IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2024] SGHC 85

Originating Claim No 230 of 2023 (Registrar's Appeal No 10 of 2024)

Between

(1) Lutfi Salim bin Talib
(2) Zayed bin Abdul Aziz Talib (executor of the estate of Abdul Aziz bin Amir bin Talib)

… *Claimants*

And

British and Malaysian Trustees Limited

… *Defendant*

GROUNDS OF DECISION

[Civil Procedure — Production of documents — Specific production]
[Civil Procedure — Production of documents — Privilege]

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Lutfi Salim bin Talib and another
v
British and Malayan Trustees Ltd

[2024] SGHC 85

General Division of the High Court — Originating Claim No 230 of 2023
(Registrar's Appeal No 10 of 2024)
Chua Lee Ming J
27 February 2024

25 March 2024

Chua Lee Ming J:

1 Registrar's Appeal No 10 of 2024 was the defendant's appeal against the Assistant Registrar's order that the defendant produce three categories of documents. The issues in this appeal related to (a) the conclusive nature of the defendant's statement on affidavit that it did not have any further documents in its possession and/or control with respect to two of the categories; and (b) whether common interest privilege applied to the documents under the third category.

Background

2 The first claimant, Mr Lutfi Salim bin Talib, is a beneficiary under a trust (the "Trust") created by an Indenture of Settlement dated 10 September 1921 (the "Indenture"). The second claimant, Mr Zayed bin Abdul Aziz Talib, is the executor of the estate of Mr Abdul Aziz bin Amir bin Talib, a beneficiary

under the Trust who passed away in 2020. The defendant, British and Malayan Trustees Ltd, has been the trustee of the Trust since 31 March 1989.

3 In brief, the Indenture provides that if a beneficiary dies, his or her share in the Trust would devolve to his or her "issue". In the course of the defendant's administration of the Trust, a question arose as to what would happen if a beneficiary died without issue. Two conflicting interpretations of the relevant provisions in the Indenture were advanced:

(a) The first was that in such a case, the deceased beneficiary's share should be divided amongst all the other beneficiaries (the "*Pari Passu* Interpretation").

(b) The second was that the deceased beneficiary's share should be divided amongst only the beneficiaries within the same branch of the family, *ie*, the deceased beneficiary's sibling(s) and/or their offspring (the "Branch Interpretation").

4 The defendant, relying on legal advice, adopted and applied the *Pari Passu* Interpretation on a number of occasions. In May 2014, the first claimant's brother, Mr Shafeeg Salim bin Talib, also a beneficiary under the Trust, died without issue. The first claimant and another brother, Mr Kamal bin Salim Talib, informed the defendant that the Branch Interpretation should apply.

5 The defendant sought further legal advice, including obtaining the following opinions from M/s Allen & Gledhill LLP ("A&G") and Mr John Martin QC ("Mr Martin QC"):

(a) A&G's draft opinion dated 30 May 2014, which stated that the *Pari Passu* Interpretation applied.

(b) Mr Martin QC's opinion dated 21 March 2016, which stated that the Branch Interpretation applied although the alternative *Pari Passu* Interpretation was "not easily dismissed".

(c) A&G's opinion dated 25 April 2016, which took into account Mr Martin QC's opinion but maintained its preference for the *Pari Passu* Interpretation.

(d) A&G's opinion dated 26 April 2016, which stated that the construction of the Indenture was not governed by Muslim Law.

(e) A&G's opinion dated 5 May 2017, which considered arguments raised by the first claimant and his brother but maintained its preference for the *Pari Passu* Interpretation.

6 The first claimant then obtained an opinion from Mr Nicholas Le Poidevin QC ("Mr Le Poidevin QC") who opined that the Branch Interpretation should apply. On 16 December 2017, the first claimant provided the defendant with a copy of Mr Le Poidevin QC's opinion.

7 On 27 April 2018, the defendant issued Trustee's Circular No 78 to the beneficiaries under the Trust, which stated (among other things) that the defendant had prepared draft court papers to seek directions from the Court on the interpretation of the Indenture. The beneficiaries were invited to submit their views on the application.

