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**Banking Secrecy in Singapore and Its Impact on Pre-Action Asset Tracing**

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**ABSTRACT:**

This paper seeks to analyse the impact of Singapore's current banking secrecy regime on pre-action discovery. There are broadly four possible avenues for pre-action discovery in Singapore: a Norwich Pharmacal order, a Bankers Trust order, pre-action discovery under the Rules of Court, and a bankers' books application under the Evidence Act. However, given Singapore's banking secrecy regime, it is likely that only one route, that of a bankers' books application, may be available for parties who require pre-action discovery from banks. Nonetheless, it is suggested that the principles governing pre-action discovery and the policy considerations emerging from the case law, may inform the development of the nascent bankers' books jurisprudence. A matter of terminology should be clarified at the outset: the term 'disclosure' is used in English law to describe the process by which a party to proceedings discloses relevant documentary evidence, while the term 'discovery' (commonly associated with US civil litigation) is the term used in Singapore broadly to describe the same process. Both terms are used interchangeably in this article with no intent to draw a distinction between them.

# BANKING SECRECY IN SINGAPORE AND ITS IMPACT ON PRE-ACTION ASSET TRACING

## I. INTRODUCTION

Singapore is one of the world's leading banking and finance centres.[1] Given its unique geopolitical characteristics, it is no surprise that the country has chosen to position itself as one of Asia's leading berths for financial services.[2] As part of its overall approach to financial services, Singapore has also maintained a strong emphasis on banker-customer confidentiality.[3] While responding to certain calls for more transparency, particularly in the global combat against tax evasion, Singapore has continued to embrace banking secrecy in the main.[4] The lifting of such rules in Switzerland have reportedly led to a deluge of wealth from Europe to Asian financial hubs such as Hong Kong and Singapore,[5] and Singapore is generally perceived to be a jurisdiction friendly to the inflow of foreign wealth,[6] especially from the *nouveau riche* in Asia.

Banking secrecy in Singapore is governed by primary legislation. Section 47 of the Banking Act[7] provides that 'customer information shall not, in any way, be disclosed by a bank in Singapore or its officers to any other person except as expressly provided by the Act'. A contravention may lead to a fine or a jail term.[8]

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[1] Singapore has been ranked second on the Global Competitiveness Report 2014/2015 published by the World Economic Forum. Its financial market development has been rated a 5.8 out of 7. See World Economic Forum, 'The Global Competitiveness Report 2014/2015' (2014) <http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2014-15.pdf> accessed 3 September 2015. Singapore is also ranked fourth on the Global Financial Centre Index, published by the Z/Yen Group in March 2015. <http://www.longfinance.net/images/GFCI17_23March2015.pdf> accessed 3 September 2015.

[2]Economic Review Committee Sub-Committee on Services Industries Financial Services Group, Ministry of Trade and Industry, *Positioning Singapore as a Pre-Eminent Financial Centre for Asia* (September 2002). <https://www.mti.gov.sg/ResearchRoom/Documents/app.mti.gov.sg/data/pages/507/doc/12%20ERC_Services_Financial.pdf>. For an overview of the development of Singapore's financial services industry, see Tan ChweeHuat, *Financial Markets and Institutions in Singapore* (11th edn, Singapore University Press, 2005). In particularly, Singapore is developing a niche for private wealth management. See Singapore Parliamentary Debates 12 August 2013, vol 90 (Singapore's Private Banking Sector).

[3] Singapore Parliamentary Debates 16 May 2002, vol 73, cols 1689 & 1690.

[4]'Singapore banks agonise over rich clients in tax evasion clampdown' *Financial Express* (7 May 2013); Wei Gu, 'Banks in Asia get pickier about high-end clients' *The Wall Street Journal* (30 April 2015). For a useful overview of the development of the Swiss banking secrecy regime, see Henri B Meier, *Swiss Finance: Capital Markets, Banking, and the Swiss Value Chain* (Wiley, 2013).

[5]'Exporting banking secrecy' *Swiss News* (1 November 2010); Neil Chatterjee and John O'Donnell, 'Singapore's star rises as Switzerland stumbles' *AFX Asia* (Singapore / Frankfurt, 15 December 2008).

[6]'Singapore expected to dislodge Switzerland as world's wealth management capital' *Asia One Business News* (12 May 2014).

[7]Banking Act (Cap 19) (2008 Rev ed).

[8]Section 47(6), Banking Act.

The exceptions to the duty of confidentiality are set out in the Third Schedule of the Act, and these exceptions have been held to be comprehensive.[9]

The unintended effect of the broad gateways to the inflow of foreign wealth and the current banking secrecy regime in Singapore is that it may be possible for perpetrators of fraud to benefit from the confidentiality regime and be protected from asset-tracing measures. The ubiquity and ease of online transfers in modern banking makes it easy for money to be moved from one jurisdiction to another. Prior to launching proceedings, victims of sophisticated fraud may wish to trace the flow of monies in and out of bank accounts to ascertain their destination. In some cases, this is done in the slim hope that such assets may be frozen. Where the identity of the perpetrator is unclear, victims of fraud may also file discovery applications against banks as third parties who, although are not privy to the fraud, may possess vital information.[10] The Third Schedule of the Banking Act appears to limit the avenues for such procedures.

This paper seeks to analyse the impact of Singapore's current banking secrecy regime on pre-action discovery. There are broadly four possible avenues for pre-action discovery in Singapore: a *Norwich Pharmacal* order, a *Bankers Trust* order, pre-action discovery under the Rules of Court, and a bankers' books application under the Evidence Act. However, given Singapore's banking secrecy regime, it is likely that only one route, that of a bankers' books application, may be available for parties who require pre-action discovery *from banks*. Nonetheless, it is suggested that the principles governing pre-action discovery and the policy considerations emerging from the case law, may inform the development of the nascent bankers' books jurisprudence. A matter of terminology should be clarified at the outset: the term 'disclosure' is used in English law to describe the process by which a party to proceedings discloses relevant documentary evidence, while the term 'discovery' (commonly associated with US civil litigation) is the term used in Singapore broadly to describe the same process. Both terms are used interchangeably in this article with no intent to draw a distinction between them.

## II. BANKING SECRECY IN SINGAPORE

Singapore is a good keeper of banking secrets; and it is no secret that this is perceived to underpin confidence in the banking regime. Banking law in Singapore is primarily governed by the Banking Act.[11] The Act was first introduced in Parliament in 1962[12] but due to issues relating to the introduction of a new currency, the bill was not passed until 1971.[13] In the interim, the Malayan Banking Ordinance applied.[14] As explained during one parliamentary session: 'The banking secrecy provisions of the Banking Act protect the confidentiality of customer information. Tight banking secrecy is important to maintaining the confidence of customers in our banking system'.[15]

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[9] *Susilawati v American Express Bank Ltd* [2009] 2 SLR(R) 737.
[10] Under the eponymous Norwich Pharmacal order, which derives from *Norwich Pharmacal Co v Commissioners of Customs and Excise* [1974] AC 133.
[11] And the relevant subsidiary legislation.
[12] Singapore Parliamentary Debates, 16 January 1962, vol 15 col 120-175.
[13] Act 41 of 1970, Banking Act 1970 which came into force on 1 January 1971.
[14] Singapore Parliamentary Debates, 2 September 1970, vol 30, col 202.
[15] Singapore Parliamentary Debates 16 May 2002, vol 73, cols 1689 & 1690.

In recent years, the global tide has flowed against having strict secrecy rules. Switzerland, traditionally renowned for its strong confidentiality regime, has received criticism from the US government and several EU counterparts for preventing tax authorities from taking measures against money in Swiss bank accounts possibly subject to tax in the customer's home jurisdiction.[16] Measures in the EU and the US[17] on this front have created new inroads and led to divergent views on the impact on the Swiss financial services sector.[18] The pattern of the well-heeled shifting assets to banking centres with robust confidentiality rules is not exclusive to Switzerland. It has been observed that Singapore has likewise become a domain for wealthy Asians,[19] and Singapore has received some criticism for this.[20] In 2009, Singapore demonstrated its commitment towards combating tax evasion[21] by accepting the OECD's Exchange of Information (EOI) framework. Further, it committed to measures to allow the local tax authorities to check on customer accounts without the need for a court order.[22] Separately, a dark shadow has been cast over the confidentiality regime by its use for terrorism financing, money laundering and related criminal activities. But strictly speaking, the scourge of criminal activities is not shielded by the secrecy rules. Paragraph 5 of the Third Schedule allows customer information to be disclosed for purposes of formal investigations pursuant to an order or a request made under written law.[23] There is also the Mutual Assistance in Criminal Matters Act[24] which allows the Singapore authorities, at the request of a foreign state, to exercise their powers to aid and facilitate the investigation and gathering of evidence in relation to criminal matters with a cross-border reach.

