Ching Mun Fong *v* Standard Chartered Bank
[2012] SGCA 38

Case Number : Civil Appeal No 120 of 2011

Decision Date : 26 July 2012

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Andrew Phang Boon Leong JA

Counsel Name(s) : Suresh s/o Damodara (Damodara Hazra LLP) for the appellant; Patrick Ang, Mohamed Reza and Alina Chia (Rajah & Tann LLP) for the respondent.

Parties : Ching Mun Fong — Standard Chartered Bank

Civil procedure – Discovery of documents – Pre-action discovery

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2012] SGHC 5.]

26 July 2012 Judgment reserved

Chao Hick Tin JA (delivering the judgment of the court):

Introduction

1 This appeal relates to an application by the Appellant for pre-action discovery against the Respondent in contemplation of an action in contract and/or in tort to be commenced by the former against the latter arising out of two disputed transactions between the parties. The application was first dismissed by an Assistant Registrar, and later on appeal, by a High Court judge ("the Judge"). This is the Appellant's appeal against the Judge's decision.

Facts

2 The Appellant is a client of the Respondent bank. Their relationship began on 4 August 2009 when the Appellant opened a private banking account with the Respondent. [note: 1] On 27 and 28 August 2009, the Appellant gave instructions to enter into two Commodity-Linked Premium Current Investments ("CPCI"). [note: 2] These transactions are the source of the present dispute between the parties.

3 According to the Respondent, each CPCI entailed the investment of a quantity of gold (expressed as "XAU", a unit of measurement of gold) by the Appellant for a stated period of time. [note: 3] At the end of that period, the Appellant would receive the principal sum with interest. However, this would not necessarily be returned in XAU. In consideration for the interest received, the Appellant sold a currency option to the Respondent giving the latter the right to make repayment in XAU or in US Dollars upon the maturity of the CPCI. In effect, by using a pre-determined conversion rate stipulated in the CPCI contracts, the transactions allow the Respondent to hedge against increases in gold prices. As events transpired, the Respondent exercised both options and the Appellant was repaid in US Dollars. [note: 4]

4 The Appellant appears to have a different understanding of the CPCIs. A letter from the Appellant to the Respondent after the maturity of the CPCIs suggests that the Appellant was under

the impression that it was she, the customer, who had the option to redeem the investments either in XAU or US Dollars. [note: 5] Subsequent letters show that the Appellant expected her account to be maintained in gold. [note: 6] This was said to be market practice, as the Appellant had never had her gold holdings unilaterally converted into other currencies by other banks before. Following a period of communication between the parties, the Appellant in October 2010 made demands for the restitution of her gold holdings. [note: 7]

5 On 25 November 2010, Messrs Damodara Hazra LLP, acting for the Appellant, requested the Respondent to furnish them with all account opening documentation as well as any documents which the Appellant had executed in respect of the transactions with the Respondent. [note: 8] The Respondent did not produce the documents requested.

6 On 1 March 2011, the Appellant applied under s 47 of the Banking Act (Cap 19, 2008 Rev Ed) for the Respondent to deliver to the Appellant's solicitors the following: [note: 9]

(i) Complete set/s of account opening forms (including but not limited to those relating to Account no. 108518-1) including the terms and conditions thereof, which the Plaintiff has or may have had with the Defendant;

(ii) All records, including mechanical, audio, written and computer records of the purported trades effected by the Defendant in respect of any or all of the Plaintiff's accounts with the Defendant for the dates 29 June 2010, 1 July 2010 and 2July 2010; and

(iii) All records, documents, memos and correspondence related to CPCI Deal Nos. 782251 and 783476 respectively.

7 The Respondent, through its solicitors, responded by providing the Appellant with the documents it thought the Appellant was entitled to. [note: 10] The only outstanding documents or materials which the Appellant still seeks are those referred to in [6](iii) above.

