Prima Bulkship Pte Ltd (in creditors' voluntary liquidation) and another *v* Lim Say Wan and another
[2015] SGHCR 10

Case Number	: Suit No 911 of 2014 (Summons Nos 377 and 378 of 2015)
Decision Date	: 20 April 2015
Tribunal/Court	: High Court
Coram	: Nicholas Poon AR
Counsel Name(s)	: Andrew Chan Chee Yin and Alexander Yeo (Allen & Gledhill LLP) for the 1st and 2nd plaintiffs; Sarbjit Singh and Ho May Kim (Selvam LLC) for the 1st defendant; Tan Teng Muan and Loh Li Qin (Mallal & Namazie) for the 2nd defendant.
Parties	: Prima Bulkship Pte Ltd (in creditors' voluntary liquidation) and another — Lim Say Wan and another

Civil procedure – pleadings – further and better particulars

20 April 2015

Nicholas Poon AR:

Introduction

1 It is common practice to declare in response to a letter request for further and better particulars of a pleading or an application for the same that the best particulars have already been furnished, and no better particulars can be provided until after the conclusion of discovery and interrogatories. The court in determining the application may either disregard the declaration and grant the application, or order the respondent to furnish best particulars with liberty to supplement after the conclusion of discovery and interrogatories.

2 Which course the court should take was the crux of Summons Nos 377 and 378 of 2015 ("the Summonses"), two applications taken out by each of the Defendants for better particulars of a number of averments made by the Plaintiffs' in their statement of claim. While most of the Defendants' requests for better particulars were ostensibly unjustified, there were three requests which I considered were particulars that ought ordinarily be provided.

3 Mr Alexander Yeo ("Mr Yeo") nevertheless sought to persuade me that his clients, the Plaintiffs, should not have to provide better particulars for those three requests until after the conclusion of discovery and interrogatories, principally because his clients had already particularised their claims as best they could. They did not have knowledge of any other material facts and were additionally not able to obtain further information that would enable them to better particularise their averments.

4 I was not persuaded, and ordered the Plaintiffs to furnish better particulars of the relevant averments. Although the Plaintiffs did not appeal against my decision, it would be helpful, in my opinion, to issue my written grounds of decision as the local jurisprudence on this issue is relatively sparse.

Background

The parties

The parties

5 The Plaintiffs in this action, Prima Bulkship Pte Ltd ("Prima") and Star Bulkship Pte Ltd ("Star"), were incorporated for the sole purpose of purchasing vessels to engage in the international carriage of dry bulk commodities. The Defendants, Mr Lim Say Wan ("Lim") and Mr Beh Thiam Hock ("Beh"), were the sole directors of Prima and Star respectively.

6 The main action, Suit 911 of 2014, was commenced by the present liquidators of the Plaintiffs, Mr Tam Chee Chong and Mr Andrew Grimmett ("Mr Grimmett"), who were appointed by the High Court on 4 May 2012 ("the Liquidators"). In a nutshell, the Liquidators allege that the Defendants had breached their director's duties.

Purchase of the vessels

7 The genesis of this longstanding dispute began when Lim and Beh were appointed. On that same day, they each caused a director's resolution to be passed, authorising the Plaintiffs to:

(a) purchase suitable dry bulk vessels to engage in the international carriage of dry bulk commodities;

(b) enter into any memorandum of agreements pertaining to the purchase of those vessels; and

(c) appoint the same three specifically identified persons as the company's attorneys-in-fact, each of whom had extremely wide powers to do such acts and things that are necessary to further the company's business mandate (the "POA Holders").

8 Also on the same day, the Plaintiffs signed two separate Memoranda of Agreement with two companies ("the Sellers") for the purchase of a vessel from each seller for US$34m each (the "MOAs"). One of the POA Holders signed the MOAs on behalf of the Plaintiffs.