As to banking secrecy in Singapore more generally, in 2001, the Singapore government undertook a review of the legislation in this area. The erstwhile provisions under Section 47 of the Banking Act were completed repealed and replaced. Notably, the old Section 47(1) which generally prohibited the Monetary

[16]OECD, Promoting Transparency and Exchange of Information for Tax Purposes (19 January 2010) < http://www.oecd.org/newsroom/44431965.pdf >; OECD, The Era of Bank Secrecy is Over (26 October 2011) < http://www.oecd.org/ctp/exchange-of-tax-information/48996146.pdf >.

[17]For eg, the Foreign Account Tax Compliance Act, more popularly known as FATCA, enacted by the US Congress in March 2010.

[18]'No longer so secret, Swiss banks look to expand after purge' *Reuters* (Zurich, 27 June 2015). Although the move away from bank secrecy related business has helped: Giles Broom, 'Swiss Bankers Losing Secrecy Helps Image Abroad' *Bloomberg Business* (9 June 2015); John Letzing, ' 'There is (still) no country like Switzerland' says HSBC's Swiss Chief' *The Wall Street Journal* (12 May 2015).

[19]'Singapore bankers rattled by chase for undeclared funds' *Today* (Singapore, 19 August 2015).

[20]'Dearth of compliance expertise complicates Singapore's fight against unlawful money' *The Business Times* (27 July 2015).

[21] Ministry of Finance, 'Singapore Endorses the OECD Standard for Exchange of Information' (6 March 2009)
<http://www.news.gov.sg/public/sgpc/en/media_releases/agencies/mof/press_release/P-20090307-1.html>

[22]As implemented by Income Tax (Amendment) (Exchange of Information) Act 2009 (No. 24 of 2009).

[23]One example being Section 31 of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A) (2000 Rev ed).

[24] Cap 190A (2001 Rev. ed).

Authority of Singapore (MAS) from enquiring into the affairs of a customer was replaced by the following text:[25]

> Customer information shall not, in any way, be disclosed by a bank in Singapore or any of its officers to any other person *except as expressly provided in this Act.* (Italics added)

The exceptions to customer confidentiality as referred to in the new Section 47 are set out in the Third Schedule of the Act. Of relevance to the present discussion is paragraph 7 of the Third Schedule. Paragraph 7 permits disclosure of customer information under Part IV of the Evidence Act,[26] comprising the bankers' books provisions. Here, documents used in the 'ordinary business of the bank' may be disclosed pursuant to a court order. In particular, Section 175(1) of the Evidence Act provides:

> On the application of any party to a legal proceeding, the court or a Judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings.

This appears to be the only gateway to obtain disclosure directly from a bank, outside of cases where proceedings are between the bank and the customer.[27]

Traditionally, it was thought that a banker's duty of confidentiality was governed by the common law,[28] *as well as* by the Banking Act. However, the amendments to Section 47 in 2001 led to doubts as to whether *Tournier's* case, the leading common law decision in this area, still had room to operate.[29] In *Susilawati v American Express Bank Ltd*[30] the Singapore Court of Appeal confirmed that the duty of confidentiality between banker and customer was exclusively governed by the Banking Act, and the exceptions to banking secrecy listed in the Third Schedule were comprehensive.[31] Further, it confirmed that there was no residual room for the common law exceptions to operate.[32] This conclusion has been criticised for conflating the banker's contractual duty with its statutory duty.[33] It has also been argued that Parliament's intent was not to abrogate but supplement the common law duty. This argument is based on Section 47(8) of the Banking Act which states that '[f]or the avoidance of doubt, nothing in this section shall be construed to prevent a bank from entering into an express agreement with a customer of that bank for a higher degree of confidentiality than

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[25]For a discussion on the provision and the relevant case law, see Poh Chu Chai, *Banking Law* (2nd edn, LexisNexis, 2011) 555-573.
[26] In particular, Sections 170-176 of the Evidence Act (Cap 97) (1997 Rev Ed).
[27]As to which, see paragraph 4, Third Schedule of the Banking Act.
[28] Under the landmark decision *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461.
[29]See the view expressed in A Yeo & J Tan, 'Singapore' in Gwendoline Griffiths (eds), *Neate: Bank Confidentiality* (4th edn, Tottel Publishing, 2006) 584-585.
[30] *Susilawati v American Express Bank Ltd* [2009] 2 SLR(R) 737.
[31] *Susilawati v American Express Bank Ltd* [2009] 2 SLR(R) 737, [64]-[70].
[32] *Susilawati v American Express Bank Ltd* [2009] 2 SLR(R) 737, [67].
[33]Tan Yun Hui, 'Banking Secrecy in Singapore' *Rodyk & Davidson LLP Business Bulletin* (September 2014); Poh Chu Chai, *Banking Law* (2nd edn, LexisNexis, 2011) 560-561.

that prescribed in this section'.[34] With respect, these criticisms are not well founded, and the interpretation of Section 47 in *Susilawati* must be correct. By use of the appendage phrase 'except expressly provided in this Act', the Act makes clear that there can be no operative exceptions outside of it − the exceptions in the Third Schedule are comprehensive, save that a customer may seek to impose a strict contractual duty of confidentiality which does not derogate from the Schedule.[35] The exceptions to banker-customer confidentiality are so central to the duty itself that the exceptions effectively delineate the rule without scope for a collateral common law duty.

## III. PRE-ACTION DISCLOSURE IN AID OF ASSET-TRACING

### A. *Norwich Pharmacal* orders, *Banker's Trust* orders and Pre-action Discovery under the Rules of Court

Civil fraud is no respecter of persons. 'Fraud' is a protean term and covers broad shades of conduct. It ranges from dishonest acts arising from a contractual relationship, corruption in public office,[36] breach of express trust, and the more straightforward but no less sophisticated 'boiler room' fraud.[37] The magnitude and spread of such activities has led to the International Chamber of Commerce setting up its own Commercial Crime Services body and a worldwide network of law firms able to assist with such cases.[38] The pervasiveness of technology has increased the ease and width of fraudulent activities. Universal interconnectedness means that fraud can be committed from a foreign jurisdiction with the click of a few buttons. With artful use of technology, false identities, addresses and websites can be set up, while documents can be doctored and forged. Further, the ease of online transfers means that unwitting victims can part with their money easily, and the same sums can be moved out of jurisdiction almost instantaneously. Unsurprisingly, a report states that online banking fraud increased by 48% from 2013 to 2014.[39] This trend is corroborated by UK's fraud watchdog, the Financial Fraud Action, which states that remote banking (being telephone and online banking) losses rose in the first six months of 2015 to £65.9 million.[40] Singapore has faced similar problems. From 2009 to 2015, there was a reported three-fold

[34]Poh Chu Chai, *Banking Law* (2nd edn, LexisNexis, 2011), 560-561.
[35] It has been suggested that this outcome leaves a customer with no contractual remedies but a cause of action in breach of statutory duty. But it is possible for duties imposed by written law to be contractual duties, such as in the sale of goods: See for eg Part IV of the Sale of Goods Act (Cap 393) (1999 Rev Ed).
[36]*Eg Republic of Haiti v Duvalier* [1989] 2 WLR 261.
[37] Where cold calls are made typically to wealthy and vulnerable individuals to invest in schemes promising high returns. The name 'boiler room' refers to the high pressure tactics used to persuade and coerce potential victims. See for eg http://www.bbc.com/news/business-25761528. The UK has set up an authority to deal with this specific problem: <http://www.actionfraud.police.uk/fraud-az-boiler-room-fraud>.
[38]<https://icc-ccs.org/home/fraudnet>
[39] Kevin Peachey, ' Online banking fraud up by 48%' *BBC* (UK, 27 March 2015).
[40] Financial Fraud Action UK, New Release, 'New fraud figures show fraudsters directly targeting customers' 2 October 2015. Available online at: http://www.financialfraudaction.org.uk/download.asp?file=3020

increase in cyber-cheating cases.[41] A mid-year brief by the Singapore Police Force reported that amidst the generally low crime rates in Singapore, commercial crimes, in particular, online scams, have increased significantly.[42]

In many fraud cases, victims rarely possess sufficient information about the wrongdoers. Where the defendant is known to the victim, it may be open to the victim to launch proceedings and apply for freezing injunction where appropriate.[43] A freezing injunction is apposite only where monies are about to be dissipated.[44] However, this may be difficult if the location of the fraudster is not known, nor where their assets may be. Moreover, in many cases, the information provided to the victim is fictitious – false identities, sham companies, dressed-up websites, fabricated certificates of financial instruments, temporary contact numbers and addresses, etc. Thus, when little is known about the perpetrator, the only accurate information may be that of the bank account to which money is transferred. In these cases, the availability of pre-action discovery against banks becomes critical.

