 1 of the list when such documents should have been disclosed in part 2 of Schedule 1. The amendment sought is to remove the privileged documents from part 1 and to put them instead into part 2 of Schedule 1. There does not seem to have been a case, however, where the court has permitted a party to amend his list by deleting documents which he considers to be irrelevant.

11 The various authorities that were cited by the parties dealt with a situation where the party who had filed a list later claimed that he had mistakenly included privileged documents in the wrong part of Schedule 1. In *Guinness Peat*, the defendants inadvertently included in Part 1 of Schedule 1 to a supplemental list of documents, a letter for which they had intended to claim privilege. Before serving the supplemental list, the defendants invited the plaintiffs' solicitors to inspect the documents. The plaintiffs' solicitors did so and copied the letter. The defendants later realised their mistake and issued a summons seeking an order restraining the plaintiffs from making any further use of the copy of the letter. The injunction was granted and upheld on appeal on the basis that the plaintiffs' solicitors must have realised on inspection that they had been permitted to see the document by reason of an obvious mistake. Slade LJ who delivered the court's judgment set out the principles that should be followed in the case where privileged documents had been disclosed by mistake. He said at p 1045:

> In my judgment, the relevant principles may be stated broadly as follows.
>
> (1) Where solicitors for one party to litigation have, on discovery, mistakenly included a document for which they could properly have claimed privilege in Part 1 of Schedule 1 of a list of documents without claiming privilege, the court will ordinarily permit them to amend the list under R.S.C., Ord. 20, r. 8, at any time before inspection of the document has taken place.
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> (2) However, once in such circumstances the other party has inspected the document in pursuance of the rights conferred on him by R.S.C., Ord. 24, r. 9, the general rule is that it is too late for the party who seeks to claim privilege to attempt to correct the mistake by applying for injunctive relief. Subject to what is said in (3) below, the *Briamore* decision [1986] 1 W.L.R. 1429 is good law.
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> (3) If, however, in such a last mentioned case the other party or his solicitor either (a) has procured inspection of the relevant document by fraud, or (b) on inspection, realises that he has been permitted to see the document only by reason of an obvious mistake, the court has the power to intervene for the protection of the mistaken party by the grant of an injunction in

exercise of the equitable jurisdiction illustrated by the *Ashburton, Goddard* and *Herbert Smith* cases. Furthermore, in my view it should ordinarily intervene in such cases, unless the case is one where the injunction can properly be refused on the general principles affecting the grant of a discretionary remedy, for example, on the ground of inordinate delay: see *Goddard's* case [1986] 3 W.L.R. 734, 745E-F per Nourse L.J.

12 *Guinness Peat* is currently the main authority on what can be done when a document has been disclosed by mistake. It considered most of the earlier cases on this issue. It dealt only with privileged documents and made no mention of documents that were irrelevant but had been put in the list by mistake. The other cases cited, the *CH Breazer* and *Briamore* decisions, also dealt with the mistaken disclosure of privileged documents. In *Briamore*, however, Hoffmann J made some comments which could be regarded as referring not only to privileged documents but to other documents that had been mistakenly disclosed as well. Hoffmann J, however, did not indicate in his judgment that the list could be amended so as to entirely delete such documents from it. What he said was that there may be "an objection to production on the grounds that production would not be justifiable within that rule [*ie* O 24 r 13] and not simply on the ground of privilege" (at p 1431).

13 The cases therefore indicate that before inspection, a party may apply to amend his list of documents by moving some documents from part 1 of Schedule 1 to part 2 of the same schedule. Additionally, even after inspection, if there has been fraud or it is clear that inspection of a privileged document was given by mistake, the party who saw it may be injuncted from making use of the knowledge gained from that document. The cases also suggest that where documents that are not privileged have been included in the list by mistake the listing party may object to producing them for inspection. That is the remedy he can ask the court for to correct his mistake. There is no suggestion, however, anywhere that he can apply to have the documents entirely deleted from the list. It will be up to the court to decide whether the documents should be produced for inspection or not and the court's decision would depend on the relevance of the documents to the issues in the action.