9 The remainder of the procedural history is rather convoluted. To cut a long story short, the Plaintiffs subsequently breached their obligation under the MOAs to pay the Sellers a deposit of US$3.4m for each vessel, prompting the Sellers to cancel the MOAs and commence two parallel London arbitrations which resulted in two awards that resolved, as a preliminary issue, that the Plaintiffs were each liable for the deposit sum with interest.

The appointment of the Liquidators

10 Before the awards on the preliminary issue were rendered, the Sellers were informed by the Plaintiffs' solicitors that the Plaintiffs had been dissolved pursuant to a creditors' voluntary winding up.

11 Despite several rounds of correspondence with the liquidator managing the winding up, the Sellers were none the wiser as to the events leading up to the winding up. Dissatisfied and suspicious of some irregularities which they discovered, the Sellers commenced new winding up proceedings in the High Court against the Plaintiffs, seeking amongst other prayers, orders that any purported dissolution of the Plaintiffs be declared void and that the Plaintiffs be restored to being in liquidation.

12 Both of those prayers were granted by Chan Seng Onn J. That was how the Liquidators came to be in control of the Plaintiffs.

The interview with the Defendants

13 The Liquidators thereafter held two meetings with the Defendants ("the Interviews"). A range of questions, spanning the entire chronology from the Defendants' appointment as directors to the circumstances leading to and resulting in the void liquidation of the Plaintiffs, was fielded by Mr Yeo and his colleague. The first interview lasted about 1.5 hours; the second lasted just over an hour.

14 The Defendants answered some but not all of the questions posed. Suffice to say, the impression given at the end of the Interviews was that the Defendants were nominee directors. They were, it seems, appointed only because the shareholders or investors which had incorporated the Plaintiffs required Singapore directors. They had minimal to no participation in the affairs of the Plaintiffs from the moment they passed the director resolutions appointing the POA Holders.

Commencement of this action

15 Sometime after the Interviews, the Plaintiffs' solicitors wrote to the Defendants' solicitors demanding from each of the Defendants the deposit of US$3.4m and £4,650 (the cost of the award payable to the tribunal) on the ground that Lim and Beh had breached their director's duties to Prima and Star respectively. The Defendants refused to pay. The Plaintiffs then commenced the present action.

Present applications

16 As alluded to at the outset, three of the Defendants' requests for better particulars warranted deeper consideration ("the Three Requests"). They were:

(a) In respect of the averment, "[f]urther in the course of managing the affairs of Prima and Star, Lim and Beh had acted together in the course of their respective directorships of the Companies", please state the full facts, circumstances and grounds relied upon by the Plaintiffs in support of the allegation that Lim and Beh had "acted together" ("the First Request").

(b) In respect of the averment, "[a]s director of Star, Beh was accustomed to and did act in accordance with the directions or instructions of Lim", please state the full facts, circumstances and grounds relied upon by the Plaintiffs in support of the allegation that "Beh was accustomed to and did act in accordance with the directions or instructions of Lim" ("the Second Request").

(c) In respect of the averment, "[f]urther, the Directors held themselves out to possess and/or did in fact possess special knowledge or experience as Directors …", please state the full facts, circumstances and grounds relied upon by the Plaintiffs in support of the allegation that each of the Defendants had "held [himself] out to possess special knowledge or experience as [Director]" ("the Third Request").

17 As the arguments unfolded, it became clear that the generality of the Plaintiffs' pleadings in relation to the Three Requests did call for a more precise, elaborate formulation. The sole question, therefore, was whether there were sufficient grounds to postpone the provision of better particulars until after the conclusion of discovery and interrogatories.

Parties' submissions

The Plaintiffs' submissions

18 Stressing that the state of the Plaintiffs' pleadings was not self-induced, Mr Yeo submitted that Plaintiffs were suffering from a deficit of information, in large part because the first liquidator had

destroyed the Plaintiffs' books. The Liquidators therefore did not have knowledge of and were not in a position to obtain information that would enable them to better particularise their claims. Mr Yeo said that these were all recorded in the Plaintiffs' response to the Defendants' request for particulars by letter as well as in Mr Grimmett's affidavit opposing the Summonses.