8 The application was heard by Choo Han Teck J, who ordered that it be amended to one for pre-action discovery under Order 24 Rule 6 (O 24 r 6) of the Rules of Court (Cap 332, R5, 2006 Rev Ed). The Appellant accordingly filed an amended application on 5 July 2011. [note: 11] This was first dismissed by the AR and later by the Judge.

Decision below

9 The Judge noted that the Appellant was seeking only the voice-logs of the communications which she had with the Respondent's representatives in relation to the two CPCI deals. The Judge discussed the law on pre-action discovery, noting that every application for discovery must meet the test of necessity as provided under O 24 r 7, which also defines the scope of the court's discretion. Necessity has to be understood in the light of the purpose for which pre-action discovery is sought, which is to assist a plaintiff, who suspects that he has a case against the other party, to obtain the necessary information to allow him to commence proceedings.

10 The Judge reviewed a number of cases which showed that pre-action discovery would only be granted where the would-be plaintiff did not know if he had a basis on which to bring a claim. On this approach, pre-action discovery would appear to apply only for the limited purpose of allowing a potential plaintiff to obtain the facts and materials needed to mount a claim. It would not be granted

if the plaintiff already knows his cause(s) of action and is not otherwise constrained from commencing proceedings. Nor would an application be granted if its purpose is to enable a potential plaintiff to assess or augment the strength of his claim.

11 Returning to the present case, the Judge held that the Appellant's application for discovery of the voice-logs was without justification. Based on the contract between the parties and the Appellant's own personal knowledge of what transpired during the conversations with the Respondent's representatives, the Appellant was more than able to plead her case for breach of contract and/or the tort of negligence. The proper approach for the plaintiff to adopt would be to first commence proceedings and then avail herself of the ordinary processes of general and specific discovery. The Judge observed that, given the nature of the dispute between the parties, the voice-logs would likely have to be produced in post-action discovery. It was therefore not necessary for pre-action discovery to be granted.

12 The Appellant sought to reinforce her application for pre-action discovery by relying on the Respondent's General Terms as well as s 47 of the Banking Act. The Judge noted that both the General Terms and s 47 did not really lend support to the Appellant's application for pre-action discovery. The Judge also observed that the Rules of Court formed the "port of call" for parties seeking discovery and s 47 could provide no relief where the requirements stipulated in the Rules are not met.

Arguments of parties

13 The Appellant submits that the Judge was incorrect in finding that pre-action discovery was not necessary. The Appellant contends that she is not in a position to evaluate whether she has a viable claim against the Respondent. She is also unable to plead her case without the voice-logs as pleadings must contain sufficient particulars and allegations of fact should not be made without reference to evidence. The Appellant further asserts that pre-action discovery should be granted where the documents sought are shown to be relevant to a potential claim and that s 47 of the Banking Act also aids in her application. The Appellant accordingly asks for pre-action discovery in respect of the voice-logs.

14 The Respondent submits that there are no grounds to disturb the Judge's dismissal of the Appellant's application. The Respondent clarifies that the requirement of relevance is separate from that of necessity, and that both must be satisfied in order for an application to succeed. The Respondent reiterates that the Judge's observations on O 24 r 7 are correct, as is the Judge's application of the law to the present case. In particular, the Respondent asserts that the Appellant has sufficient information to institute proceedings and to plead her case based on the documentary records already in her possession. Indeed, the Appellant had in earlier correspondence expressed the intention of proceeding with a claim in court. In the circumstances, the voice-logs can hardly be regarded as necessary for the Appellant to commence proceedings.

Issue before this Court

15 The sole issue in the present appeal is whether the Appellant has made out a case for discovery to be ordered and this in turn raises the question as to whether the requirement of "necessity" for pre-action discovery prescribed under O 24 r 7 has been met.

The law on pre-action discovery

16 The power of the Court to order pre-action discovery stems from s 18(2) of the Supreme Court

of Judicature Act (Cap 322, 2007 Rev Ed) which provides that the High Court shall have the powers set out in the First Schedule. Paragraph 12 of the First Schedule states:

> **Discovery and interrogatories**
>
> 12. Power before or after any proceedings are commenced to order discovery of facts or documents by any party to the proceedings or by any other person in such manner as may be prescribed by Rules of Court.

