IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC(I) 13

Suit No 5 of 2018 (Summons No 47 of 2019)

Between

(1) Arovin Ltd
(2) Vijay Goradia

… *Plaintiffs*

And

Hadiran Sridjaja

… *Defendant*

GROUNDS OF DECISION

[Civil Procedure] — [Production of documents] — [Lack of sufficient relevance to case or materiality to outcome]
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Introduction

1 This case concerns, relevantly to the present application ("the Application"), a claim by the Plaintiffs against the Defendant for 75% of various liabilities which have arisen when Jurong Aromatics Corporation Pte Ltd ("JAC"), a joint venture company, went into receivership. EDB Investments Pte Ltd ("EDBI") is the corporate investment arm of the Singapore Economic Development Board and it had agreed to invest in JAC on terms that it could exit from the investment in JAC.

2 The Plaintiffs, the Defendant, Shefford and EDBI entered into a Put and Call Option Agreement in October 2010 (the "Initial PCOA"). Subsequently it was agreed under a Binding Term Sheet ("BTS") in March 2011 that the 2nd Plaintiff, the Defendant and Shefford would be released from their obligations

under the Initial PCOA and Vinmar Holdings LP ("Vinmar") would provide a guarantee in favour of EDBI to cover certain liabilities. This led to an Amended and Restated Put and Call Option Agreement (the "Amended PCOA") entered into on 18 April 2011 between the 1st Plaintiff, Vinmar and EDBI.

3 The Plaintiffs' case is that the parties agreed that the Defendant and/or Shefford (a company owned and controlled by the Defendant and currently in liquidation) would take delivery and ownership of 75% of the EDBI Shares, while the Plaintiffs would take delivery and ownership of the remaining 25% and, in line with that 75/25 split, the parties agreed on 1 April 2011 by way of a Binding Side Letter Agreement ("BSLA") to share all responsibility, costs and commitments in connection with the EDBI Shares in the same proportion.

4 The Plaintiffs contend that the Defendant and/or Shefford was to bear 75% of all responsibility, costs and commitments in relation to the EDBI Shares, while the Plaintiffs were to bear 25%. On a true construction of Clauses 2 and 3 of the BSLA, the Plaintiffs say that the Defendant and/or Shefford are liable for various payments pursuant to the BSLA but, in breach of the BSLA, the Defendant has failed to make such payments to the Plaintiffs. Those payments include liabilities which arose from the settlement in August 2017 of an arbitration by EDBI against the 1st Plaintiff and Vinmar (the "Settlement").

5 The Defendant disputes any liability under the BSLA and, among other things, the Defendant has alleged that the Settlement is void for offending the public policy against: "upholding contracts affected by maintenance and/or champerty", if it is found that EDBI is aiding the Plaintiffs in the prosecution of this action against the Defendant in return for a share in the fruits of this litigation; and/or "protecting the purity of justice and the interests of vulnerable litigants", given that the amounts payable to EDBI represent a significant

portion of what the Plaintiffs may recover from the Defendant if they were to succeed in this action, so "it is reasonably foreseeable that EDBI would be in a position to influence the outcome of this litigation, when it is not a party to this action and to the [BSLA]."

6 Accordingly, the Defendant says that the Plaintiffs are not entitled to claim against the Defendant based on the amounts payable to EDBI, as allowing the Plaintiffs' claims would be giving effect to a contract that should be made void for being contrary to public policy.

The Application

7 The Application is made under O 110 r 17(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC") which generally provides for production of documents in the SICC in place of discovery under O 24 of the ROC.

8 Under O 110 r 17(2) of the ROC it is provided as follows, relevantly to the Application:

> In an application under paragraph (1), the Court may order the production of documents objected to if –
>
> (a) the request to produce was made in accordance with Rule 15(3); and
>
> (b) none of the following objections apply:
>
> > (i) lack of sufficient relevance to the case or materiality to its outcome;
> >
> > (ii) legal impediment or privilege;
> >
> > …
> >
> > (iv) loss or destruction of the document that has been shown with reasonable likelihood to have occurred;
> >
> > …

> (vii) such considerations of procedural economy, proportionality, fairness or equality of the parties as the Court determines to be compelling.

9 The document production regime in O 110 rr 14 to 21A of the ROC imposes different obligations to those which apply to discovery under O 24 of the ROC. Instead of a party having to search for and give discovery of documents which could (a) adversely affect his own case; (b) adversely affect another party's case; or (c) support another party's case, the obligation of a party is to produce documents requested by the other party under O 110 r 17(2). That obligation is in addition to the obligation under O 110 r 14(1) to provide documents on which a party relies. There are important limitations on the obligation to produce documents. The Court, in considering whether to order production under O 110 r 17(2), has a discretion to decide whether to do so when none of the objections enumerated under r 17(2)(*b*) apply. It follows that the Court will not order production if any of the objections apply. It will not do so, in particular, under r 17(2)(*b*)(i) if the documents requested lack sufficient relevance to the case or materiality to its outcome, or under r 17(2)(*b*)(vii) if there are considerations of procedural economy, proportionality, fairness or equality of the parties as the Court determines to be compelling.

10 For instance, in considering whether there is sufficient relevance or materiality, there will be cases where on a broad test of relevance the documents might be said to have some relevance to the case or a degree of materiality but where the Court determines that there is not sufficient relevance to the case or materiality to the outcome.

11 Further, the requests must be properly focussed on the specific documents or a narrow category of documents. Broad categories, casting a wide

net, will usually not be allowed unless, in specific circumstances, a narrower category within that broad category can easily be discerned by the Court.

12 With those observations in mind, I now turn to consider the Application.

13 The Application is made by the Defendant, who seeks the production of three categories of documents:

(a) Request 1: All documents (including, without limitation, internal documents, meeting minutes, and/or correspondence) relating to the circumstances in which the Defendant and/or Shefford's obligations under the Initial PCOA were finalised.

(b) Request 11: All documents (including, without limitation, correspondence, internal notes, and/or meeting notes) relating to the negotiation of Clauses 4 and 5 of the Settlement.

(c) Request 12: All documents identifying specific examples of cooperation by EDBI and/or relating to any purportedly "reasonable and lawful actions" taken by EDBI thus far in cooperation with the Plaintiffs in the prosecution of their claim against the Defendant, in accordance with Clause 4 of the Settlement or otherwise.

Request 1

Defendant's submissions

14 This Request seeks production of all documents relating to the circumstances in which the Defendant and/or Shefford's obligations under Initial PCOA were finalised. The Plaintiffs have objected to the production of these documents on the basis that they are neither relevant nor material, as: (a)

the Plaintiffs' claims are under the BSLA, and not the Initial PCOA; (b) it would be the documents relating to the circumstances in which the BSLA was finalised that would be material to the dispute, and not those surrounding the Initial PCOA; and (c) the Initial PCOA has already been disclosed.