19 Mr Yeo's secondary submissions as to why the provision of particulars should be postponed were namely, (a) the particulars sought were within the Defendants' knowledge, not the Plaintiffs', and (b) the Defendants owed fiduciary duties to the Plaintiffs.

The Defendants' submissions

20 The Defendants' position was presented by Ms Ho May Kim ("Ms Ho") and Mr Tan Teng Muan ("Mr Tan"), counsel for Lim and Beh respectively. Although Ms Ho and Mr Tan each tendered written submissions, for most parts, Mr Tan was content to ally himself with the oral submissions of Ms Ho. Therefore, purely for convenience, I shall refer to Ms Ho's submissions as if they were made on behalf of both Defendants.

21 Ms Ho's submissions revolved around the basic principle that the onus was on the Plaintiffs to properly particularise their claims. Her concern was that if the Plaintiffs were allowed to plead in the widest terms possible as they have done, those pleadings would serve as the springboard for a fishing expedition during the discovery and interrogatories stage.

22 In the same vein, Ms Ho submitted that even if the Defendants knew the true facts of the case better than the Plaintiffs, that was immaterial as the Defendants are entitled to know the outline of the Plaintiffs' case, even if that case is very different from the true facts of the case.

23 Last but not least, Ms Ho argued there was no general principle that the existence of a fiduciary relationship necessarily justifies the postponement of the provision of better particulars.

Issues

24 The central issue, thus, was whether the provision of better particulars should be postponed on account that:

(a) the Defendants were fiduciaries of the Plaintiffs;

(b) the Plaintiffs' circumstances placed them in an inferior position of knowledge relative to the Defendants; or

(c) the Plaintiffs had, at any rate, declared that they have already provided the best particulars they can.

My decision

The Defendants as fiduciaries of the Plaintiffs

25 I was not convinced that the law recognised that a fiduciary relationship between the applicant and respondent (even if proved) justified the suspension of provision of better particulars that would otherwise have been ordered.

26 One of the main authorities cited by Mr Yeo was *Haw Par Brothers International Limited and Another v Jack Chiarapurk also known as Jack Chia and others* [1991] SGHC 45 ("*Haw Par*"), a High

Court decision of Goh Joon Seng J and the only local case to have expressed any views on the issues at stake in the present applications.

27 The facts of *Haw Par* (which are reproduced at [57] to [59] below) are immaterial to this first issue. What is material is that although Goh J did cite with approval a proposition from *Zierenberg v Labouchere* [1893] 2 QB 183 ("*Zierenberg*") that discovery should precede the provision of better particulars in cases where a fiduciary relation exists between the parties, the learned judge did not elaborate on the principle undergirding such a proposition. Neither did the learned judge explain whether his decision was based on the application of this proposition. *Zierenberg* was the last of a string of references from a block citation.

28 A decision of the English Court of Appeal, *Zierenberg* concerned the extent of particulars needed to be furnished by a defendant in a libel action. The court, comprising Lord Esher MR, Bowen and Kay LJJ, was in agreement that the defendant was obliged to particularise the defence of justification prior to discovery. Kay LJ went further to distinguish defendants in a libel action from defendants charged for committing fraud in their capacity as agents or trustees. He opined that in the latter group of cases (at 189–190):

> … the fiduciary relation, and the circumstance that the facts are generally known only to the defendant, or at least that he has means of knowledge not in the first instance equally accessible to the plaintiff, may justify the Court in requiring the defendant to make discovery before the plaintiff is called on to give particulars, because the fiduciary relation of the defendant to which the plaintiff entitles the plaintiff to all the knowledge which the defendant may have …

29 Several comments should be noted of this passage which was also cited by Mr Yeo in support of his argument, first of which is that this observation of Kay LJ was *obiter*, as there was no similar pronouncement in the leading judgment of Lord Esher MR with whom Bowen LJ concurred.