17 The exercise of the power of the court to grant pre-action discovery must therefore be in accordance with the Rules of Court. The relevant parts of the Rules of Court are:

> **6. Discovery against other person (O.24, r. 6)**
>
> (1) An application for an order for the discovery of documents before the commencement of proceedings shall be made by originating summons and the person against whom the order is sought shall be made defendant to the originating summons.
>
> (3) An originating summons under paragraph (1) ... shall be supported by an affidavit which must –
>
> > (a) ... state the grounds for the application, the material facts pertaining to the intended proceedings and whether the person against whom the order is sought is likely to be party to subsequent proceedings in Court;
> >
> > (b) ... specify or describe the documents in respect of which the order is sought and show, if practicable by reference to any pleading served or intended to be served in the proceedings, that the documents are relevant to an issue arising or likely to arise out of the claim made or likely to be made in the proceedings or the identity of the likely parties to the proceedings, or both ...
>
> **7. Discovery to be ordered only if necessary (O. 24, r. 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 the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs.

18 It would be apparent from O 24 r 6(3) and r 7 that the applicant must satisfy both the requirements of relevance (r 6(3)) and necessity (r 7) to succeed in an application for pre-action discovery. These are two separate and distinct requirements. However, there is a degree of tension in the way these two rules are formulated. Rule 6(3)(a) requires that an applicant possess grounds for making the application as well as the material facts pertaining to an intended claim. Rule 6(3)(b) presupposes that an applicant knows the issues which are likely to arise out of the possible claim in requiring that the relevance of the documents sought to be disclosed be shown. In contrast, r 7 states that discovery is to be ordered only if necessary and this appears to suggest that there is some gap in the knowledge of the applicant which must be filled. It will be helpful for this tension in the level of an applicant's knowledge required under the Rules to be borne in mind when referring to case law, particularly English cases.

19 The law on pre-action discovery was considered by this court in *Kuah Kok Kim v Ernst & Young* [1996] 3 SLR(R) 485 ("*Kuah Kok Kim*") where the court noted its objectives (at [38]):

> What then is the scope of pre-action discovery? This was first laid down in *Dunning v Board of Governors of the United Liverpool Hospitals* where Lord Denning MR stated:
>
> > One of the objects of the section is to enable the plaintiff to find out – before he starts proceedings – whether he has a good cause of action or not. This object would be defeated if he had to show – in advance – that he had already got a good cause of action before he saw the documents.

20 However, the Court did not address what constituted a "good cause of action". Nevertheless, the Court did opine, bearing in mind the relevance requirement under r 6(3) as well as the English cases dealing with the matter, that (at [31]):

> It can be seen from the tenor of the cases that where pre-action discovery is sought, the plaintiff has a duty to set out the substance of his claim to enable a potential defendant to know what the essence of the complaint against him is. *This is because in the nature of pre-action discovery, the plaintiff does not yet know whether he has a viable claim against the defendant, and the rule is there to assist him in his search for the answer.* Thus the safeguards specified in the rules are to ensure that the plaintiff is not allowed to take advantage of the rules merely to enable him to go on a fishing expedition.
>
> [emphasis added]

21 Thus, the Court of Appeal appears to have treated the words "viable" and "good" interchangeably (see also paragraph [57] of the judgment, where the Court found that the documents sought in that case would assist the appellants in deciding whether they had a *good* cause of action). This suggests that a "good cause of action" is not to be understood as opposed to and on the same continuum as one that is "not as good". Such an understanding would suggest that pre-action discovery may be granted in order to assist a claimant in developing and finessing his causes of action. Rather, a "good cause of action" should be understood as one which is possible to fashion into a claim against a potential defendant, as opposed to a set of facts which does not give rise to any cause of action at all.

