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THE EARLY DEVELOPMENT OF THE DISCOVERY PROCESS IN CIVIL ACTIONS IN SINGAPORE

Discovery is a fundamental feature of the civil suit because of its impact on the course and outcome of the litigation. This article examines the development of the discovery process from the time of the first statutory code governing civil procedure, the Civil Procedure Ordinance, 1878, to the Rules of the Supreme Court, 1970. The article also measures the effectiveness of the process during this period, and considers the viability of the traditional policies which had governed it for so long.

I. INTRODUCTION

A fundamental feature of the common law system of civil litigation is the boundary between the period before trial and the trial itself. The pre-trial and trial processes have different aims, the purpose of the former being to ensure that the parties are ready to effectively prepare for adjudication, and that of the latter, to allow the parties to present their cases in a manner which is not only fair to them but, equally importantly, to enable the court to effectively adjudicate the dispute. Yet, in spite of their different objectives, these two phases of litigation are inextricably linked, for without the appropriate interlocutory steps there could be no trial, and in the absence of a final resolution of the dispute (by trial, summary or interlocutory judgment, settlement or otherwise), all interlocutory procedure would be meaningless.

The process of discovery is tied to these specific characteristics of common law litigation. Put in simple terms, the primary role of discovery is to enable a party to acquire information which he does not have concerning the issues in the suit so that he can effectively prepare and present his case for adjudication at trial. The absence of a discovery process would deprive the parties of the opportunity of finding out about evidence which could affect the outcome of the case. And a party who becomes aware of his opponent's evidence for the first time at trial may not have a sufficient opportunity to challenge it. It may be too late to call witnesses to rebut the evidence and to raise new arguments in relation to the facts. Such circumstances may result in injustice particularly when the evidence is

unreliable.[1] Furthermore, if cross-examination is a vital truth-seeking process, then discovery is an indispensible tool for achieving this objective by enabling the advocate to prepare appropriate questions for the opposing party's witnesses.

Apart from preparation, it is obviously in the interest of justice that all the relevant facts are before the court for the purpose of a just determination of the issues, and that the parties have a full opportunity to present their cases in the light of these facts. Discovery may, and often does, have a direct role in the resolution of the dispute without trial for it enables the parties to evaluate the strengths and weaknesses of their respective cases. This promotes a realistic estimate of the likelihood of success or failure at trial which in turn promotes settlement or the minimisation of issues. Discovery before the commencement of proceedings may also assist in this respect where a potential suit is not instituted because the absence of merits is evident from the information obtained.

As shown in relation to settlement, discovery is not always directly concerned with the trial. It may be necessary to require documents in support of an application for summary judgment, or in relation to an interlocutory procedure (as when the defendant is only able to plead his response to the statement of claim if documents referred to by the latter are disclosed, or when the disclosure of a document mentioned by an affidavit is necessary for the purpose of an interlocutory hearing). Evidence may have to be revealed so that measures can be taken to preserve it against disposal or destruction. Property which is the subject matter of the action, and therefore the concern of the issues in the case, may require inspection for a variety of reasons.[2] Discovery may even be appropriate before the commencement of proceedings to determine whether there is a viable cause of action or the identity of the wrongdoer. The disclosure of information may be essential to enforce an interlocutory remedy such as a Mareva injunction or a post-trial remedy such as the enforcement of a judgment when the location of the defendant's assets are unknown.

The extent to which discovery succeeds in achieving its objectives must depend on its availability and scope, considerations which are invariably

1 In 1840, Lord Wynford expressed the following view of the objectives of discovery in *Portugal* v *Glyn* 7 Cl & Fin 466, at 500: 'It is of very little use to get hold of any facts in court, unless you have a knowledge of those facts beforehand, in order to use them advantageously at the time of trial … [A] bill of discovery is much better in many cases than the examination of a witness. In the examination of a witness the answers may come upon you by surprise, but by means of a bill of discovery you have the whole examination in your possession, and you have an opportunity of thinking of it before it is used in court'.

2 *Eg*, the operation of a machine which caused injury to the plaintiff.

determined by the contemporary policy of litigation and the process of balancing its priorities. This may be illustrated by the following questions which will be examined in the course of this article:[3] Does a party have a right to discovery whenever he regards it necessary to have information? Does it extend to all types of information such as documents, oral evidence, property, the position taken by a party in relation to the facts? Does a litigant have a right to discovery at any stage of the litigation? Is discovery available against a non-party? Is it available before the commencement of proceedings? Should discovery be a matter of right or subject to the approval of the court? Related to these questions is the issue of whether the rules of procedure constitute the sole source of discovery or whether the courts have a jurisdiction to extend the scope of discovery beyond the limits of legislation.

Discovery in its orthodox and traditional sense concerns the discovery of documents. However, there are a variety of processes which relate to the disclosure of information in other forms (as assumed in the preceding paragraph) which may be regarded as involving discovery in a broad generic context. For example, the interrogatory process, which involves one party requiring the other to answer specific questions relating to the issues in the action, concerns the discovery of the latter's position in relation to the facts (the discovery of facts).[4] Related to this is the procedure by which a party admits to facts pursuant to a notice requesting him to do so for the purpose of limiting the issues in dispute. The disclosure of oral evidence and the inspection of property before the trial are other examples of discovery in a broad, non-documentary context. Although the primary intention of this and a following article[5] is to trace the development of the discovery of documents, interrogatories and the disclosure of oral evidence before trial, the related processes will be considered in context.

[3] In respect of discovery process up to and including the Rules of the Supreme Court, 1970 (RSC, 1970). Developments after this time will be considered in a subsequent article to be published in the next issue of the SJLS. See note 40.

[4] The interrogatory procedure is defined by Halsbury's Laws of England, 1975, 4th ed, vol 13, para 100 as being intended '…to enable a party to obtain from the opposite party admissions or evidence of material facts to be adduced at trial or to appraise the strength or weakness of the case before the trial and thereby to assist in the fair disposal of the proceedings at or before the trial or in saving costs.'

[5] See note 40.

II. From Ordinance V of 1878 to the Rules of the Supreme Court, 1934

A. *The English Background*

Discovery processes were available in the ecclesiastical courts, on the equity side of the Court of Exchequer and in the Court of Chancery well before litigants could make use of them in the Common Law courts. Until the statutory reform of the 1850s, a court of common law could only order discovery in very specific circumstances concerning particular persons and documents. The practice of *profert* and *oyer* has been described as follows: 'Where a party relied upon an instrument under seal in his pleading and it was in his possession he was bound to make *profert* of it, that is to say he must have averred that he brought it into court; the other party could then demand *oyer* of it, that is to say have it read to him. As a matter of fact the deed was not brought by the party into court or read to the other party, but a copy was given to him'.[6] The Common Law courts also had an 'equitable common law jurisdiction' which enabled an applicant to inspect or have copies of certain documents in his opponent's possession for the purpose of 'the framing of his pleading or the maintaining of his claim or defence'. The applicant had to be a party to the document 'in fact or in interest' and the documents had to be 'held by the adversary upon a trust express or implied to produce them when necessary for the use of the party demanding inspection'.[7] Discovery might also be permitted in relation to documents of a public character such as court rolls, corporation documents, by way of *mandamus* or by a rule in the action itself.[8] With regard to the administration of interrogatories in the common law system, this procedure was generally only possible in respect of a witness who was unable to be present at the trial because of illness or his absence from the jurisdiction. It was more akin to the present day deposition process[9] than the much broader system of administering and answering interrogatories which was available in the Court of Chancery.

In Chancery, the plaintiff's bill of complaint (essentially the statement of his case) would normally contain three sections concerning the facts on which he relied for the equitable remedy he sought, the evidence in support of his claim, and interrogatories (questions concerning specific facts)

6 Bray, E, *The Principles and Practice of Discovery Law of Discovery* (1885), at 264.
7 *Ibid*, p 264 *et seq*.
8 *Ibid*, pp 4, 281 *et seq*.
9 See O 39 (RC).

addressed to the defendant.[10] The defendant was obliged to answer these interrogatories as long as they were linked to the issues raised by the plaintiff in his bill. It was said that the overriding purpose of the Bill in Chancery was 'to scrape the conscience of the defendant'.[11] The original allegations first made in the Bill by way of narrative and charge were converted, as Lord Bowen put it, 'into a chain of subtly framed inquiries addressed to the defendant, minutely dovetailed and circuitously arranged so as to surround a slippery conscience and to stop up every earth'.[12] After 1852, as a result of the Chancery Procedure Act of that year,[13] the interrogation part of the bill was re-constituted as an independent process so that interrogatories came to be served in a separate and self-contained document as is the position today.[14] The defendant, too, could administer interrogatories to the plaintiff by issuing a separate bill (in effect a cross-bill). Equity also recognised the need of the parties to have access to the appropriate documentary evidence relating to the issues in the case, and to this end was prepared to make orders for the disclosure and production of documents on the application of the plaintiff or the defendant.[15] In 1844, Lord Langdale MR said in *Flight* v *Robinson*:[16]

> According to the general rule which has always prevailed in this court, every defendant is bound to discover all facts within his knowledge and to produce all documents in his possession which are material to the case of the plaintiff. However disagreeable it may be to make the disclosure, however contrary to his personal interests, however fatal to the claim upon which he may have insisted, he is required and

[10] For the function of interrogatories, see text at notes 4, 11-15.

[11] *Per* Lord Bowen in *Progress in the Administration of Justice during the Victorian Period in The Reign of Queen Victoria: A survey of Fifty Years of Progress* (1877) Vol I at 281, 329, edited by TH Ward and reprinted in *Select Essays in Anglo-American Legal History* (1907) Vol I at 516–557).

[12] *Ibid*. These extracts are taken from Sir Jack IH Jacob, *The Fabric of English Civil Justice*, 1987, at 93.

[13] 15 & 16 Vict, c 86.

[14] For the current process, see O 26 and 26A (RC).

[15] Although the defendant would not usually have a right to discovery from the plaintiff until the defendant responded sufficiently to the plaintiff's bill of complaint or bill of discovery. For a fuller account of the Chancery practice, see ER Daniell, *The Practice of the High Court of Chancery* (4th ed, 1865); Bray E, *supra*, note 6 as well as his *Digest of Discovery* (London, 1910).

[16] 8 Beav 22, at 34; 50 ER 9 at 13-14. Although the case was concerned with discovery of documents, the principle clearly applies to interrogatories as well ('discover all facts').

> compelled, under the most solemn sanction, to set forth all he knows, believes, or thinks in relation to the matters in question. The plaintiff being subject to the like obligation, on the requisition of the defendant in a cross-bill…'

The more generous processes of discovery available in Chancery inevitably attracted Common Law suitors, who could tap this jurisdiction by filing a bill for discovery. Also of considerable advantage to the common law litigant was the power of the Court of Chancery to grant an injunction to ensure compliance with the discovery process or to stay proceedings at law until the discovery process was complete.[17] The process by which a common law litigant sought discovery in Chancery is said to have had its origin in the fifteenth century.[18] However, by 1854, the need to resort to another court for discovery was no longer necessary. As a result of the Evidence Act 1851,[19] the process for the inspection of documents was widened and the Common Law Procedure Act, 1854[20] introduced general processes for the discovery of documents[21] and interrogatories.[22]

The institution of a single Supreme Court of Judicature[23] in place of the various courts[24] by the Supreme Court of Judicature Acts of 1873 and 1875[25] was to lead to even more fundamental reforms. The fusion of common law and equity ensured that a common discovery procedure would apply in all divisions of the High Court. A new set of rules was created for this purpose and included in the First Schedule of the Supreme Court of Judicature Act of 1875.[26] As pointed out in contemporary cases, the new rules adopted the principles of discovery established by the Court of Chancery rather than the narrower approach of the Common Law courts.[27] The rules in the First Schedule were replaced by the Rules of the Supreme Court, 1883, which were in turn superseded by the current Rules of the Supreme Court, 1965.