14 In this instance, there were two types of amendments to be made: those involving documents for which privilege was asserted and those involving documents which were alleged to be irrelevant. As far as the privileged documents were concerned, I decided after hearing the arguments whether the same were privileged or not and allowed or disallowed amendment accordingly. As far as the "irrelevant" documents were concerned, my view was that I could not and should not permit amendment of the lists to remove these documents. If the documents were truly irrelevant, however, they need not be produced for inspection and therefore I adjourned the matter so that I could inspect the documents and decide on relevance. In view of the number of documents involved, I gave directions for the preliminary sorting exercise I refer to in [4(d)] above.

Item 442

15 In the affidavit that he filed to support the applications made by himself and the fifth defendant to amend their supplementary lists of documents, the first defendant explained his reasons for his objection to produce document no. 442 as follows:

(i) On 18 January 2006, the Plaintiffs herein sent an e-mail to the other directors of the 5th Defendants, stating that "*the [5th Defendants] is insolvent*" and alleging:

"It is now clear that the [5th Defendants'] current liabilities exceed its current assets. In view of that, the [5th Defendants] should not continue to trade. The Directors owe a duty

to creditors to conserve the assets of the [5th Defendants].

We will not participate in or agree to any act or decision which may be construed as allowing the [5th Defendants] to continue trading"

(ii) The Plaintiffs' above e-mail is pleaded in paragraph 12(d) of the Plaintiffs' Statement of Claim filed on 7 July 2006 in this Suit. The central dispute in this Suit concerns the issue of whether the 5th Defendants was insolvent as of December 2005 and should cease trading – the Plaintiffs' position was that the 5th Defendants was insolvent and should cease trading, but that was denied by all the Defendants.

(iii) The Plaintiffs' above position led to operational difficulties on the part of the 5th Defendants – e.g. the 2nd Plaintiff (George Ser Song Cheh) refused to sign certain documents to authorize payment by the 5th Defendants (see my e-mail to the directors of the 5th Defendants dated 19 January 2006 and the 2nd Plaintiff's reply dated 19 January 2006). The 2nd Defendant was concerned about the operational difficulties suffered by the 5th Defendants and disagreed with the position taken by the 2nd Plaintiff (see the 2nd Defendant's e-mail to the other directors of the 5th Defendants dated 19 January 2006). … S/No. 42 is an e-mail dated 3 March 2006 from the 5th Defendants' Chief Financial Officer Rainer Gumpert to the 2nd Defendants' solicitor (Sean Yu Chou), the 2nd Defendant and I *(sic)* communicating certain matters to the 2nd Defendant and his solicitor, in contemplation of litigation.

16 Counsel for the first defendant submitted that item 442 was clearly privileged because it was sent in contemplation of litigation. This submission was echoed by counsel for the fifth defendant who pointed out that the test to be applied was that enunciated by Taylor LJ in *Balabel v Air India* [1988] Ch 317 as follows:

This case raises an important point concerning legal professional privilege. Broadly, the issue is whether such privilege extends only to communications seeking or conveying legal advice, or to all that passes between solicitor and client on matters within the ordinary business of a solicitor. …

[T]he test is whether the communication or other document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege … There will be a continuum of communication and meetings between solicitor and client … **Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach**. A letter from the client containing information may end with such words as "please advise me what I should do". But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.

It may be that applying this test to any series of communications might isolate occasional letters or notes which could not be said to enjoy privilege. But to be disclosable such documents must

be not only privilege-free but also material and relevant. Usually a letter which does no more than acknowledge receipt of a document or suggest a date for a meeting will be irrelevant and so non-disclosable … (Emphasis added)

17 Counsel submitted that the e-mail was sent in the context of a divided board of directors of the company. It was because of the operational difficulties caused by the position taken by the plaintiffs that Rainer Gumpert, the CFO of the Company, was communicating with the second defendant, another director of the Company, and his solicitor. Therefore, he submitted, the communication between Rainer Gumpert and the solicitor was clearly for the purpose of obtaining legal advice and it must necessarily be privileged. Further, there was a common interest between the management of the company and the majority directors comprising, *inter alia*, the second defendant. By virtue of the majority decision of the board of the company, the management was obliged to continue trading. This was the opposite position to that taken by the plaintiffs who were of the view that the company was insolvent and should cease trading.