22 Like the Judge, the Court of Appeal in *Kuah Kok Kim* regarded the requirement of necessity to be the principle on which the discretion to grant pre-action discovery is based (at [43]). While in *Kuah Kok Kim* the Court did not have to deal at length with the requirement of necessity as the point of contention in that case was not related to r 7 (then r 8), the Court's observations in relation to r 6(3) shed some light on the issue of necessity (at [34] and [35]):

> Although the affidavit should state the cause of action, it is not necessary to give particulars of it, even though it may be desirable. Indeed the rule does not state that particulars of the cause of action must be given. We do not agree with the respondents that "material facts" under r 7A(3)(a) meant all the facts sufficient to constitute the elements of the cause of action.
>
> *If the material facts had to be as precise as those normally pleaded in any cause of action, and if the appellants were in a position to depose to an affidavit to this effect, they could well be in a position to commence proceedings immediately. It would not be necessary to provide a scheme for discovery before action.* We are of the opinion that as long as the appellants stated the facts sufficiently to explain why pre-action discovery was necessary, this was adequate.

[emphasis added]

23 Thus, the scheme of pre-action discovery is to accommodate the situation where a potential plaintiff does not have sufficient facts to commence proceedings. This is consistent with its purpose being to allow a potential plaintiff to determine whether he has a "good cause of action". It follows that pre-action discovery is unnecessary where an individual is in a position to commence proceedings. In this regard, we think the phrase in O 24 r 7, "discovery is not necessary, or not necessary at that stage of the cause or matter" lends weight to this approach.

24 This approach to r 7 has been applied by the High Court in later cases. In *Ng Giok Oh v Sajjad Akhtar* [2003] 1 SLR(R) 375, it was held that the plaintiffs ought to commence the writ action and proceed to discovery in the usual course if the cause of action had already accrued (at [7]).

25 The following observations in *Bayerische Hypo- und Vereinsbank AG v Asia Pacific Breweries (Singapore) Pte Ltd* [2004] 4 SLR(R) 39 ("*Bayerische Hypo- und Vereinsbank AG*")(at [25]) are also pertinent:

> It seems to me that the banks are not constrained from starting proceedings without pre-action discovery. From their contentions, it is obvious that the banks have taken a view as to whether they have a case that APBS is responsible for the loans and whether to plead a case. It has not been said anywhere in the affidavits or in submissions by counsel that without pre-action discovery the banks are unable to plead a case. This is unlike the case of an applicant who is unable to plead a case as he does not yet know whether he has a viable claim against the opponents, and needs pre-action discovery to fill the void or gaps in his knowledge. That is the nature (and I should add, function) of pre-action discovery, and the rule is there to assist him to search for the answer: *per* Lai J in *Kuah Kok Kim* ...

26 It has been said that the last two cases discussed stand for the proposition that (see Jeffrey Pinsler, *Singapore Court Practice 2009*, LexisNexis 2009 ("*Pinsler*") at 632 para 24/6/2):

> ...if the claimant has sufficient evidence to mount a claim, he is not entitled to discovery before proceedings in order to complete his 'entire picture' of the case. He does not have the right to all the evidence before he sues simply because this is not necessary. If it were otherwise, the ordinary processes of general and particular discovery pursuant to O 24 r 1 and r 5 respectively would be rendered otiose.

27 Admittedly, in certain circumstances the line between seeking materials in order to mount a claim and obtaining information to determine whether a claim if mounted could have a reasonable prospect of success can be difficult to draw. The case of *Dunning v Board of Governors of the United Liverpool Hospitals* [1973] 1 WLR 586 ("*Dunning*") provides a good illustration of the difficulty (see also the related discussion at [30] and [31] below). There, the applicant was admitted into hospital for investigation in relation to a cough. Till then she seemed to be in good health and had no other known medical conditions. She was in hospital for 17 weeks and left it in rather poor shape, with impaired memory and difficulty in walking. Subsequently her condition deteriorated. She consulted a physician who wanted to see the medical notes of the hospital in relation to her case. The hospital refused the request. The High Court granted the application. The English Court of Appeal by a majority affirmed it. Lord Denning MR suggested that the notes could contain information pointing to the negligence of the hospital and at 590 he stated, "one of the objects of the section is to enable a plaintiff to find out – before he starts proceedings – whether he has a good cause of action or not". The "section" referred to s 31 of the Administration of Justice Act, 1970, which was later replaced by s 33(2) of the Supreme Court Act 1981. We do not think the word "good" in Lord Denning MR's