As explained above, it appears that the only means to obtain pre-action discovery against a bank in Singapore is via the bankers' books provisions in the Evidence Act. However, there are other avenues for pre-action discovery (not against banks) which should be borne in mind. Indeed, because there is scant jurisprudence on the bankers' books provisions, the case-law in these other areas become extremely helpful in guiding a court towards the relevant considerations. In Singapore, apart from the bankers' books provisions, there are broadly three other avenues by which a victim may obtain pre-action discovery in aid of potential civil proceedings: a *Norwich Pharmacal* order, a *Bankers Trust* order, and pre-action discovery under the Rules of Court. A detailed discussion of these forms of pre-action discovery goes beyond the scope of this paper and the reader is referred elsewhere.[45] For present purposes, this section provides an overview and in the later section draws on aspects of the relevant case-law.

As is well known, under the common law, pre-action discovery may be sought via a *Norwich Pharmacal* order.[46] The order originates from the House of Lords decision *Norwich Pharmacal Co v Commissioners of Customs and Excise*[47] where owners of a patent sought against the commissioners of customs and excise

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[41] 'Big spike in cyber scams drive up crime rates' Today Online (Singapore, January 2015).

[42] Singapore Police Force Mid-Year Brief 2015, available at: http://www.spf.gov.sg/stats/crimebrief2015.html

[43] As to which see generally Iain Goldrein (ed), *Commercial Litigation: Pre-emptive Remedies* (2nd intl edn, Sweet & Maxwell, 2011) 245-393; Steven Gee, *Commercial Injunctions* (5th edn, Sweet & Maxwell, 2004), Ch 3; Mark Hoyle, *The Mareva Injunction and Related Orders* (3rd edn, LLP, 1997); Adrian Wong, *Interlocutory Injunctions* (2nd edn, LexisNexis, 2010) Ch 5.

[44] Iain Goldrein (ed), *Commercial Litigation: Pre-emptive Remedies* (2nd intl edn, Sweet & Maxwell, 2011), 313-327.

[45] Supra n 43 and n 46.

[46] See generally Paul Matthews and Hodge Malek, *Disclosure* (4th edn, Sweet & Maxwell, 2011) 63-90; Iain Goldrein (ed), *Commercial Litigation: Pre-emptive Remedies* (2nd intl edn, Sweet & Maxwell, 2011) 435-461; C Hollander, *Documentary Evidence* (12th ed, Sweet & Maxwell, 2015) 59-82; Cockerill, *The Law and Practice of Compelled Evidence* (OUP, 2011) 56-62; Steven Gee, *Commercial Injunctions* (5th edn, Sweet & Maxwell, 2004), Ch 22.

[47] *Norwich Pharmacal Co v Commissioners of Customs and Excise* [1974] AC 133; [1973] 2 All ER 943.

disclosure of the identity of importers who allegedly breached their licence. As Lord Reid famously put it:

> [i]f through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers.[48]

The order essentially requires a non-party who is mixed up in a wrongful act to disclose information[49] which may be necessary for the potential claimant to bring its action. The *Norwich Pharmacal* order is the 'modern manifestation'[50] of the old Chancery procedure of the bill of discovery.[51] Recent Singapore case law suggests that the remedy is now subsumed within the civil procedure rules, and do not operate independently.[52] Nonetheless, the Singapore Court of Appeal has confirmed that the principles governing *Norwich Pharmacal* relief are likely to useful as guidance.

Whereas a *Norwich Pharmacal* order operates widely, a victim of fraud having a proprietary claim in respect of misappropriated assets may seek a *Bankers Trust* order for disclosure of information and documents from a bank to trace the flow of money. In *Bankers Trust Co v Shapira*,[53] due to forgeries by the first and second defendant, the claimant lost a sum of US$1,000,000. It commenced proceedings against the two men and the bank nominated to receive payment. The application went uncontested as the first and second defendants were not served. Despite this, the Court of Appeal allowed Bankers Trust Co.'s application for disclosure against the nominated bank of the first and second defendant's bank balances, correspondence, cheques drawn on their accounts, debit vouchers and internal memoranda. Lord Denning explained the court's reason for the grant of relief, which was novel at the time:[54]

> In order to enable justice to be done – in order to enable these funds to be traced – it is a very important part of the court's armoury to be able to order discovery… *This new jurisdiction* must, of course be exercised carefully. It is a strong thing to order a bank to disclose the state of its customer's account and the documents and correspondence relating to it. It

[48] *Norwich Pharmacal Co v Commissioners of Customs and Excise* [1974] AC 133, 168.
[49] Initially, disclosure under a *Norwich Pharmacal* order was limited to the identity of the wrongdoer. This has been expanded to encompass information and documents which may be relevant to the wrongdoing.
[50] Paul Matthews and Hodge Malek, *Disclosure* (4th edn, Sweet & Maxwell, 2011) 63; *Gait v Osbaldeston* (1826) 1 Russ 158; *Mendizabal v Machado* (1826) 2 Russ 540.
[51] Paul Matthews and Hodge Malek, *Disclosure* (4th edn, Sweet & Maxwell, 2011) 64; C Hollander, *Documentary Evidence* (12th ed, Sweet & Maxwell, 2015) 59. Traditionally, discovery of documents was only possible where proceedings were afoot, and the old chancery procedure was equity's exception to the rule. Thus, it has been said that the re-introduction of pre-action disclosure in the *Norwich Pharmacal* decision was an act to 'revive' the old procedure: *Dorsey James Michael v World Sport Group Pte Ltd* [2014] 2 SLR 208, [37].
[52] *Dorsey James Michael v World Sport Group Pte Ltd* [2014] 2 SLR 208.
[53] *Bankers Trust v Shapira* [1980] 1 WLR 1274.
[54] *Bankers Trust v Shapira* [1980] 1 WLR 1274, 1282. Italics added.

> *should only be done when there is a good ground for thinking the money in the bank is the plaintiff's money*. (Italics added)

Some commentators have said that the *Bankers Trust* order is a species of the *Norwich Pharmacal* order[55] – Lord Denning himself referred to the *Norwich Pharmacal* for support. However, when carefully analysed, it becomes apparent from the judgment that the juridical basis for the two orders are distinct.[56]

The third avenue is to seek pre-action disclosure via the Singapore Rules of Court ("**Rules of Court**"). The Rules of Court have their origin in the English rules of civil procedure.[57] They substantially track the English Rules of Supreme Court 1965,[58] but with the subsequent severance of the legal 'umbilical'[59] cord between the two legal systems, the Rules of Court have developed autochthonously and evolved over time under the oversight of a rules committee.[60]

Order 24 of the Rules of Court deals *generally* with the discovery and inspection of documents. In 1999, the Rules of Court were amended, [61] and the current Order 24 Rule 6 was introduced then to provide for 'discovery against other person(s)' not directly involved in the proceedings, and includes pre-action discovery. [62] . As mentioned above, in a recent decision, [63] the Singapore Court of

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[55]Iain Goldrein (ed), *Commercial Litigation: Pre-emptive Remedies* (2nd intl edn, Sweet & Maxwell, 2011) [A3-071] discusses the decision as one of the many types of *Norwich Pharmacal* orders; Paul Matthews and Hodge Malek, *Disclosure* (4th edn, Sweet & Maxwell, 2011) [3.19] refers to it as 'one of the most commonly encountered application of the *Norwich Pharmacal* jurisdiction are what are generally called *Bankers Trust* orders'; C Hollander, *Documentary Evidence* (12th ed, Sweet & Maxwell, 2015) [4-35] appears to recognize the distinction, explaining that the jurisdiction to grant *Bankers Trust* relief is 'based on a combination of the powers of equity to take appropriate steps to restore a trust fund and a loose invocation of the *Norwich Pharmacal* principle'.