15 The Defendant does not dispute the points raised by the Plaintiffs, but submits that the circumstances in which the Initial PCOA were finalised remain relevant and material. The Plaintiffs' case is that parties had specifically intended to share all liabilities arising out of the guarantee associated with EDBI's investment in JAC and, given that the Defendant was later removed from his obligations under the Initial PCOA, the BSLA was meant to ensure that the Defendant continued to share a portion of these liabilities at the backend.

16 However, the Defendant contends that the question of who was meant to bear the liabilities arising out of EDBI's investment in JAC is inextricably linked to the question of who was allocated certain offtake agreements in respect of the products to be manufactured by JAC's plant. The Defendant says that he is therefore disputing the Plaintiffs' underlying assertion that parties had specifically intended to share fixed portions of liabilities arising out of the guarantee associated with EDBI's investment in JAC.

17 The Defendant says that the Initial PCOA represents the first time parties had allocated responsibility arising out of the guarantee associated with EDBI's investment in JAC, but the agreement itself is silent as to why and how parties had agreed to this arrangement. Accordingly, he submits that the negotiations leading up to the signing of the Initial PCOA would shed light as to the broader principles governing the allocation of responsibility for the guarantee associated with EDBI's investment in JAC.

18 The Defendant also says that the Plaintiffs have not alleged that pre-contractual negotiations are inadmissible *per se*, which is in itself an acknowledgement that these documents may be probative towards the interpretation of a contract.

19 In the circumstances, the Defendant submits that these documents are both relevant and material for the purposes of this dispute.

Plaintiffs' submissions

20 While the Plaintiffs do not dispute that pre-contractual negotiations may be admissible to assist the Court in contractual interpretation, they submit that the contract to be interpreted in the present case is the BSLA and the Plaintiffs have already disclosed, among other things:

(a) Documents evidencing that the Defendant was unable and/or unwilling to procure that Shefford provide the irrevocable standby letter of credit required under the Initial PCOA;

(b) Documents relating to the circumstances in which parties had agreed to the removal of the Defendant and Shefford as parties to the Initial PCOA;

(c) Documents relating to the circumstances in which the Multi-Products Offtake Volumes and the volumes of orthoxylene and benzene had been allocated to the Plaintiffs and/or their related entities;

(d) Documents that it was the common intention, understanding and agreement amongst the Contracting Parties that they would share all responsibility, costs and other commitments in line with the proportion

of the EDBI Shares that they would each eventually take delivery and ownership of; and

(e) All previous drafts prepared of the BSLA and/or all documents recording proposed amendments to the BSLA made prior to the signing of the BSLA on 1 April 2011.

21 The Plaintiffs submit that, even if the Initial PCOA Documents can shed light on "why and how parties had agreed" to the allocation of responsibilities under the Initial PCOA, they are neither relevant nor material to the circumstances in which parties agreed on the risk-sharing arrangement encapsulated in the BSLA. Any contractual agreement under the Initial PCOA would have been superseded by negotiations, including fresh discussions on the allocation of responsibility, leading up to the execution of the BSLA. It would be the documents surrounding the BSLA that are relevant and material to the proceedings, and not those relating to the Initial PCOA.

22 The Plaintiffs also submit that the very nature of the Defendant's request for the Initial PCOA Documents suggests that this is merely a fishing exercise as he has not been able to identify any specific document(s) within this category of documents, even though the Defendant and Shefford were both parties to the Initial PCOA and therefore would have been privy to some (if not all) of the Initial PCOA Documents. The Defendant has also not offered any explanation for why he "has been unable to retrieve the documents relating to this point which he may have previously had in his possession, custody, and/or power". Instead, the Plaintiffs say that the Defendant has chosen to cast an unacceptably wide net, apparently to trawl for information which is not allowed under O 110 r 17.

Defendant's reply submissions

23 The Defendant refers to the Plaintiffs' explanation of the lead up to the signing of the BSLA in that:

(a) The Initial PCOA had provided for the Plaintiffs to bear the yearly advance payments to EDBI, while the Defendant (through Shefford) had been obliged to put up the Standby Letter of Credit ("SBLC") required by EDBI;

(b) The Defendant then informed the Plaintiffs that he did not want himself and Shefford to be parties to the Initial PCOA because he was unable to procure the required SBLC; and

(c) The parties agreed to the removal of the Defendant and Shefford as parties to the Initial PCOA, on the condition that, *inter alia*, the Defendant and Shefford would bear 75% of the liabilities and responsibility for the obligations under the Initial PCOA.

24 The Defendant submits that the Plaintiffs are suggesting that the allocation of responsibility for the EDBI Guarantee had already been fixed or the principles for determining the same had already been agreed upon and that the removal of the Defendant and Shefford from their obligations under the Initial PCOA had been done for practical reasons unrelated to the allocation of responsibility, because the Defendant had been unwilling or unable to provide the said SBLC. He says that the Plaintiffs are suggesting that the BSLA does not substantially alter the allocation of responsibility that had been agreed upon under the Initial PCOA.

25 The Defendant says that the Plaintiffs rely upon certain assumptions regarding the common intention, understanding and agreement of the Parties "at all material times". He submits that this brings documents relating to the circumstances in which the Defendant and/or Shefford's obligations under the Initial PCOA were finalised within the scope of the issues relevant and material to the outcome of the case. Accordingly, while the BSLA remains the primary contract that has to be interpreted in this Suit, it cannot be said that documents relating to the allocation of responsibility under the Initial PCOA would be irrelevant or unnecessary. The Defendant submits that the Initial PCOA demarcates the starting point as to how parties had intended to share responsibility for the Parties' obligations to EDBI.

26 The Defendant rejects the suggestion that this request is effectively a "fishing" expedition. He refers to the High Court decision in *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte Ltd* [2014] 4 SLR 832 in which it was observed at [42] that whether a party is "fishing" is not strictly speaking a test, and the answer to that question has no consequence when considered in a vacuum. If "fishing" means asking for a generally broad category of documents, every pre-action discovery application will inevitably involve some amount of fishing. It would therefore not assist a defendant to say that the plaintiff is fishing for documents, without saying why the request for those documents should be denied by reference to the twin requirements of relevance and necessity.

27 In any event, given the breadth of documents including email correspondence, internal notes and drafts of the Initial PCOA that could explain how parties had reached the allocation of risk and responsibility under the Initial PCOA, the Defendant submits that it cannot be said that the Defendant is on a "fishing" expedition.