statement should be taken to mean "reasonable prospects of success" as on the facts then the applicant would have no idea what her cause of action, if any, would have been. The applicant needed the notes to know how to start, if at all. If a patient goes into hospital for what is a common ailment like cough and comes out very much worse, he must know what went wrong before he can sue. There could well be a simple explanation for all that had happened and there could be no liability to talk about. In the context of *Dunning*, the grant of the pre-action discovery was vital as the applicant had no basis to formulate a claim.

28 It seems to us that the word "good" in the context used by Lord Denning MR should be taken to refer to the state of being in possession of facts sufficient to formulate a claim. Order 24 provides for both pre-trial and the normal post commencement of action discovery. If the object of pre-action discovery also encompasses the object of obtaining evidence to boost one's case, then it would, as pointed out in *Pinsler* (see [26] above), effectively render otiose the provisions for the normal discovery following the commencement of action – r 1 for general discovery following the commencement of action and r 5 for the discovery of specific documents. The pre and post-action discovery processes must necessarily serve different objectives. If the objectives of the two processes are the same, then there would be no reason for the Rules Committee to have provided for them under separate distinct rules.

29 Historically pre-action discovery in Singapore has its roots in English law. Our rules bear similarities to O 24 r 7A of the UK Rules of the Supreme Court (SI 1971 No 1269) formerly applicable in England and Wales. It is for this reason that courts in Singapore have referred to English cases. However, we should add that pre-action discovery in England stemmed from the Administration of Justice Act 1970 (c 31) (UK) which provided only for claims in respect of personal injuries or death. Thus the English rules were for this limited purpose. *Dunning* was such a case.

30 It would be seen from the cases discussed above (see [19] to [25]) that while the Singapore courts have referred to English cases, the approach the courts here have taken in relation to pre-action discovery is more limited. In *Dunning*, James LJ noted at 593:

> Mr. Clark formulates for the court's decision the question: is section 31 available to a person who may have a cause of action, but who, until discovery of documents has been made by the person intended to be sued, does not know whether he has one or not? In my judgment there is no simple unequivocal answer to the question. Section 31 is, by its terms, expressed to provide a way of obtaining disclosure of documents, in certain circumstances and subject to certain safeguards, before the commencement of proceedings. It covers both the situation in which without sight of the documents in question the intending plaintiff may have ample evidence upon which to found a claim, and also the situation in which the documents are the evidence essential to the claim or are evidence without which the claim is not so strong.

31 It can be seen that the question posed to the English Court of Appeal as referred to by James LJ is the very question which has been answered in the affirmative locally. However, while local courts take this to be the limit of pre-action discovery, the English courts envisage a broader role for it to play. On the approach taken in *Kuah Kok Kim*, pre-action discovery would not be available in two of the three situations envisaged by James LJ. While this Court in *Kuah Kok Kim* did note these various situations without disapproving of James LJ's observations, it did so in the context of the relevancy requirement rather than that of necessity, and only to caution against fishing expeditions (at [49] and [50]). It also bears mentioning that although this Court referred to an observation of Lord Denning MR to establish the scope of pre-action discovery, the learned Master of Rolls took the stated purpose to be just one of a number of purposes (see [19] above).