[56] Although the Court of Appeal referred to the *Norwich Pharmacal*, it exercised this 'new jurisdiction' on the basis of three unreported decisions cited to it: *London and Counties Securities (in liquidation) v Caplan* (unreported), 26 May 1978, Templeman J, *Mediterranea Raffineria Siciliana Petroli S.p.a v Mabanaft G.m.b.H* Court of Appeal (Civil Division) Transports No. 816 of 1978, and *A v C* (unreported), 18 March 1980, Robert Goff J. These were referred to at 1280F-1281D. Indeed, the *Norwich Pharmacal* order was at the time primarily an exception to the mere witness rule, whereas, by contrast, *Bankers Trust* was dealing with a right to trace and follow assets: See for instance, the analysis by Hoffmann J in *Arab Monetary Fund v Hashim and ors (No 5)* [1992] 2 All ER 911, 913F-914E. Lord Denning's reference to the *Norwich Pharmacal* was simply an example that the court could order disclosure from an innocent third party: *Bankers Trust v Shapira* [1980] 1 WLR 1274, 1281F-1282B.

[57] Jeffrey Pinsler, *Singapore Court Practice 2014*, Vol 1 (LexisNexis, 2014) 1-3.

[58] Jeffrey Pinsler, *Singapore Court Practice 2014*, Vol 1 (LexisNexis, 2014) 1.

[59] A term used by the Chief Justice, Mr Sundaresh Menon, in his speech to the English Commercial Bar in September 2013. The speech has since been published: Sundaresh Menon, 'The Somewhat Uncommon Law of Commerce' (2014) 26 SAcLJ 23. [8]-[12] provide a pithy overview of the historical relationship between English and Singapore law.

[60]As set out in Section 80 of the Supreme Court of Judicature Act (Cap. 322) (2007 Rev Ed). The committee comprises the Chief Justice, Attorney-General, not more than 5 Supreme Court Judges, the Senior District Judge, a District Judge and two practising advocates and solicitors: Section 80(3).

[61] Vide Rules of Court (Amendment No. 2) Rule 1999, S 551/1999.

[62] Unlike the English procedure rules CPR r 31.16 and 31.17, which respectively concern disclosure from a potential defendant prior to proceedings, and disclosure from a non-party during proceedings respectively, Order 24 Rule 6 of the Rules of Court concerns disclosure from a non-party prior to or during proceedings.

Appeal has confirmed that Order 24 rule 6 now encapsulates the *Norwich Pharmacal* relief.

At the risk of oversimplification, the above three forms of relief comprise similar elements. First, the applicant must show that a wrong has been committed. In the *Norwich Pharmacal* and *Bankers' Trust* cases, the respondent to an application is typically a third party caught up in the wrong and holds critical information about the wrongdoer or the wrongful transaction. Order 24 Rule 6 is similar. Secondly, when faced with such applications, a court is normally faced with a balancing exercise. It should not stymie a legitimate request for relevant information which may lead to substantive proceedings. On the other hand, it should guard against the unnecessary intrusion of the privacy of third parties, who, despite having done no wrong, may be burdened by the need to retrieve and disclose such information; and one can think of banks as a prime example of conduits who possess a trove of information and are particular susceptible to applications for pre-action relief. In all these cases, the bank's general duty of confidence to its customers appears to be an additional factor against disclosure.

## B. Bankers' Books Orders: An Overview

As explained above, pre-action discovery against a bank in Singapore must be sought via the bankers' books provisions in the Singapore Evidence Act.[64] The bankers' books provisions, namely, Sections 170 to 176 of the Act, mirror the English Bankers' Books Evidence Act 1879.[65] Decisions interpreting the English Act are therefore instructive.[66]

Essentially, the bankers' books provisions set out to achieve three purposes. According to *Wheatley v Commissioner of Police of the British Virgin Islands*,[67] the first is to enable bankers' books to be inspected despite the duty of confidentiality, the second is to relieve bankers of the onerous need to produce these books in court, and the third is to provide that authenticated copies of such books be received as prima facie evidence.[68] Conceptually, the second and third purposes coalesce as part of the overarching aim to facilitate the production of bankers' books as evidence.[69] The broader context to this is the general

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[63] *Dorsey James Michael v World Sport Group Pte Ltd* [2014] 2 SLR 208. See also the recent decision *La Dolce Vita Fine Dining Co Ltd and anor v Deutsche Bank AG and anor* [2016] SGHCR 3 at [23], although the Court noted that it could also make similar orders under its inherent jurisdiction: [24]-[26].

[64] Cap 97 (1997 Rev Edn).

[65] See generally, Hodge Malek (gen ed), *Phipson on Evidence* (17th edn, Sweet & Maxwell, 2010) 1062-1067.

[66] Unlike Singapore, where the Bankers' Books provisions are incorporated in the primary legislation concerning evidence in proceedings, other commonwealth jurisdictions such as India and Malaysia, like the UK, have a separate Bankers' Books legislation.

[67] [2006] 1 WLR 1683.

[68] *Wheatley v Commissioner of Police of the British Virgin Islands*[2006] 1 WLR 1683, 1692.

[69] What is deemed a 'book' for purposes of the provisions has been interpreted with modern lenses. For instance, microfilm records of cheques have been held to be 'books': *Barker v Wilson* [1980] 1 WLR 884; *Wheatley v Commissioner of Police of the British Virgin Islands* [2006] UKPC 24. In *Wee Soon Kim Anthony v UBS AG* [2003] 2 SLR(R) 91 the Singapore Court of Appeal interpreted 'books' purposively to mean any form of permanent record maintained by a

requirement for documentary evidence admitted in civil proceedings to be accompanied by oral testimony.[70] The bankers' books provisions were an exception crafted specially for banks in an age when it was thought that having a bank representative produce physical bank documents in court would be an 'intolerable inconvenience'[71] to a bank's day-to-day operations. Instead of this, attested copies could suffice. Consequently, a bank is not compellable to attend as witness to prove the matters recorded in its books without special cause.[72] As such, the provisions have even been referred to as a "privilege".[73]

More significant for present purposes is Section 175(1). It provides that a court may order a party to legal proceedings to be at liberty to inspect and take copies of bankers' books for any purpose of the proceedings. 'Legal proceedings' are defined in Section 170 as any civil or criminal proceeding and includes an arbitration. It is noteworthy that Section 7 of the English Bankers' Books Evidence Act, the equivalent of Section 175 of the Singapore Evidence Act, has developed into a form of discovery procedure on its own. To avoid Section 7 becoming a backdoor attempt at obtaining evidence from a bank outside of the disclosure rules, early English decisions made clear that the usual disclosure considerations apply.[74]

Although the provisions have been used for asset-tracing exercises,[75] they are generally underutilised, and there is limited English and Singapore case law interpreting them. Notwithstanding that, some broad parameters (mainly from the

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bank in relation to a customer's transactions. On the facts, the court ordered disclosure of a range of documents related to forex transactions including correspondence, statements, confirmation advice and facility letters.

[70]Indeed, *Phipson on Evidence* has categorised the bankers' books provisions as part of the exceptions to the rule against hearsay: Hodge Malek (gen ed), *Phipson on Evidence* (17th edn, Sweet & Maxwell, 2010) 1012.

[71]*Pollock v Garle* [1897] 1 Ch 1, 4 (CA).

[72]Section 174 of the Evidence Act (Singapore) and Section 6 of the Bankers' Books Evidence Act.

[73] Bankers' Books Evidence (Amendment) Bill, 2nd reading, The Attorney-General: "One of the most important privileges conferred by the Ordinance is that certified copies of entries in bankers' books are receivable as evidence in courts of law."

