# THE USE OF PRE-ACTION DISCOVERY IN DISCLOSING THE IDENTITY OF ANONYMOUS SPEAKERS IN DEFAMATION SUITS: THE LAW SO FAR AND THE POTENTIAL CONSTITUTIONAL DELIBERATIONS

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**Abstract**

*The High Court decision of Kopitiam Asia Pacific Sdn Bhd v Modern Outlook Sdn Bhd & Ors*[1] *indicates the first attempt to set clear grounds upon which a party who is likely to bring an action may resort to pre-action discovery, to lift the anonymity of commentators on websites, to facilitate a possible action in defamation.*

*The case note considers the impact of the decision by, firstly, setting out the tests for pre-action discovery under Order 24 rule 7A of the Rules of Court 2012. Secondly, the case note raises the possible constitutional consequences when lifting anonymity of speakers, in developing a more comprehensive and cogent consideration when dealing with free speech by undertaking a balancing exercise of the countervailing interests of an actionable tort initiated by victims of defamatory statements against the protection of free speech by anonymous speakers and commentators on the Internet.*

## Introduction

The proliferation of speech generated by individuals facilitated by social media platforms and user-generated comments on websites has added to the "marketplace of ideas" where discourse is open, interactive, citizen-to-citizen and democratic. In Justice Oliver Wendell Holmes dissent in *Abrams v United States*,[2] he argues that society's ultimate good is better reached by free trade in ideas and 'that the best test of truth is the power of the thought to get itself accepted in the competition of the market'. The Internet has however added another layer to this marketplace of ideas – that of anonymity of the speakers and commentators on the Internet and the various platforms. Anonymity has taken a central discussion in protecting speech in the context of its importance to this freedom. The US Supreme Court in *N.Y. Times Co v Sullivan* recognised the importance of anonymity in promoting freedom of speech as anonymity allows public discussion to be more 'uninhibited, robust and wide-open'.[3] In another pronouncement, the US Supreme Court took the position in favour of anonymity as the need for anonymity may be motivated by fear of economic or official retaliation.[4] Whilst this position has been consistently recognised within the realm of protection of the First

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1 [2019] 10 MLJ 243.

2 250 US 616 (1919).

3 376 US 254 (1964), 270.

4 514 US 334 (1995), 341.

Amendment[5] of the US Constitution, it cannot be denied that anonymous speech on the Internet may contain defamatory statements that may be actionable as part of a civil action to be instituted by the victim of those statements. This is where lifting the anonymity of the speaker or commentator through a pre-action discovery order may assist the plaintiff to a defamatory suit to initiate legal proceedings. In the US, these are referred to as John Doe applications, which will be discussed *infra*.

In Malaysia, with Article 10 of the Federal Constitution protecting free speech and expression, a review of whether the lifting of anonymity may impact the freedom in the same vein as highlighted by the US Supreme Court when issuing John Doe applications must be undertaken.

**Pre-action Discovery**

A pre-action discovery order is pursued when the party seeking the order contemplates a civil action in court. The court's power to order pre-action discovery is found in Order 24 rule 7A of the Rules of Court 2012 ('the Order'). The rule provides that the action must commence by way of originating summons,[6] supported by an affidavit containing the following:[7]

> (a)…the grounds for the application, the material facts pertaining to the intended proceedings and whether the person against whom the order is sought is likely to be party to subsequent proceedings in Court; and
> (b) in any case, specify or describe the documents in respect of which the order is sought and show…that the documents are relevant to an issue arising or likely to arise out of the claim made or likely to be made in the proceedings or the identity of the likely parties to the proceedings, or both, and that the person against whom the order is sought is likely to have or have had them in his possession, custody or power.

The Court of Appeal's decision in *Infoline Sdn Bhd (sued as trustee of Tee Keong Family Trust) v Benjamin Lim Keong Hoe* ('*Infoline*')[8] is the leading authority in setting out the various requirements of the Order. The purpose of issuing the order is that it will allow for the fair disposal of the cause, or, that it will be a cost-saving exercise.[9] Thus, it is on this premise the court exercises its discretion in making the Order. In *Infoline,* the court stated that the applicant:

> …must show that the discovery is necessarily required even before an action is initiated as it is precisely to enable the respondent to decide whether he can even commence action against the appellant in particular, to start with. And, if the information revealed from that discovery can determine or assist in reaching an answer to that predicament, then the order ought to be made. Such an approach is not only fair but sensible and practical as it can obviously avoid unnecessary litigation thus saving costs and preventing wastage of time and resources which is what pre-action discovery seeks to achieve. Where the court is of the opinion

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5 The First Amendment reads as follows: 'Congress shall make no law…bridging the freedom of speech, or of the press'.
6 Order 24 rule 7A(1).
7 Order 24 rule 7A(3).
8 [2017] 6 MLJ 363.
9 *Infoline* (n 8) 380 [41]. See also *Kuah Kok Kim & Ors v Ernst & Young (a firm)* [1997] 1 SLR 169, 179 [43].

> that the applicant is unable to satisfy these conditions, certainly the court must dismiss the application…[10]

Prior to the introduction of the Order, pre-action discovery was not available under the rules. The Malaysian courts had referenced the English equitable principle on pre-action discovery in *Norwich Pharmacal Co and others v Commissioners of Customs and Excise* ('*Norwich Pharmacal* order') where 'that if through no fault of his own, a person gets mixed up in the tortuous acts of others so as to facilitate their own 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'.[11]

The most succinct version of the requirements in a *Norwich Pharmacal* order was set out by Lightman J in *Mitsui v Nexen Petroleum*:[12]

> The three conditions to be satisfied for the courts to exercise the power to order Norwich Pharmacal relief are:
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> i) a wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer;
>
> ii) there must be the need for an order to enable action to be brought against the ultimate wrongdoer; and
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> iii) the person against whom the order is sought must: (a) be mixed up in so as to have facilitated the wrongdoing; and (b) be able or likely to be able to provide the information necessary to enable the wrongdoer to be sued.

There are certainly differences in the requirements between the *Norwich Pharmacal* order and the Order set out under the Malaysian Rules of Court 2012. These will be addressed later in the case note.

**The Requirements of the Order**

Justice Mary Lim, in *Infoline*, provides helpful guidance in setting out the requirements to be satisfied,[13] Her Ladyship enumerates as follows:

> In summary, O 24 r 7A(3) requires an applicant seeking discovery of documents before action to:
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> (a) state the material facts pertaining to the intended proceedings;

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10 *Infoline* (n 8) 380 [42].

11 [1973] 2 All ER 943, 948 (HL) (Lord Reid). See *Teoh Peng Phe v Dato' Seri Dr Ting Chew Peh (On Behalf Of The Malaysian Chinese Association)* [2004] 5 MLJ 241; *ESPL (M) Sdn Bhd v Harbert International Est Sdn Bhd* [2004] 1 MLJ 296; *K Anandaraj a/l Krishnasamy v Dato' Dr Vijayasingam & Anor* [2005] 7 MLJ 120; *Stemlife Bhd v Bristol-Myers Squibb (M) Sdn Bhd* [2008] MLJU 354; *First Malaysia Finance Bhd v Dato' Mohd Fathi bin Haji Ahmad* [1993] 2 MLJ 497; *Lee Lim Huat v Yusuf Khan bin Ghows Khan & Anor* [1997] 2 MLJ 472; [1997] 3 CLJ 197 (CA); and *RHB Bank Bhd v Ab Malik Abdullah & Ors* [2010] 6 CLJ 981).

12 [2005] 3 All ER 511, [21].

13 *Infoline* (n 9) 371 [14].

(b) state whether the person against whom the order is sought is likely to be a party in the subsequent proceedings in the High Court;
(c) specify or describe the documents sought and show that the documents are relevant to an issue arising or likely to arise out of the claim made or likely to be made; and
(d) identify the persons against whom the order is sought is likely to have or had the documents in his possession, custody or power.[14]

Being a new provision, the Court took guidance from the decisions of the Singaporean Court of Appeal in *Kuah Kok Kim & Ors v Ernst & Young (a firm)*[15] ('*Kuah Kok Kim'*) and *Ching Mun Fong v Standard Chartered Bank*[16] ('*Ching Mun Fong'*).