28 Finally, the Defendant says that the fact that he has been unable to retrieve relevant documents in this category that may have been in his possession, custody, and/or power is irrelevant. This is not an objection that can be found in O 110 r 17 of the ROC. He says that the Plaintiffs admit that there is a possibility that the Defendant had not been privy to all relevant documents and the Plaintiffs have not alleged that disclosure of these documents would impose an unreasonable burden on them.

Decision

29 The Plaintiffs' claims arise under the BSLA which was negotiated as part of the amendment to the arrangements in the Initial PCOA which were contained in the terms of the BTS and the Amended PCOA. However, the foundation for certain of the Defendant's obligations was the Initial PCOA. It is noted that the Plaintiffs, among other things, contend in paragraph 3(d) of the Reply that there was a common intention, understanding and agreement in relation to the 75% liability.

30 Whilst I accept that the interpretation of the BSLA is at the centre of the dispute, matters which were known to the parties at the time of the Initial PCOA might assist in the interpretation of the BSLA. I am just persuaded that the documents have sufficient relevance or materiality to the outcome of the case to justify an order for production.

31 However, I consider that the scope of the documents requested should be narrower than in Request 1. I consider that it should narrowed to "All documents (including, without limitation, internal documents, meeting minutes, and/or correspondence) relating to the sharing of liabilities arising out of any guarantee and/or exit option demanded by EDBI in respect of the Initial PCOA."

Request 11

Defendant's submissions

32 This Request seeks production of all documents relating to the negotiation of cll 4 and 5 of the Settlement. The Plaintiffs object to the production of these documents on the basis that they do not "go to the substance of the dispute" and are not "material" to the Suit.

33 Again, the Defendant notes that the Plaintiffs have not argued that these documents are irrelevant, merely that they are insufficiently material. The Defendant disagrees with the Plaintiffs and says that he has pleaded that, *inter alia*, he is not liable for any expenditure incurred by the Plaintiffs under cll 4 and/or 5 of the Settlement, on the basis that these clauses may offend the public policy against champerty and maintenance.

34 The Defendant says that, in response, it is conceivable that the Plaintiffs will argue that EDBI has a legitimate interest in the outcome of these proceedings, and/or that there is no realistic possibility that the administration of justice would suffer as a result, which are possible defences to an allegation of champerty and maintenance and the Defendant refers to *Re Vanguard Energy Pte Ltd* [2015] 4 SLR 597 ("*Re Vanguard*") at [43].

35 The Defendant therefore says that these documents cannot be said to be "immaterial". First, it says that these documents are important to identify the precise nature of EDBI's interest in the outcome of these proceedings. It submits that EDBI's interest in these proceedings would be easily identifiable if its ability to satisfy its claim against the Plaintiffs is effectively contingent on the result of these proceedings and it refers, for example, to *Lim Lie Hoa v Ong Jane Rebecca* [1997] 1 SLR(R) 775 (at [53]).

36 However, the Defendant says that as EDBI's claims against the Plaintiffs have already been settled and as the Plaintiffs are undoubtedly entities of means, this is evidently not the case here. At face value, it is therefore unclear what exactly EDBI's actual interest in these proceedings is, other than the possibility that EDBI opportunistically saw the Plaintiffs' claims against the Defendant as a convenient vehicle to recover the monies that it had decided not to recover from the Plaintiffs, even though the Plaintiffs were the only parties that EDBI had a contractual relationship with. Nonetheless, in light of the fact that parties had specifically intended for the relationship between EDBI and the Plaintiffs and the Plaintiffs and the Defendant to be kept separate and distinct, this cannot be said to be a legitimate interest by any stretch.

37 Accordingly, the Defendant submits that production of the documents relating to the negotiation of the offending provisions of the Settlement would enable the Defendant to delineate, understand, and pin down the exact nature of EDBI's ostensible interest in these proceedings and why EDBI saw fit to be involved in these proceedings. Without these documents, the Defendant says that the Plaintiffs can possibly concoct a post-hoc rationalisation to justify EDBI's involvement in these proceedings that may have no bearing with EDBI's actual interest in these proceedings.

38 Secondly, the Defendants submits that these documents are likely to have a bearing on the question of the likelihood of cll 4 and 5 of the Settlement having an adverse impact on the administration of justice. In this regard, the relevant public policy in question is that which "weighs against a person who is in a position to influence the outcome of litigation not having an interest in that outcome" as stated in *R v Secretary of State for Transport, Local Government and the Regions (No 8)* [2003] QB 381 at [76]. Accordingly, the Defendant says that the extent of the third-party's involvement in the litigation proceedings is

of considerable relevance in determining whether the administration of justice is affronted.

39 The Defendant refers to cl 4(i) of the Settlement which states that:

> "[EDBI] shall use its reasonable endeavours, provided such steps do not adversely affect the reputation(s) of [EDBI] and/or the Singapore Economic Development Board, to cooperate with [the Plaintiffs] in the prosecution of their claim against [Shefford] and [the Defendant], including but not limited to…".

The Defendant notes that cl 4(i) is open-ended in terms of what is meant by "reasonable endeavours" on the part of EDBI. Further, the clause goes on to give only an illustrative (and not exhaustive) set of examples of these "reasonable endeavours". Accordingly, the Defendant says that he is unable, just from a review of the relevant clauses of the Settlement, to fully understand the extent of EDBI's intended involvement in these proceedings and submits that the negotiations of cll 4 and 5 would therefore shed light on this important question.

40 Thirdly, the Defendant says that the Settlement itself appears to suggest that details about EDBI's actions in the lead up to the execution of the Settlement would be relevant and material to these proceedings and it refers to cl 4(i)(b) of the Settlement which specifically envisages that it may be necessary to describe the context of "[EDBI's] participation in relation to and arising out of … the [Settlement]" in the course of these proceedings.

41 Further, the Defendant says that, to the extent that it is held that, as the Plaintiffs submit in relation to Request 12, the documents identifying specific examples of cooperation by EDBI cannot be disclosed on the ground of privilege, these negotiation documents would be the only available documents shedding light on the scope of EDBI's intended involvement in these

proceedings, which would only underscore the materiality of these documents should Request 12 not be allowed.

Plaintiffs' submissions

42 The Plaintiffs disagree with the Defendant's contention that the negotiations leading up to the Settlement are relevant to the construction of cll 4 and 5 of the Settlement.

43 First, the Plaintiffs say that EDBI's interest in these proceedings is sufficiently clear from the face of the Settlement, which has been disclosed to the Defendant. The Plaintiffs refer to the salient terms of the Settlement relating to EDBI's role in these proceedings. They submit that these terms of the Settlement are clear in both their scope and meaning. There is no ambiguity and the Defendant has not pleaded any meaning separate or different from the plain reading of the words set out in cll 4 and 5 of the Settlement. It is therefore the Plaintiffs' position that production of the category of documents requested for by the Defendant would fail the materiality test and should not be allowed.