8 On 22 November 2018, the defendant issued Trustee's Circular No 79 to the beneficiaries under the Trust, which stated (among other things) that it would be filing an application to seek directions from the Court on the interpretation of the Indenture, and that it would apply for an order appointing

persons to act as representatives of the group of beneficiaries who supported the *Pari Passu* Interpretation and the group of beneficiaries who supported the Branch Interpretation.

9 On 1 February 2019, the defendant filed HC/OS 163/2019 ("OS 163/2019"), seeking the Court's determination whether, on a proper construction of the terms of the Indenture, the *Pari Passu* Interpretation or the Branch Interpretation ought to apply. On 20 November 2019, the High Court decided in favour of the Branch Interpretation: *British and Malayan Trustees Ltd v Lutfi Salim bin Talib and others* [2019] SGHC 270.

10 On 18 April 2023, the claimants (also representing 31 other beneficiaries under the Trust) commenced the present action against the defendant, claiming (among other things) that the defendant breached the following duties:

(a) its duty to administer the Trust in accordance with the terms of the Indenture;

(b) its duty to act with reasonable care and skill in administering the Trust;

(c) its fiduciary duty to act with honesty and good faith for the benefit of the beneficiaries; and

(d) its fiduciary duty to disclose information of relevance and concern to the claimants.

The claimants' application for production of documents

11 On 5 October 2023, the parties exchanged their respective lists of documents pursuant to O 11 r 2 of the Rules of Court 2021 ("ROC 2021").

12 On 17 November 2023, the claimants applied under O 11 r 3 of the ROC 2021 for an order that the defendant produce documents described in eight categories. Eventually, the claimants proceeded on only categories 3, 6, 7 and 8. The Assistant Registrar ("the AR") ordered the defendant to produce the documents described in categories 3, 6 and 7 only.

13 With respect to categories 3 and 6, in his affidavit contesting the claimants' application, the defendant's Executive Director stated that:

> (a) apart from the documents that had been disclosed, the defendant did not have within its possession and/or control any further documents responsive to the requests; and
>
> (b) the defendant was not aware of the existence of any further responsive documents that may have been in its possession and/or control at a previous point in time.

14 The AR did not accept the defendant's assertions and ordered the production of the documents described in categories 3 and 6 (with a minor editorial deletion). The AR agreed with the claimants' argument that there was "a reasonable suspicion" that the documents sought existed.

15 Under category 7, the claimants sought documents between the defendant and A&G relating to Trustee's Circulars Nos 78 and 79 and OS 163/2019. The defendant claimed legal privilege over these documents. The AR agreed with the claimants that the joint interest exception to legal privilege applied and ordered the production of the documents sought.

16 The present appeal was against the AR's orders for production of the documents described in categories 3, 6 and 7.

The test under O 11 r 3(1) of the ROC 2021

17 The rules relating to the production of documents have been streamlined in O 11 of the ROC 2021. Order 11 r 2(1), which deals with the production of documents in the first instance, states:

> **Order for production (O. 11, r. 2)**
>
> **2.—**(1) The Court may, at a case conference, order that the parties in an action must within 14 days after the date of the case conference, exchange a list of and a copy of all documents in their possession or control, which fall within one or more of the following categories:
>
> (a) all documents that the party in question will be relying on;
>
> (b) all known adverse documents;
>
> (c) where applicable, documents that fall within a broader scope of discovery —
>
> (i) as may be agreed between the parties or any set of parties; or
>
> (ii) as ordered by the Court.

I shall refer to an order under O 11 r 2(1) as a "general production order".

18 A party who is not satisfied that a general production order has been fully complied with may apply under O 11 r 3(1) for an order for the production of a specific document or class of documents (a "specific production application"). Order 11 rr 3(1) and 3(2) state:

> **Production of requested documents (O. 11, r. 3)**
>
> **3.—**(1) The Court may order any party to produce the original or a copy of a specific document or class of documents (called

> the requested documents) in the party's possession or control, if the requesting party —
>
> (a) properly identifies the requested documents; and
>
> (b) shows that the requested documents are material to the issues in the case.
>
> (2) If the requested documents are not in the party's possession or control, the Court may order that party to file an affidavit stating this, as well as whether that party had such possession or control previously and if so, when that party parted with possession or control and what has become of the requested documents.

I shall refer to an order under O 11 r 3(1) as a "specific production order".