18 The plaintiffs submitted that it was wrong of the defendants to suggest that this e-mail was sent "in contemplation of litigation". At the time of the e-mail in March 2006, there were no proceedings in progress. Prior to March 2006, the only thing that the plaintiffs had done was to send the e-mail of 18 January 2006 which alleged that the Company was insolvent. It was an exaggeration on the part of the defendants to suggest that that one e-mail caused the second defendant to contemplate litigation. The plaintiff further argued that there was no suggestion here that the e-mail contained any advice. It was an e-mail sent from Mr Gumpert to the first and second defendants dealing with issues on which, among other things, the second defendant himself wished to seek legal advice. It was copied to the second defendant's lawyer so that the latter could subsequently give the second defendant legal advice. In the plaintiffs' submission, the communication should be treated as a communication from the Company to the second defendant which provided him with certain information on which he wanted legal advice and should be disclosed as otherwise privilege would be used to cloak the directors' own dealings with the Company.

19 I accepted the plaintiffs' submission on this point. From the circumstances, it did not appear to me that item 442 was privileged. First, no legal proceedings had been threatened as yet. Second, the e-mail apparently dealt with operational problems in the Company and those were matters which all directors had a right to know about, not just the first and second defendants. The plaintiffs, even if either of them had been the cause of the problems, were entitled to know what consequences their actions had had. Communications between the CFO of the Company and some of its directors should not be withheld from other directors. The fact that that one director might want to seek legal advice on the issues raised by the e-mail would not make the e-mail itself privileged in this context where all directors of the Company were entitled to know what was happening. This was a different situation from that contemplated in the *Balabel* case. It was not a communication between solicitor and client. It was information given to two persons and copied to the lawyer of one of them so that he could take advice on it. The person giving the information (by this I mean the Company) was not a party to any litigation and was not seeking legal advice for itself, nor was this e-mail sent to the Company's own lawyer in the course of correspondence on a litigious matter.

20 I also accepted the plaintiffs' argument that there was no common interest between the management and the second defendant. This was confirmed by the second defendant in his affidavit dated 11 October 2007. In para 10 of the same, he said "[n]otwithstanding the Plaintiffs' objections, the 5th Defendant's management team was obliged to continue with the 5th Defendant's business and trading activities in accordance with the decision of the majority of the board of directors". The second defendant was part of the majority making the decision and the management had no choice but to comply with that decision. The fact that the management was required to obey the majority

directors did not give it a common interest with the majority directors.

21 For the reasons given above, I ordered item 442 to be disclosed.

The 16 documents (S/Nos 74, 81, 86, 88, 97, 104-106, 139, 168, 170-173, 178 and 189)

22 The Company has made a claim against Holland Leedon Pte Ltd ("HL") arising out of a sale and purchase agreement made in June 2004 whereunder HL sold its business and assets to the Company. This claim is currently being resolved by arbitration proceedings between HL and the Company. The 16 documents in dispute are, allegedly, related to this claim.

23 The first defendant explained in his affidavit how the 16 documents came into existence. He stated that by an e-mail dated 30 July 2005 ("the 30 July e-mail"), he wrote to several members of the Company's senior management and staff to direct them to proceed to complete their investigations and collate the necessary documents and information in order to make a claim against HL for, *inter alia*, breaches of warranties pursuant to the sale and purchase agreement. The sale and purchase agreement provided that in the event the Company wished to make such a claim, it had to notify HL of its claim by 30 September 2005 in order to secure the sum of $25m which was being held in escrow as security for the Company in the event that a claim for breaches of warranties was made. According to the sale and purchase agreement, if HL was not notified of such a claim by 30 September 2005, the sum of $25m was to be released to HL.

24 According to the first defendant, after he sent out the 30 July e-mail, various members of the management and staff of the Company sent out e-mails to each other. These e-mails are the 16 documents for which privilege is claimed. He asserted that the e-mails were sent out in the context of the contemplated litigation against HL (subsequently commenced in SIAC Arbitration No. ARB068/DA17/05). They related to the internal investigations and collation of documents and information that took place in order to substantiate the Company's claim against HL. In the arbitration proceedings, the Company had, subsequently, asserted that the documents were privileged.

25 The first defendant stated that he had been advised that the documents were also privileged as against the plaintiffs herein in view of the fact that the plaintiffs are directors and the majority shareholders of HL. Additionally, the plaintiffs have filed substantive witness statements in the arbitration on behalf of HL. Finally, the issue of the Company's warranty claims against HL is not a matter which is in dispute in this action.