30 Second and more importantly, Kay LJ was not in my view so much establishing a general proposition that a fiduciary relationship by that very fact alone invited a different set of rules, as he was highlighting that the circumstances in each case mattered. It is true that cases of fiduciary relationships should be scrutinised more closely because there is a higher possibility of knowledge asymmetry. However, it would be going one step too far to say that there is a general rule that discovery should precede the provision of particulars in cases where the applicant is alleged to have owed fiduciary duties to the respondent. Indeed, this was how Chitty J in the English High Court case of *Waynes Merthyr Company v D Radford & Co.* [1896] 1 Ch 29 ("*Waynes Merthyr*") at 34–35 also interpreted the dictum of Kay LJ.

31 Third, there is nothing in the cases referred to by Kay LJ which points unambiguously to the existence of such a general proposition. The first of the two cases cited, *Leitch v Abbott* (1886) 31 Ch D 374 ("*Leitch*"), stands for the proposition that the generality of an allegation of fraud is not a bar to discovery, particularly where the very reason for the pleader's inability to plead except in general terms is ignorance of some fact which is known *only* to the other party (at 379).

32 The other case, *Sachs v Speilman* (1887) 37 Ch D 295 ("*Sachs*"), concerned a plaintiff suing the defendant for acting as principal and not as the plaintiff's agent in the purchase and sale of certain shares and securities, even though the defendant had been engaged to act as the plaintiff's stockbroker for the transactions. Applying the reasoning in *Leitch*, North J dismissed the defendant's application for better particulars prior to putting up his defence because he was convinced that the particulars requested were *all* in the knowledge of the defendant (at 305).

33 Thus, neither *Zierenberg*, nor *Leitch* and *Sachs* stand for the proposition that an allegation of the existence of a fiduciary relationship triggered, without more, the postponement of the provision of better particulars.

The Plaintiffs' lack of knowledge and inability to obtain the relevant information

34 It follows from the foregoing that Mr Yeo was on firmer territory in arguing that the Plaintiffs were disadvantaged in terms of knowledge of the material facts. Reliance was placed, in particular, on the English Court of Appeal's decision in *Millar v Harper* (1888) 38 Ch D 110 ("*Millar*").

3 5 *Millar* involved a dispute between the executors of the defendant's wife's estate and the defendant. The executors who were the plaintiffs claimed that the under a settlement agreement between the defendant and his wife, the wife was entitled to retain various chattels following their marriage under her separate estate. The plaintiffs hence commenced proceedings seeking a declaration that certain chattels in the defendant's possession belonged to the wife's estate. The defendant in turn applied for full particulars of the chattels that were said to belong to the wife's estate.

36 In a preliminary hearing, the first instance judge directed the defendant to make an affidavit stating which of the items in an inventory of chattels in the defendant's home drawn up by the plaintiffs previously came within the scope of the marriage settlement agreement. This was not complied with, resulting in the defendant's application for better particulars being dismissed.

37 His appeal was also dismissed. Cotton LJ delivering the longest (though at ten lines was not lengthy by any measure) of the three judgments explained that while the defendant must know what furniture his wife had, the plaintiffs could not be supposed to have any such knowledge. Accordingly, in these circumstances, "it is right that discovery should come first" (*Millar* at 112), notwithstanding that it was also right that the plaintiffs would eventually have to provide better particulars before trial. Bowen LJ considered this approach "good practice" and rooted in "good sense" (*id*).

38 The reasoning in *Millar* is, with respect, somewhat threadbare, and invariably invites contrast against another familiar principle, which is that the "state of knowledge of [the applicant] has no bearing on the [respondent's] responsibility to supply them", given that the applicant is entitled to know, regardless of his knowledge of the facts, what case the respondent intends to put at trial: see *Keshi Pty Ltd and Another v Firefly Press (Australia) Pty Ltd and Others* [2008] FCA 440 ("*Keshi*") at [30]; and B C Cairns, *Australian Civil Procedure* (Lawbook Co, 9th Ed, 2011) at para 6.470. As also stated pithily in *Singapore Civil Procedure* vol 1 (G P Selvam gen ed) (Sweet & Maxwell, 2015) at para 18/12/63, "each party is entitled to know the outline of the case that his adversary is going to make against him, and to bind him to a definite story".