17 See ER Daniell, note 15, at 1414-1418.
18 Bray E, *supra*, note 6, at 5, refers to the reign of Henry VI.
19 14 & 15 Vict, c 99.
20 17 & 18 Vict, c 125.
21 *Ibid*, s 50.
22 *Ibid*, s 51-52.
23 Which comprised the High Court of Justice and the Court of Appeal.
24 Including the common law courts, the Court of Exchequer Chamber, the Court of Chancery and the Court of Appeal in Chancery.
25 36 & 37 Vict, c 66 and 38 & 39 Vict, c 77 respectively.
26 Rules also appeared in the Schedule to the Supreme Court of Judicature Act of 1873.
27 *Lyell* v *Kennedy* (1883) 8 App Cas 217, at 223 and 233; *Jones* v *The Montevideo Gas Company* (1880) 5 QBD 556, at 558.

B. *Origins of Singapore's Discovery Process*

The rules of procedure contained in the First Schedule of the Supreme Court of Judicature Act of 1875 were substantially reproduced in Singapore's first statutory code governing civil procedure, the Civil Procedure Ordinance, 1878.[28] Prior to this, the rules of procedure were developed and applied by the courts pursuant to their inherent jurisdiction,[29] and certain statutes applied rules of procedure to their respective spheres of law.[30] The 1878 Ordinance[31] was followed by the Civil Procedure Codes of 1907[32] and 1926[33] before the rules were re-constituted as the Rules of the Supreme Court, 1934 (RSC, 1934),[34] the Rules of the Supreme Court, 1970 (RSC, 1970)[35] and finally the Rules of Court, 1996 (RC).[36] The codification of the rules of procedure, first in the form of primary legislation,[37] and later as subsidiary legislation[38] (a vital development in the context of the proliferation of the rules),[39] clarified the law and constituted a comprehensive source of procedure which was readily available to judges and lawyers. In the course of the 118 years from 1878 to 1996 there have been striking developments in the discovery process.[40] Although the Civil Procedure Ordinance, 1878 was founded on the First Schedule of the Supreme Court of Judicature Act of 1875 (UK),[41] the rules of discovery have not always corresponded to developments in the UK.

The RSC, 1934, embodied the various modifications to the rules in the Civil Procedure Ordinance, 1878[42] and the Civil Procedure Codes of 1907 and 1926. The two Civil Procedure Codes and the RSC, 1934 provided

28 As indicated in the terminology of s 1 of this statute.
29 See Pinsler JD, 'The Inherent powers of the court' [1997] SJLS 1-49.
30 *Eg*, the Crown Suits Ordinance, No XV of 1876.
31 Which was amended by the Civil Procedure Ordinance, 1880 (No 8 of 1880). This statute was defined as 'An Ordinance for the further improvement of civil procedure'. It did not affect the discovery provisions in the Ordinance of 1878.
32 Ordinance No 31 of 1907.
33 Ordinance No 102 of 1926.
34 No 2941 of 1934.
35 S 274/1970.
36 S 71/1996.
37 *Ie*, the Civil Procedure Ordinances of 1878, 1907 and 1926 (*supra*, notes 31-33).
38 *Ie*, the RSC, 1934, RSC, 1970 and RC (*supra*, notes 34-36).
39 The CPC, 1926 (*supra*, note 33) contained well over a thousand sections.
40 Which will be examined in this article and in a subsequent article 'Disclosure of Evidence Before Trial: the Development of the Rules of Court and the Transformation of Policy', to be published in the next issue of the SJLS.
41 *Supra*, text at note 26.
42 As amended by the Civil Procedure Ordinance, 1880 (No 8 of 1880).

four primary avenues for the discovery of documents: documents referred to in pleadings and affidavits; discovery of specific documents; production of documents by order of the court and discovery of documents in general. The Civil Procedure Ordinance, 1878 catered to all these modes except the discovery of specific documents, a procedure which had been introduced in England in 1893 and subsequently adopted in Singapore.[43] Documents referred to in pleadings and affidavits had to be produced for inspection and for the taking of copies on notice being given by the other party.[44] The rule operates today[45] and its rationale is that disclosure in these circumstances enables the other party to plead in response or to make an effective reply in his own affidavit to the affidavit referring to the documents.

A broader rule enabled a party who knew or suspected that his opponent might have access to certain material documents to make an application ('at any time')[46] to the court for disclosure (a procedure referred to as 'discovery of specified documents' or 'specific discovery'). He would have to state in an affidavit that he believed that his opponent had access (at the time or previously) to the documents specified and that they related to the issues in the case (in the words of the rule, documents which 'relate to the matters in question in the cause or matter, or to some or one of them').[47] In response to the application, the court could 'make an order requiring any other party to state by affidavit whether any one or more specific documents …. is or are, or has or have at any time been, in his possession or power; and, if not then in his possession, when he parted with the same, and what has become thereof'.[48] As will be seen, the principle on which this rule is based has remained substantially intact through to the current Rules of Court, 1996.[49]

43 By the RSC, Nov 1893, r 15.

44 RSC, 1934, O 31, r 14, s 291 of the Civil Procedure Ordinance, 1878, s 346 of the Civil Procedure Code, 1907 and the same section of the Civil Procedure Code,1926.

45 See O 24, r 10 (RC).

46 Although, as will be seen, the courts did not entertain applications under this rule in the early stages of proceedings.

47 O 30, r 18(6) (RSC, 1934).

48 O 30, r 18(5) (RSC, 1934). Also see s 350 of the Civil Procedure Code, 1907 and the same section of the Civil Procedure Code,1926. For cases concerning the rule, see *White* v *Spafford* (1901) 2 KB 241 and *Graves* v *Heinemann* 18 Times Rep 115 (meaning of 'specific documents': documents must be named and specified); *Ormerod* v *St George's Ironworks* 95 LT 694 (the court could order discovery under this rule if the applicant could show, *prima facie*, that the documents were relevant and available to the other party). Also see *Astra-National Productions Ltd* v *Neo-Art Productions Ltd* [1928] WN 218.

49 See O 24, r 7(1)-(3) (RC).

The third avenue of discovery involved production of documents at the instance of the court.[50] The court could order the production of any document in a party's possession or power relating to any matter in question. The rationale of this rule, which continues to operate,[51] is that the court must have the power to ensure that all material documentary evidence is made available in the interest of fair adjudication. The last of the four processes of discovery involved general disclosure of documents. More often than not the party would not know what material documents were available to his opponent. In these circumstances he could make a 'blind' application to see what would come up. He was entitled 'at any time' in the proceedings to notify the other party 'to make discovery, on oath, of the documents which are or have been in his possession or power relating to any matter in question therein'.[52] The principle was the same as that which formed the basis of specific discovery:[53] a party was only liable to give discovery if he had possession of them or the 'power' to make them available and they had to be relevant to the issues in the case. As this was merely a request by one party to another the latter could refuse to comply. Only in these circumstances could the party seeking discovery make an application to the court for the appropriate order.[54] Moreover, it would determine whether discovery was appropriate at the time of the application, and if so, the scope of the documents which should be disclosed. If discovery was not appropriate at that stage, the court could refuse to make an order or adjourn the application to a suitable time. Order 30, rule 11(1) and (2) (RSC, 1934) entitled a party to request material documents from his opponent and to apply to the court for discovery in the event of the latter's refusal. Order 30, rule 11(3) and (4) (RSC, 1934) provided respectively:

> On the hearing of such application the court or judge may either refuse or adjourn the same, if satisfied that such discovery is not necessary,

[50] O 30, r 13 (RSC, 1934). Also see s 288 of the Civil Procedure Ordinance, 1878; s 343 of the Civil Procedure Code, 1907 and the same section of the Civil Procedure Code, 1926.

[51] See O 24, rr 12, 13 (RC).

[52] O 30, r 11(1) (RSC, 1934). Also see s 289 of the Civil Procedure Ordinance, 1878; ss 344 of the Civil Procedure Code, 1907 and the same section of the Civil Procedure Code, 1926. For contemporary cases on this notice requirement, see the judgment of Fisher J in *AP Naina Mohamed* v *TS Arunasalam Chitty* (suit No 410 of 1910, judgment dated 4 December, 1911, Singapore); and Hyndman-Jones CJ in *Singapore & Batu Pahat Steamship Co* v *Koh Hock Seng* (suit no 406 of 1911, judgment dated 15 January, 1912).

[53] See the previous paragraph.

[54] O 30, r 11(2) (RSC, 1934). The party requested to make discovery had to reply within seven days of the notice failing which the party requesting discovery could apply to court for the same.

> or not necessary at that stage of the cause or matter, or make such order either generally or limited to certain classes of documents as may, in its or his discretion, be thought fit.
>
> Discovery shall not be ordered when and so far as the court or judge is of the opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs.

The rule gave the court considerable discretion to order discovery subject to the materiality of the document, its necessity at the particular stage of the proceedings, and its availability to the party ordered to make discovery. Nevertheless, its operation was restricted by the limitations in the phraseology, certainly when compared to the corresponding provisions in the Civil Procedure Ordinance, 1878. Sections 288 and 289 of the 1878 Ordinance stated respectively:

> It shall be lawful for the court, at any time during the pendency therein of any suit or proceeding, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such suit or proceeding, as the court shall think right; and the court may deal with such documents, when produced, in such manner as shall appear just.
>
> Any party may, without filing any affidavit, apply to the court for an order, directing any other party to the suit to make discovery, on oath, of the documents which are or have been in his possession or power, relating to any matter in question in the suit.

It is immediately apparent that the unqualified wording of these provisions could have been construed to enable a court to order discovery as a matter of course, a generous approach reminiscent of Chancery practice before the fusion of the courts.[55] Documents merely had to relate to the issues in the case and be capable of production by the party ordered to give discovery.[56] It is also evident from section 288 of the Civil Procedure Ordinance, 1878 that the discretionary basis for discovery under that provision

[55] See *Bustros* v *White* 1 QBD 426 45 LJQB 642; 34LT 835; 24 WR 721 in which Jessel MR pointed out that the corresponding rules in First Schedule of the Supreme Court of Judicature Act of 1875 applied the practice in Chancery.

[56] The order for discovery was made in Chancery without reference to the probability or improbability of the party having any relevant documents in his possession. Bray, E, *supra*, note 6, at 157.

had not yet been formulated. The section may be compared to section 343 of the Civil Procedure Code, 1907, section 343[57] of the Civil Procedure Code, 1926 and Order 30, rule 11(4) RSC, 1934.[58] The three latter provisions incorporated the requirement that discovery must be 'necessary either for disposing fairly of the cause or matter or for saving costs'.[59] The introduction of additional elements in the RSC, 1934, such as the express provision for the court's refusal or adjournment, the requirement of necessity at a particular stage of the proceedings, the discretion to limit discovery to certain classes of documents, and the general condition that the documents had to be 'necessary either for disposing fairly of the cause or matter or for saving costs' signified a new circumspection probably aimed against abuse of the process. In *Jacobs* v *GWR Co*,[60] Mathew J said:[61]

> The object of the rule which requires an order to be obtained for discovery of documents is to enable the judge to exercise a discretion, to see what the object of the discovery sought is, and whether there is any real need for it. It would be defeating that intention to say that the obtaining [of] an order to interrogate included an order for discovery of documents. The object of the new Rules was to restrict discovery. The power of compelling the other side to disclose all documents as [a matter] of course was one of the most oppressive things in the practice before the Judicature Acts.[62]

The condition that the documents be necessary at that stage of the cause or matter (*ie*, the application) seriously qualified the earlier words may 'any time' in rule 11(1). With the exception of documents referred to in pleadings and affidavits[63] and other specific situations (as when discovery of the document was essential to enable a party to plead)[64] the court would not readily grant orders for discovery until the parties had delivered their respective