19 A specific production order may but need not be accompanied by an order under O 11 r 3(2). However, in most cases, it would be expedient to also seek an order under O 11 r 3(2) when making a specific production application under O 11 r 3(1). This will obviate the need for a subsequent application for such an order.

20 The respondent may challenge a specific production application on the grounds that the requested documents have not been properly identified and/or are not material to the issues in the case. He may also object to the specific production application on one or more of the following grounds and file an affidavit (the "opposing affidavit") stating the same:

(a) the requested documents do not exist;

(b) the requested documents are protected from production by, *eg*, legal privilege;

(c) the requested documents have never been in his possession or control; or

(d) the requested documents were but no longer are in his possession or control, in which case the respondent should explain what has become of such documents; or

(e) the respondent does not know or cannot confirm (i) whether the requested documents were ever in his possession or control; or (ii) what has become of the requested documents that were previously in his possession or control.

21 It is possible that the opposing affidavit may not contain all of the objections above and that the respondent may raise such objections in a subsequent affidavit filed in response to an order under O 11 rr 3(1) or 3(2) of the ROC 2021.

22 It is uncontroversial that an affidavit relating to the production of documents (whether it is an opposing affidavit, or an affidavit filed in response to an order under O 11 rr 3(1) or 3(2)) is generally conclusive subject to exceptions. This was the law under the previous versions of the Rules of Court, and it remains the law under the ROC 2021. The question is, what is the scope of the exceptions?

23 Paragraph 24/5/9 of Jeffrey Pinsler, *Singapore Court Practice 2017* vol 1 (LexisNexis, 2017) states that the court has the discretion to order further discovery, and refers to the following principle expressed by Brett LJ in *Jones v The Monte Video Gas Company* (1880) 5 QBD 556 at 558:

> … when the affidavit has been sworn, if from the affidavit itself, or from the documents therein referred to, or from an admission in the pleadings of the party from whom discovery is sought, the master or judge is of the opinion that the affidavit is insufficient, he ought make an order for a further affidavit; *but except in cases of this description no right to a further affidavit exists* in favour of the party seeking production. It cannot be

> shewn by a contentious affidavit that the affidavit of documents is insufficient. …
>
> [emphasis added]

24 Brett LJ did not state what was the threshold that had to be met before the court would conclude that the affidavit was insufficient. However, in my view, the emphasis on the documents that had been produced and the respondent's pleadings or affidavits suggested a higher, rather than lower, threshold. One could not argue, for example, that the requested documents must have existed merely because in the ordinary course of events such documents would exist.

25 In *Soh Lup Chee and others v Seow Boon Cheng and another* [2002] 1 SLR(R) 604 ("*Soh Lup Chee*"), the High Court concluded that the plaintiffs had made out a sufficient case to strike out the defence because they had "amply demonstrated" that the defendants had not disclosed documents that "must *surely* exist, or to be more precise, have existed" [emphasis added] (at [11]).

26 In that case, the first defendant was ordered to and had disclosed Balance Budget Summaries ("BBS") for certain projects. The BBS were hard copies of documents containing budget summaries in respect of each of the projects. The information that each BBS carried was stored in the database of the second defendant's computers. Each BBS represented a snapshot of the current status of the project's budget at the time it was generated.

27 The first defendant asserted in his affidavits that he had provided all the documents that were required of him. The plaintiffs argued that the defendants had failed to comply with the discovery orders because they had not produced the supporting or source documents from which the information fed into the data pool must originally have been set out.

28 The Court was taken through a "labyrinthine trail of documents" and agreed with the plaintiffs that it was "inconceivable" that no record had been kept of the supporting or source documents (at [7]). The Court also agreed with the plaintiffs that it was "apparent from the face of the BBS" that it was "impossible" for the defendants to have no record of the source or supporting documents (at [8]), as being in the nature of summaries, the BBS could not have existed without source documents (at [10]).

29 It can be seen from the above that the Court in *Soh Lup Chee* based its decision on what the documents that had been produced showed. The use of the words "surely", "inconceivable" and "impossible" suggested that the Court had in mind a higher threshold to the question whether it had been shown that the supporting or source documents existed. However, the Court also expressed its view that there was "more than a reasonable suspicion" that the supporting or source documents must have existed (at [7]), and referred, without disapproval, to the "lighter test" of "reasonable suspicion" (set out in *Lyell v Kennedy* (1884) 27 Ch D 1 at 20) as the test applicable in deciding whether to allow further discovery (at [9]).