[74] In *South Staffordshire Tramways Co. v Ebbsmith* [1895] 2 QB 669, 674 the Court of Appeal confirmed that applications under Section 7 must conform with the general law of discovery: '…it appears to me that, where such an inspection is asked for, the conduct of the Court in the exercise of this jurisdiction ought to be regulated by the general rules laid down by the decisions in relation to inspection of documents before the trial' (Lord Escher MR). See also *Williams v Summerfield* [1972] 3 WLR 131, 135: 'In civil proceedings the normal approach to the use of section 7 is that documents which would not be discoverable under the ordinary rules are not to be disclosed by a side wind, as it were, by the application of section 7… one must I think recognize that an order under Section 7 can be a very serious interference with the liberty of the subject. It can be a gross invasion of privacy. It is an order which clearly must only be made after the most careful thought and on the clearest grounds. I would like to adopt the approach which is adopted in civil proceedings if that were practical' (Lord Widgery CJ).

[75]*A and anor v C and ors* [1981] 2 WLR 629 where Goff J made an order under Section 7 of the Bankers' Books Evidence Act for disclosure of bank statements in aid of a proprietary claim. See also *Mackinnon v Donaldson, Lufkin and Jenrette Corp* [1986] 1 WLR 453 where the plaintiff brought a fraud action against several individuals, and sought disclosure under the Bankers' Books Evidence Act against a non-party bank. Hoffman J explained that it was only in exceptional circumstances that a court should order a foreign bank, whose relationship was governed by the law of another jurisdiction, to be subject to a disclosure order in the UK. On the facts, the plaintiff had sought the remedy too late in the day, being some months from trial, and there were other alternatives which he could have but did not seek.

discovery rules) circumscribe the scope of relief: First, the documents sought must be material to the proceedings. A court will not entertain a fishing expedition,[76] and if the relevance of documents is unclear.[77] Second, third parties should not be prejudiced – here, typically a bank or a customer.[78] Further, because the rules of discovery apply to applications for bankers' books, in *Bhimji v Chatwani (No 2)*[79] it was held that 'by parity of reasoning'[80] documents disclosed under bankers' books provisions are subject to the usual implied undertaking that documents obtained are not to be used for purposes outside of the litigation. These appear to be the key applicable principles.

## IV. UNLOCKING THE DOOR: RETHINKING THE BANKERS' BOOKS PROVISIONS

Despite its importance as the only gateway to obtain banking documents, there is limited case law interpreting the bankers' books provisions. This is unsurprising since in most cases, parties who require bank documents may obtain it from the other party during the discovery process. Nonetheless, it is possible to rethink the scope and application of the bankers' books provisions, with reference to the jurisprudence derived from other forms of pre-action discovery which attempt to strike a balance between the competing private and public interests involved.

### A. Pre-Action Discovery – The Competing Tensions

*Private Considerations*

The considerations for and against pre-action discovery purely from a civil litigation perspective[81] are finely balanced although the default position appears to be that such relief is often exceptional and must be necessary.[82]

Court orders for pre-action discovery have consistently been viewed with caution. At a basic level, the default position in common law civil litigation is for parties to reveal their hand only after pleadings are filed. Respecting this procedural sequence ensures several benefits. First, it is only when proceedings have been brought that the issues are crystallised through the pleadings. This way, the parties have a better sense of what information or documents are relevant and required to be disclosed. Cost and time is saved by the avoidance of unnecessary disclosure which may occur in the absence of the parties' pleaded cases.[83] Having parties plead their case results in fairly clear boundary lines on what is and is not

[76] *Williams v Summerfield* [1972] 3 WLR 131.
[77] *South Staffordshire Tramways Company v Ebbsmith* [1895] 2 QB 669.
[78] *South Staffordshire Tramways Company v Ebbsmith* [1895] 2 QB 669, 674-675. See also *DB Deniz Nakliyati v Yugopetrol and ors* [1992] 1 WLR 437 and *Pollock v Garle* [1897] 1 Ch 1, 5 (Lindley MR), 6 (Chitty LJ).
[79] [1992] 1 WLR 1158.
[80] *Bhimji v Chatwani (No 2)* [1992] 1 WLR 1158, 1164G; Knox J, relying on *Waterhouse v Barker* [1924] 2 KB 759, 774 for the proposition.
[81] As opposed to public policy which is discussed below.
[82] "Necessity" being the test used in Order 24 rule 7 of the Singapore Rules.
[83] *Dorsey James Michael v World Sport Group Pte Ltd* [2014] 2 SLR 208, [49].

relevant. Secondly, lenient pre-action discovery rules may also encourage spurious law suits. Litigious parties are encouraged to seize the opportunity to discover documents in a bid to support a speculative claim. Thirdly, in the absence of proceedings, there is little reason to disturb a potential defendant's right to privacy and confidence. The law does not generally encourage pre-action discovery against a potential party, and this approach prevents "roving requests".[84] It could be argued therefore, that an order to allow discovery prior to proceedings against a *non-party* is even more intrusive.[85] Moreover, on a technical point, pre-action disclosure may transgress the 'mere witness' rule which holds that a party cannot obtain early disclosure from a non-party to proceedings who may be called as a witness, since such testimony would be given at a later stage.[86]

Where disclosure against a bank is concerned, bank secrecy can also be justified by the importance of client confidentiality. Although *Tournier's* case is no longer the standard bearer in Singapore, *Tournier* and its progeny help to explain the rationale for confidentiality. The first is simply the protection against unwarranted attempts by outsiders to inquire into one's financial affairs. The second, is the need to ensure the confidence of business customers, who repose trust and divulge key business information to their bankers and cannot have such information reach their competitors.[87] However, it is helpful to note that the exceptions highlighted in *Tournier's* case do remind us that no duty of confidentiality can be absolute. The common law has considered that a banker would be released from such an obligation if under compulsion of law, such as in aid of criminal investigations, or if there is an overriding public duty.[88]

On the other hand, the existence of various avenues of pre-action disclosure point towards the utility and legitimacy of such relief.[89] As in the *Norwich Pharmacal* and *Bankers Trust* cases, there will be instances where critical information lies in the hands of a third party. Without access to this, a victim of fraud may have no means to initiate proceedings. So crucial is this point, that in the *Norwich Pharmacal*, the innocent party mixed-up in the wrong is said to be under a duty to disclose.[90] Secondly, time and cost may in certain instances be saved through pre-action discovery.[91] Having obtained information and

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[84] *Dorsey James Michael v World Sport Group Pte Ltd* [2014] 2 SLR 208, [26].
[85] *Dorsey James Michael v World Sport Group Pte Ltd* [2014] 2 SLR 208, [27].
[86] *Mercantile Group (Europe) AG v Aiyela* [1994] QB 366; Iain Goldrein (ed), *Commercial Litigation: Pre-emptive Remedies* (2nd intl edn, Sweet & Maxwell, 2011) 438; C Hollander, *Documentary Evidence* (12th ed, Sweet & Maxwell, 2015) 60-61, 72. As to the rules pertaining to compelled evidence see generally Cockerill, *The Law and Practice of Compelled Evidence* (OUP, 2011).
[87] G S George Consultants and Investments Pty Ltd v Datasys Pty Ltd (1988) (3) SA 726 (W) 726, 736.
[88] David Chaikin, 'Adapting the Qualifications to the Banker's Common Law Duty of Confidentiality to Fight Transnational Crime' (2011) Sydney Law Review 265, 271-284.
[89] *Dorsey James Michael v World Sport Group Pte Ltd* [2014] 2 SLR 208 [26].
[90] *Norwich Pharmacal Co v Commissioners of Customs and Excise* [1974] AC 133; [1973] 2 All ER 943. Lord Reid famously put it at 168: "[i]f through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers."
[91] *Dorsey James Michael v World Sport Group Pte Ltd* [2014] 2 SLR 208 [32] : "[the procedure] is to help save unnecessary costs and avoid needless claims in relation to actual or anticipated proceedings…".

documents, a potential claimant may in fact realise that its case is not as strong as it envisaged, causing it to relent from commencing proceedings. Finally, even where the 'mere witness' rule is concerned, the courts have recognised exceptions in exactly these cases – where without the information, the alleged wrongdoer cannot be pursued.[92]

*Public Policy*

Leaving the arena of private considerations to the sphere of public policy, one gets a sense that the converse is true, i.e., that discovery against banks (pre-action or otherwise) is growing in perceived legitimacy due to the public outcry against bank secrecy being used as a tool for hiding assets from tax authorities and the swelling of ill-gotten gains through illegal activities – cue the Panana papers.[93]

Much ink has been spilt on the ills generated by jurisdictions with strict banking secrecy, and those arguments will not be rehashed here. Amidst the criticisms however, there appear to be a handful of possible justifications for a banking system with strict secrecy rules. Interestingly, the Swiss banking secrecy regime in Switzerland appears to have been spawned by events of foreign interference, and has more of political history to "blame" for its origins. The French Herriot Government's seizure of funds located in Swiss banks and later, the harsh treatment by the Nazi government of Germans who failed to disclose their Swiss bank accounts, led ultimately to the Swiss government enshrining the importance of bank secrecy in the Federal Banking Act in 1934.[94] In one sense, the enactment of such laws was simply a decision to emphasise Swiss sovereignty and the rule of law – it was up to the state to independently decide how and to what extent it wished to protect bank accounts within its jurisdiction, without fear of foreign intervention.