57 The section remained the same.
58 The text of r 11(4) is set out *supra*, text following note 54.
59 This requirement had been introduced to the English rules in 1893 by the RSC, Nov 1893, as a proviso tacked onto O 31, r 12 (RSC, 1883).
60 (1884) WN 33.
61 *Ibid*, at 34.
62 Note, however, that Bray E, note 6, at 156, indicates a less restrictive practice.
63 See the consideration of O 30, r 14 (RSC, 1934) *supra*, text accompanying notes 44-45.
64 See *Whyte* v *Ahrens* (1884) 26 Ch D 717; *Cashin* v *Craddock* (1875-1876) 2 Ch D 140, at 147.
65 See *Cashin* v *Craddock* (1875-1876) 2 Ch D 140, at 145-147; 34 LT 52; *Phillips* v *Phillips* (1879) 40 LT 815, at 821-823; *Republic of Costa Rica* v *Strousberg* (1879) 11 Ch D 323, at 326.

pleadings.[65]

The interrogatory process was subject to even stricter constraints in respect of the stage at which a party could administer his questions to the other party. Section 280 of the Civil Procedure Ordinance, 1878, enabled the plaintiff and defendant to utilise the process without leave during the period commencing from the time of service of the statement of claim or defence respectively until the close of pleadings. Leave was only required if a party wished to serve interrogatories at any other time or to deliver more than one set of interrogatories.[66] The developments in this sphere are interesting for while the English approach became more restrictive pursuant to amendments to the RSC, 1883 in 1893,[67] the original scope of the procedure in Singapore remained intact. In 1878, the time of Singapore's first Civil Procedure Ordinance, the principle governing the requirement of leave to administer interrogatories was the same in both Singapore and England. Section 280 of the Civil Procedure Ordinance, 1878 had adopted Order 30, rule 1 of the First Schedule of the Supreme Court of Judicature Act of 1875.[68] However, while the English position concerning leave became stricter under the RSC, 1883 and amendments in 1893,[69] the substance of the Singapore provisions gradually gained more flexibility under the RSC, 1970 and the subsequent amendments.[70]

In England, the first change came about under the Rules of Court, 1883. Order XXXI, rule 1 provided that leave had to be obtained in all actions except in those 'where relief by way of damages or otherwise is sought on the ground of fraud or breach of trust…'. This more rigorous rule resulted from the misuse of the interrogatory process. It was utilised in inappropriate circumstances and the administering party often failed to comply with the conditions that underpinned the procedure.[71] Presumably, it was thought that actions for fraud and breach of trust merited the procedure more than other suits and hence leave was not required in these cases. If so, the

66 See s 335 of the Civil Procedure Code, 1907; O 30, r 1, RSC 1934; O 26, r 1 RSC, 1970.

67 RSC (Revision), 1893 (UK).

68 *Supra*, text accompanying notes 23-27.

69 The strictness of the position was to continue until 1989 (when the RSC (Amendment No 4) 1989 Rules (SI 1989 No 2427) were introduced).

70 The amendments subsequent to the RSC, 1970 will be considered in a subsequent article (see note 40).

71 See the observations of Bowen LJ in *Aste* v *Stumore* (1883) 13 QBD 326. According to Bray, at 91-92, the effect of the more generous rule in the First Schedule to the Judicature Act, 1875 was 'that voluminous and unnecessary interrogatories were freely administered entailing great and useless expenditure, the *burthen* to poor litigants being very heavy'.

development was short-lived as subsequent modifications introduced in 1893[72] ensured that leave would be required even in those circumstances. For the following 96 years, leave was obligatory in all actions in the English process.[73]

When the RSC, 1934 was superseded by the new Rules in 1970 (RSC, 1970), far from incorporating the English approach, the pre-existing practice in Singapore of allowing parties to administer interrogatories without leave during the period of delivery of pleadings to their close was extended to the whole period before the close of pleadings. Order 26, rule 2 (RSC, 1970) provided: 'A party to any cause or matter may at any time before the close of pleadings without the leave of court deliver interrogatories relating to any matter in question between the parties'. It would seem that the abuse sought to be avoided in England by the requirement of leave in all circumstances was never a reality in Singapore. Singapore case law does not indicate the form of opportunism which had required the abandonment in England of the original position under the First Schedule to the Judicature Act, 1875. It is particularly significant that Order 26, rule 2 (RSC, 1970) affords an important (if uncommon) example of a situation in which rules of the RSC, 1965 (UK)) were not automatically imported in the face of a practice which had long been justified. Singapore underwent further developments in the 1990s, a course which, as will be seen, altered the traditional perspective of the interrogatory process.[74]

A characteristic of the interrogatory process which *did* remain constant in both the UK and Singapore was the unqualified rule that answers to interrogatories be given by oath or affirmation in an affidavit.[75] The rationale for this requirement is that as the answers may be used as evidence at the trial,[76] they must be subject to the same requirements as testimony in court.

[72] *Ie*, RSC (Revision) 1893. See Halsbury's Laws, 1975, vol 13, para 100, note 2. The procedure governing the application for leave in O XXXI, r 2 was also amended in 1893. See Bray E, *Digest of the Law of Discovery* (2nd ed, 1910), at 37-38.

[73] The leave requirement was significantly modified by the RSC (Amendment No 4) 1989 Rules (SI 1989 No 2427). These developments will be considered in a subsequent article (see note 40).

[74] These developments will be considered in a subsequent article (see note 40).

[75] See s 340(1) of the Civil Procedure Code, 1907; O 30, r 8 (RSC, 1934) and O 31, r 8 (RSC (1883) (UK)). Now, the court has the discretion to make an alternative order pursuant to O 26, r 2(2) (RC); O 26, r 2(2) (RSC (1965) (UK)).

[76] See s 355 of the Civil Procedure Code, 1907; O 30, r 23 (RSC, 1934) and O 31, r 24 (RSC, 1883 (UK)); O 26, r 7 (RC); O 26, r 7 (RSC, 1965 (UK)).

As will be seen, a relatively recent provision has been introduced to enable the court to make an alternative order when appropriate.[77] With regard to the position of the oath in the process of discovery of documents, here again, as in the case of the requirement of leave to deliver interrogatories, developments in England were not followed in Singapore until much later when the RSC, 1970 were introduced. In England, until 1919, the person asked or ordered to disclose documents under the general discovery rule[78] would have had to make an affidavit concerning the documents in his 'possession' or 'power'[79] (referred to as the 'affidavit of documents'). In that year, provision was made for an alternative procedure by which the court could order a party to deliver a list of the documents in the prescribed form.[80] The practice of giving discovery by list came to be more popular than discovery by affidavit with the result that it was put on a general and automatic footing by the RSC, 1965 (UK).[81] In Singapore, the affidavit of documents was the sole method of discovery[82] until it was abandoned by the RSC, 1970 in favour of the list process.

The primary rules governing interrogatories and discovery of documents in Order 30 of the RSC, 1934[83] were part of a framework of provisions intended to support the two processes. With regard to interrogatories, these ancillary rules concerned the application procedure,[84] costs,[85] the form for interrogatories,[86] the procedure applicable to corporations and other bodies empowered by law to sue and be sued,[87] objections to interrogatories,[88]

[77] See O 26, r 2(2) (RC (1996)). See the RSC (Amendment) Rules, 1992 and SC (Amendment No 2) Rules, 1993, which replaced O 26 in its entirety. The same amendment was made to the RSC (UK) in 1989 by the RSC (Amendment No 4) 1989 Rules (SI 1989 No 2427). These developments will be considered in a subsequent article (see note 40).

[78] *Ie*, O 31, r 12 ((RSC, 1883 (UK)). The corresponding rule in Singapore at the time was s 343 of the Civil Procedure Code, 1907 (which was later re-constituted as O 30, r 11 (RSC, 1934)).

[79] The term 'custody' had yet to be introduced.

[80] O 30, r 13A (RSC, 1883 (UK)), was introduced by RSC (Revision) 1919. No oath was required by this rule.

[81] With the additional requirement that the list of documents be verified by affidavit.

[82] See s 343 of the Civil Procedure Code, 1907; O 30, r 11 (RSC, 1934).

[83] *Ie*, O 30, r 1 (interrogatories); r 11 (general discovery of documents), r 14 (documents in pleading and affidavits) and r 18(5) (discovery of specific documents). These rules have been considered.

[84] O 30, r 2 (RSC, 1934).

[85] O 30, r 3 (RSC, 1934).

[86] O 30, r 4 (RSC, 1934).

[87] O 30, r 5 (RSC, 1934).

[88] O 30, r 6 (RSC, 1934).

[89] O 30, r 7 (RSC, 1934).

provision for setting aside or striking out improper interrogatories,[89] the manner of the answers (by affidavit in prescribed form),[90] the consequences following an omission to answer,[91] the use of answers at trial,[92] the liability of a solicitor who is served with an order for interrogatories,[93] the position of the Sheriff[94] and the application of the interrogatory procedure to infants and their representatives.[95]

The rules incidental to the four avenues of documentary discovery concerned the form of affidavit to be made by a party ordered to give general discovery,[96] the form of notice to produce documents referred to in a pleading or affidavit,[97] notice of inspection of those documents,[98] the order for inspection made by the court in respect of those documents if the party concerned did not allow inspection,[99] the application for discovery of specific documents,[100] the court's determination of issues on objection to discovery or inspection,[101] the consequences of non-compliance,[102] the liability of a solicitor who is served with an order for discovery or inspection,[103] the position of the Sheriff[104] and the application of the discovery procedure to infants and their representatives.[105]

Order 30 of the RSC, 1934, though the governing Order for discovery of documents and interrogatories, was not exclusive. Discovery was also provided for in other rules in the context of specific processes requiring documentary or factual information. So, in proceedings for summary

90 O 30, rr 8 & 9 (RSC, 1934).
91 O 30, rr 10 and 20 (RSC, 1934).
92 O 30, r 23 (RSC, 1934).
93 O 30, rr 21 & 22 (RSC, 1934).
94 O 30, r 24 (RSC, 1934).
95 O 30, r 26 (RSC, 1934).
96 O 30, r 12 (RSC, 1934), in relation to general discovery under O 30, r 11 (RSC, 1934).
97 O 30, r 15 (RSC, 1934), in relation to discovery of documents referred to in pleadings or affidavits under O 30, r 14 (RSC, 1934).
98 O 30, r 16 (RSC, 1934), in relation to discovery of documents referred to in pleadings or affidavits under O 30, r 14 (RSC, 1934).
99 O 30, r 17 (RSC, 1934), in relation to discovery of documents referred to in pleadings or affidavits under O 30, r 14 (RSC, 1934).
100 O 30, r 18(6) (RSC, 1934), in relation to discovery of specific documents under O 30, r 18(5) (RSC, 1934).
101 O 30, r 19 (RSC, 1934).
102 O 30, r 20 (RSC, 1934).
103 O 30, rr 21 & 22 (RSC, 1934).
104 O 30, r 24 (RSC, 1934).
105 O 30, r 26 (RSC, 1934).
106 The process was formerly referred to as 'judgment on writ specially indorsed'.

judgment under Order 14, rule 3(3),[106] the court could order persons attend for oral examination and to produce documents.[107] Similarly, a judgment debtor could be examined and ordered to produce documents in aid of execution pursuant to Order 40, rule 30(1) (in relation to the recovery of money)[108] and pursuant to Order 40, rule 31 (in relation to other claims).[109] There was also provision for the preservation and inspection of property involved in the action.[110] The procedure by which parties may service notices to admit facts or the authenticity of documents on each other was also available.[111]

With regard to sources of procedure other than the rules, provision was made for the application of English procedure in the absence of local rules. The RSC, 1934, as did the preceding Civil Procedure Codes, provided that in such circumstances 'the procedure and practice and the forms for the time being in force or use in the Supreme Court of Judicature in England shall, as near as may be, be followed and adopted.'[112] This clause raised two primary questions. Firstly, did it merely incorporate procedure expressed in the English rules or did it extend to principles of procedure established by the cases but which were not, or had yet to be, formulated by those rules. For example, did the clause apply cases decided by the courts before the Judicature Acts? Secondly, could the clause apply an English rule which was not part of the RSC, 1934, in relation to an area of procedure which was generally, if not comprehensively governed, by an Order of the RSC, 1934? For example, if a new rule had been introduced to the English rules but not to the Singapore rules, could the Singapore court apply the new rule by virtue of the clause (even though the Singapore rules included an Order governing the general area of procedure involved) on the basis that the new rule was 'in force or use in the Supreme Court of Judicature in England'. A positive response to this question might have met with the objection that if the clause had this effect, all amendments to the English

[107] Also see the former s 210 of the Civil Procedure Codes, 1907 and 1926 to the same effect.