32 In *Shaw v Vauxhall Motors Ltd* [1974] 1 WLR 1035, the English Court of Appeal considered pre-action discovery to be available and desirable in order to enable a potential plaintiff to *decide* if a claim should be brought. The Court was dealing with a case where a claim was dependent on legal aid, and legal aid would be granted or withdrawn depending on the strength of a potential claim in light of the evidence discovered. The Court did not have in mind merely *enabling* plaintiffs to mount a claim. It bears noting that Lord Denning MR, whom it will be recalled also presided over *Dunning* and was the source of the phrase "good cause of action", observed thus in regard to pre-application correspondence and the application for pre-action discovery itself (at 1039):

> All that should be required is that the potential plaintiff should set out in an open letter in general terms his own knowledge, however vague, of how his accident happened. If he does so, and gives information which shows that the reports may well be material, then I think the court may properly order disclosure of them before action brought. That should, I think, be the general practice. *It enables each side to know the strength or weakness of the case before embarking on litigation.* It is particularly useful in a legal aid case, because it *gives the solicitors and counsel better material on which to advise*.
>
> [emphasis added]

33 We should also mention that pre-action discovery in England has been extended beyond cases involving personal injury and death. It is now governed by a new regime set out in s 33 of the Supreme Court Act 1981 (as amended in 1999) and the Civil Procedure Rules (see Matthews and Malek, *Disclosure* Sweet & Maxwell, 3rd Edition, 2007 at p 71 para 3.26) ("*Matthews and Malek*"). In *Black v Sumitomo Corporation* [2002] 1 WLR 1562, Rix LJ, upon reviewing the English authorities prior to the change in the applicable rules, observed (at [68]):

> ... the power to grant pre-trial disclosure was not intended to assist only those who could already plead a cause of action to improve their pleadings, but also those who needed disclosure as a vital step in deciding whether to litigate at all or as a vital ingredient in the pleading of their case.

34 In our view, the English cases which were decided under the regime where pre-action discovery only applied to personal injury or death cases must be viewed with circumspection. Legally aided cases also gave rise to some other considerations and, therefore, should be considered with some care. Our courts have from the earliest stages taken a different approach to pre-action discovery and English cases are consequently of only limited guidance. This is even more so with the change in the regime applicable there. The current English Civil Procedure Rules do not have a provision which is similar to O 24 r 7 (see [17] above).

35 Furthermore, while some English cases under the current Rules would appear not to have required the court to consider the element of "necessity" or the interaction between pre-action discovery and the normal post-action discovery, some do. In *XL London Market Ltd & Anor v Zenith Syndicate Management Ltd* [2004] EWHC 1182, Langley J said that (at [24]) "it is a powerful argument against an order that the applicant can well make a case without disclosure".

36 In the later case of *First Gulf Bank v Wachovia Bank National Association* [2005] EWHC 2827, Christopher Clarke J said (at [17]):

> Taking the evidence as a whole I am not persuaded that without pre- action discovery First Gulf cannot plead a case against FUNB. The tenor of Mr Cooke's original witness statement, including the express statement that the cross examination "*will support a plea that FUNB knew or should*

have known that Mr Kounnou's companies were involved in fraudulent activities", suggests to me that what First Gulf really seek is further material to improve their case and to allow them to be better informed in deciding whether or not to proceed

[emphasis in original]

37 It is also pertinent to note that in *Matthews and Malek*, the authors set out the following as one of the important considerations in determining whether pre-action discovery should be granted (at p 76 para 3.34):

The nature of the injury or loss complained of. The jurisdiction used to be confined to personal injury cases. The expansion beyond personal injury cases means that there is a spectrum of cases in which the extent to which pre-action disclosure is likely to be appropriate varies. A personal injury case in which medical records are sought is at the top of the spectrum and a speculative commercial action, with broad disclosure being sought, is at the bottom.

Application to the present appeal

38 As stated at [6] above, the Appellant's initial application was for three broad categories of documents. However, she is now only seeking the early discovery of the voice-logs of conversations between herself and the Respondent's representatives relating to the CPCIs. [note: 12] Thus, we will consider the application in relation only to the voice-logs.