The sovereignty argument may be further supported by potential benefits of competition.[95] An analogy could be had with the capital markets, where different jurisdictions compete on the basis of innovative and diverse listing rules. Any comparative advantage gained is a result of arbitrage through the exercise of national sovereignty.[96] From Singapore's viewpoint, as a relatively young city state with little natural resource, the building of a stable and attractive financial

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[92] *Jade Engineering (Coventry) Ltd v Antiference Window Systems Ltd* [1996] FSR 461; *AXA Equity & Law Life Assurance Society plc and others v National Westminster Bank plc and others* [1998] EWCA 782; *Aoot Kalmneft v Denton Wilde Sapte (a firm)* [2001] EWHC 1 (Mercantile)).

[93] A significant leak in confidential documents revealing the use of offshore tax havens by the global elite to protect their wealth, and in some cases, from tax authorities. See Financial Times, Geoff Dyer, Max Seddon and Richard Milne, 4 April 2016, 'Panama Papers lead highlights global elites use of tax havens'. Available at http://www.ft.com/cms/s/0/549c1e96-f9e7-11e5-8f41-df5bda8beb40.html#axzz4Guz67jk6

[94] Robert Ladd, 'Swiss Miss: The Future of Banking Secrecy Laws in Light of Recent Changes in the Swiss System and International Attitudes' (2011) 20 Transnational Law & Contemporary Problems 539, 541-543.

[95] Arturo Bris (IMD International), 'Keeping Banking Secrecy and Preserve Globalisation" June 2009.

[96] As with the case of taxation. See e.g., Chris Edwards and Danile J Mitchell, Global Tax Revolution: The Side of Tax Competition and the Battle to Defend it (2008) 175.

services sector was one way to ensure growth and employment.[97] More fundamentally, proponents of bank secrecy will further argue that such a regime engenders customer confidence in the banking system. For the sake of argument, in an extreme case, if customers lose confidence in the banking system, panic withdrawals could lead to bank illiquidity and even liquidation.[98]

But the argument from sovereignty can only goes so far – it is agnostic as to the intrinsic value of banking secrecy. Customer confidence in the financial system may be a better reason. Further, some of the above justifications are rooted in decades past, and now have to face up to criticisms of a contemporary nature. Both the Swiss and Singapore banking secrecy regimes were set up decades ago, where the scourge of cross-border crime syndicates was less common. The global recognition that bank secrecy may impede legitimate initiatives by tax authorities or criminal prosecutors to unravel crime[99] suggests an acceptance that in the appropriate case, the public interest may in fact swing the other way – in favour of less secrecy and more disclosure.

## B. Rethinking Section 175(1)

With the above competing tensions in mind, we consider how Part IV of the Evidence Act may be reimagined without doing violence to its text. With emphasis added, the relevant parts of Part IV of the Evidence Act read:

> **Interpretation**
> **170.** In this Part —
> "bank" and "banker" mean any company carrying on the business of bankers in Singapore under a licence granted under any law relating to banking;
> "bankers' books" includes ledgers, day books, cash books, account books and all other books used in the ordinary business of the bank;
> "court" means the High Court;
> *"legal proceeding" means any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes an arbitration.*
>
> **Court or Judge may order inspection**
> **175.**
> —(1) *On the application of any party to a legal proceeding, the court or a Judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings.*
> (2) An order under this section may be made either on or without summoning the bank or any other party, and shall be served on the

[97] Indeed, as early as the 1960s, Singapore's former Prime Minister Mr Lee Kuan Yew had a vision to transform Singapore into an Asian financial hub, and sought strategic advice on this: Lee Kuan Yew, *From Third World to First: The Singapore Story - 1965-2000* (Harper, 2003), p 89.
[98] David Chaikin, 'Adapting the Qualifications to the Banker's Common Law Duty of Confidentiality to Fight Transnational Crime' (2011) Sydney Law Review 265, 269.
[99] David Chaikin, 'Adapting the Qualifications to the Banker's Common Law Duty of Confidentiality to Fight Transnational Crime' (2011) Sydney Law Review 265, 266.

> bank 3 clear days before the same is to be obeyed unless the court or judge otherwise directs.

'*Party to a Legal Proceeding'*

The first question that arises is whether Section 175 (read with Section 170) permits pre-action relief. Section 175 permits a Judge to make an order on the application of "*any party to a legal proceeding*". Section 170 further defines "legal proceeding" as any "civil or criminal proceeding or inquiry in which evidence is or may be given, and includes an arbitration".

At first blush, the bankers' books provisions do not appear suited for pre-action discovery since Section 175 seems to permit bankers' books applications on the premise of ongoing legal proceedings. Indeed, there has been a recent decision which suggested that separate legal proceedings were necessary.[100] Can Section 175 be interpreted otherwise?

The first obvious point about the definition of "legal proceeding" in Section 170 (and consequently, the application of Part IV) is that it is framed broadly. The bankers' books provisions are housed in Part IV of the Evidence Act. Structurally, the Act is divided in four parts – Parts I, II and III provide the substantive laws governing aspects of evidence in judicial proceedings such as the burden of proof, hearsay, and trial procedures, but Section 3 makes clear that Parts I, II and III do not apply to arbitration proceedings. By contrast, Part IV (the bankers' books provisions), which appears very much a stand-alone, allows bankers' books applications to be made in relation to arbitration proceedings. Although this does not tell us much about whether pre-action relief is available, it suggests that the bankers' books provisions are agnostic to the specific type of proceedings being initiated. Compared to the other Parts of the Evidence Act, the bankers' books provisions appear to be *facilitative* and are not intended to spell out a party's comprehensive rights and obligations with respect to evidence. Such a view leans slightly in favour of a generous reading of the provisions, or at least, an agnostic one.

Secondly, and unsurprisingly, the parliamentary debates and legislative history of Singapore's bankers' books provisions do not shed any light on their interpretation.[101] Given the void of direct interpretative aids, one looks towards case law.

It is suggested that the existing case law bears out a case for interpreting Section 170 as including *anticipated* or *potential* proceedings – with use of safeguards. In a limited handful of cases, it appears that applications for disclosure of bankers' books have been successful, prior to or post-trial, suggesting that there is no need for ongoing proceedings. In *Barker v Wilson*, a criminal case, the applicant, a police office, made a bankers' books application for disclosure of information relating to the respondent's bank account. At the time of application, no separate legal proceedings were afoot (although they were commenced three

[100] *La Dolce Vita Fine Dining Co Ltd v Deutsche Bank AG* [2016] SGHCR 3, [93]-[96].

[101] The Bankers' Books provisions appear to have been introduced into the Evidence Act by way of Ordinance 44 of 1949—Bankers' Books Evidence (Amendment) Ordinance 1949. There are no publicly available parliamentary reports

days later).[102] Although the decision was centred on the issue of what type of documents rightly fell within the English Act, Caulfield J was alive to the information gap facing the police: "…the police were in a quandary. They needed to know, in order to link up the evidence, the identity of the payees of the cheques which had been drawn by the appellant over a period of years."[103] In the famous *Bankers Trust v Shapira* case, although there were separate legal proceedings launched on the same day, the proceedings were practically in suspense since the two alleged fraudsters could not be served. Thus, although technically the main proceedings were afoot, practically, the discovery application was of far more importance and in no way adjunct. Had the discovery application not been brought, there would have been little chance of progress on the main suit. Interestingly, *D B Deniz Nakliyati TAS v Yugopetrol and others*[104] involved a post-judgment, stand-alone, application. There were no live, main, proceedings to speak of.