[108] Also see the former ss 575, 658-662 of the Civil Procedure Codes, 1907 and 1926 to the same effect.

[109] Also see the former s 574 of the Civil Procedure Codes, 1907 and 1926 to the same effect.

[110] O 47, r 1 & 5 (RSC, 1934).

[111] O 31 (RSC, 1934).

[112] The clause appeared in the 'Preliminary Rules' in the RSC, 1934. Also see the former s 3 of the Civil Procedure Ordinance, 1878, s 3 of the Civil Procedure Code, 1907 and s 3 of the Civil Procedure Code, 1926 to the same effect. For examples of the operation of this clause in in various areas of procedure, see *Oomah Meida binte Hajee* v *Moona Jana Shaik Allaudin & Ors* [1932] MLJ 23; *GH Slot & Co Ltd* v *Registrar of Trade Marks SS* [1939] MLJ 276; *Gian Singh & Co* v *Bank of China Ltd* [1948] MLJ 86.

rules would have been automatically operational in Singapore notwithstanding the unamended state of the local rules. This state of affairs would have deprived the Rules Committee here of their authority and discretion in determining the most appropriate system of civil procedure for this country.

Although the clause has been applied in various cases,[113] its scope was never satisfactorily defined. In *KE Mohamed Sultan Maricar* v *The Prudential Assurance Co Ltd*,[114] which involved a marine insurance action, the defendant underwriter sought discovery of various documents relating to the ship ('ship's papers'). In England, a new rule (Order XXXI, rule 12A) had been added to the RSC, 1883 (UK) in 1936,[115] which provided for this form of discovery. This provision was not incorporated in the RSC, 1934 or RSC, 1970. The principle of discovery in this situation had been established long before the Judicature Acts in recognition of the insurer's need to be aware of the circumstances concerning the marine casualty.[116] If he could not obtain documents he would be at a considerable disadvantage *vis-à-vis* the shipowner who would normally be fully informed of the situation.[117] The new English rule 12A embodied the principle of discovery in marine insurance claims. Nevertheless, in *KE Mohamed Sultan Maricar*, Terrell, Ag CJ, ruled that neither the common law practice before the introduction of rule 12A nor the new rule itself could apply to the case before him as Order 30 of the RSC, 1934, which governed discovery in the local context, applied to the exclusion of all other sources of procedure.[118] The Straits Settlements Court of Appeal agreed with this conclusion.

The weakness of this reasoning lay in the failure of the court to view the application for the discovery of 'ship's papers' in the context of general discovery, an approach clearly contemplated by the rules. Order 31, rule 11 has already been considered. It enabled a party to apply for discovery

[113] *Oomah Meida binte Hajee* v *Moona Jana Shaik Allaudin & Ors* [1932] MLJ 23; *GH Slot & Co Ltd* v *Registrar of Trade Marks SS* [1939] MLJ 276; *Gian Singh & Co* v *Bank of China Ltd* [1948] MLJ 86.

[114] (1941) MLJ 20.

[115] By RSC (No 3) 1936.

[116] *China Steamship Co* v *Commercial Assurance Co* 8 QBD 145; *Tannenbaum* v *Heath* (1908) 1 KB 1032; *Harding* v *Bussell* (1905) 2 KB 85; *Rayner* v *Ritson* 6 B & S 888; *Daniel* v *Bond* 9 CBNS 723-724; *Janson* v *Solarte* (1836) 2 Y & C 136. Also see Bray E, note 6, at 49 and 557.

[117] See *Teneria Moderna Franco Espanola* v *New Zealand Insurance Co* [1924] 1 KB 79, at 84; *Leon & Ors* v *Casey* [1932] 2 KB 576, at 579-582.

[118] (1941) MLJ 20, at 21.The learned judge also justified this outcome on the basis of the Civil Law Ordinance.

of documents in the power or possession of another party. Discovery in relation to marine insurance actions or any other type of proceeding is merely an application of this principle. Hence, the Federal Court sitting in Singapore pointed out in a different context in *China Insurance Co Ltd* v *Loong Moh Co Ltd*[119] that a distinction has to be drawn between an Order introduced to bring about new and different procedures and an Order which provides for 'the exercise of existing procedural rights with a view to securing expedition and efficiency in dealing with the type of litigation with which the Order is concerned'.[120] Indeed, the new rule 12A was an adjunct to the pre-existing rule 12 of the English rules which conferred the right of general discovery, hence corresponding with Order 31, rule 11 (RSC, 1934). Paragraph (a) of rule 12(A) provided for an order in accordance with rule 12 or 14 of the Order and therefore contemplated the application of existing principles to a specific situation.

The decision in *KE Mohamed Sultan Maricar* may also be faulted on the basis that both the High Court and the Straits Settlement Court of Appeal ignored section 11(1) of the Courts Ordinance, 1934,[121] which empowered the Singapore court to exercise 'the jurisdiction formerly exercised by the Courts of Chancery, Queen's Bench, Common Pleas and Exchequer and the contemporary jurisdiction exercised by the High Court of Justice. The section, which had its origin in the Second Charter of Justice of 1826,[122] was re-enacted[123] in all the succeeding statutes[124] governing the jurisdiction and powers of the courts until Singapore became independent in 1963.[125]

[119] [1964] MLJ 307.

[120] *Ibid.*

[121] Ordinance 17 of 1934.

[122] Letters Patent issued on the 27 November, 1826. It vested the court with: 'such jurisdiction and authority as our Court of King's Bench and our Justices thereof, and also as our High Court of Chancery and our Courts of Common Pleas and Exchequer, respectively, and the several judges, justices, and Barons thereof respectively, have and may lawfully exercise within that part of our United Kingdom called England, in all civil and criminal actions and suits …'. (See the marginal note 'Jurisdiction of the Court defined'.)

[123] Subject to changes in terminology.

[124] The Third Charter, 1855; s 23 of the Courts Ordinance, 1868 (Ordinance V of 1868); s 44 of the Courts Ordinance, 1873 (V of 1873); s 10 of the Courts Ordinance, 1878 (III of 1978); s 9(1) of the Courts Ordinance, 1907 (30 of 1907); s 8 (a) of the Courts Ordinance, 1926 (101 of 1926); s 11(1) of the Courts Ordinance, 1934 (17 of 1934); and s 17(a) of the Courts Ordinance, 1955 (Cap 3, 1955 Rev Ed).

[125] The last appearance of the clause took the form of s 17(a) of the Courts Ordinance, 1955, which provided that the High Court had: 'jurisdiction and authority of a like nature and extent as are exercised by the Chancery and Queen's Bench Divisions of the High Court of Justice in England.'

[126] Ordinance III of 1878.

The terminology of these sections varied according to the times. Section 10 of the Courts Ordinance, 1878[126] reflected the fusion of the courts of common law and equity: 'The Supreme Court shall have such jurisdiction and authority as Her Majesty's High Court of Justice in England, and the several judges thereof, respectively, have and may lawfully exercise in England, in all civil and criminal actions and suits…'. Section 9(1) of the Courts Ordinance, 1907,[127] s 8 (a) of the Courts Ordinance, 1926,[128] and section 11(1) of the Courts Ordinance, 1934[129] referred to the jurisdiction formerly exercised by the Courts of Chancery, Queen's Bench, Common Pleas and Exchequer and the contemporary jurisdiction exercised by the High Court of Justice. Section 17(a) of the Courts Ordinance, 1955[130] referred to the 'jurisdiction and authority of a like nature and extent as are exercised by the Chancery and Queen's Bench Divisions of the High Court of Justice in England'.

Accordingly, the Singapore court did have the power to apply principles of equity and common law which had been established by the English cases.[131] In the context of discovery in marine insurance actions, the authorities in support of such discovery could have been relied on to apply the general rule in Order 30, rule 11 (RSC, 1934). In *China Insurance Co Ltd* v *Loong Moh Co Ltd*,[132] which involved an insurer's application for discovery of documents in marine insurance proceedings, the Federal Court doubted the validity of the decision of the Straits Settlements Court of Appeal in *KE Mohamed Sultan Maricar*. The Federal Court, which considered itself bound by the decision,[133] indicated that it might otherwise have allowed the application.[134] Although the Federal Court (in its short judgment) did not give reasons for its misgivings, it clearly implied that the common occurrence of marine insurance claims justified a new consideration of discovery in

[127] Ordinance 30 of 1907.
[128] Ordinance 101 of 1926.
[129] Ordinance 17 of 1934.
[130] Cap 3, 1955 Rev Ed.
[131] See cases in note 114.
[132] *Supra*, note 120.
[133] Thomson LP said: 'As to whether the case was rightly or wrongly decided I express no opinion; that point will have to be decided, if at all, elsewhere' (*ibid*, at 307).
[134] Thomson LP, dismissed the appeal 'with considerable reluctance' (*ibid*, at 307). His Lordship referred to the remarks of Greer LJ in *Leon & Ors* v *Casey* [1932] 2 KB 576, at 587: '…no more unpleasant duty has to be performed by a judge than that of giving, in accordance with binding authority, a decision which upon the facts before him he considers both unreasonable and unjust'.
[135] *Ibid*, note 108.

this sphere. Furthermore, the Federal Court's reference to *Leon & Ors* v *Casey*[135] (albeit in the different context of a judge's duty to follow binding authority)[136] is telling, for the case is one of several which rationalises the insurer's right to discovery in relation to a marine casualty.[137] Finally, the point ought to have be made in both *KE Mohamed Sultan Maricar* and *China Insurance Co Ltd* that the English courts did regard themselves free to consider equitable and common law principles of discovery.[138] Where there were rules to govern the particular area of discovery, these principles could be applied within the statutory framework,[139] as evinced by the cases which upheld the insurer's right of discovery in marine insurance claims under the general discovery rule[140] before the new Order 31, rule 12A (RSC, 1883) was inserted in 1936.[141] The Singapore court had a similar jurisdiction by virtue of its empowerment to act in the same capacity as the English courts.[142]

The English courts could also resort to principles of discovery established by Equity or Common Law beyond the scope of the rules of court.[143] A primary example of such discovery was the 'action for discovery'. This procedure, which had its origin in Equity, enabled a person to obtain

136 *Ibid.*

137 Also see *Teneria Moderna Franco Espanola* v *New Zealand Insurance Co* [1924] 1 KB 79, at 84.

138 Which were preserved by s 73 of the Judicature Act, 1873 (36 & 37 Vict, Ch 66).

139 See *Kearsley* v *Philips*:[1883] 10 QBD 465, at 466; *Attorney-General* v *Gaskill* [1882] 20 Ch D 519, at 526; *Lyell* v *Kennedy* (1883) 8 App Cas 223, at 223 and 233.

140 *Ie*, O 31, r 12 (RSC, 1883 (UK)).

141 For these cases, see note 114, *supra*. As to O 31, r 12A (RSC, 1883 (UK)), see text at, and subsequent to, note 115, *supra*.

142 *Ibid*, text at, and subsequent to, note 122. For examples of the earlier cases in which the court exercised its inherent power to regulate its proceedings, see *Ong Kin Hong* v *Ong Cho Teck* [1935] MLJ 142 in relation to the doctrine of *forum non conveniens*; and *Joshi* v *Indian Overseas Bank* [1953] MLJ 83 in which the common law principles established by the English Court of Appeal in *St Pierre* v *South American Stores (Gath and Chaves) Ltd* [1936] 1 KB 382 were applied. Also see *The Blue Fruit* [1979] 2 MLJ 279, at 281; *Emilia Shipping Inc* v *State Enterprises For Pulp and Paper Industries* [1991] 2 MLJ 379, at 381.Also see the observations of KS Rajah JC in *United Overseas Bank Ltd* v *Thye Nam Loong (S) Pte Ltd* S 413/94 (judgment dated 14/10/1994 (94 SC 423)).This doctrine of inherent powers was and is, of course, subject to the circumstances of the case, the question of whether particular rules of court applied to the situation, and the relationship between the inherent powers of the court and the rules of court. The subject is considered in Pinsler JD, 'The Inherent Powers of the Court' [1997] SJLS 1-49.

