

**DALAM MAHKAMAH TINGGI DI SHAH ALAM
DALAM NEGERI SELANGOR DARUL EHSAN, MALAYSIA
[SAMAN PEMULA NO.: BA-24NCvC-691-04/2024]**

Dalam perkara mengenai Aturan 24 Kaedah 7A(1) dan Aturan 24 Kaedah 7A(5) Kaedah-Kaedah Mahkamah 2012, seksyen 25(2) dan perkara 14 kepada Jadual Akta Mahkamah Kehakiman 1964.

DAN

Dalam perkara suatu permohonan penzahiran dokumen pra-tindakan terhadap Defendan untuk pendedahan dokumen dan/atau maklumat.

DAN

Dalam perkara CS Eco Glass Sdn Bhd.

ANTARA

**CS ECO GLASS (M) SDN BHD
(NO. SYARIKAT.: 1206325U/ 201601035384) ... PLAINTIF**

DAN

**CEEKAY SHIPPING SDN BHD
(NO. SYARIKAT: 1377050P/ 202001020730) ... DEFENDAN**

JUDGMENT

Introduction

[1] This is an application by the Plaintiff pursuant to Order 24 rule 7A

of the Rules of Court 2012 for pre-action discovery of documents. The Defendant vehemently objects to this application.

The Overriding Poser

[2] The prevailing issue is whether this is a proper case for this Court to make an order for pre-action discovery under the aforementioned provision.

[3] Arising from this predominant issue are the following two questions, namely, (1) whether the circumstances of the present case fulfill the threshold under Order 24 rule 7A of the Rules of Court 2012; and (2) whether the documents sought are protected by litigation privilege.

The Documents Sought

[4] In its Originating Summons, the Plaintiff sought, inter alia, an order that the Defendant produce to the Plaintiff the following documents and information:

1. a copy of the full and complete survey report in respect of the investigation conducted by the Defendant's surveyor(s) on the damages of the coating glasses carried in Container No.: YMLU6218884, Container No.: CXSU1220457 and Container No.: YMLU6217851 shipped through vessel Gregos with the Bill of Lading No.: CKYPKGJEA70856 ("the First Vessel");
2. a copy of the full and complete survey report in respect of the investigation conducted by the Defendant's surveyor(s) on the damages of the coating glasses carried in Container No.: CKLU2000243 and Container No.: CKLU2000182 shipped through vessel Wadi Bani Khalid with the Bill of Lading No.: CKYPKGJEA70916 ("the Second Vessel");
3. a copy of all the photos, documents, information and/or records provided to and relied on by the Defendant's surveyor(s) in producing the survey report(s) as set out in 1 and 2 above.

[5] It is evident that the documents and information requested by the Plaintiff are precise and have been explicitly outlined.

The Parties and the Background Facts

[6] The Plaintiff, CS Eco Glass (M) Sdn Bhd, was the shipper of cargos containing coating glasses shipped onboard the vessels ‘GREGOS’ and ‘WADI BANI KHALID’.

[7] The Defendant, Ceekay Shipping Sdn Bhd, was the shipping company engaged by the Plaintiff’s freight forwarder and booking agent to ship those cargos to Port Jebel Ali, UAE.

[8] Complaints were made that the coating glasses in some of those containers were damaged.

[9] Following the complaints, surveyors were appointed to represent the Defendant and/or the Defendant’s interests to inspect the alleged damage and to produce the Survey Reports.

[10] The Plaintiff’s solicitors sent notices to the Defendant demanding for the production of a copy of the Survey Reports, and that the Defendant compensate it for its purported loss.