44 Secondly, even if the Defendant wished to rely on extrinsic evidence in aid of the interpretation of cll 4 and 5 of the Settlement, pursuant to *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and anor* [2013] 4 SLR 193 and paragraph 35A of the Supreme Court Practice Directions, the Defendant is required to plead: (a) with specificity each fact of the factual matrix that he wishes to rely on in support of his construction of the Settlement; (b) the factual circumstances in which the facts in sub-paragraph (a) above were known to both or all the relevant parties; and (c) the effect which such facts will have on their contended construction.

45 However, the Plaintiffs say that the Defendant has not done so. There is therefore no clarity at all on the construction that the Defendant wishes to place on cll 4 and 5 of the Settlement. In the circumstances, the Plaintiffs submit that the Defendant is on a fishing expedition hoping to extract information from this category of requests in order to build a case and there is no obligation on the part of the Plaintiffs to disclose the cll 4 and 5 Negotiation Documents.

Defendant's reply submissions

46 In relation to the Plaintiffs' submission that EDBI's expressed interest in these proceedings can be discerned from the terms of the Settlement, the Defendant submits that this conflates the question of the nature of the third-party interference (which the terms of the Settlement may shed some light on) with the question of whether the third-party had a legitimate interest in the proceedings. In other words, the terms of the Settlement merely set out some parameters of EDBI's intended role in these proceedings, and not its interest in the same. Put yet another way, the Settlement does not explain or identify an interest in the outcome of these proceedings that is independent of cll 4 and 5 of the Settlement.

47 Further, the Defendant submits that such an interest cannot be easily inferred. As mentioned earlier, the Plaintiffs appear to be entities or persons of some means and EDBI's ability to recover monies against the Plaintiffs pursuant to the Amended PCOA clearly does not hinge on the outcome of these proceedings. Accordingly, the Defendant submits that production of the documents relating to the negotiation of the offending provisions of the Settlement would enable the Defendant to understand the nature of EDBI's interest in these proceedings and why EDBI is involved in these proceedings at all. The Defendant submits that only after this expressed interest is identified

will the Court be in a position to assess whether this interest is a legitimate one justifying third-party interference in these proceedings.

48 Further, the Defendant submits that the Plaintiffs have not dealt with his submission that these documents would shed light on the extent of EDBI's intended interference in these proceedings, given that the Settlement does not purport to exhaustively set out EDBI's scope of involvement. He says that the extent of EDBI's interference in these proceedings is a highly pertinent issue.

49 In addition, the Plaintiffs have not dealt with his submission that the details of the lead up to the execution of the Settlement would be relevant and material to these proceedings. In this regard, cl 4(i)(b) of the Settlement specifically envisages that it may be necessary to describe the context of "[EDBI's] participation in relation to and arising out of … the [Settlement]" in the course of these proceedings.

Decision

50 The provisions of cll 4 and 5 of the Settlement are clear and the Defendant does not suggest otherwise. In those circumstances, it is difficult to see why documents relating to the negotiation of cll 4 and 5 of the Settlement would be relevant or material to the outcome of this dispute. The rights and liabilities of the Plaintiff are dealt with in that agreement which sets out the extent of EDBI's "interest" in these proceedings and the "extent of EDBI's intended interference in these proceedings".

51 I do not consider that documents relating to the negotiation would be relevant to the way in which the terms of the Settlement were, in fact, implemented, which appears to be the thrust of the Defendant's submissions.

52 On that basis, I am not persuaded that the documents are sufficiently relevant or material to the outcome of these proceedings and I decline to order any production in respect of Request 11.

Request 12

Defendant's submissions

53 This Request seeks production of all documents identifying specific examples of cooperation by EDBI and/or relating to any purportedly "reasonable and lawful actions" taken by EDBI thus far in cooperation with the Plaintiffs in connection with these proceedings. The Plaintiffs have objected to the production of these documents on the basis that production is unnecessary as the Settlement has already been disclosed and/or that these documents are privileged.

54 The Defendant notes that the Plaintiffs have not said that these documents are irrelevant and submits that the production is necessary because, as stated in relation to Request 11, given that Clause 4(i) of the Settlement is open-ended in terms of what is meant by "reasonable endeavours" on the part of EDBI, the Defendant is unable to understand the extent and nature of EDBI's involvement in these proceedings just by reviewing the clauses of the Settlement.

55 In relation to privilege, the Defendant infers that this is likely to be litigation privilege, which protects documents created for the dominant purpose of litigation from disclosure and it refers to *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and other appeals* [2007] 2 SLR(R) 367 at [70]–[77].

56 The Defendant submits that the dominant purpose requirement may not be satisfied in terms of all of the documents falling within this request. In this regard, it is clear that the dominant purpose requirement is high and exacting, and the Defendant submits that there are two main qualifications to the requirement. First, where there is a strong suggestion of any other equal or more dominant purpose behind the creation of the documents in question, this would in itself be fatal to the claim for privilege: *Brink's Inc v Singapore Airlines Ltd* [1998] 2 SLR(R) 372 at [20]. Secondly, the documents in question must have been created to either obtain advice or seek information in connection with existing or contemplated litigation: *WH Holding Ltd and anor company v E20 Stadium LLP (No. 2)* [2018] EWCA Civ 2652 ("*E20 Stadium*") at [27].

57 It follows, the Defendant submits, that documents falling within this request would, at the very least, include documents that were created for a purpose other than the procurement of advice or the seeking of information in connection with these proceedings. For instance, he says that cl 4(i)(a) makes reference to EDBI's obligation to consider in good faith "accepting a transfer of shares in [the 1st Plaintiff] so as to facilitate [its] participation in the prosecution of [these proceedings]" and it is unclear how documents relating to a transfer of JAC shares in the 1st Plaintiff would have a strong nexus with legal advice or information with a bearing on the conduct of this litigation.

58 The Defendant also relies on cl 4(i)(d) which refers to negotiations, discussions, meetings, and/or mediations organised by the Plaintiffs in relation to these proceedings. He submits that *E20 Stadium* (at [18]) makes it clear that documents relating to commercial discussions, even those touching on the settlement of ongoing lawsuits, would not necessarily be protected by litigation privilege; only documents created in the course of discussions or negotiations that touch on legal advice or information with a bearing on the conduct of the

litigation would be so privileged.

59 Further the Defendant relies on cl 4(i)(e) which refers to actions in Singapore to "assist the prosecution and collection efforts of [the Plaintiffs] against [the Defendant]". He says that there is a possibility that the context in which such documents were created would fall outside of the litigation context and, further, that documents created in furtherance of an intention to "assist prosecution and collection efforts" may not necessarily be documents created for the purposes of obtaining legal advice or seeking information for use in connection with ongoing or anticipated litigation. Accordingly, the Defendant submits that the Plaintiffs should not be allowed to assert a blanket claim of privilege over this entire broad category of documents, which cannot be privileged *in toto*.