In considering the first requirement in (a) above, *Infoline* referenced *Kuah Kok Kim* where the court stipulated that whilst the affidavit should 'state the cause of action, it is not necessary to give particulars of it.'[17] Relying on the English decision in *Dunning*,[18] Lai J in *Kuah Kok Kim* asserted that 'the object of pre-action discovery would be defeated if the appellants had to show in advance that they had already got a good cause of action before they saw the documents.'[19] Lai J went on to state that as long as the applicants had 'stated the facts sufficiently to explain why pre-action discovery was necessary, this was adequate.'[20]

As for the second requirement in (b), whether the person against whom the order is sought is likely to be a party in the subsequent proceedings, Lai J again resorted to the explanation in *Dunning* by Denning MR to state that the principles of pre-action discovery is to 'enable the plaintiff to find out before he starts proceedings whether he has a good cause of action or not. This object would be defeated if he had to show - in advance - that he had already got a good cause of action before he saw the documents.'[21] The words 'likely to be made' were read to mean 'may' or 'may well be made' upon examination of the documents sought to be discovered.[22]

Moving further to requirement (c), a description of the documents that are sought by the applicant is required and that these documents must be relevant. Here again, Lai J spells out that it is 'enough' if the type or class of documents are described with reasonable precision and that these documents were relevant to the cause of action or intended cause of action.[23] It is also to be noted that apart from the documents being relevant to the cause of action or intended cause of action, the documents may be relevant in identifying the likely parties against whom this cause of action may lie.

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14 ibid.
15 [1997] 1 SLR 169.
16 [2012] 2 SLR 22.
17 *Kuah Kok Kim* (n 15) 178 [34].
18 *Dunning v Board of Governors of the United Liverpool Hospitals* [1973] 2 All ER 454 (CA).
19 *Kuah Kok Kim* (n 15) 182 [60].
20 *Kuah Kok Kim* (n 15) 178 [35].
21 *Kuah Kok Kim* (n 15) 178-179 [38].
22 *Kuah Kok Kim* (n 15) 179 [39].
23 *Kuah Kok Kim* (n 15) 178 [37].

Finally, for requirement (d), 'the applicant has to identify the person having possession, custody or power over the documents sought although this averment may, in appropriate cases, be the same person who is a potential defendant.'[24]

These four requirements were systematically addressed by the High Court in *Kopitiam*. Prior to reviewing the application of these requirements in *Kopitiam*, it is equally important to explore the position of such orders prior to provision in the Rules of Court 2012.

**Lifting Anonymity Prior to *Kopitiam***

Prior to *Kopitiam*, the *Norwich Pharmacal*'s principle was applied in a case involving lifting of anonymity of commentators on Internet platforms.

In *Stemlife Bhd v Bristol-Myers Squibb (M) Sdn Bhd*,[25] the plaintiff had applied for pre-action discovery against the defendant for defamatory postings on the defendant's website as well as postings found on an external blog which was linked to the defendant's web forum. The postings were made by two users of the forum operating under the pseudonyms *stemlie* and *kakalily*. The plaintiff sought a *Norwich Pharmacal* order against the defendants to reveal the identity of the users on the basis that the defendant should have the relevant information as the users were registered with the defendant whereby the registration process would require the users to provide their particulars to the defendant.

The High Court granted the order by applying the principles in *Norwich Pharmacal* which was discussed *supra*.[26] Further, the High Court in *Stemlife* commented that it need not decide on the Defendant's liability in the same wrongdoing that was committed by the users *stemlie* and *kakalily* but rather whether the Defendant had facilitated their wrongdoing. The Court answered this in the affirmative as there was evidence, firstly, that showed the Defendant's website had a posting which expressly invited users to an external blog via a hyperlink which published these alleged defamatory statements against the Plaintiff's company; secondly, the Defendant's website contained terms and conditions that reserved the Defendant's editorial rights which allowed the Defendant to exercise its sole discretion to edit or completely remove the postings in the website if it so desired without prior notice or explanation.

*Stemlife* is an exemplary case that demonstrates the use of *Norwich Pharmacal* orders to lift the anonymity of online users. With the Order now available to facilitate such pre-action discoveries, the remedy no longer lies in English equitable principles.