The Parties’ Contentions

[11] In support of its application, the Plaintiff averred that they have satisfied the four requisite elements under Order 24 rule 7A(3) of the Rules of Court 2012, namely, that it has:

1. stated the material facts pertaining to the intended proceedings;
2. stated whether the person against whom the order is sought is likely to be a party in the subsequent proceedings in Court;
3. specified or described the documents in respect of which the order is sought and had shown 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 likely parties to the proceedings; and

4. identified the person against whom the order is sought is likely to have or have had them in his possession, custody or power. (see *Kopitiam Asia Pacific Sdn Bhd v. Modern Outlook Sdn Bhd & Ors* [2019] 10 MLJ 243)

[12] On the test of necessity pursuant to Order 24 rule 8 of the Rules of Court 2012 which has to be satisfied, that is, the disclosure of the documents is necessary either for disposing fairly of the cause or matter or for saving costs, the Plaintiff submitted that it is fact centric in determining whether a discovery order ought to be granted. On this point, the Plaintiff alluded to the cases of *Infoline Sdn Bhd (sued as trustee of Tee Keong Family Trust) v. Benjamin Lim Keong Hoe* [2017] 8 CLJ 554; [2017] 6 MLJ 363; [2017] 4 MLRA 203 (“*Infoline*”) and *Bandar Utama Development Sdn Bhd & Anor v. Bandar Utama 1 JMB* [2018] 5 AMR 321; [2019] 10 CLJ 516; [2018] MLJU 697; [2018] 4 MLRA 345.

[13] In relation to the test of relevancy and necessity, the Plaintiff referred this Court to the case *Ahmad Zahri Mirza v. Pricewaterhousecoopers Capital Sdn Bhd & Ors* [2015] AMEJ 1156; [2015] 7 CLJ 930; [2015] MLJU 878; [2016] 1 MLRH 193 and *Mohammad Ghazi Fatani Est v. Ukhwah Firdausi Travel Sdn Bhd & Anor* [2018] CLJU 1012; [2018] MLJU 775.

[14] The Plaintiff further impressed upon this Court that it is crucial and necessary for the Material Documents to be disclosed at this stage of the proceedings instead of after the commencement of the action. The reasons advanced include, first, the Plaintiff may risk having its claim struck out for lack of particulars since the particulars to the cause of the damages to the cargo are well within the Survey Reports; second, the Plaintiff may have to file amendment application(s) to include additional parties in the event the Survey Reports disclose the involvement of other parties that may contribute to the damages in the course of the shipment; third, the matter would be disposed of fairly and thereby saving cost of all parties if

the Plaintiff is able to assess and formulate an accurate claim against the relevant parties at the early stage of the proceedings; and fourth, there may be potential possibility for negotiations between the relevant parties upon disclosure of the Survey Reports to avoid litigation proceedings.

[15] The Plaintiff drew support from the case of *Wong Jie Min, Adrian & Ors v. Perbadanan Pembangunan Ladang Rakyat Negeri Kelantan & Ors* [2018] AMEJ 1225; [2018] MLJU 1440; [2018] MLRHU 1210, where the High Court had allowed an application for pre-action discovery on the basis that the documents sought will enable the Plaintiff to assess or commence any intended action against the intended parties.

[16] In reply to the litigation privilege point raised by the Defendant, the Plaintiff submitted that the onus lies on the Defendant who refused to disclose the Material Document to prove that the Material Documents are subject to litigation privilege, citing the authority of *Sufian bin Mohamad v. Pengarah, Jabatan Bomba dan Penyelamat Malaysia Negeri Sarawak* [2020] 1 AMR 933; [2019] CLJU 2061; [2019] MLJU 2057; [2020] 1 SSLR392.

[17] Most importantly, it was contended by the Plaintiff that “the evidence before this Honourable Court shows that the Defendant did not obtain the Material Documents for the dominant purpose of litigation”. The Plaintiff further submitted that the facts in the present case are similar to those in *Brink’s Inc and another v. Singapore Airlines Ltd and another* [1998] 2 SLR(R) 372 (“*Singapore Airlines*”) where a report was obtained out of a standard routine.

[18] In opposing the Plaintiff’s application, the Defendant submitted that the requirements set out in Order 24 Rule 7A and Rule 8 are not the only legal requirements that an applicant has to satisfy for a pre-action discovery.