Most recently, this esoteric issue was raised in the Singapore court in *Success Elegant Trading Limited v La Dolce Vita Fine Dining Company Limited and ors* ("**Success Elegant**").[105] In brief, the claimants in an arbitration brought discovery applications in the Singapore Court to compel the respondents' banks to disclose certain documentary evidence. As the application was not quite pre-action, the discrete point was not an issue in contention. Nonetheless, following an earlier Bruneian decision *Chan Swee Leng*,[106] the High Court Registrar opined that the applicants had to "show that they [were parties] to separate and independent legal proceedings.[107] On appeal, the High Court judge dispelled this notion. In reviewing *Chan Swee Leng* carefully, the Judge noted that the Brunei court was not itself faced with a pre-action application, but in any event, the thrust of that decision was that the bankers books' provisions did not create a right to discovery where there was none. In other words, what was crucial was for "a party … to establish *a substantive right* to obtain disclosure before an order would be made".[108] Therefore "if a party could demonstrate a substantive right to the documents, without relying on s175 of the EA, an order could be made under s 175 for disclosure".

In his attempt to interpret the section, the Judge held:

> The "legal proceedings" in s175 would refer to the very application for disclosure, in which the applicant demonstrates a right to discovery independent of s175. In fact, any reliance on s175 alone for disclosure would be misconceived since that section did not provide an independent right to inspection of bankers' books where none existed. …

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[102] *Barker v Wilson* [1980] 2 All ER 81.
[103] *Barker v Wilson* [1980] 2 All ER 81, 82G.
[104] *DB Deniz Nakliyati v Yugopetrol and ors* [1992] 1 WLR 437.
[105] *Success Elegant Trading Limited v La Dolce Vita Fine Dining Company Limited and ors* [2016] SGHC 159.
[106] *Chan Swee Leng v Hong Kong and Shanghai Banking Corporation Ltd* [1996] 5 MLJ 133
[107] *La Dolce Vita Fine Dining Co Ltd and anor v Deutsche Bank AG and anor and anor matter* [2016] SGHCR 3, [90]-[96].
[108] Emphasis added. *Success Elegant Trading Limited v La Dolce Vita Fine Dining Company Limited and ors* [2016] SGHC 159, [91].

> …it could readily be seen that s175 was not meant to confer an independent right of discovery … [it] relate only to *how* evidence is to be provided by the banks ... If this was the case, s175 should also, concomitantly, not be read as abrogating whatever substantive rights a party might have to discovery. By requiring an independent set of legal proceedings before pre-action disclosure was granted, banks would be generally exempt from pre-action disclosure orders unless there was an on-going separate legal proceeding. I did not think s175 was meant to have that effect given that it was enacted to ease how evidence of bankers' books would be adduced in court.

With one minor caveat, it is respectfully suggested that the Judge's explanation on the role of s175 is correct. What should be required by way of safeguard is that the applicant show a substantive right underlying the disclosure application – as was in the case in *Bankers Trust* where a right to trace property was given effect by the grant of disclosure. The Judge's view on the policy implications of such a narrow interpretation is also laudable – it appreciates, realistically, that pre-action discovery against banks would become an extremely rare occurrence if independent legal proceedings are required. However, the Judge's explanation that "legal proceeding" in s175 would therefore refer to the discovery application itself, is, with respect, difficult to follow. Section 175 read with section 170 – which spells out what legal proceedings are – suggest that the bankers' books relief are an adjunct. The better interpretation is therefore that what is permitted, in the spirit of the rules, is that the "legal proceeding" referred to in section 175 includes anticipated proceedings where the applicant has a supporting, underlying, legal right. As identified in the *Norwich Pharmacal* and *Bankers Trust* cases, there may be instances where a wrong has clearly been committed but the party is unable to complete the puzzle for want of facts not reasonable obtainable.[109] The Judge's conclusions (albeit obiter) are therefore welcomed.

*The Exercise of Discretion – Some Safeguards*

Given the new-fangled importance on the bankers' books provisions, since *Susilawati*, and the potentially wide discretion a court may have when faced with such applications, it is thought that certain safeguards to that discretion are apposite. These follow the collective wisdom of the jurisprudence on pre-action discovery under the other avenues.

*(a) Establishing a Substantive Right*

Following *Success Elegant*, if a safeguard be needed, the courts may impose the same threshold requirement as it does in interlocutory injunctions and require that the applicant show a 'serious issue to be tried' on its case.[110] Pitching the threshold any higher may shut the door to possible relief. The court may also impose a further practical safeguard. It was suggested by the court in *Kuah Kok Kim & Ors*

[109] *Aoot Kamneft v Denton WildeSapte* [2002] 1 Lloyd's Rep 417, [20].
[110] *Bouvier, Yves Charles Edgar and anor v Accent Delight International Ltd and anor and anor appeal* [2015] SGCA 45

*v Ernst & Young (a firm)*[111] that a draft of the pleadings which may be used in anticipated proceedings would aid the court in appreciating the nature of the case. Such a technique should be adopted.[112] Some flexibility may be afforded in cases where the need to trace the flow of monies is urgent. The ease of online transfers means that money may swiftly be shifted from jurisdiction to jurisdiction such that delay to the application may ultimately hinder the success of a tracing exercise. In the absence of a set of the draft pleadings, the applicant should at least be able to articulate in a witness statement what the material facts are, what the potential cause of action is, and what remedies it intends to seek, with the relevant documentary proof. Imposing this amount of disclosure from the applicant aids to weed out fishing expeditions. A pre-action discovery order should not be sought for purposes of attempting to formulate a case. The contours of a case must be sufficiently clear, with the application, aiding only to fill some gaps.

The court also should not require that the applicant intends to bring a suit. In two *Norwich Pharmacal* cases, *BSC v Granada Television*[113] and *Ashworth v MGN*,[114] it was clarified that this is not required, although it will almost always be the case.[115]

*(b) Necessity*

As in pre-action discovery cases, the documents sought must be necessary to the applicant's exercise to trace misappropriated assets. The applicant should show that without the documents it seeks, it cannot proceed with further investigation. It is here that the *Norwich Pharmacal* case-law provides us helpful guidance on when relief is necessary. Some cases frame the question of necessity more narrowly, asking whether the information was vital to sue or vital to plead[116] or could not be obtained from elsewhere.[117] More recent cases, however, confirm that the test of necessity ought not to be unduly fettered. In *R (on the application of Mohamed) v Secretary of State for Foreign and Commonwealth Affairs*,[118] the Court held that what was necessary depended on a balancing of a wide range of factors including the size and resource of the applicant, the urgency involved, and any public interest in granting the application. A similar flexible approach was

[111] *Kuah Kok Kim & Ors v Ernst & Young (a firm)* [1996] 3 SLR(R) 485.
[112] Some analogy may be drawn with cases involving derivative actions under the Companies Act. There, it has become a practice to provide the court with a draft of the statement of claim to enable it to ascertain if the potential causes of action have merit: *Law Chin Eng and anor v Hiap Seng & Co Pte Ltd (Lau Chin Hu and others, applicants)*[2009] SGHC 223, [5]; *Fong Wai Lyn Carolyn v Airtrust (Singapore) Pte Ltd and anor* [2011] 3 SLR 980, [6]; *Chan Tong Fan and another v Chiam Heng Luan Realty Pte Ltd (Chiam Toon Tau and another, non-parties)* [2013] SGHC 192, [10]; *Chua Swee Kheng v E3 Holdings Ltd and anor* [2015] SGHC 22, [26].
[113] *BSC v Granada Television* [1981] AC 1096.
[114] *Ashworth v MGN* [2002] 4 All ER 193, [45].
[115] Such a conclusion is sensible since one purpose of pre-action disclosure is to enable potential litigants to decide *against* launching proceedings. See *Dorsey James Michael v World Sport Group Pte Ltd* [2014] 2 SLR 208 [26].
[116] *Nitkin v Richards Butler LLP* [2007] EWHC 173.
[117] *Mitsui & Co Ltd v Nexen Petroleum UK Ltd* [2005] EWHC 625 (Ch); [2005] 3 All ER 511
[118] *R (on the application of Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 2048.

taken in *Rugby Football Union v Consolidated Information Services Ltd*,[119] where Lord Kerr added to the above factors that the court should assess if the order would deter similar future wrongdoing, and whether innocent parties would be prejudiced.[120] Indeed, Lord Kerr explained that '[t]he essential purpose of the remedy is to do justice. This involves the exercise of discretion by a careful and fair weighing of all relevant factors'. A flexible approach is consistent with the remedy's provenance as a revival of the old equitable bill of discovery, and courts should avoid limiting the relief but instead determine whether it is 'necessary' and just in all the circumstances. While the balancing act may admit of some inherent uncertainty, such tasks are routinely undertaken by courts in applications concerning document disclosure and should not cause additional burden.