143 As these principles were expressly preserved by s 73 of the Judicature Act, 1873 (36 & 37 Vict, Ch 66).

information concerning the identity of the potential defendant from a person who facilitated the circumstances leading to the wrongdoing. This was an exception to the long-established rule that a person who was merely a potential witness (as opposed to being a party) in the intended proceedings could not be subject to a discovery order before trial. As Lord Reid put it much later on in *Norwich Pharmacal Co* v *Customs & Excise Commissioner*:[144] 'It has been clear at least since the time of Lord Hardwicke that information cannot be obtained by discovery from a person who will in due course be compellable to give that information either by oral testimony as a witness or [to produce documents] on a *subpoena duces tecum*.'[145] His Lordship added that the foundation of the rule is the assumption that eventually the testimony would be available at trial.[146] The rule was most probably linked to the incompetency of parties at common law before the Evidence Act, 1851[147] allowed them to testify. Prior to this development, discovery between the parties attracted far greater concern, for the only method by which their evidence could be made known was by the bill of discovery.[148] Correspondingly little emphasis was given to the discovery of a non-party's evidence before trial, as he would eventually testify. The rule that non-party witnesses could and, therefore, should only give evidence at the trial was also premised on the belief that non-party witnesses, having no direct interest in the case, should not be made to suffer the inconvenience or trouble of giving information before the trial.[149] Therefore, a person could not be made a party merely for the purpose of discovery.[150] Other con-

[144] [1974] AC 133, at 174.

[145] This principle was primarily based on the expectation that there would be a trial at which the evidence would become available. The general rule that non-party witnesses should only give evidence at the trial was also premised on the belief that non-party witnesses, having no direct interest in the case, should not be made to suffer more inconvenience than necessary. See Bray E, note 6, at 40 *et sequor* for an account of this general rule. The exception mentioned in the text was applied in *Norwich Pharmacal*. For some of the earlier cases concerning this exception, see *Upmann* v *Elkan* [1871] LR 12 Eq 140 ; [1871] LR 7 Ch App 130; *Orr* v *Diaper* (1876-1877) 4 Ch D 92; *Reiner* v *Salisbury* (1875-1876) 2 Ch D 378.

[146] *Norwich Pharmacal Co* v *Customs & Excise Commissioner* [1974] AC 133, at 174. Also see *Manchester Fire Insurance Co* v *Wykes* 33 LT 142, at 144 & 146; 23 WR 885.

[147] S 2. *Supra*, note 19.

[148] For an account of the procedure, see the paragraph following note 9.

[149] *Portugal* v *Glyn* (1840) 7 Cl & Fin 466 (7 ER 1147); *Newman* v *Godfrey* (1788) 2 Bro CC 332 (29 ER 185); *Tooth* v *Dean and Chapter of Canterbury* (1829) 3 Sim 49 (57 ER 119).

[150] See *Douihech* v *Findlay* [1990] 1 WLR 269.

siderations included the danger that a party, having advance knowledge of his opponent's evidence, might concoct evidence in response or be tempted to suborn the witness.[151] The exceptions to the 'mere witness' rule other than the 'action for discovery' included situations in which a person might be made a party for the purpose of discovery on the basis of his relationship with the principal, such as an agent implicated in a fraud.[152]

The authority of the Singapore court to exercise the common law or equitable jurisdiction of the English courts ceased with the repeal of the Courts Ordinance, 1955[153] in 1964, and the introduction in that year of a statutory provision which confined the court's power to order discovery to the scope set by the rules of court.[154] As will be seen,[155] these developments rendered the process of discovery insufficiently flexible to take into account the needs of parties to obtain information in circumstances not specifically contemplated by the rules. The status of the exceptions to the 'mere witness' rule (such as the 'action for discovery'),[156] established by Equity, was, and continues, to be in doubt. The insurer's right of discovery in marine insurance actions, which might, until the statutory developments of 1964, have been determined by the principles of English case law (pursuant to the vesting of the English court's jurisdiction and authority in the Singapore court),[157] was devoid of a specific procedural basis[158] from that time until the introduction of a new rule in 1992. Moreover, the rules of court did not contemplate discovery in respect of newly developed reliefs such as obtaining information concerning assets in aid of a *Mareva* injunction and the *ex parte* application for an Anton Piller order. These matters will be considered after the system of discovery, interrogatories and related processes under

[151] See Hare, *Discovery of Evidence* (1st ed, 1836), at 68; (2nd ed, 1876), at 54; *Plummer* v *May* (1749-1750) 1 Ves Sen 426 (175) (27 ER 1121); *Norwich Pharmacal Co* v *Customs & Excise Commissioner* [1974] AC 133, at 154 (counsel's argument).

[152] For an account of this and other exceptions, see Bray E, note 6, at 48, 556 and 609 *et seq.* Also see the judgments of the High Court, Court of Appeal and House of Lords (and the parties' arguments before the House of Lords) in *Norwich Pharmacal Co* v *Customs & Excise Commissioner* [1974] AC 133, at 154-155, 157-160, 173-174 (CA & HL); [1972] 1 Ch 566, at 582 (HC).

[153] S 17(a) of which had vested the Singapore court with the jurisdiction and authority of the English courts. *Supra*, text at, and subsequent to, note 122

[154] See para 14 of the Schedule to the former CJA, 1964 and the former s 18(2)(m) of the SCJA, 1970. This development, and the consequences on the discovery process, are discussed under 'IV Discovery beyond the RSC, 1970?' (*infra*, text after note 196).

[155] Under 'IV Discovery beyond the RSC, 1970?' (*infra*, text after note 196).

[156] *Supra*, notes 144-153.

[157] By the successive Courts Ordinances. *Supra*, notes 122-131.

[158] Para 14 of the Schedule to the CJA, 1964 and s 18(2)(m) of the SCJA, 1970 limited the scope of discovery to the rules.

the RSC, 1970 are examined.

III. Discovery under the Rules of the Supreme Court, 1970

The RSC, 1970 introduced significant changes to the system of discovery and interrogatories. A major development concerned the separation of the two processes by the introduction of distinct Orders (Order 24 in relation to discovery of documents and Order 26 in respect of interrogatories). This measure was necessary to underline the difference between the respective functions, one relating to the discovery of documentary evidence, the other being concerned with the discovery of the position taken by an opposing party in relation to the facts. The division was also appropriate in the context of the development of separate and distinct rules corresponding to the operation of the two processes. The introduction of the summons for directions constituted no less a fundamental change to the procedural apparatus.

With regard to discovery of documents, the types of discovery available under the former RSC, 1934 (general discovery, specific discovery, discovery of documents in pleadings and affidavits, and production at the instance of the court)[159] were preserved and modified. General discovery under the preceding rule 11 of Order 30 (RSC, 1934), which had been available on notice to the other party on application to the court,[160] was transformed into an automatic requirement. As most parties sought, and were entitled to, general discovery after the close of pleadings, the formality of notice and subsequent application to the court unnecessarily delayed the procedure. Order 24, rule 2(1) (RSC, 1970), which continues to operate in the Rules of Court (1996), provides that, in proceedings commenced by writ of summons, the parties must exchange lists of documents (verified by affidavit, if requested)[161] within 14 days after the pleadings are deemed to be closed. Moreover, the rule requiring the party giving discovery to make an 'affidavit of documents' was abrogated in favour of the list process.[162] The court was also vested with a supplemental power to order parties to make and serve lists of documents on each other.[163] This could be exercised where the parties have not complied with the rule or where Order 24, rule

[159] Described above.

[160] Under the previous rule the party seeking discovery had to give notice to the other party. It was only if the other party did not comply that an application could be made to the court.

[161] See O 24, r 2(7) (RSC, 1970).The parties could limit discovery (see O 24, r 1(2) (RSC, 1970)) and a number of qualifications applied (see O 24, r 2(2)-(7) (RSC, 1970)).

[162] See O 24, r 2 generally.

[163] O 24, r 3 (RSC, 1970). The position is the same under O 24, r 3 (RC, 1996).

2(1) does not apply (as when the proceedings were commenced by a process other than the writ of summons). The procedures concerning the disclosure of documents referred to in a pleading or affidavit[164] and enabling a party to obtain discovery of particular documents[165] were retained by Order 24, rule 10 and rule 7 (RSC, 1970) respectively. And the court continues to have the power to order a party to produce documents pursuant to Order 24, rule 12 (RSC, 1970).[166]

Another significant development which broadened the scope of discovery was the introduction of the alternative condition of custody to the determination of whether documents were available to a party for the purpose of disclosure by him. Under the RSC, 1934, the party only had to disclose documents which were within his 'possession' or 'power'. Under the RSC, 1970 the obligation was extended to documents in the party's 'custody'. It was established long ago that 'possession' in the context of the rule connotes a legal right to deal with the document and is not constituted by mere physical possession (custody).[167] Therefore, a person who has physical access to a document, but no possessory rights over the document, may be said to have custody of it. Although a party who has custody of a document has, since the introduction of the RSC, 1970, been obliged to disclose it, it may be possible for him to object to its production on the basis that the person who has legal rights over the document has refused his consent. The court has a discretion whether to order inspection, and for this purpose will determine whether the person claiming a legal right over the document would be prejudiced by its disclosure.[168]

The summons for directions, which was originally introduced in England in 1954[169] on the recommendations made in the final report of the 'Evershed Committee',[170] did not become part of Singapore's civil process until 1970 when it was adopted by the RSC of that year. Although the procedure is

[164] In the former O 30, r 14 (RSC, 1934).

[165] In the former O 30, r 18(5) (RSC, 1934).

[166] Hitherto the power was vested by O 30, r 13 (RSC, 1934).

[167] *Reid* v *Langlois* 3 M & G 636; *Kearsley* v *Phillips* 10 QBD 40. Also see Bray, note 6, at 194 and 224.

[168] See SCP, 1997, vol 1, para 24/2/4 which was approved in *Alfred Crompton Amusement Machines Ltd* v *Commissioners of Customs and Excise (No 2)* [1974] AC 405, at 429. Also see s 133 of the Evidence Act. Issues of breach of confidence by the person having custody may also arise.

[169] By RSC (Summons for Directions) 1954. The procedure was initially governed by O 30 and was later reformulated and replaced by O 25 of the RSC, 1965 (UK).

[170] Final Report of the Committee on Supreme Court Practice and Procedure, July 1953 (Cmd 8878).

not specifically concerned with discovery, the power of the court to give directions and make orders on the hearing of the summons (which occurs after the pleadings are deemed to be closed)[171] has had a vital impact on the disclosure of evidence before trial. The process is said to provide '... a thorough stocktaking in relation to the issues in the action and the manner in which the evidence should be presented at a trial with a view to shortening the length of the trial and saving costs generally'.[172] It enables the court and the parties to review the case as a whole to determine what steps remain to be taken and what further steps are necessary for the matter to be ready for trial.

The procedure has a direct bearing on the discovery process because of the various orders which the court might make in relation to the disclosure of evidence before the trial. For example, under the RSC, 1970, the court could give directions concerning such matters as the disclosure and inspection of evidence pursuant to Order 24, the service of interrogatories pursuant to Order 26, the inspection of property being the subject matter of the action under Order 29, the admission of statements of evidence, affidavits, depositions, photographs and plans, and expert reports[173] pursuant to the parties' agreement.[174] Although the summons for directions procedure did not create new modes of discovery, it did ensure that the rules requiring discovery would be observed. Moreover, it had the added significance of bringing the parties together in an official manner to encourage them to agree to the admission of evidence, an opportunity which may not otherwise have arisen. For example, in relation to expert witnesses, the court might make an order that 'A medical report be agreed, if possible, and that, if not, the medical evidence be limited to ... witnesses for each party'.[175] Being privileged documents, the parties were not obliged to disclose their respective expert reports to each other.[176] However, this right was often waived and the reports exchanged before trial in the interest of effective preparation. This practice has often been encouraged by the court to avoid the considerable difficulties which may arise from the concealment of expert evidence.[177]

[171] See O 25, r 1.