39 There is undoubtedly some tension between this principle which renders the applicant's extent of knowledge of the particulars requested irrelevant, and cases such as *Millar*, *Leitch* and *Sachs*, which have given protection to respondents who are ignorant of material particulars which are entirely in the knowledge of the applicants. In my view, the path to reconciliation of the two seemingly conflicting positions can be found in the decision of Chitty J in *Waynes Merthyr*.

40 In that case, the plaintiffs claimed that the defendants had fraudulently misrepresented on a number of occasions coal not from the plaintiffs' colliery as coal obtained from that colliery. Particulars were given of one such occasion. As to that occasion, the defendants averred that fraud had been committed by one of its clerks. They however sought better particulars in relation to the other occasions generally pleaded. The plaintiffs submitted that they did not have the requisite information

to frame accurate particulars of the other instances of fraud. As the defendants, not the plaintiffs, had the means of information which the plaintiffs did not, the plaintiffs argued that discovery should be permitted to precede the delivery of better particulars.

41 Chitty J agreed with the plaintiffs. First, he was swayed by the fact that the defendants could, by a careful examination of their books, have the means of discovering whether any other frauds similar to those alleged had been committed within the period that the plaintiffs had limited its case to, an avenue that was not so available to the plaintiffs. Second, he noted that the defendants had already "admitted the fraudulent use" of two of the plaintiffs' permits (*Waynes Merthyr* at 35). For Chitty J, these facts substantiated his judgment that the plaintiffs' claim was not "a fishing case, but one having *substantial foundation* [emphasis added]" (*Waynes Merthyr* at 35 and 36).

42 This "substantial foundation" or "non-fishing" principle, as it were, has also been referred to with approval in a series of Australian cases, including *Tomazos and another v Tomazos and others* (1993) 115 FLR 215; *Graphite Energy Pty Ltd & anor v Lloyd Energy Systems Pty Ltd & ors* [2014] NSWSC 1326; and *WA Pines Pty Ltd v Bannerman* (1980) 41 FLR 175 ("*WA Pines*").

43 In *WA Pines*, a decision of the Federal Court of Australia, Brennan J (with whom Bowen CJ and Lockhart J agreed) acknowledged that there could be cases where discovery is permitted before a claim was particularised but those were mostly explained by an anterior relationship between the parties which entitles one to obtain information from the other, or sufficient is shown to ground a suspicion that the party applying for discovery has a good case proof of which is likely to be aided by discovery. That was however not the case on the facts there (at 181) as:

> … where a bare allegation is made by [para 6] of the statement of claim and, the paragraph being denied, the applicant seeks to interrogate the Chairman and ransack his documents in the hope of making a case. That is mere fishing. … for the court to assist the applicants by making available to them the processes of interrogatories and discovery would be to assist them in an essentially fishing exercise and from this the court on established principles should refrain …

44 Fitzgerald J sitting in the Federal Court of Australia in *Lyons v Kern Construction (Townsville) Pty Ltd* (1983) 70 FLR 135 summed the position up thus (at 151):

> [T]hroughout all the cases, there is an insistence that discovery not be made available to a party before pleading or particulars for the purpose of "fishing". Even if a fishing investigation is not what is intended, the proper balance of the competing considerations may require the court to refuse early discovery. ...