60 In any event, the Defendant submits that litigation privilege cannot be relied upon on these facts because legal professional privilege, which encompasses litigation privilege, serves the law's aim of maintaining the efficacy of the administration of justice: Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 6th Ed, 2017) ("*Pinsler*") at para 14.113. He therefore submits that litigation privilege cannot be relied upon where there has been iniquitous conduct on the part of the party claiming privilege and, in support of this submission, it says, first, that section 128(2)(*a*) of the Evidence Act (Cap 97, 1997 Rev Ed) stipulates that legal advice privilege is inapplicable to "any such communication made in furtherance of any illegal purpose" and that the Court should "in the interest of the administration of justice, act purposively by extending the principle in [s 128(2)(*a*) of the Evidence Act] to litigation privilege": see *Pinsler* at para 14.115.

61 Secondly, the Defendant submits that an "illegal purpose" may extend

beyond criminal conduct and he notes that courts in other jurisdictions have accepted that the exception may apply in a civil context: see Chen Siyuan & Lionel Leo, *The Law of Evidence in Singapore* (Sweet & Maxwell, 2nd Ed, 2018) ("Chen & Leo") at para 8.111 and *Gelatissimo Ventures (S) Pte Ltd and ors v Singapore Flyer Pte Ltd* [2010] 1 SLR 833 ("*Gelatissimo*") at [64]. On this basis, the Defendant contends that this exception would include improper conduct that is not criminal in nature. Thirdly, the Defendant also submits that an "illegal purpose" may also extend beyond conduct involving some form of dishonesty. He refers to *Barclays Bank plc v Eustice* [1995] 1 WLR 1238 ("*Barclays Bank*"), where it was suggested (at 1252) that the fraud exception is capable of capturing iniquitous conduct falling short of dishonesty. *Barclays Bank* was cited favourably in *Gelatissimo* (at [64]), and has been followed in *BBGP Managing General Partner Ltd v Babcock & Brown Global Partners* [2011] 2 WLR 496, where at [62] the court commented that such conduct would include "[what] the law treats as entirely contrary to public policy". The Defendant therefore submits that conduct that is not *per se* dishonest may still nonetheless have the effect of prejudicing the administration of justice, which remains the ultimate underlying interest of the doctrine of legal professional privilege.

62 On that basis, the Defendant submits that the Plaintiffs should not be able to claim privilege over this category of documents insofar as these documents may reveal conduct in furtherance of an illegal purpose consisting of officious third-party interference in litigation, agreements relating to which remain illegal and contrary to public policy: see section 5A(2) of the Civil Law Act (Cap 43, 1999 Rev Ed) ("CLA").

63 The Defendant accepts that to raise this exception to privilege, however, there must be at least some *prima facie* evidence of such illegality: see

Gelatissimo at [79]. He submits that there is a *prima facie* case that the documents sought may reveal officious third-party interference in these proceedings. He contends, first, that unlike the facts in *Re Vanguard*, where the third-party was not in any position to influence the litigation save the choice of solicitors or settlement of the dispute (see [46]), EDBI in this case is obliged to use its "reasonable endeavours" to assist the Plaintiffs in the prosecution of their claims. The Settlement thus obliges EDBI to be actively involved throughout the course of these proceedings and the Defendant says that this is not a case where the third-party is simply a passive funder of the litigation.

64 Secondly, the Defendant says that nothing in the Settlement expressly provides that the Plaintiffs would retain ultimate control over the conduct of these proceedings. While cl 4.1(iv) states that the Plaintiffs shall have the right to cease prosecution of their claim against the Defendant at any time for any reason, the Defendant says that there is no provision that specifically requires the Plaintiffs to retain effective control over the conduct of these proceedings insofar as these proceedings continue to persist. Thirdly, the Defendant says that EDBI had claimed at least US$38.5 million from the Plaintiffs in arbitration proceedings filed against the Plaintiffs but was only able to recover US$17 million upfront from the Plaintiffs under the Settlement. Accordingly, this suggests EDBI will be incentivised to steer these proceedings aggressively, in order for it to maximise its chances of being able to recover the shortfall. In this regard, it is worth nothing that cl 4(iv) of the Settlement provides that EDBI shall not be responsible for any costs of these proceedings, which frees it from the cost consequences of any aggressive conduct of these proceedings.

65 The Defendant therefore submits that the Plaintiffs should not be able to rely on privilege to cloak conduct that may be quite conceivably an affront to the administration of justice, which demands that these documents be so

disclosed.

Plaintiffs' submissions

66 The Plaintiffs submit, first, that the Request 12 documents were created for the dominant purpose of litigation which exists by virtue of the common law. They submit that litigation privilege "applies to every communication, whether confidential or otherwise so long as it is for the purpose of litigation. It also applies to communications from third parties whether or not they were made as agent of the client". They say that for litigation privilege to apply, there are two requirements. First, litigation must have been contemplated, which is determined by applying the test of whether there is a "reasonable prospect" of litigation. Secondly, the document must have been created for the dominant purpose of pending or contemplated litigation.

67 The Plaintiffs refer to *E20 Stadium* where the English Court of Appeal held that litigation privilege also extends to documents created with a purpose of obtaining advice or evidence or information so as to decide whether to litigate and whether to settle the dispute giving rise to the litigation and to documents in which advice or information obtained for the sole or dominant purpose of conducting litigation cannot be disentangled, or documents which would otherwise reveal the nature of such advice or litigation. The rationale underlying litigation privilege was stated in *Skandinaviska* at [23] to be to ensure the efficacy of the adversarial process because "parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and fear of premature disclosure".

68 Further, the Plaintiffs refer to Chen & Leo at paras 8.039 and 8.040 where it is stated that "[l]itigation privilege is concerned with the protection of

the litigation strategy, approach, and preparation for apprehended or actual litigation. It has been described as creating a zone of privacy to allow a party to prepare for litigation without fear of adversarial interference or premature disclosure. It has also been said that litigation privilege is an aspect of the right to a fair trial."

69 The Plaintiffs submit that litigation privilege is critical to the effective administration of justice and that the Request 12 documents clearly fall within the ambit of litigation privilege. They say, first, that it cannot be disputed that the documents were created when litigation was contemplated given the explicit reference of an impending litigation against the Defendant in the Settlement itself. Secondly, they say that it is clear from the wording of the request itself that the dominant purpose underlying the creation of the documents is the "prosecution of [the Plaintiffs'] claim against the Defendant".