39 The Appellant contemplates making claims against the Respondent in contract and/or in tort. [note: 13] In particular, the Appellant suggests that the Respondent had breached its contractual obligations and was negligent in failing to advise her of its intentions, the trend in gold prices and what strategies to adopt. Since the Appellant knows what her intended causes of action are and the basis on which they are said to have arisen, the discovery of the voice-logs is not necessary to enable her to institute the intended action. [note: 14]

40 On the Appellant's declared intentions as regards the voice-logs, it is to help her assess, based on the evidence contained in the voice-logs, whether she would be able to substantiate her assertion that the Respondent had failed to properly advise her and in turn failed in its duty to her in contract and/or in tort. [note: 15] In effect, the Appellant is attempting to determine whether she is likely to succeed in her causes of action, as opposed to merely enabling the formulation of her pleadings. In this regard, we would underscore that under O 18 r 7, only facts and not evidence, are to be pleaded. What the Appellant seeks relates to matters of evidence, *viz*, whether the Respondent's officers had given her proper advice. The fact that the Respondent has denied any failure in that regard is a phenomenon which often occurs in civil litigation. The following observation made by the High Court in *Bayerische Hypo- und Vereinsbank AG* is germane (at [26]):

In my judgment, a disbelief of APBS's position itself cannot be a sufficient reason for seeking pre-action discovery. Otherwise, it will result in pre-action disclosure being applied for as a matter of course. That is not what the procedure is intended for. Invariably, cases that make their way to court are founded on a mutual disbelief of each other's perception of things, and a face-off is a situation common in any dispute before the commencement of proceedings.

41 In these circumstances, we hold that the Judge was correct in her decision to refuse the application for pre-action discovery of the voice-logs. It seems to us that the Appellant is, at this point, on a fishing expedition. In the normal course, the appellant would be entitled to have these

discovered after the commencement of action.

42 We would like to observe that there is another general consideration which suggests that this is hardly the sort of a case where pre-action discovery should be granted. We have more or less alluded to this point in our discussion on *Dunning* (see [27] and [28] above). Cases in which pre-action discovery has been ordered have invariably concerned documents which were, from their inception, within the exclusive possession of the respondent. The applicant was from the outset never privy to such evidence (see for example, besides *Dunning*, *Kuah Kok Kim*, *Beckkett Pte Ltd v Deutsche Bank AG Singapore Branch* [2003] 1 SLR(R) 321 and *Asta Rickmers Schiffahrtsagesellschaft mbH & Cie KG v Hub Marine* [2006] 1 SLR(R) 283). Such cases are readily distinguishable from the present case, which concerns a record of the verbal communications between the parties that each must naturally have been equally privy to. While the Appellant has, consciously or not, avoided reference to the contents of the communications in question in keeping with her claim of ignorance as regards such contents, she cannot deny knowledge of what was spoken between her and the Respondent's representatives. Therefore, discovery of the voice-logs cannot be necessary in the same sense as in the past cases in which pre-action discovery was granted. Of course, we recognise that the Appellant may not remember exactly what was spoken or might even have forgotten substantially what transpired in the conversation. But to permit discovery at this stage would amount to allowing an applicant to raid the cupboards of the respondent for the purposes of finding fault, *ie*, a fishing expedition, which is not an object of discovery. Public policy, as reflected in O 24 rr 6 and 7, would frown against such a practice which would only incite or promote litigation.

43 In civil litigation, resolution of factual dispute through oral evidence of the disputants is all too common. In many of these situations, the parties will not have the convenience of voice-logs to aid in the establishment of the truth. It cannot seriously be contended that a potential plaintiff in such a case would as a result be unable to succeed in his claim, let alone be unable to commence proceedings. Yet, the corollary of accepting the Appellant's arguments in the present appeal would be exactly that; it would entail accepting that a claim in which a record of the parties' interactions is unavailable is unviable. This is an amazing and unacceptable proposition. The non-discovery, at this stage, of the voice-logs does not hinder the Appellant in commencing an action.