As to what amounts to fishing, Fitzgerald J cited with approval the following instructive extracts from various judgments (at 152):

> "The moment it appears that questions are asked and answers insisted upon in order to enable the party to see if he can find a case, either of complaint or defence, of which at present he knows nothing, and which will be a different case from that which he now makes, the rule against 'fishing' interrogatories applies." [*Hennessy v Wright* (1888) 24 WBD 445 at 448]
>
> "A plaintiff who issues a writ must be taken to know what his case is. If he merely issues a writ on the chance of making a case he is issuing what used to be called a 'fishing bill' to try to find out whether he has a case or not. That kind of proceeding is not to be encouraged. For a plaintiff after issuing his writ but before delivering his statement of claim to say, 'Show me the documents which may be relevant, so that I may see whether I have a case or not', is a most undesirable

proceeding." [*Gale v Denman Picture Houses Ltd* [1930] 1 KB 588 at 590]

> "A 'fishing expedition', in the sense in which the phrase has been used in the law, means, as I understand it, that a person who has no evidence that fish of a particular kind are in a pool desires to be at liberty to drag it for the purpose of finding out whether there are any there or not." [*Associated Dominion Assurance Society Pty Ltd v Sir John Fairfax & Sons Ltd* (1955) 72 W.N. (N.S.W.) 250 at 254]

45 In summary, where a respondent claims to have no knowledge of the particulars sought, and further claims to be unable to obtain that information pending discovery and interrogatories, the court must go further to assess the sustainability of the specific averments in the totality of the existing pleadings and evidence. If the respondent is unable to satisfy the court that the specific averments for which particulars are sought have a "substantial foundation", the court should ordinarily order better particulars.

46 Consequently, the principle that the applicant's level of knowledge is irrelevant is correct, to the extent that the inquiry is rightly focused on the respondent. At the same time, it is also correct that a respondent who is ignorant of material facts ought to be permitted to provide particulars after the conclusion of discovery and interrogatories, though not merely because those facts are entirely in the knowledge of the applicant which is a necessary condition, but equally because there is substantial foundation to the respondent's averments for which particulars are sought. Inevitably, whether there is substantial foundation, and in what form, varies from case to case.

47 In my view, this approach fairly balances the applicant and respondent's respective interests, that is, for the applicant, the expectations of certainty as to the case which it has to meet as well as not be subjected to an overly expansive discovery and interrogatories process, and for the respondent, the expectation that it should be able to have recourse to discovery and interrogatories to equalise any informational handicap not of its own doing. I was also mindful that an overly forgiving philosophy may encourage respondents to be lackadaisical in their approach towards the formulation of their case, which is neither beneficial to the court, the parties or the overall resolution of the dispute.

48 Applying all of the above to the present case, the Plaintiffs' claims at least in relation to the Three Requests had, to my mind, little to no substantial foundation, and appeared more likely to be an attempt to fish for new claims.

The First Request

49 On the First Request (see [16(a)] above), which concerned the circumstances under which Lim and Beh acted together in the course of their directorship of each of the Plaintiffs, Mr Yeo submitted that Lim and Beh had so admitted in the Interviews to acting together. The basis of Mr Yeo's submission was one paragraph of the minutes which recorded the following:

> Lim stated that he and Beh acted together, that 'everything else is the same' and that whatever information they have, 'it is together'. SS (another counsel for the Defendants) stated that the Directors were appointed on the same day and acted together. SS preferred that they both be present as he acts for both of them and it would be inconvenient otherwise.

50 Although this seems like an admission of the same nature that proved to be material in *Waynes Merthyr*, it becomes far more ambiguous when read in context. The above paragraph was in response to a request by Mr Yeo that the interviews with Lim and Beh be conducted separately. Thus, in

saying that they acted together or had the same information, I understood the Defendants and their solicitor to mean that they were in the same boat, that they were both nominee directors appointed for the same purpose by the shareholders, and that they had discharged their responsibilities against that backdrop.

51 It is one thing to say that both Defendants regarded themselves as nominee directors with identical responsibilities and mandate, and another to say that they had "acted together". A simple admission to the former was not sufficient ground for an inference of the latter.