70 The Plaintiffs do not accept the Defendant's submission that there are some documents within the Request 12 documents "that were created for a purpose other than the procurement of advice or the seeking of information in connection with these proceedings" and are therefore not privileged. The Plaintiffs say that, for documents relating to cl 4(i)(a) of the Settlement, the transfer of JAC shares from EDBI to the 1st Plaintiff would have a bearing on the conduct of this litigation given that this dispute is exactly concerned with parties' obligations in relation to the EDBI Shares. For documents relating to cl 4(i)(d) of the Settlement, such documents would also be privileged as any negotiations, discussions, meetings, and/or mediations with the Defendant, organised by the Plaintiffs, would surely touch on information relating to this dispute. For documents relating to cl 4(i)(e) of the Settlement, such documents would fall within the ambit of litigation privilege given that they would relate

to actions "to assist the prosecution and collection efforts of [the Plaintiffs] against Shefford and [the Defendant]".

71 Accordingly, the Plaintiffs submit that the Request 12 documents are protected by litigation privilege. Further they submit that the "crime/fraud exception" is not applicable. The Plaintiffs accept that both legal advice privilege and litigation privilege are subject to the crime/fraud exception so that privilege does not attach to communications with a lawyer where a person consults with the lawyer in furtherance of a crime or fraud. The Plaintiffs refer to *Gelatissimo* where, in summary, the High Court held that:

> (a) Where criminal or civil fraud is involved (i.e. the "core" of fraud), the crime/fraud exception applies strictly, and no balancing exercise needs to be conducted.
>
> (b) For cases in the "penumbra" of fraud, a balancing approach should be adopted which considers, among other factors, the public policy considerations that militate against the purpose for which legal advice was given, and whether that purpose is sufficiently iniquitous for it to be classified as fraud. In carrying out the balancing exercise, the High Court considered the following factors to be relevant:
>
> > (i) The culpability of the party who seeks to rely on privilege, including whether there is dishonesty;
> >
> > (ii) The specific purpose for which legal advice was given;
> >
> > (iii) The importance of preserving the legal professional privilege in the particular case;
> >
> > (iv) Whether the allegedly fraudulent conduct of the party seeking privilege is itself an issue in the proceedings; and

(v) The extent to which the party seeking to lift privilege is able to show that privileged communications were made as part of an ongoing fraud.

72 However, the Plaintiffs refer to the fact that the High Court cautioned that "there is a limit to how much any particular word can be stretched beyond its natural meaning to take on meanings which it cannot reasonably encompass". Thus, the court will have to consider whether the purpose for which the document was created is "sufficiently iniquitous for it to be classified as fraud". The Plaintiffs emphasise that in particular, the High Court stated that "[i]t may well be that one day we will adopt the 'fraud on justice' definition of fraud that was propounded by the Australian High Court in *Kearney*", which suggests that such a wide ambit of the crime/fraud exception has *not* been adopted in Singapore.

73 The Plaintiffs submit that this is borne out by an analysis of the facts in *Gelatissimo* and *Barclays Bank*. In *Gelatissimo* an email thread between the plaintiffs and their solicitor suggested that the content of an affidavit filed in support of the plaintiff's application was untrue. The defendant argued that privilege in the email thread should be stripped because it evidenced iniquitous behaviour and/or an abuse of process. The Court held, inter alia, that "although the making of a false statement in an affidavit in support of a pre-discovery application constituted serious misconduct, the practical consequences of such an act are not as severe as those arising from traditional notions of fraud and is unlikely to cause severe harm to the defendant". Although the Court had stated that dishonesty is not the only touchstone for determining if the fraud exception applies, the Plaintiffs submit that the decision in *Gelatissimo* suggests that there is still a significant resistance against moving away from "traditional notions of fraud" in determining if privilege should be lifted. Coupled together with the

finding that the party seeking disclosure had not established a *prima facie* case of the plaintiff's dishonesty, the Court in *Gelatissimo* held that privilege over the email thread was not lifted.

74 In *Barclays Bank*, the plaintiff bank sought declarations to set aside certain transactions entered into by the defendant as transactions at an undervalue. In support of its application, the plaintiff sought to lift privilege on communications between the defendant and his solicitors which prove that the defendant had the intention of putting the assets out of the bank's reach. The Court decided, by a fine margin, that privilege would be lifted and ordered the communications to be disclosed. The Plaintiffs say that while the Court in *Barclays Bank* did not agree that privilege could only be lifted in cases involving dishonesty, the Court in *Gelatissimo* was quick to point out that the facts in *Barclays Bank* had "all the elements of fraud" and was therefore a case which justified the lifting of privilege. Arguably, the moving of assets beyond the reach of creditors is, in effect, a means of defrauding the creditors. This is an act that dishonestly channels away money from creditors where such monies are rightfully the legal entitlement of the creditors. The Plaintiffs submit that the decision in *Barclays Bank* again illustrates that the courts are keen on keeping the ambit of fraud narrow, and highlights the point in *Gelatissimo* that conduct that warrants the lifting of privilege must still be capable of being contained within the natural meaning of "fraud".

75 The Plaintiffs submit that, applying the legal principles set out above, it is submitted that the crime/fraud exception does not apply in the present case. First, the present case involves neither criminal nor civil fraud. Secondly, insofar as the Defendant is alleging that the present case falls within the penumbra of fraud as the Request 12 documents may reveal "officious third-party interference in litigation" then, adopting the balancing approach, the

Plaintiffs submit that litigation privilege ought to be upheld. The Plaintiffs submit that it is doubtful whether "officious third-party interference in litigation" would fall within the penumbra of fraud and says that, as cautioned by the High Court in *Gelatissimo* at [66], there is a limit to how much the word "fraud" can be stretched beyond its natural meaning. The Plaintiffs also submit that the Defendant has not alleged that there is any dishonesty on the part of the Plaintiffs and/or EDBI. Further the issue of whether or not there is "officious third-party interference in litigation" is in itself an issue in the suit and, in such cases, the law requires that the party objecting to the claim of privilege will need to show that there is a strong *prima facie* case of fraud, and not merely a *prima facie* case. The Defendant, however, has not discharged his burden of establishing a strong *prima facie* case of "officious third-party interference in litigation".

76 The Plaintiffs submit that even though EDBI is obliged to "use its reasonable endeavours … to cooperate with [the Plaintiffs] in the prosecution of their claim against Shefford and [the Defendant]", it does not necessarily mean that the Plaintiffs lack control of the litigation. On the contrary, they say that it is clear from the face of the Settlement that EDBI's role is limited to "cooperating" and "assisting" the Plaintiffs in the litigation (see cll 4(i) and 4(i)(e)) and that ultimately it is the Plaintiffs who control the conduct of the litigation.