[172] SCP, 1997, vol 1, para 25/1/1.

[173] *Eg*, medical, engineering and survey reports.

[174] See paras 12-26 of Form 46 of Appendix A and O 25, r 1.

[175] See paras 23 of Form 46 of Appendix A and O 25, r 1.

[176] See *Worral* v *Reich* [1955] 1 QB 296; *Causton* v *Mann Egerton (Johnsons)* [1974] 1 WLR 162.

[177] In this context, see the observations of Mustill LJ in *Wilsher* v *Essex Area Health Authority* [1987] 2 WLR 425, at 461 and the ruling of Wilberforce J in *In re Saxton* (*Johnson* v *Saxton*) [1962] 1 WLR 859. See *infra*, note 180.

The only rule which made the right of a party to call an expert witness dependent on the disclosure of his report before trial concerned reports on accidents on land due to a collision or apprehended collision. This rule[178] was directed at eliminating the element of surprise in the evidence of experts who claimed to be able to draw from their examination of the damage sustained by motor vehicles such inferences as their respective speeds and the point and angle of impact.[179] It will be seen that the principle of making the adduction of expert testimony at trial dependent on pre-trial disclosure of the expert's report has very much wider application under the present Rules of Court than it did in the past.[180]

As in the case of discovery of documents, the general approach of allowing the parties to interrogate each other was maintained subject to significant modifications. The first rule of Order 26 (RSC, 1970) re-expressed the principle of the former Order 30, rules 1 and 2 (RSC, 1934). The interrogatories had to relate matters in question between the two parties in the proceedings[181] and be 'necessary either for disposing fairly of the cause or matter or for saving costs'.[182] Moreover, the court was required under the RSC, 1970, as it was under the RSC, 1934, to take into account any offer made by the party to be interrogated to give particulars or to make admissions or to produce documents relating to the matters in question.[183] Perhaps the most interesting development in Order 26 of the RSC, 1970 was not merely the retention of the existing practice of allowing a party to administer interrogatories without leave during the period commencing with the delivery of his pleading to the close of pleadings, but the extension of this right to any time from the commencement of proceedings to the close of pleadings.[184] This development was in complete contradistinction to the English process in which leave was required in all circumstances

[178] O 38, r 6 (RSC, 1970).

[179] See the Law Reform Committee's 17th Report (Evidence of Opinion and Expert Evidence), 1970 (Cmnd 4489), at 15.

[180] To be discussed in a subsequent article (see note 40). Also see *In re Saxton* [1962] 1 WLR 859, in which Wilberforce J would only give leave to a party for his expert to inspect certain documents (for the purpose of assessing handwriting) on condition that his resulting report be offered to the opposing party before the trial.

[181] O 26, r 1(1)(a) (RSC, 1970) and O 30, r 1(3) (RSC, 1934).

[182] O 26, r 1(3) (RSC, 1970) and O 30, r 2 (RSC, 1934).

[183] *Ibid.*

[184] See O 26, r 2 (RSC, 1970). See text after note 73.

[185] *Ibid.*

in which interrogatories were administered. The possible reasons for this departure from English procedure have already been considered.[185] Other rules in Order 26 (RSC, 1970) corresponded in substance, though not in form, with many of the provisions governing interrogatories in the former Order 30 (RSC, 1934).[186]

The RSC, 1970, as did the RSC, 1934, made provision for discovery of documents or of facts under other rules. The court hearing an application for summary judgment might order the defendant to produce documents.[187] It might have made an order allowing a party to inspect property.[188] A party could serve a notice to admit facts or the authenticity of documents on his opponent.[189] Under the RSC, 1934, a judgment debtor could be examined and ordered to produce documents in aid of execution pursuant to Order 40, rule 30(1) (in relation to the recovery of money)[190] and pursuant to Order 40, rule 31 (in relation to other claims).[191] Although these rights of discovery against the judgment debtor were retained by Order 48 (RSC, 1970),[192] doubts arose as to the scope of the provision – in particular, whether it extended to foreign jurisdictions.

A variety of approaches might have been taken in relation to Order 48. The court might have preferred the narrow view by holding that it only had power to examine the judgment debtor in relation to Singapore assets. It may have considered that its jurisdiction was broader than this where those assets could be used to satisfy the Singapore judgment (by virtue of a reciprocity agreement between Singapore and the foreign country or the transfer of the foreign assets to Singapore), or where the information concerning those assets might reveal details, hitherto unknown, about the

[186] Compare O 26, rr 1(2), (4)-(6), 3-9 (RSC, 1970) with O 30, rr 5-10, 20-23 (RSC, 1934), concerning the form for interrogatories, the procedure applicable to corporations and other bodies empowered by law to sue and be sued, objections to interrogatories, provision for setting aside or striking out improper interrogatories, the manner of the answers (by affidavit in prescribed form), the consequences following an omission to answer, the use of answers at trial, the liability of a solicitor who is served with an order for interrogatories. Additional matters were included in O 26 (RSC, 1970), such as the right of a party to raise privilege (r 5), the applicable procedure when two or more parties were to be served with interrogatories (r 4), and the matter of revocation or variation of orders (r 9).

[187] O 14, r 4(4) (RSC, 1970).

[188] O 29, r 2(1) (RSC, 1970).

[189] O 27 (RSC, 1970).

[190] Also see the former ss 575, 658-662 of the Civil Procedure Codes, 1907 and 1926 to the same effect.

[191] Also see the former s 574 of the Civil Procedure Code, 1907 to the same effect.

[192] See O 48, rr 1-3 (RSC, 1970).

[193] [1990] 3 MLJ xxxi.

judgment debtor's Singapore assets. In *Indian Overseas Bank* v *Sarabjit Singh*,[193] which concerned the former Singapore rule, the assistant registrar ruled that although the examination need not be confined to property within the jurisdiction, questions concerning property which the judgment debtor owned in Japan could only be asked if that property could be used to satisfy the judgment obtained in Singapore. As the judgment obtained in Singapore was not enforceable in Japan, the assistant registrar ruled that questions concerning the property there were not within the scope of Order 48 (RSC).[194] Order 48, rule 1(1) (RC) was later amended[195] to provide that the oral examination of the judgment debtor extends to 'whatever property the judgment debtor has and wheresoever situated'. The broadening of this rule corresponds with the court's greater preparedness to make orders affecting assets in foreign jurisdictions in particular circumstances. For example, there is no reason why a judgment creditor who secures a 'worldwide' Mareva injunction to enforce his judgment should not seek information from a judgment debtor concerning his foreign assets under this amended rule, although the courts are generally inclined to make orders for discovery incidental to the injunction.[196]

IV. Discovery beyond the Rules of the Supreme Court, 1970?

As has been said, the authority of the Singapore court to exercise the common law or equitable jurisdiction of the English courts ceased with the repeal

[194] Also see *Interpool Ltd* v *Galani* [1988] 1 QB 738, at 742, in which the English Court of Appeal held that the judgment debtor may be asked for information concerning his assets outside the jurisdiction 'which he can utilise to find out whether, in default of any English assets, there are foreign assets available to satisfy his judgment'. The case is distinguishable from *Indian Overseas Bank* v *Sarabjit Singh* as the judgment to be enforced was registered in England pursuant to a reciprocal enforcement scheme between England and France. However, even in the absence of such a scheme, it was arguable that information as to the judgment debtor's foreign property may aid the enforcement process, particularly if there is a chance that it may be transferred to the judgment creditor's own jurisdiction in the future.

[195] By the Rules of Court, 1996.

[196] See *Gidrxslme Shipping Co Ltd* v *Tantomar-Transportes Maritimos Lda* [1995] 1 WLR 299, which concerned a worldwide *Mareva* injunction granted in aid of execution of an arbitration award and a related order for discovery.

[197] S 17(a) of which had vested the Singapore court with the jurisdiction and authority of the English courts. *Supra*, note 130.

[198] For a consideration of these statutory developments, see Pinsler JD, 'The Inherent Powers of the Court' [1997] SJLS pp 1-49.

of the Courts Ordinance, 1955[197] in 1964.[198] Paragraph 14 of the Schedule to the Courts of Judicature Act, 1964 and its successor, section 18(2)(m) of the Supreme Court of Judicature Act, 1970, empowered the court 'to order discovery of facts or documents by any party or person in such manner as may be prescribed by the rules of court'. This apparent limitation of the scope of discovery to the manner prescribed by the rules (a limitation which continues to operate under the current paragraph 12 of the First Schedule to the SCJA)[199] was considered by the Court of Appeal in *Kuah Kok Kim & Ors* v *Ernst & Young (a firm)*:[200]

> … it can be seen that although paragraph 12 of the First Schedule of the SCJA confers on the court a wide power to order discovery, nevertheless, it is explicitly stated that these powers are to be exercised subject to the proper procedure under the Rules of Court. Thus, one must still look at the RSC in order to find the prescribed procedure and these procedures, whatever they may be, cannot be circumvented by the SCJA, which does not govern the matter.[201]

The issue is significant for there are areas of discovery beyond the scope of the rules which have had a vital role in litigation. The former jurisdiction of the Court of Chancery to order a person to give information concerning the identity of a potential defendant where the former facilitated the circumstances leading to the wrongdoing (referred to as the *Norwich Pharmacal* order)[202] has never been formulated as a rule of court. Indeed, the rules contemplate discovery between the parties in pending proceedings in relation to 'any matter in question between [the parties] in the action'.[203] The *Norwich Pharmacal* order involves discovery against a non-party prior to the commencement of proceedings in relation to the identity of the potential defendant (not the issues in the action). In *Abraham* v *Law Society of Singapore*,[204] Rajendran J rejected the argument that the court had the discretion to order discovery under Order 24, in the absence of a pending cause or matter,

199 Although s 18(2)(m) of the SCJA, 1970 was replaced by Para 12 of the First Schedule to the SCJA in 1993, discovery is still required to be in accordance with the rules of court. These developments will be considered in a subsequent article (see note 40).

200 [1997] 1 SLR 169.

201 *Ibid*, at para 22.

202 This form of discovery has already been referred to *supra*, text at note 144. The name of the order is taken from the case: *Norwich Pharmacal Co* v *Customs & Excise Commissioner* [1974] AC 133.

203 See the terminology in O 24, r 1, 2, 3, 7, 8, 13.

204 [1991] 3 MLJ 359.

on the basis of *Norwich Pharmacal*. The plaintiff was an advocate and solicitor against whom a complaint had been made to the Law Society. On being informed that a penalty would be imposed on him, he applied for a copy of the inquiry committee report. This request was not acceded to and in consequence an application for discovery was made to the court. Rajendran J held that he had no power to make an order for discovery under Order 24.[205] A more positive approach towards the order might be gleaned from *Sim Leng Chua* v *JE Manghardt*,[206] in which the High Court held that a defamatory letter disclosed by the defendant in another action before the High Court between the same parties could not be used by the plaintiff to institute a libel action against the defendant. In the course of its judgment, the court considered whether the plaintiff, before commencing any action, could have obtained a *Norwich Pharmacal* order against the third party who was in possession of the defamatory letter. The court referred to the judgment of Lord Reid in *Norwich Pharmacal* and concluded that no order could have been made because in the circumstances, the conditions for the grant of the order, as set out by Lord Reid, had not been satisfied.[207] It is clear, however, that these cases are not authorities on the application of the jurisdiction in Singapore. Interestingly, in Malaysia, the Supreme Court in *First Malaysia Finance Bhd* v *Dato' Mohd Fathi bin Haji Ahmad*,[208] declared that the *Norwich Pharmacal* principles were applicable in Malaysia on the basis of a specific statutory provision which preserved the equitable jurisdiction of the English courts.[209] The Supreme Court appears to have reached this conclusion on the basis of section 3(1)(a) of the Civil Law Act 1956, which applies 'the common law of England and the rules of equity as administered in England on the 7th day of April, 1956'.