30 In *Natixis, Singapore Branch v Lim Oon Kuin and others* [2023] SGHC 301, the High Court dealt with an application for specific discovery under O 24 r 5 of the Rules of Court 2014 (2020 Rev Ed). The High Court referred to *Soh Lup Chee* as authority for the proposition that "the court may order further discovery if it has a reasonable suspicion that there are further documents to be discovered" (at [27]). The Court concluded that a reasonable suspicion did exist that there were further documents to be discovered (at [29]).

31 Thus, there is authority that under the previous versions of the Rules of Court, an affidavit in respect of discovery of documents was not conclusive if there was a *reasonable suspicion* that further discoverable documents existed.

32 However, in my view, this "reasonable suspicion" test has no place under O 11 r 3 of the ROC 2021. For the purposes of deciding an application under O 11 r 3(1), a respondent's opposing affidavit and any subsequent affidavits filed in response to a previous order under O 11 rr 3(1) or 3(2) of the ROC 2021 are conclusive and the court should not go behind the affidavits unless it is *plain and obvious* from the documents that have been produced, the respondent's affidavits or pleadings, or some other objective evidence before the court, that the requested documents (a) must exist or have existed; (b) must be or have been in the respondent's possession or control; or (c) are not protected from production.

33 At this interlocutory stage of the proceedings, the court cannot resolve a dispute as to the sufficiency of affidavits relating to production of documents based on contentious affidavits. Logic and principle require a high threshold to be met before the court can go behind the affidavits relating to production of documents.

34 In addition, the higher threshold of "plain and obvious" is consistent with the Ideals in O 3 r 1 of the ROC 2021, in particular, expeditious proceedings, cost-effective work and efficient use of court resources. It is also consistent with the aim of preventing parties from engaging in unnecessary requests and applications with the hope of uncovering a "smoking gun": Civil Justice Commission, *Civil Justice Commission Report* (29 December 2017) (Chairperson: Justice Tay Yong Kwang) (the "CJC Report") at p 19. It is a rare case in which the further pursuit of specific documents actually results in the

uncovering of a smoking gun. As the CJC Report also noted, discovery is very expensive, time consuming and labour intensive. The costs of pursuing specific production orders are often disproportionate. The "plain and obvious" test would filter out the often-unproductive applications.

Documents sought under categories 3 and 6

35 In August 2015, Mr Martin QC's draft opinion was sent to A&G and in December 2015, A&G discussed certain parts of Mr Martin QC's draft opinion with him. Under category 3, the claimants sought production of all documents and correspondence between the defendant and A&G from September to November 2015 relating to Mr Martin QC's draft opinion.

36 In August 2016, the defendant and A&G discussed points to be raised to Mr Martin QC. It appears that the defendant and A&G had a meeting in April 2017. On 5 May 2017, A&G issued its third opinion (see [5(e)] above). Under category 6, the claimants sought production of all documents and correspondence between the defendant and A&G from August 2016 to May 2017 relating to Mr Martin QC's opinion and A&G's further opinion, and the disclosure of the opinions to the beneficiaries under the Trust.

37 The defendant's opposing affidavit stated that the defendant did not have any further documents responsive to the claimants' requests and was not aware of the existence of any further responsive documents that may have been in its possession and/or control previously (see [13] above).

38 The AR did not accept the defendant's assertion that it had no further documents. In essence, the AR agreed with the claimant that there was a reasonable suspicion that documents falling within the scope of categories 3 and

6 existed. It appeared that the AR did not accept that there were no other instructions from the defendant to its solicitors, A&G.

39 For reasons stated earlier (see [32]–[34] above), the AR should have applied the "plain and obvious" test. In my view, the evidence before the AR could not support a finding that it was plain and obvious that there were further documents falling within the scope of categories 3 and 6, which had not been produced. On the contrary, before me, counsel from A&G also confirmed that there were no such documents. There was no reason to doubt his confirmation. After all, categories 3 and 6 referred to documents between the defendant and A&G and he had a duty to this court to inform me if there were any such documents.

40 In my view, the defendant's affidavit ought to be treated as conclusive since it could not be said that it was plain and obvious that there were further documents that had not been produced. I therefore allowed the appeal against the AR's decision in respect of categories 3 and 6.