77 Further the Plaintiffs refute the Defendant's contention that they do not have ultimate control over the conduct of the litigation simply because there is no express provision for it in the Settlement and submit that, on the contrary, the Settlement expressly provides that the 1st Plaintiff and Vinmar have an obligation to fund up to S$500,000 for the prosecution of claims against Shefford and the Defendant (see cl 4(iii)); that the Plaintiffs have the right to

cease the prosecution of their claim against Shefford and the Defendant "at any time for any reason" (see cl 4(iv)); that EDBI shall not be responsible for any costs relating to the prosecution of the claims against Shefford and the Defendant by the Plaintiffs (see cl 4(v)); that while the Plaintiffs are required to "in good faith discuss and consult with [EDBI] in advance of any compromise or settlement", the Plaintiffs ultimately have "the right to negotiate and/or agree to any compromise or settlement in relation to their claims against Shefford and [the Defendant]" (see cl 4(vi)); that the Defendant's allegation that "EDBI will be incentivised to steer these proceedings aggressively" is a bare allegation and that, in any case, "aggression" does not necessarily equate with maintenance and/or champerty.

78 Rather the Plaintiffs say that it has to be shown that the alleged champertous maintainer (i.e. EDBI) might be tempted for its personal gain to "inflame the damages, to suppress evidence, to suborn witnesses or otherwise to undermine the ends of justice". The Defendant has not alleged that EDBI might be so tempted and the Plaintiffs submit that the risk of injustice and prejudice to the Plaintiffs, if they are compelled to disclose documents relating to litigation strategy and preparation so as to compromise their right to a fair trial, far outweigh the risk of the Defendant not having sight of the Request 12 documents. In fact, in determining whether the Settlement offends the public policy "against upholding contracts affected by maintenance and/or champerty" or "of protecting the purity of justice and the interest of vulnerable litigants", the issue is one of contractual interpretation of the Settlement. It is immaterial to this suit what actual steps EDBI has taken to cooperate with the Plaintiffs in the prosecution of their claim against the Defendant.

79 In any event, the Plaintiffs say that they have already explained in correspondence that in or around November 2012, the 2nd Plaintiff's email

account at vijaygrd@yahoo.com was hacked and all of the emails in the account were deleted. The 2nd Plaintiff thereafter closed the account. Accordingly, any document that may only be retrievable from the 2nd Plaintiff's email account at vijaygrd@yahoo.com can no longer be retrieved. Therefore, where the requested documents may only be retrieved from vijaygrd@yahoo.com, such documents would have already been destroyed in 2012. The Plaintiffs therefore submit that the objection at O 110 r 17(2)(*b*)(iv) ROC applies in the present case.

80 Accordingly, the Plaintiffs submit that the documents should not be ordered to be produced.

Defendant's reply submissions

81 The Defendant submits that the Plaintiffs have not met their burden of proof to show that *all* of the documents sought are protected by litigation privilege but have merely suggested that this is "clear from the wording of the request itself" as the dominant purpose underlying the creation of these documents is the "prosecution of [the Plaintiffs'] claim against the Defendant". The Defendant emphasises that litigation privilege does not cover all documents brought into existence for the purposes of actual or contemplated litigation: *E20 Stadium* at [13], [16]–[17] and [21]–[22]. It only protects documents created for the dominant purpose of obtaining advice as to litigation, obtaining evidence to be used in such litigation or obtaining information which might lead to the obtaining of such evidence.

82 The Defendant submits that documents created for the purpose of deciding whether to litigate or settle a dispute may not necessarily be privileged and would only be privileged insofar as they reveal a party's views on the merits

of the litigation or reveal evidence and/or information that is ultimately meant to be used in the litigation. As stated by the Plaintiffs, if the documents in question do not relate to "litigation strategy, approach, and preparation" then there is no compelling reason why disclosure should be disallowed. The Defendant submits that, for instance, if a party has drafted an email expressing its intention to settle a dispute for purely commercial reasons without reference to the legal merits of the case, there is no reason why such documents should be necessarily protected by litigation privilege.

83 In relation to cl 4(i)(a) of the Settlement, the Defendant says that it is unclear if the transfer of shares has anything to do with obtaining information or evidence in relation to these proceedings and the Plaintiffs merely assert that this "would have a bearing on the conduct of this litigation". In relation to cl 4(i)(d) of the Settlement, the Defendant says that purely commercial settlement discussions not touching on the merits of litigation would not be protected by litigation privilege, nor would commercial discussions on the direction of this litigation and the possibility of settlement with the Defendant, without reference to the legal merits of these proceedings. In relation to cl 4(i)(e), the Defendant says that the Plaintiffs have not explained how all documents relating to the collection efforts of the Plaintiffs against the Defendant relate to legal advice rendered or have a nexus with the evidence and information that may be used in these proceedings. Accordingly, the Defendant submits that it is entirely conceivable that there would exist documents falling with this request that are not protected by litigation privilege.

84 Finally, the Defendant submits that the Plaintiffs could be permitted to redact some documents or some parts of documents that may be privileged. However, he says that the Plaintiffs cannot claim privilege over the entire

category of documents when they have not even adequately substantiated their claim.

85 The Defendant disagrees with the Plaintiffs' contention that these documents are irrelevant and/or unnecessary because the question of whether cll 4 and 5 are contrary to public policy is a question of contractual interpretation of the Settlement and it is immaterial what actual steps EDBI has taken to cooperate with the Plaintiffs. It submits that the harm arising from officious third-party interference in legal proceedings would only arise when the champertous contract is actually performed and so cannot be fully assessed without reference to the actual third-party interference. He says that the Court would not be able to assess whether there is any realistic possibility that the administration of justice may suffer as a result of the third-party interference, which is a legitimate answer to an allegation of maintenance and champerty.

86 Further, the Defendant submits that as a matter of contractual interpretation, parties' subsequent conduct is relevant if such conduct provides cogent evidence of the parties' agreement at the time when the agreement was entered into: *Centre for Laser and Aesthetic Medicine Pte Ltd v GPK Clinic (Orchard) Pte Ltd* [2018] 1 SLR 180. Given that cl 4(i) of the Settlement is open ended, the Defendant submits that parties' subsequent conduct would be of considerable assistance in determining the ambit of the same.

87 The Defendant submits that privilege should be lifted in the situation where it is necessary to determine the extent of officious third-party interference in legal proceedings. First, it says that this situation involves a clearly defined public policy intentionally preserved (at least in part) by s 5A of the CLA.

88 Secondly, that the public policy has a direct bearing on the administration of justice, the protection of justice and the interests of litigants which serves the interests of the public at large and he refers to *Li Shengwu v Attorney-General* [2019] 1 SLR 1081. The Defendant submits that while there does not appear so far to have been any dishonesty *per se* on the part of the Plaintiffs in relation to the Settlement, this is not the only touchstone for lifting privilege: *Gelatissimo* at [65].