***Kopitiam* – The Facts and Decision**

In *Kopitiam*, the plaintiff, the owner of a franchise of cafes, discovered a defamatory article referencing the plaintiff's acquisition by a "hippopotamus" which resulted in the worsening of the quality of the plaintiff's food and beverages. The plaintiff contended that this was defamatory as such acquisition, as alleged in the article, was untrue as the plaintiff was a public listed company. The plaintiff intended to initiate an action for slander of goods against the party responsible for posting the defamatory article. Without particulars of the potential

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24 *Infoline* (n 8) [39] 379.
25 [2008] MLJU 354.
26 See *Norwich Pharmacal* (n 11).

defendant's identity, the plaintiff was unable to commence the action. Therefore, the plaintiff initiated the procedure for the pre-action discovery order to be made against the defendants on the basis that the defendants possessed the information needed by the plaintiff to identify the author of the defamatory article. There were three defendants in this case who could facilitate the identification of the maker of the defamatory statements. The first defendant was a company that deals with payment and top-up services on internet portals. The second defendant was a company that provides website registration services. The third defendant was the provider of the server that hosts the website where the defamatory article was placed. The decision of the High Court was as a result of the third defendant appealing the pre-action discovery order that was allowed by the court.

The High Court found in favour of the plaintiff by systematically addressing the principles of the pre-action discovery order as laid down in *Infoline.* The consideration of these principles is set out in the paragraphs below: [27]

*a. The purpose of issuing the order is that it will allow for the fair disposal of the cause or that it will be a cost-saving exercise.*

The plaintiff was able to show that the application was necessary to dispose of the plaintiff's action fairly and to save costs. The High Court was satisfied that this requirement was fulfilled as the plaintiff was unable to commence the action against the intended parties if the plaintiff did not possess the necessary particulars and it was the defendants, the administrators of the website containing the defamatory article, who would likely have the information.

*b. Requirement (a) – The applicant of the order must state the material facts pertaining to the intended proceedings.*

The plaintiff wanted to initiate a defamatory suit against the maker of the defamatory article. It was clear from the plaintiff's affidavit that there were material facts pertaining to the intended proceedings.

*c. Requirement (b) – The person against whom the order is sought is likely to be a party in the subsequent proceedings in the High Court.*

The plaintiff in *Kopitiam* had clearly identified the maker of the defamatory article as the person against whom subsequent or intended proceedings of defamation were to be made.

*d. Requirement (c) – The applicant must specify or describe the documents sought and show that the documents are relevant to an issue arising or likely to arise out of the claim made or likely to be made or the identity of the likely parties to the proceedings.*

The court found that the relevancy test was satisfied as the plaintiff had indicated the information required to commence the action against the maker of the defamatory article. The court relied on *Stemlife* to conclude that for purposes of the Order, 'documents' included information.

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[27] *Infoline* (n 8) 251-252 [31]-[37].

*e. Requirement (d) – The applicant must identify the persons against whom the order is sought is likely to have or had the documents in his possession, custody or power.*

The third defendant was the party who had registered the domain name of the website where the defamatory article was published and the director of the third defendant was the contact person of the domain name. Hence, the third defendant was the party who possessed the particulars and were in a position to reveal the identity of the maker of the defamatory article.

From the above, the plaintiff had made a very convincing case in seeking the Order and for the court to be satisfied that the requirements had been fulfilled.

**_Kopitiam_ – The Implications and Constitutional Questions**

*a. A lower threshold for lifting anonymity*

The decision in *Kopitiam* is the first case where the Order has been allowed for lifting the anonymity of commentators on the Internet under the Rules of Court 2012. The Order has a broader scope under the Rules than that permitted by the principles of pre-action discovery prior to the said Rules as the courts were limited by the application of the *Norwich Pharmacal* principles. The facilitation of the Order to lift the anonymity of commentators has far-reaching consequences. To appreciate these consequence, one must go beyond a superficial read of the judgment and the nature of the Order. For instance, under the *Norwich Pharmacal* order, the defendant in the application must act in the role of "facilitating" the wrongdoing. In *Stemlife*, the facilitation took place when the defendant's website allowed the user-generated comments to upload a hyperlink to an external blog and failed to exercise their editorial power to filter the information being placed on this facility. If the *Norwich Pharmacal* order requirement of "facilitating" tortious acts was to be applied in the *Kopitiam* case, as in facilitating the defamatory article of anonymous commentators, the said requirement may not be satisfied as the third defendant was only in the business of delivering the service of content providers, and not facilitating. It is essential to note that in *Kopitiam*, the third defendant did not set out any obligation to monitor content or to undertake any editorial responsibility.

*b. The constitutional question*

A question that may arise as a result of lifting the anonymity of commentators in revealing their identities is related to the right of these speakers to protection under Article 10 of the Federal Constitution. For purposes of this case note, in-depth jurisprudential discussion is beyond the scope of this case note. The premise is to raise the potential for such issues to be raised by anonymous speakers or the defendants to pre-action discovery applications as an objectionable argument to the lifting of anonymity.