Section 47 of the Banking Act

44 In this appeal, the Appellant continues to rely on section 47 of the Banking Act ("s 47") in an attempt to strengthen her application. It would be recalled (see [6] and [8] above), that the Appellant first made this application for pre-action discovery pursuant to s 47. It was Choo J who directed that the application should appropriately have been made under O 24 r 6. The Appellant duly complied and made the amendments to the pleadings accordingly. If the Appellant had thought that s 47 was still the relevant provision which governed the application, she should have challenged Choo J's direction, or, if she wished to retain this option, amended the Originating Summons to plead in the alternative. Be that as it may, we will nevertheless examine s 47 to see if it could really assist the Appellant.

45 We will first set out the provisions of s 47.

> **Banking Secrecy**
>
> 47.–(1) Customer information shall not, in any way, be disclosed by a bank in Singapore or any of its officers to any other person except as expressly provided in this Act.
>
> (2) A bank in Singapore or any of its officers may, for such purpose as may be specified in the

first column of the Third Schedule, disclose customer information to such persons or class of persons as may be specified in the second column of that Schedule, and in compliance with such conditions as may be specified in the third column of that Schedule.

As rightly observed by the Judge ([18] of her Grounds of Decision), the object of the section was to loosen the previously tight banking secrecy laws to the benefit of banks and to strike a better balance between operational requirements of banks and the need to preserve customer confidentiality. [note: 16] This is supported both by the Parliamentary Debates (see *Singapore Parliamentary Debates, Official Report* (16 May 2001) vol 73 col 1689 (BG Lee Hsien Loong, Deputy Prime Minister) as well as the wording of the section. Rather than placing an obligation on banks to disclose otherwise secret customer information, the section lifts the obligation of secrecy on banks in the circumstances provided for in the Third Schedule of the Act.

46 It will be noted that under s 47(2) a bank *may*, but need not, disclose customer information in the circumstances provided for in the Third Schedule. Discretion is given to the bank to furnish customer information in the specified circumstances. Row 4(a) of Part I of the Third Schedule provides for disclosure in connection with proceedings between a bank and its customers. However, this does not mean that the bank is obliged to make such a disclosure. This is entirely consistent with the sub-heading to Part I of the Third Schedule, which reads "Further Disclosure Not Prohibited". In our opinion, the Appellant's submission that the Respondent is under an obligation to provide pre-action discovery of the voice-logs by virtue of s 47 is therefore wholly without merit. We do not see how an entirely permissive provision could be read in the way in which the Appellant has contended.

Conclusion

47 In light of the foregoing reasons, we hold that this appeal should be dismissed with costs and the usual consequential orders.

[note: 1] Record of Appeal Volume IIIA page 66, Tan Ailin's First Affidavit dated 26 April 2011 at [10]

[note: 2] Record of Appeal Volume IIIA pages 17 and 18, Ching Mun Fong's First Affidavit dated 1 March 2011

[note: 3] Record of Appeal Volume IIIA page 69, Tan Ailin's First Affidavit dated 26 April 2011 at [15]

[note: 4] *Ibid* at [17]

[note: 5] Record of Appeal Volume IIIA page 10, Ching Mun Fong's First Affidavit dated 1 March 2011

[note: 6] Record of Appeal Volume IIIA pages 11, 19 and 47, Ching Mun Fong's First Affidavit dated 1 March 2011

[note: 7] Record of Appeal Volume IIIA pages 5, 26 and 28, Ching Mun Fong's First Affidavit dated 1 March 2011 at [7]

[note: 8] Record of Appeal Volume IIIA page 34, Ching Mun Fong's First Affidavit dated 1 March 2011

[note: 9] Record of Appeal Volume II page 10, Originating Summons 149 of 2011

[note: 10] Record of Appeal Volume IIIA pages 77 to 79, Tan Ailin's First Affidavit dated 26 April 2011

[note: 11] Record of Appeal Volume II page 13, Originating Summons (Amendment No. 1)

[note: 12] Appellant's Case at [15] and [19]

[note: 13] Appellant's Case at [23] and [39]

[note: 14] Appellant's Case at [7]

[note: 15] Appellant's Case at [37], [39] and [41]

[note: 16] Record of Appeal Volume I, page 14, Grounds of Decision at [18]