41 It must be noted that the defendant's affidavit is conclusive only for the purposes of the specific production application. It remains open to the claimants' counsel (if he or she so chooses) to cross-examine the relevant defendant's witnesses at trial on the defendant's assertion that there are no further documents, and to submit that the court should draw the appropriate adverse inferences if the court finds the defendant's assertion to be untrue.

Documents sought under category 7

42 Under category 7, the claimants sought production of all documents and correspondence between the defendant and A&G, as well as within the

defendant, relating to the preparation and circulation of Trustee's Circulars Nos 78 and 79 (see [7]–[8] above) and/or OS 163/2019 (see [9] above).

43 The defendant submitted that these documents were protected by legal privilege. The claimants submitted that any legal privilege attached to these documents was jointly held with the beneficiaries under the Trust.

44 The relevant legal principles were not in dispute. The relationship between a trustee and beneficiary is recognised as one that gives rise to a joint interest: Colin Liew, *Legal Professional Privilege* (Academy Publishing, 2020) at para 6.25, citing *CIFG Special Assets Capital I Ltd (formerly known as Diamond Kendall Ltd) v Polimet Pte Ltd and others* [2016] 1 SLR 1382 at [75]. Beneficiaries under a trust are entitled to an order that trustees produce legal advice obtained by the trustees and paid from the trust fund because the privilege is held for the benefit of the beneficiaries: Lynton Tucker, Nicholas Le Poidevin & James Brightwell, *Lewin on Trusts* (Sweet & Maxwell, 20th Ed, 2020) at para 21-059.

45 However, the beneficiaries' joint interest applies only to legal advice obtained by trustees for the benefit of the trust as a whole, *eg*, to guide them in the due administration of the trust. Beneficiaries have no joint interest in legal advice obtained by trustees for themselves personally, *eg*, legal advice in relation to a possible breach of trust or defending an action commenced against them: see *Talbot v Marshfield* (1865) 62 ER 728 at 729; *Lewis and others v Tamplin and others* [2018] 21 ITELR 277 at [59]; *Krok v Szaintop Homes Pty Ltd (No 1)* [2011] VSC 16 at [28].

46 The dispute in this case was whether the documents under category 7 related to legal advice obtained for the benefit of the Trust or the defendant's

own benefit. The defendant submitted that the joint interest exception to legal privilege did not apply because the documents were created when litigation was contemplated or pending. The defendant pointed out that a dispute over the interpretation of the Indenture had arisen by then.

47 I disagreed with the defendant's submissions. It was true that by the time Trustee's Circulars Nos 78 and 79 and the court papers for OS 163/2019 were being prepared, there had arisen a divergence of views as to the interpretation of the Indenture between the defendant and the claimants. However, although the defendant had previously adopted one interpretation, upon perusing the opinion of Mr Le Poidevin QC, which was provided by the claimants, the defendant decided to obtain the court's determination as to whether, on a proper construction of the Indenture, the *Pari Passu* Interpretation or the Branch Interpretation applied. OS 163/2019 was filed for that purpose. Trustee's Circulars Nos 78 and 79 related to the application that was subsequently made in OS 163/2019.

48 It was clear that the defendant took a neutral position in OS 163/2019. In addition, in OS 163/2019, the defendant had sought and obtained an order for the costs in those proceedings to be paid by the Trust.

49 I agreed with the claimants that the legal advice obtained by the defendant relating to Trustees Circulars Nos 78 and 79 and OS 163/2019 was for the purposes of the administration of the Trust and was therefore for the benefit of the Trust as a whole. Accordingly, the claimants had a joint interest in these documents and were entitled to an order for production of the same.

Conclusion

50 For the reasons stated above, I allowed the appeal with respect to categories 3 and 6 but dismissed the appeal with respect to category 7. I ordered each party to bear its own costs in this appeal. I also set aside the costs order made by the AR for the hearing below and substituted it with an order that each party was to bear its own costs.

Chua Lee Ming
Judge of the High Court

Lin Shumin, Cheng Si Yuan Shaun and Song Yihang (Drew & Napier LLC) for the claimants;
Chan Tai-Hui, Jason SC, Afzal Ali and Wong Ling Yun (Allen & Gledhill LLP) for the defendant.