In short, in determining necessity under the Bankers' Books provisions, the court should have regard to: (a) the potential harm to the applicant measured against the potential harm to the respondent; (b) whether disclosure sought is onerous. Here, instead of refusing the application outright, a Judge could limit an overzealous request for disclosure, such as to information relating to specific impugned transfers; (c) the size and resource of the applicant;[121] (d) the public interest in granting the application;[122] (e) the deterrence of future wrongful conduct.[123] Factors (d) and (e) require a Judge to balance policy considerations. The overall image of a strict and stable confidentially regime is a strong policy goal in Singapore; yet, it is suggested that limited and justified orders for disclosure do not detract from that goal.

*(c) Use in other Proceedings?*

Where the applicant has a proprietary right over the misappropriated assets (as opposed to a mere contractual right), it is arguable that the implied undertaking as to collateral use of documents need not apply. In *Omar v Omar*, a *Bankers Trust* case, the first instance judge held that since the discovery application was to trace the applicant's own property in the UK and abroad, it would be logical not to impose such a requirement. In the event, the judge gave leave to use the bank documentation in foreign proceedings, although he considered it was not strictly necessary. It is respectfully suggested that this approach is correct. As discussed above, the modus operandi of fraudulent schemes is for monies to be laundered from jurisdiction to jurisdiction to whitewash the illegality. It would be unrealistic and somewhat paradoxical for a court to order disclosure of bank documents to aid a victim's tracing exercise, but limit the use of those documents to local proceedings. Indeed, the documents sought may often simply reveal that money has been channelled to another jurisdiction. In the light of this, it is submitted that the *Riddick* principle should not be imposed to a tracing exercise under the bankers' books provisions although I would be prudent for the applicant to make

[119] *Rugby Football Union v Consolidated Information Services Ltd* [2012] UKSC 55.
[120] *Rugby Football Union v Consolidated Information Services Ltd* [2012] UKSC 55, [17].
[121] *R (on the application of Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 2048.
[122] *R (on the application of Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 2048.
[123] *Rugby Football Union v Consolidated Information Services Ltd* [2012] UKSC 55.

clear in its sworn statement that it intends to pursue the perpetrators, even outside of jurisdiction, and intends to use the disclosed documents, where useful, for such purposes.

In a similar vein, because pre-action bankers' books applications will often be used in the civil fraud context, they will regularly be coupled with applications for gagging and sealing orders under paragraph 5 of the First Schedule of the Supreme Court of Judicature or Section 4(10) of the Civil Law Act.[124] These concurrent requests 'protect' the bank, and more importantly, prevent a 'tip-off' of the alleged fraudster.

*(d) Other Considerations*

Many applications for disclosure of bankers' books will be made *inter partes*, with the banks' counsel present, although in substance, the true adversary, the alleged perpetrator, is not heard. It is trite that an applicant in an *ex parte* hearing has a duty of full and frank disclosure,[125] including the disclosure of any material fact which may work against it, and in the alleged perpetrator's favour.

Although bankers' books relief is statutory in nature, it resembles an interim mandatory injunction. As such, in exercising its discretion under Section 175, a Court may pay heed to the usual equitable considerations which apply to interlocutory injunctions. It is suggested that one such requirement is that of 'clean hands'. The applicant must not itself be a party to a fraudulent transaction, or an illegal activity. Second, any delay in making the application must be explicable. Dilatory conduct may suggest that there was no real belief that a fraud took place or that the applicant does not have a genuine interest in prosecuting the claim.[126] Inexplicable delay may also suggest that the proceedings are being used for collateral purposes, and also mean that the court's exercise of its powers may be futile.

Lastly, the court should be mindful of prejudice to the banks. In this regard, pursuant to Section 176 of the Evidence Act, a judge should normally exercise its discretion and order that a bank be indemnified for the cost incurred in assisting the applicant.

## C. Overall Approach to Section 175(1)

By infusing Section 175 with some of the key principles from other pre-action discovery relief, one must be careful not to saddle the applicant with too many burdens so as to stymie its attempt. In many such cases, the applicant would be compelled to act swiftly before assets are dissipated beyond reach. However,

[124] But contrast this with the recent decision of *BBW v BBX and others* [2016] SGHC 190 where the High Court found that sealing orders were rooted in the Court's inherent jurisdiction.

[125]See generally *The "Vasiliy Golovnin"* [2008] 4 SLR(R) 994; *Tay Long Kee Impex Pte Ltd v Tan Beng Huwah* [2000] 1 SLR(R) 786 (endorsing (*The King v The General Commissioners for the Purposes of the Income Tax Acts for the District of Kensington*[1917] 1 KB 486); Steven Gee (n43) [9.001].

[126]*Bouvier, Yves Charles Edgar and another v Accent Delight International Ltd and anor and anor appeal* [2015] SGCA 45, [109]-[114]; *Antonio Gramsci Shipping Corporation v Recoletos Limited* [2011] EWHC 2242 (Comm), [28]-[29]; *Madoff Securities International Ltd v Raven &Ors* [2011] EWHC 3102 (Comm), [158]-[159].

victims of sophisticated fraud are often faced with information gaps which prevent them from presenting a watertight case. Overall, the above factors should not be bright line rules but guidelines for the exercise of discretion in a Section 175 application. Each case turns on its own facts, and so long as the applicant is able to sufficiently explain the gaps in its case, the court should not presume against it.

It should be recalled that, although the bankers' books laws were primarily aimed at facilitating the giving of evidence by banks, they were intended to directly address the banking secrecy issue. As explained in *Wheatley and anor v Commissioner of Police of the British Virgin Islands*,[127] one purpose of the provisions is "to enable a banker's books to be inspected and copied *despite* the duty of confidentiality owed by banker to customer".[128]

## V. CONCLUSION

As Lord Kenyon famously remarked:[129]

> All laws stand on the best and broadest basis which go to enforce moral and social duties: Though indeed it is not every moral and social duty the neglect of which is the ground of an action. For there are, which are called in the civil law, duties of imperfect obligation, for the enforcing of which no action lies … But there are certain duties, the non-performance of which the jurisprudence of this country has made the subject of a civil action. And [it has been said] that "an action upon the case for a deceit lies when a man does any deceit to the damage of another".

An application for pre-action asset tracing in the context of civil fraud poses some difficult questions for the court. The banking secrecy rules in Singapore impose a strong confidentiality regime, and deviation from which requires some justification. But in the spirit of Lord Kenyon's speech, it would be amiss if the law acts to prevents pre-action disclosure against an actionable fraud. It is somewhat unfortunate that the legal framework in Singapore does not appear to permit pre-action disclosure against a bank in the normal way, via the Rules of Court, or by way of a *Norwich Pharmacal* or *Bankers Trust* order. This, however, should not be reason to jettison the careful and considered reasoning on aspects of pre-action disclosure present in those cases. The only route appears to be through the bankers' books provisions, and while those provisions remain underexplored by the courts, it is suggested that the way those provisions are interpreted and applied may be informed by the host of authorities concerning pre-action discovery. These authorities highlight that at a pre-action stage, an order for disclosure is effectively an act of balancing the interest of a victim claimant against the broader public interest of privacy and confidentiality. Further, the court must be mindful to ensure that such orders do not impermissibly encroach on banks, who in many cases, serve merely as conduits, with no ostensible involvement in a civil fraud. With the right safeguards in mind, Section 175 of the

[127] [1980] 2 All ER 82.
[128] [1980] 2 All ER 82, [42].
[129] *Pasley v Freeman* (1789) E.3 T.R.51.

Evidence Act may be interpreted in such a way that is attuned to the needs and reality of fraud victims, and in the appropriate case, be a means for them to trace misappropriated assets.