The extension of the *Norwich Pharmacal* order to other circumstances

[205] Note that the case was not concerned with the specific circumstances which arose in *Norwich Pharmacal*, namely pre-action discovery to obtain the identity of a wrongdoer.

[206] [1987] 2 MLJ 153.

[207] Also see *Reebok International Ltd* v *Royal Corp* [1992] 2 SLR 136, in which the High Court mentioned that '*Anton Piller* jurisdiction is derived from the principle of a right to discovery of information which was revived by the decision of the House of Lords in *Norwich Pharmacal Co* v *Customs & Excise Commissioners*' (*ibid*, at 143). However, the court did not state it had the jurisdiction to grant the *Norwich Pharmacal* order.

[208] [1993] 2 MLJ 497, at 506.

[209] *Ie*, s 3(1)(a) of the Civil Law Act 1956, which applies 'the common law of England and the rules of equity as administered in England on the 7th day of April, 1956'.

[210] See, *eg*, *Arab Monetary Fund* v *Hashim & Ors* [1992] 2 All ER 911; *X Ltd* v *Morgan-Grampian (Publishers) Ltd* [1990] 1 All ER 1; *Mercantile Group (Europe) AG* v *Aiyela* [1994] 1 All ER 110.

in which the court might order information to be disclosed emphasises its importance.[210] Yet, it is not part of Singapore's discovery process. Even the relatively new Order 24, rule 7A (RSC, 1970, and now, RC, 1996) and Order 26A (RSC, 1970, now RC, 1996)[211] which allow discovery and interrogatories to be administered before the commencement of proceedings and against non-parties in the prescribed circumstances, do not encompass the *Norwich Pharmacal* order. In particular, Order 24, rule 7A(3)(b) and Order 26A, rule 1(3)(b) provide that the discovery must relate to 'an issue arising or likely to arise out of the claim made or likely to be made in the proceedings'. Yet, the purpose of seeking the *Norwich Pharmacal* order is to ascertain the identity of the wrongdoer rather than to obtain information in connection with the dispute. Moreover, the principle which governs an order under Order 24, rule 7A and Order 26A is 'necessity', whereas the *Norwich Pharmacal* order involves the additional element that the person concerned has 'facilitated' the wrong. The point may also be made that Order 24, rule 7A and Order 26A correspond to the English Order 24, rule 7A[212] which did not entail the *Norwich Pharmacal* order, a discovery process which has a separate basis in common law.

Another area of uncertainty is discovery of information in aid of the enforcement of a *Mareva* injunction, a relief which was only established after the introduction of the RSC, 1970, and therefore not within the express contemplation of those rules.[213] Its purpose is to prevent the defendant from removing his assets out of the local or other jurisdiction, or from disposing of those assets, so as to avoid having to comply with a potential judgment in favour of the plaintiff. Although Order 24, rule 7 (RSC, 1970) enables a party to apply for discovery of particular documents at any time, they must relate to the issues in the action.[214] Discovery in relation to the *Mareva* injunction, like the *Norwich Pharmacal* order, concerns extraneous matters. In the case of the *Mareva*, the information is generally sought to determine the assets available and their location. Moreover, discovery must be necessary 'for disposing fairly of the cause or matter or for saving costs',[215] which again emphasises that discovery under the rule must concern the merits of the case rather than incidental procedures such as the attachment of assets to secure the claim. In *Bekhor (AJ)* v *Bilton*,[216] the English Court of Appeal

[211] These provisions will be considered in a subsequent article (see note 40).

[212] The English rule is, however, limited to personal injuries. The contrast will be considered in a subsequent article (see note 40).

[213] The injunction was named after the case, *Mareva Compania Naviere SA* v *International Bulk Carriers SA* [1975] 2 Lloyd's Rep 509.

[214] See O 24, r 7(3) (RSC, 1970 and RC, 1996).

[215] These words appear in r 8 to which r 7 is subject.

[216] [1981] 1 QB 923.

justified the order of discovery incidental to *Mareva* relief on the basis of inherent jurisdiction. Ackner LJ said:

> In so far as counsel for the plaintiffs contends that there is inherent jurisdiction in the court to make effective the remedies that it grants, this seems to me merely another way of submitting that, where the power exists to grant the remedy, there must also be inherent in that power the power to make ancillary orders to make that remedy effective. This I have accepted.[217]

In the same case, Stephenson LJ said of the power of the judge:

> He has a judicial discretion to implement a lawful order by ancillary orders obviously required for their efficacy, even though not previously made or expressly authorised. This implied jurisdiction, inherent because implicit in powers already recognised and exercised … is hard to define and is to be assumed with caution. But to deny this kind of inherent jurisdiction altogether would be to refuse to judges incidental powers recognised as inherent or implicit in statutory powers granted to public authorities, to shorten the arm of justice and to diminish the value of the courts.[218]

In the unreported case of *United Overseas Bank Ltd* v *Thye Nam Loong (S) Pte Ltd*,[219] KS Rajah JC considered this view favourably in the context of the court's authority to extend the scope of discovery prescribed by Order 48 in relation to the examination of a judgment debtor. The English courts have considered their inherent jurisdiction to require discovery in various circumstances not expressly contemplated by the rules. For example, the power to make an order for discovery against the principal of a party (*ie*, a non-party) and to stay proceedings until that order is complied with,[220]

[217] *Ibid*, at 939-940. Goff J's view in *A & Anor* v *C & Ors* [1980] 2 All ER 347, that the court had power pursuant to Order 24, rule 7 to make an order for the discovery of documents to support the enforcement of a *Mareva* injunction was not endorsed.

[218] [1981] 1 QB 923, at 954.

[219] S 413/94. Judgment dated 14/10/1994 (94 SC 423). Also see the cases in note 142 (concerning inherent jurisdiction).

[220] *Abu Dhabi National Tanker Co* v *Product Star Shipping Ltd* [1992] 2 All ER 20. Also see *Willis & Co* v *Baddeley* [1892] 2 QB 324; *Nelson (James) & Sons* v *Nelson Line (Liverpool) Ltd* [1906] 2 KB 217.

[221] *Panayiotou* v *Sony Music Entertainment (UK) Ltd* [1994] 2 WLR 241. O 39, rr 2 and 3 (UK RSC) did not extend to this situation.

and to issue a letter of request to the judicial authorities of a foreign country seeking production of documents from a non-party company which could have been obtained in domestic proceedings by subpoena.[221] However, limits apply even in the context of the English court's inherent jurisdiction to make orders not specifically sanctioned by statute or the rules.[222]

It has been said that the difficulty with regard to Singapore was, and is, that successive statutory provisions – Paragraph 14 of the Schedule to the CJA, 1964, section 18(2)(m) of the SCJA, 1970 and Paragraph 12 of the First Schedule to the SCJA, 1970 (as amended in 1993) – limited, and continues to limit, the scope of discovery to the context of the rules of court.[223] Accordingly, there is a basis for contending that the inherent jurisdiction of the court to order discovery beyond the rules is excluded by statute. Nevertheless, it is possible to view these statutory provisions as being solely concerned with discovery in connection with the matters in issue in the proceedings rather than the incidental function of discovery. The terminology of the rules of Order 24 would support this conclusion as they do not contemplate discovery beyond matters concerning the action. If this point is accepted, it could be argued that discovery unconnected with the issues but incidental to the proceedings could be granted pursuant to the court's inherent power to make its remedies effective.[224] This view is buttressed by the fact that statutory amendments in 1993 formulated a specific provision to cater to the *Mareva* injunction.[225] Paragraph 5(c) of the First Schedule to the SCJA states: 'Power before or after any proceedings are commenced to provide for the preservation of assets for the satisfaction of any judgment which has been or may be made'. Although no mention is made of discovery, the provision may well be read to imply that the court is empowered to order the disclosure of information where this is essential to the making of the statutory order. Such an approach would certainly be consistent in

[222] See *Dubai Bank Ltd* v *Galadari (No 6)* TLR, 14 October, 1992, in which the Court of Appeal ruled that a party could not be ordered to obtain documents so that an order for discovery could be made, and *Cox* v *Bankside Members Agency Ltd*, unreported, 29 November, 1994, in which the Court of Appeal ruled that the court does not have the power to reformulate the discovery process. Also see MS Dockray, 'The Inherent Jurisdiction to Regulate Civil Proceedings' [1997] 1 LQR 120, in which the limits of the English court's inherent jurisdiction is considered.

[223] *Supra*, text at notes 197-199.

[224] For an account of the doctrine of the court's inherent powers, see Pinsler JD, 'The Inherent powers of the court' [1997] SJLS 1-49.

[225] Before, courts had to rely on a general provision of the Civil Law Act (see s 4(8) and *Art Trend Ltd* v *Blue Dolphin (Pte) Ltd & Ors* [1983] 1 MLJ 25).

[226] *Supra*, note 216.

the context of Stephenson LJ's view in *Bekhor (AJ)* v *Bilton*[226] that 'incidental powers' are 'recognised as inherent or implicit in statutory powers' because they give effect to those statutory powers.

Similar difficulties attend the *ex parte* application for an *Anton Piller* order,[227] which enables the plaintiff or his representative to enter the defendant's premises to search for, inspect and seize the materials so that they may be preserved until the trial.[228] Order 29, rule 2 (RSC, 1970 and RC, 1996) enables the court to make an order for the detention, custody or preservation of property and therefore encompasses such an order.[229] However, the *Anton Piller* order is generally made *ex parte* so that the defendant is not given the opportunity, by notice, to obstruct the purposes of the remedy.[230] As an application pursuant to Order 29, rule 2 is required to be made by summons,[231] the basis for *ex parte* relief must be found beyond the rules. Although in England, the power to grant the order on an *ex parte* application is derived from the inherent jurisdiction of the court,[232] such a conclusion may not be justified in the context of Singapore in the face of the former section 18(2)(m) of the SCJA, 1970, and its successor, paragraph 12 of the First Schedule to this statute. As in the case of the *Mareva* injunction, the provision limits discovery to that allowed by the rules. Here again, it might be argued that the new provisions in 1993 which put the *Anton Piller* order on an express statutory footing[233] contemplate that the *ex parte* procedure may be vital to achieve the objectives of the order. If so, notwithstanding paragraph 12 of the First Schedule which has a general rather than specific operation, the court retains its inherent power in the appropriate circumstances to entertain a procedure not provided for by the rules to give efficacy to *Anton Piller* relief. The *ex parte Anton Piller* order and the order for

[227] Named after the case, *Anton Piller KG* v *Manufacturing Processes Ltd* [1976] Ch 55.

[228] The plaintiff will want to apply for the *Anton Piller* order when there is a grave danger that the defendant will dispose of or destroy incriminating evidence in his possession, whether documents, articles or other materials, and their continued existence is necessary for the purpose of the plaintiff's case.

[229] Chan Sek Keong J said in *Reebok International Ltd* v *Royal Corp* [1992] 2 SLR 136, at 143 that the *Anton Piller* jurisdiction is derived from the principle of a right to discovery of information.

[230] See *Expanded Metal Manufacturing Pte Ltd & Anor* v *Expanded Metal Co Ltd* [1995] 1 SLR 673.

[231] See O 29, r 2(5).

[232] See *EMI* v *Pandit* [1975] 1 WLR 302; *Anton Piller KG* v *Manufacturing Processes Ltd* [1976] Ch 55, at 60-61.

[233] Paras 5(a) & (b) of the First Schedule of the SCJA provide for the preservation of property and evidence by, *inter alia*, injunction, seizure, and detention.

discovery in support of a *Mareva* injunction have yet to be challenged in a jurisdictional context.