[19] The Defendant argued instead that:

- a pre-action discovery is to enable the plaintiff to obtain

information or evidence to formulate a claim and to determine whether it has a viable cause of action. The application is not for the plaintiff to fish for additional evidence to further strengthen its case;

- the plaintiff is not entitled to discover evidence in a pre-action discovery application because what must be pleaded to commence an action is material facts and not evidence;
- the threshold test in a pre-action discovery application is extremely high, higher than the ordinary general and specific discovery application; and
- If an action can be filed without a pre-action discovery, the plaintiff should apply for subsequent discovery orders through the normal process (after the commencement of legal proceedings) to obtain the requested documents;

[20] The Defendant asserted that by merely applying the test of necessity and relevancy, the Plaintiff is “conflating a pre-action discovery with the ordinary process of general and specific discovery. On this point, the Defendant drew heavily upon the *Infoline* case.

This Court’s Findings

[21] The first of two questions that this Court will have to deal with relates to the issue of whether the pre-requisites as laid down in Order 24 rule 7A(3) of the Rules of Court 2012 have been complied with. For convenience, the said rule 7A(3) stipulates as follows:

- (3) An originating summons under paragraph (1) or a notice of application under paragraph (2) shall be supported by an affidavit which shall —
 - a. in the case of an originating summons under paragraph (1), 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; and

- b. in any case, 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, and that the person against whom the order is sought is likely to have or have had them in his possession, custody or power.

[22] The above provision is to be read with rule 8, which provides as follows:

Discovery to be ordered only if necessary (O. 24, r. 8)

8. On the hearing of an application for an order under rule 3, 7 or 7A, the Court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or 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.

[23] After reviewing the cause papers filed in support of this application and considering the background facts and the specific nature of the documents sought, this Court finds no difficulty in concluding that the prerequisites outlined in rules 7A(3) and 8 of Order 24 of the Rules of Court have been met. The Defendant also appeared to have conceded this point. In other words, as in the *Infoline* case, “the parties are in accord on the operation of the applicable provisions of the Rules of Court 2012” and “there is no issue on any procedural non-compliance of the terms of O. 24 r. 7A of the Rules of Court 2012”.

[24] However, as this Court understands, the Defendant’s argument was

that the overarching purpose or scope of pre-action discovery under Order 24 rule 7A is more limited and specific compared to the usual post-action discovery process. The Defendant contended that the primary objective of rule 7A is to assist a party in formulating a claim and determining whether it has a viable cause of action.

[25] As noted, the Defendant heavily referenced the *Infoline* case, where the Defendant submitted in its written submissions and attributed the following passage to the Court of Appeal:

8. What then is the purpose of pre-action discovery? Pre-action discovery is to assist a plaintiff who ‘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’. The word ‘viable’ must not be understood to mean that the plaintiff is entitled to pre-action discovery for the purposes of augmenting his case or to ‘complete his entire picture of the case’. If that was the case, the ordinary processes of general and specific discovery ... would be subverted... pre-action discovery serves a somewhat more modest purpose: it is merely to allow the plaintiff who suspects he has a case to obtain the necessary information to commence proceedings.

[26] The paragraph quoted above was incorrectly attributed to the Court of Appeal in *Infoline*. In fact, it originates from the Singapore decision in *Ching Mun Fong v. Standard Chartered Bank* [2012] 2 SLR 22, one of many cases cited by the Court of Appeal. Notably, Mary Lim JCA (as her Ladyship then was) specifically cautioned that “the cases cited must be approached with some degree of caution”.

[27] This Court reminds counsel of the Federal Court’s admonition in *Dato’ Azizan bin Abd Rahman & Ors v. Concrete Parade Sdn Bhd & Ors* [2024] 3 AMR 709; [2024] 5 CLJ 193; [2024] MLJU 690; [2024] 4 MLRA 187. In no uncertain terms, Nallini Pathmanathan FCJ stated:

[204] Given the growing tendency to cite authorities which are not relevant, or to fail to point out salient differing features such as the

overruling of a decision, such instances of misleading should not simply be ignored, or mentioned in passing, but should be subject to censure and disciplinary action.

[28] Returning to the issue for determination, this Court is of the considered view that while Order 24 rule 7A may be invoked to enable a party to determine whether it has a viable cause of action, the scope and intent of pre-action discovery cannot be limited to that singular objective.