26 In the plaintiffs' view, the 16 e-mails are documents that would simply show the cost of regularising various aspects of the Company's business. The documents were created to help the Company quantify the costs of certain work and there was no reason why disclosure should not be given. At the time the e-mails were exchanged, no solicitors had been appointed by the Company. It was not until 15 September 2005 that the board passed a resolution to authorise the appointment of solicitors to pursue the warranty claim. The accounting experts too were not engaged until September 2005.

27 The plaintiffs submitted that since the documents simply showed whether or not costs were incurred to bring various aspects of the Company into purported regulatory compliance, they were not privileged. If costs were not incurred then there would be no basis for the Company's claim for breach of warranty. Whether or not the claim for breach of warranty was a bona fide claim was an issue that was directly in dispute in this action. One of the main issues in this action is whether the Company was or is insolvent. One of the grounds on which the plaintiffs believed that the Company was insolvent was the fact that it owed about $12m to HL. In response to this, the Company had asserted

that it had a bona fide claim against HL for about $34m for breaches of warranty under the sale and purchase agreement and since its claim exceeded the alleged indebtedness to HL, that indebtedness would not be payable in any event. The plaintiffs, however, do not believe that the claim for breach of warranty is a bona fide one and that is why that claim is directly relevant to establishing the financial status of the Company and is clearly a matter which is in dispute in this action.

28 The plaintiffs also submitted that the court had to consider the dominant purpose of the litigation. Even if the litigation was part of the reason for the creation of the documents, it was not the main reason. The main reason was to quantify certain costs and not to obtain legal advice. The plaintiffs submitted that the main reason appeared from a perusal of the 30 July e-mail. The heading of the e-mail was "Cost to Comply". This heading clearly reflected the author's (first defendant's) intentions in the matter. His intention was to urgently investigate and obtain documents to quantify the costs of bringing the Company into purported compliance for an internal review. These costs would have to be incurred by the Company even if it did not have a claim for breach of warranty against HL.

29 The fifth defendant, however, submitted that the dominant purpose of the 30 July e-mail was to procure the collation of documents and investigation of information in order to bring the claim against HL. Counsel pointed out that the e-mail was sent to senior staff and management, in particular Mr Toh, the head of human relations, Mr Thava Narayanasamy, head of quality assurance, the CFO, Mr Gumpert and Ms P Goh, head of purchasing. It was stated explicitly that this was a top priority matter. If the problem was just having to rectify certain irregularities, why was there the urgency? The urgency was explained by the deadline on the claim provided for by the sale and purchase agreement. Unless notice of the claim was given by 30 September 2005, the sum would be released and that was why the e-mail was so urgent. The e-mail also stated that the purpose of obtaining the information was to "claim money back from the escrow account, as part of the sales agreement". Then too, counsel pointed out, if one considered the type of information required, it was clear that it was needed for litigation. For example, both item 3 which related to the cost of bringing the Woodlands and Senoko factories into compliance with the EHS regulations and item 4 relating to the equipment were items that had been specifically warranted in the sale and purchase agreement. Then, item 6 included items that were not costs that the Company had to incur but were losses that the Company had suffered by reason of the breaches of the agreement. Further, the last paragraph of the e-mail stated that the compiling of the information had to be completed by 12 August 2005 "with all supporting documents". The first defendant would not have asked for all the supporting documents if he had simply wanted to find out the costs of compliance. Clearly he required the documents to support the Company's claim against HL. The fact that the e-mail was headed "Cost to Comply" was misleading as a reading of the e-mail would show that this was not its true purpose. Thus, counsel submitted, the 16 documents which were created as a result of the July 30 e-mail would be privileged.

30 Having read the 30 July e-mail carefully, I accepted the fifth defendant's submissions. I agreed that the main purpose of the e-mail was to collate evidence to support the Company's claim for breach of warranty. Whether the Company had a good claim or not was not the point. The point was that documents and information were being collated that were relevant to the claim and could, hopefully, substantiate it to the satisfaction of the tribunal. The fact that some of the items claimed might have to be spent by the Company in any case in order that it could bring its business into compliance with various regulatory regimes would not, in my view, take away the protection of privilege from the 16 documents. The 16 documents might also in the future be used by the Company in its financial planning but the reason that the documents were brought into existence at the time they were was so that the Company could evaluate and substantiate its claim. As I saw it, this was the predominant purpose of the creation of the documents. The Company was not simply assessing

costs that had to be incurred but working towards mounting its claim so that it could support its right to the moneys in escrow. I therefore upheld the assistant registrar's decision that the documents were privileged.