V. Observations on the Nature and Extent of Pre-trial Disclosure of Oral and Documentary Evidence under the Rules of the Supreme Court, 1934 and the Rules of the Supreme Court, 1970

The common law system of litigation, which was traditionally characterised by the primacy of oral evidence and its adduction from witnesses at trial, made little allowance for its production beforehand. The rules provided that the evidence of a witness had to be proved by oral examination at trial.[234] Save for very specific circumstances, a party was not entitled to discover the oral evidence which his opponent would produce at trial. The interrogatory process, which is concerned with the discovery of facts by requiring responses from the opponent, offered, and continues to offer, a preview of some aspects of the testimony to be given at trial.[235] As already shown, a party could, under the RSC, 1970, administer (without leave up to the close of pleadings,[236] and with leave thereafter)[237] interrogatories which 'relate to any matter in question between the parties in the action.' The process could be employed to better advantage after the close of pleadings when the issues of fact had been declared, so that questions could be specifically geared to more specific matters not raised in the pleadings. Nevertheless, the requirement for leave at this stage and the variety of court rulings which have circumscribed the scope of the process have rendered it unpopular.[238] Sir Jack Jacob remarked in this respect: '… at least since the war, the art and skill of framing interrogatories have fallen into disuse, so that this source of pre-trial oral evidence is rarely resorted to or allowed and it has virtually dried up'.[239] The interrogatory procedure is intended '…to enable a party to obtain from the opposite party admissions or evidence of material facts to be adduced at trial or to appraise the strength or weakness

[234] O 38, r 1 (RSC, 1970) and its predecessor, O 35, r 1(1) (RSC, 1934).

[235] Although the interrogatory process may not be used to find out the opponent's evidence: *Overseas-Chinese Banking Corp Ltd* v *Norman Wright & Ors* [1989] 3 MLJ 73 (HC), [1992] 2 SLR 710 (CA).

[236] O 26, r 2 (RSC, 1970).

[237] O 26, r 1 (RSC, 1970).

[238] See *Overseas-Chinese Banking Corp Ltd* v *Norman Wright & Ors* [1989] 3 MLJ 73 (HC), [1992] 2 SLR 710 (CA).

[239] Sir Jack IH Jacob, note 12, at 96.

[240] Halsbury's Laws of England, 1975, 4th ed, vol 13, para 100.

of the case before the trial and thereby to assist in the fair disposal of the proceedings at or before the trial or in saving costs.'[240] However, as it consists of questions in relation to specific issues of fact, it is distinguishable from a process which provides for the disclosure before trial of the whole of a witness's evidence in the form of a deposition, affidavit or statement.

In contrast to interrogatories, which concern questions in relation to specific factual issues, the deposition is a process by which the whole of a witness's evidence may be obtained in the form of an affidavit or sworn statement and put in as evidence at trial. Very much an exception to the fundamental rule that a witness's evidence may only proved by oral examination at trial, depositions are only allowed in very limited circumstances. The discretion of the court, which is based on the criteria that the deposition 'appears necessary for the purposes of justice',[241] was, and is, only exercised when the witness is abroad or will be abroad at the time of the trial, or is too ill, or is otherwise unable (on justifiable grounds) to be present at the proceedings. Although the deposition is an alternative mode of adducing evidence in exceptional circumstances rather than a discovery process, it obviously has significance, when it is utilised, as a procedure which involves the disclosure before trial of the oral evidence of a witness. The rules also made provision for the adduction of affidavit evidence with the leave of the court or by the agreement of the parties.[242] However, the courts were extremely reluctant to allow an affidavit to be tendered as evidence if it concerned disputed facts or the credibility of the deponent was in issue or its admission would contravene the law governing the admissibility of evidence.[243]

The general rule propounded by Lord Reid in *Norwich Pharmacal Co* v *Customs & Excise Commissioner*[244] that 'information cannot be obtained by discovery from a person who will in due course be compellable to give that information either by oral testimony as a witness or [to produce documents] on a *subpoena duces tecum*'[245] meant that discovery could not be sought against a non-party witness merely because he had knowledge of the

[241] See O 39, r 1 (RSC, 1970); O 36, r 1 (RSC, 1934)

[242] See O 38, r 2 (RSC, 1970); O 35, r 1(2) (RSC, 1934).

[243] Such as inadmissible hearsay. See *UMBC Finance Ltd* v *Woon Kim Yahn Robin* [1990] 3 MLJ 360; *Stacey H* v *Diamond Metal Products Co Ltd* (1935) SSLR 245, [1935] MLJ 249.

[244] *Norwich Pharmacal Co* v *Customs & Excise Commissioner*, *supra*, note 144, at 173-174.

[245] *Per* Lord Reid in *Norwich Pharmacal Co* v *Customs & Excise Commissioner*, *supra*, note 144, at 174.

[246] *Supra*, text at note 203. See O 24 (RSC, 1970) and O 24 (RC) generally.

circumstances of the case. This was also established by the rules which contemplated discovery between the parties.[246] The restriction against making a person a party to the proceedings for the purpose of obtaining discovery from him continued to operate under the RSC, 1970.[247] The reasons for, and the exceptions to, the rule prohibiting discovery against a 'mere witness' before trial have been considered elsewhere.[248]

It is pertinent to point out that the courts were not always comfortable with the 'mere witness' rule. In *Khanna* v *Lovell White Durrant*,[249] the English High Court considered the emergent practice of using the *subpoena duces tecum* to procure documentary evidence prior to trial. The plaintiff had commenced proceedings against a firm of solicitors for professional negligence. The trial date was set for November 1994. In June, the plaintiff issued a *subpoena duces tecum* against a solicitor who was a member of another firm (the solicitor was not a party to the action), requiring him to produce documents for the consideration of the court in July (several months before the trial).[250] Nevertheless, Sir Donald Nicholls V-C recognised and endorsed an emerging practice whereby the court would, in the appropriate circumstances, issue a *subpoena duces tecum* for the production of documentary evidence before trial.[251] His Lordship said: 'The practice has much to commend it. As between the parties to the action, the production of documents pre-trial is likely to save costs and to further the interests of justice rather than impede them.'[252] His Lordship added that a party may need to see the documents prior to the trial to enable him to properly prepare his case. Settlement negotiations may have a better chance of succeeding if the documentary evidence is known. The learned judge also emphasised that pre-trial production would be consistent with the modern approach in

[247] *Douihech* v *Findlay* [1990] 1 WLR 269. Also see O 15, rr 4 and 6, which do not include this ground as a basis for joinder of parties.

[248] *Supra*, text at notes 143-152. It has been seen that a litigant could utilise the 'action for discovery' to obtain information concerning the identity of the potential defendant from a person who had no interest in the litigation: *Norwich Pharmacal Co* v *Customs & Excise Commissioner*, *supra*, note 144, at 173-174. For an account of this and other exceptions, see Bray E, *supra*, note 6, at 48, 556 and 609 *et sequor*. Also see the judgments of the High Court, Court of Appeal and House of Lords (and the parties' arguments before the House of Lords) in *Norwich Pharmacal Co* v *Customs & Excise Commissioner*, *supra*, note 144, at 154-155, 157-160, 173-174 (CA & HL); [1972] 1 Ch 566, at 582 (HC).

[249] [1994] 4 All ER 267.

[250] These documents related to the previous action out of which the negligence suit arose. The firm by whom the solicitor was employed had custody of these documents.

[251] His Lordship noted that the practice had grown up since the decision of the Court of Appeal in *Williams* v *Williams* [1987] 3 All ER 257.

[252] [1994] 4 All ER 267, at 270-271.

civil procedure: 'Increasingly, court procedures are designed to require production of evidential material at an earlier rather than a later stage of the proceedings. The emphasis is on the parties knowing the strengths and weaknesses of each other's case as soon as possible, and not being kept in the dark until the trial, by which time increased costs will have been incurred on both sides'.[253] This is now the predominant principle in Singapore's discovery process.[254]

Although the rules governing discovery of documentary evidence were more generous than those pertaining to oral evidence, discovery prior to the close of pleadings was not available, except in limited and specific instances. As has been seen, general automatic discovery operated (barring delays) two weeks from the time the pleadings are deemed to be closed.[255] A party had the right to serve a notice on any other party in whose pleadings or affidavits 'reference is made to any document', requiring him to produce that document for the inspection of the party giving the notice, and to permit him to take copies.[256] A court hearing an application for summary judgment could order the defendant to 'produce any document'.[257] The court had the power to order discovery of particular documents between the parties at any time – even before the pleadings stage – on the basis that it is necessary either for disposing fairly of the cause or matter or for saving costs.[258] However, the established view was that this discretion should only be exercised in exceptional circumstances. It was said, *inter alia*, that as the rule required the documents to 'relate to one or more of the matters in question in the cause',[259] discovery was not appropriate until the issues were precisely declared by the pleadings.[260]

VI. Conclusions

A number of conclusions may be drawn from the state of the rules governing discovery under the RSC, 1934 and the RSC, 1970. Apart from the process

[253] [1994] 4 All ER 267, at 270. Also see *Williams* v *Williams* [1987] 3 All ER 257, at 258.
[254] As will be shown in a subsequent article (see note 40).
[255] *Supra*, text following note 159. See Ord 24, r 2 (RSC, 1970).
[256] O 24, r 10 (RSC, 1970); O 31, r 14 (RSC,1934).
[257] O 14, r 4(4) (RSC, 1970); O 14, r 3(3) (RSC, 1934).
[258] O 24, r 7 (RSC, 1970); O 30, r 18(5), (6) (RSC, 1934).
[259] O 24, r 7(3) (RSC, 1970); O 30, r 18(5)(RSC, 1934).
[260] *RHM Foods Ltd* v *Bovril Ltd* [1982] 1 WLR 661, at 665-669. The court declared that until at least a statement of claim has been delivered, a court can seldom know what are the matters in question in the action.

of interrogatories and affidavits filed in interlocutory proceedings (and other procedures which indirectly revealed what might be said at trial), a party would not normally be aware before the trial of the oral evidence to be given by the opposing party's witnesses. The rules did not provide for a procedure under which discovery of oral evidence would be available before the trial. They contemplated discovery as a process between parties in pending proceedings and therefore did not make provision for the disclosure of information before the commencement of proceedings. Discovery was not available against non-parties, and, as a general rule, documents did not have to be disclosed before the close of pleadings. Common law discovery may have ameliorated the situation by providing for additional mechanisms such as the 'action for discovery'[261] or discovery in support of a *Mareva* injunction[262] or the *ex parte* procedure for the *Anton Piller* order. However, as has been argued in relation to Singapore, after the statutory changes in 1964 and 1970 (which limited the scope of discovery to the perimeters set by the rules of court), it was unclear whether the Singapore courts had the jurisdiction to make these orders.

The cases of the nineteenth century (particularly those decided in the era of the Supreme Court of Judicature Acts of 1873 and 1875),[263] reveal the contemporary view of the objectives of the discovery process: to assist the parties to prove their respective cases; to avoid the expense of obtaining the evidence by some other means; and to prevent the delay which would inevitably result from a less efficient means of securing evidence.[264] It is evident that the potential of discovery to enable the parties to resolve suits by settlement or summary dispute resolution early on in the proceedings had yet to be established. Moreover, the above-mentioned objectives were counterbalanced by other considerations. The rule precluding discovery against non-party witnesses was primarily justified on the basis that they would eventually give evidence at trial.[265] Documentary discovery was generally unavailable before the pleading stage of the action because of

[261] *Supra*, text following note 143.

[262] *Supra*, text following note 213.

[263] 36 & 37 Vict, c 66 and 38 & 39 Vict, c 77 respectively.

[264] See, *eg*, *Hall* v *L & NWR Co* 35 LT 850; *A-G* v *Gaskill* 20 Ch D 528, at 531; *Chadwick* v *Chadwick* 22 LJ Ch 330; *Portugal* v *Glyn* 7 Cl & Fin 466 (1840), at 500; *Montague* v *Dudman* 2 Ves p 397; *Finch* v *Finch* 2 Ves p 492.

[265] See text at notes 143-152 for other reasons for the rule.

the belief that discovery was not necessary before the issues were declared. The limitations imposed on the interrogatory procedure (including the requirement for leave and the case law concerning the type of answers which were acceptable) were intended to avoid the abuse of the procedure. These countervailing factors significantly restricted the scope of discovery, a situation compounded in Singapore by legislation which appeared to curtail discovery beyond the rules. The situation would change in a flurry of developments in the 1990s spurred by a transformation of policy unprecedented in civil procedure.[266]

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[266] These developments will be considered in a subsequent article (see note 40).

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