The Second Request

52 On the Second Request (see [16(b)] above), the foundation of the Plaintiffs' allegation that Beh was accustomed to and did act in accordance with the directions or instructions of Lim, was even shakier. The Defendants were left in the dark as to what it was that Lim did which Beh followed to such extent that Beh could be said to have acted in accordance with the former's directions or instructions. By that same token, the Defendants also had no way of knowing what about Lim's pattern of conduct Beh was accustomed to follow and did follow.

53 It did not help Mr Yeo's case that there was a real doubt as to whether the Defendants were employed by the same company – Corporate Managers Pte Ltd ("CMPL") of which Lim was a director – at the material time. Although the Plaintiffs averred that Beh was an employee of CMPL at all material times, this was refuted by Lim and Beh who both claimed that Beh only joined CMPL on 1 November 2011 which was after the Plaintiffs had already been placed under the first liquidation. As between the two averments, it seemed to me that the Defendants' version was facially more credible.

The Third Request

54 As for the Third Request (see [16(c)] above), I likewise did not see any substantial foundation for the allegation that Lim and Beh had held themselves out as possessing special knowledge or experience as Directors. The Interviews made it clear that the Defendants saw themselves as having been appointed for an extremely limited purpose. That being the case, it seemed counter-intuitive that the Defendants would have held themselves out to possess or in fact possessed special knowledge or experience as directors.

55 On balance, I was not satisfied that there was a substantial foundation for the three averments in respect of which the Defendants were seeking better particulars Accordingly, to allow the Plaintiffs to proceed to discovery and interrogatories without better particularisation would be to permit the Plaintiffs to fish for new claims under the guise of a hypothesis that is largely conjectural at this point.

The Plaintiffs' declaration that it could not provide better particulars pending discovery and interrogatories

56 On the final issue, that of whether the outcome should be different if the respondent has declared that it is unable to provide better particulars, I was of the view that it did not matter once the court concludes that there is no substantial foundation for the averments for which particulars are sought.

57 Locally, the only case which seems to have touched on this point, albeit gently, is *Haw Par*. The plaintiffs and the defendants in that case were partners in a joint venture. Under their joint venture agreement, the joint venture companies would have use of the plaintiffs' Tiger Balm

trademarks, and shall manufacture, market and distribute the Tiger Balm products in numerous countries across Asia.

58 Sometime towards the end of the joint venture (after the plaintiffs had intimated they would not renew the joint venture agreement), the defendants began manufacturing and marketing their own balm products under another brand, the Golden Lion Shield brand. The plaintiffs sued the defendants for, amongst other things, breach of the joint venture agreement. They claimed that the defendants had manufactured their own products in the same location as and with the same personnel from the joint venture companies. The plaintiffs also claimed that the defendants had priced the Tiger Balm products less competitively than the defendants' own Golden Lion Shield products.

59 The application for better particulars was taken out by the defendants who asked for particulars relating to the manufacturing process of the Tiger Balm products, as well as the pricing mechanism used by the joint venture companies. While Goh J upheld the assistant registrar's decision below to order best particulars within 30 days of discovery or interrogatories, it was evidently on the basis that he did not consider the plaintiffs' allegations as to the defendants' mismanagement of property and personnel and pricing to be without substantial foundation. And it was not difficult to see why, given that the defendants were manifestly in control of the joint venture companies. In fact, the 1st defendant was the managing director and chief executive officer of the joint venture companies.

60 In other words, *Haw Par* can be justified on the same principle in *Waynes Merthyr*, even though Goh J did not admittedly articulate his decision in those terms. More importantly, nowhere in *Haw Par* was there articulated a principle that a declaration by the respondent that no better particulars may be provided pending discovery or interrogatories is on its own sufficient to warrant a postponement of the provision of better particulars.

61 Mr Yeo sought to persuade me otherwise in his further written submissions by referring to two Australian decisions. I accepted that the court in those cases implicitly affirmed the approach which permits a respondent who has indicated that it is unable to provide better particulars to provide best particulars pending completion of discovery. However, I did not consider these authorities to be of any utility because the principle upon which those decisions were made is far from apparent.