89 Thirdly, the Defendants says that, if privilege is not lifted, it would be exceedingly difficult for the Defendant to identify the extent of officious third-party interference, given that these relate to matters to which the Defendant would not be privy. The court would therefore not have the benefit of having all relevant evidence before it in this regard that might undermine the efficacy of these proceedings.

90 In relation to the Plaintiffs' contention that *Gelatissimo* cautions against a wide ambit of the exception, the Defendant submits that the better view is that litigation privilege in Singapore continues to be based on the common law, with the implication that there is technically no requirement to squeeze the categories of iniquitous conduct into the language of "fraud", consistent with the approach in other jurisdictions. The Defendant also submits that the *dicta* in *Gelatissimo* are not binding and that if it is held that the language of "fraud" should be maintained, this court can adopt the view that this term would extend to situations where there has conceivably been a "fraud on justice", which is the prevailing position in Australia. Further, he submits that this expansive definition of "fraud" makes sense, as even *Gelatissimo* acknowledged that dishonesty is not the only touchstone giving rise to fraud. On this basis, given that judicial conceptions of fraud are typically premised on dishonesty, the

Defendant submits that the "middle-ground" approach towards defining fraud adopted in *Gelatissimo* appears artificial.

91 The Defendant submits that he has shown a *prima facie* case that there has been officious third-party interference in these proceedings. In particular, though the Plaintiffs have asserted that EDBI's role is limited to cooperation and assistance and that the Plaintiffs have the right to discontinue these proceedings, the terms of the Settlement do not expressly provide that the Plaintiffs retain control over the conduct of the proceedings. The terms "cooperation" and "assistance" are inherently vague and do not necessarily rule out EDBI having a substantial influence on the conduct of these proceedings.

92 The Defendant emphasises that the Settlement obliges EDBI to be actively involved throughout the course of these proceedings so that this is not a case where the third party is simply a passive funder of the litigation. Further, that EDBI claimed at least US$38.5 million from the Plaintiffs in arbitration proceedings but recovered only US$17 million suggests that EDBI has a strong incentive to move these proceedings as aggressively as possible in the hopes of recovering the shortfall, especially in light of cl 4(iv) of the Settlement which provides that EDBI shall not be responsible for any costs of these proceedings.

93 In addition, cll 4(iii) and 4(iv) of the Settlement oblige the Plaintiffs to fund up to SG$500,000 for these proceedings and stipulates that any amount not expended in this regard will be payable to EDBI. The Defendant submits that this appears, *prima facie*, to be a devious way of circumventing the prohibition on third party funding of litigation. In essence, this SG$500,000 represents money that EDBI has paid upfront to the Plaintiffs (or has agreed to offset from the amounts owed to EDBI by the Plaintiffs), on the understanding that it will be refunded to EDBI if it is not exhausted by the Plaintiffs and that this creates

extraneous pressure for the Plaintiffs to carry on with their claim in these proceedings.

94 Further, the Defendant says that one of EDBI's representatives may appear as a witness for the Plaintiffs in these proceedings, which means that EDBI itself may be directly involved in and has the ability to influence the fact-finding process.

95 On this basis, the Defendant submits that he has demonstrated at least a *prima facie* case of officious third-party interference on the part of EDBI. The Defendant disagrees that this is a case that requires a higher *prima facie* standard of proof; in *Gelatissimo*, this higher standard only applied to "privileged communications that may reveal the veracity of statements made within the affidavits or during trial", which is not relevant here. The Defendants also says that it is EDBI's conduct and not the Plaintiffs' conduct that is in issue here, and EDBI is not a party to these proceedings.

96 In relation to the Plaintiffs' statement that some of the requested documents can no longer be retrieved from the 2nd Plaintiff's Yahoo email account, the Defendant notes in the preliminary that this explanation can only be directed at Request 1 given that this is the only category of requested documents pre-dating November 2012. In any case the Defendant says, first, that this objection was not stated in the Plaintiffs' response to this Request. Further, the Plaintiffs have not been clear about how much of the correspondence falling within Request 1 has been affected; they have made a bare assertion without providing any detailed substantiation or evidence, including evidence of any forensic email recovery specialists consulted or confirmation that the emails are no longer retrievable from another source. The Defendant therefore submits that the Plaintiffs have not met their burden of

showing that the objection under O 110 r 17(2)(*b*)(iv) ROC has been made out and that, if the Plaintiffs are not able to produce some or all of these documents, they can then provide a detailed explanation on affidavit why they are not able to do so.

Decision

97 The Defendant is essentially seeking documents to show what is the actual extent of EDBI's involvement in this litigation, whether that is cooperation "in accordance with Clause 4 of the Settlement or otherwise". However, the Defendant has not established any case that EDBI has acted otherwise than in accordance with the terms of the Settlement. As pleaded in paragraph 48 of the Defence and Counterclaim (Amendment No 1), the Defendant alleges that the Settlement is void as being contrary to public policy. Paragraph 48(a) pleads that it would offend public policy for EDBI to aid the Plaintiffs for a share of the fruits of the litigation as agreed under the Settlement, and paragraph 48(b) contends that the Settlement is contrary to public policy. In such circumstances, the foundation for the Defendant's case must be the terms of the Settlement and whether the Settlement was contrary to public policy.

98 On that basis alone, I do not consider that the broad production of the documents requested in Request 12 can be said to be sufficiently relevant to the case or material to the outcome of the case. The requests must be properly focussed on specific documents or a narrowly defined category of documents.

99 Even if I had not come to that conclusion, I consider that the particular communications between the Plaintiffs and EDBI would be covered by litigation privilege as they were evidently created when litigation was

contemplated given the explicit reference of an impending litigation against the Defendant in the Settlement. The Request seeks documents produced in the prosecution of the Plaintiffs' claim against the Defendant, indicating that the dominant purpose underlying the creation of the documents would be the prosecution of the claim against the Defendant.

100 Further, I see nothing to suggest that this is a case where, on the facts as currently known, the protection of litigation privilege should be taken away on the basis of the crime/fraud exception. I do not need to decide what the nature of that exception is under Singapore law because I consider that whether dishonesty or fraud, or some lesser conduct is required, the Defendant has not established for the purposes of the Application that there is any such conduct which would merit the removal of the litigation privilege.

101 In those circumstances, I decline to order production of documents in relation to Request 12.

Vivian Ramsey
International Judge

Paul Seah, Alcina Chew, Eugene Low and Pang Hui Min
(Tan Kok Quan Partnership) for the plaintiff;
Andy Leck, Kong Xie Shern and Lee Zhe Xu (Wong & Leow LLC)
for the first defendant.