[29] Every application must be approached against the factual matrix of the given case. As in the *Infoline* case, where the pre-action disclosure sought by the respondent was granted, this too is a case where the Plaintiff's application for pre-action discovery should be allowed.

[30] The basis of this decision is premised on justice, necessity and expediency and these are in line with the overall intent of Order 24 rule 7A of the Rules of Court 2012.

[31] This Court shall now deal with the question of whether the documents sought are protected by litigation privilege.

[32] The test is whether the Defendant had obtained the Material Documents for the dominant purpose of litigation (*Wang Han Lin & Ors v. HSBC Bank Malaysia Bhd* [2017] 6 AMR 148; [2017] 10 CLJ 111; [2017] MLJU 1075; [2017] MLRAU 299).

[33] On this vital issue of litigation privilege, it is apposite to recap the background facts and the decision in the *Singapore Airlines* case. In that case, the appellants commenced an action against the respondents in respect of the loss of gold bars by robbery. The first respondent commissioned a report of investigation on the robbery from a firm of loss adjusters in which the appellants sought discovery of the report.

[34] The Singapore Court of Appeal found that the respondents had failed to prove that the report was obtained for the dominant purpose of obtaining legal advice at a time when litigation was in reasonable prospect. In respect of the issue on litigation privilege, the Singapore

Court of Appeal held that:

[6] It is established law that communications between the client and third parties attract legal privilege only if the document was obtained for the dominant purpose of obtaining legal advice upon pending or contemplated litigation

[7] ... The privilege clearly should not attach to all professional advice taken merely on the basis that it is normal or procedural for the insurer to instruct such reports to be made in the immediate aftermath of an incident and for such reports to be forwarded to their solicitors

...

[10] Before we turn to examine the first respondents' purpose (acting through their insurers) in instigating the report, reference should be made to the appellants' reliance on the Federal Court of Canada's unreported decision in *Re The Philippine Victory* (26 November 1991) (unreported). The plaintiffs in that case had applied for the defendants to produce all survey reports prepared with regard to alleged damage to cargo. The reports were found to be made in the ordinary course of cargo damage soon after discharge of cargo and were therefore not privileged. One of the affidavits considered by the court affirmed that it was the standard routine of the P & I Club to instruct a surveyor to examine the cargo and vessel in order to obtain information of the damage, so as to allow the P & I Club to consider coverage and possible defence of a claim. This evidence was similar to the appellants' argument before us, that the Graham Miller report was commissioned as part of standard routine and should not, for that reason alone, be privileged from discovery.

[35] In the Defendant's own submission, it averred as follows:

"Given that Ceekay was involved in shipping the coating glasses, there was and has been a reasonable prospect of litigation against

Ceekay.”

It further went on to assert that:

“The Survey Reports were thus prepared *inter alia* to determine the cause of damage of the coating glasses with a reasonable prospect of litigation in mind”.

[36] The use of the terms such as “reasonable prospect” and “*inter alia*” negate the conclusion that the Survey Reports were prepared for the dominant purpose of litigation.

[37] As in the *Singapore Airlines* case, this Court is of the view that the Survey Reports sought by the Plaintiff had been obtained by the Defendant “out of a standard routine” and not for the dominant purpose of litigation. As such, the defence of litigation privilege is not available to the Defendant.

[38] On the issue of costs, the Defendant submitted that based on Order 24 rule 7A(9) of the Rules of Court 2012, it is entitled to costs on an indemnity basis as the relevant rule states that “where an application is made in accordance with this rule for an order, the person against whom the order is sought shall be entitled to his costs of the application, and of complying with any order made thereon on an indemnity basis”. This is in fact true except that the provision is preceded with the phrase “unless the Court orders otherwise”.

[39] The Plaintiff’s application is allowed with costs of RM3,000.

Dated: 13 NOVEMBER 2024

(CHOONG YEOW CHOY)

Judicial Commissioner

High Court of Malaya

Shah Alam

Counsel:

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For the defendant - Theodore Wong Siong Lung; M/s Tommy Thomas