62 In *National Mutual Life Association of Australasia Limited v Tolfield Pty Ltd (No 3)* [2012] FCA 100, the learned judge simply stated (at [14]) that he accepted the respondent's contention that it had provided the best particulars, and hence the "preferable approach" was to give the respondent liberty to amend the particulars after discovery.

63 The explanation in *Styles v Clayton Utz (No 3)* [2011] NSWSC 1452 was also brief. The learned judge indicated (at [64]) that he would order better particulars to be provided "unless it is indicated that the defendants have provided the best particulars they are able to provide of that paragraph". There was no explanation, either of principle or policy, why he was prepared to require the defendants to only furnish best particulars upon a declaration by the defendants of the same.

64 On the contrary, the Australian authorities cited by Ms Ho in her second round of submissions were closer to the mark. *Sedco Forex International Inc v Nexus Energy WA Proprietary Limited (No 2)* [2013] FCA 216 ("*Sedco Forex*"), in particular, provided a good illustration of the relevant concepts and how they ought to be applied.

65 The applicant's claim was primarily for damages for the respondents' repudiatory breach of a drilling contract and a cooperation agreement. One of the first respondent's defence was that the

applicant was not ready, willing and able to perform the drilling contract at all material times as there were defects with the rig which the applicant was supposed to supply. This was disputed by the applicant which requested the first respondent to particularise this aspect of its defence. It was argued by the applicant that without further particularisation discovery was an "impossible exercise", would be expensive, and would cause significant delays in the advancement of the proceedings.

66 The first respondent resisted, claiming that without a full and complete discovery of the appropriate documents it would not be able to identify all the defects in the rig. Especially pertinent to the present case was that the first respondent, like the Plaintiffs, submitted to the court that "it [had] given all the particulars it can at this point" – it had already particularised some defects; and the others were within the applicant's knowledge. The applicant countered that there was no evidence that the first respondent could not particularise further with the materials and information that it already had. Rather, the first respondent was on a fishing expedition and was seeking to delay the trial.

67 Barker J sitting in the Federal Court of Australia dismissed the first respondent's arguments. Noting that the crux was whether it could be said that the first respondent was on a fishing expedition, the learned judge took the view that the behaviour of the first respondent fell very much into the category of a fishing expedition because it was seeking to undertake a comprehensive search of the applicant's documents to "see if any other 'defects' can be found" when it "does not know if there are any others" and where "there is nothing to suggest there are any" (see *Sedco Forex* at [39]–[41]). It was not a case, Barker J said, of there being some evidence that supported the allegation.

68 There is some overlap between *Sedco Forex* and *Waynes Merthyr* because an assertion that best particulars have already been provided, as made in *Sedco Forex*, typically follows from an assertion of lack of knowledge, inability to procure the relevant information, or such similar handicap, as made in *Waynes Merthyr*. Logically, it is therefore strictly immaterial whether a respondent asserts blankly that it is not able to provide better particulars, or does not have the means to provide better particulars. In both instances, where the applicant has established that the respondent's pleadings are inadequately particularised, the onus is on the respondent to convince the court that notwithstanding its lack of knowledge of the material particulars, there is a substantial foundation for its averments.

69 Hence, having decided in the first instance that the Plaintiffs' claims in relation to the Three Requests had little to no substantial foundation, and appeared more likely to be an attempt to fish for new claims, it did not matter that they had declared that they were unable to provide better particulars.

Conclusion

70 For all of the foregoing reasons, I allowed the Defendants' applications in so far as it related to the Three Requests. Nevertheless, as all of the other requests were dismissed, I awarded the Defendants a reduced amount in costs.

71 Finally, it remains for me to record my utmost appreciation to Mr Yeo, Ms Ho and Mr Tan (and their respective colleagues) for their written submissions which were of the highest quality, and for the patience, deference and professionalism which they scrupulously exercised in the course of presenting their oral arguments, all without any compromise in conviction of their clients' cases. The court was ably assisted.