Article 10 is the provision that extends protection to speech and expression. The relevant clauses in Article 10 related to freedom of speech and expression are as follows:

(1) Subject to Clauses (2), (3) and (4) -
(a) every citizen has the right to freedom of speech and expression; …
(2) Parliament may by law impose -

> (a) on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence;

Article 10 is Clause 2(a) allows for a restriction to be imposed on this freedom when it is deemed 'necessary or expedient' in the objectives listed therein. In order to ensure that the restriction of speech and expression is permissible, the courts have employed a number of tests. These are, firstly, the "real and proximate" test, and, secondly, the "reasonable" and "proportionality" test.[28] The said restrictions have been constructed widely by the courts and the omission of any explicit qualification on the restriction in the wordings of the Constitution has been taken by the courts as leaving the courts with minimal jurisdiction to review the constitutionality of a legislation which acts as a restrictive mechanism. This attitude has allowed for the erosion in the past of this fundamental right.

In the UK, when the courts were considering the lifting of anonymity of speakers, they had to undertake a balancing exercise with Article 10 of the European Court of Human Rights[29] that has a similar structure as Article 10 of the Federal Constitution. The balancing is between the right of the applicant of the *Norwich Pharmacal* order and the right of the anonymous speaker to retain his anonymity to preserve his right to free speech and expression. This is however limited to the protection of journalistic sources.[30] The English Court of Appeal has however cautioned by way of a broad brush, and not just limiting it to journalistic sources, in *Totalise Plc v Motley Fool Ltd & Anor*[31] that the order of disclosure must be made upon consideration of, *inter alia*, Article 10. Nevertheless, there has been little development of this cautionary note.

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[28] The test was introduced by the Court of Appeal in *Dr Mohd Nasir Bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213 and confirmed by the Federal Court in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333.

[29] Article 10 provides:
1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

[30] *Financial Times v United Kingdom* (App No. 821/03) 15 December 2009.

[31] [2001] EWCA Civ 1897 [25].

In the US, the jurisprudence on John Doe applications, on the other hand, are protective of the First Amendment. In such applications, the defendant, who is anonymous and unidentifiable is a party to the application as "John Doe". The courts have espoused and favoured "the Dendrite Balancing Approach"[32] established in *Dendrite International, Inc. v John Doe, No.3* ('*Dendrite*').[33] Prior to a court ordering the disclosure of the identity of the unnamed defendant, the court prescribed a five-pronged approach.[34] Firstly, the court require the plaintiff to undertake efforts to notify the anonymous speaker that s/he is the subject of a subpoena or for an order of disclosure, and withhold the action to afford the fictitiously-named defendants a reasonable opportunity to file and serve opposition to the application, which includes the posting of a notification, by the plaintiff, of the identity discovery request on the platform utilised by the defendant. Secondly, the court also requires the plaintiff to identify and set out the exact statements purportedly made by the John Doe defendant that allegedly constitutes actionable speech. Thirdly, the court must determine whether the plaintiff has set forth a *prima facie* cause of action against the John Doe defendant. Fourthly, the plaintiff must produce sufficient evidence supporting each element of its cause of action, on a prima facie basis. Finally, the court should balance the John Doe defendant's First Amendment right to anonymous free speech against the strength of the *prima facie* case presented by the plaintiff and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed. The court in *Dendrite* went on to provide advice that the test is to be applied on a case-by-case basis, emphasising that the guiding principle is that the outcome to lift anonymity must be 'based on a meaningful analysis and a proper balancing of the equities and rights at issue.'[35]

**Moving Forward**

There is already a foundational basis to introduce the "balancing" exercise which can be traced back to Raja Azlan Shah J in *Ooi Kee Saik*[36] where His Lordship quotes *AK Gopalan v State of Madras*,[37] where the Indian Supreme Court clearly indicates '…What the Constitution attempts to do in declaring the rights of the people is *to strike a balance between individual liberty and social control*.' Several in-roads of the potential for balancing competing interests to determine which interest will prevail has been suggested in the judicial commentary. For example, the Court of Appeal in *Mat Shuhaimi bin Shafiei v Public Prosecutor*[38] referred to Lord Denning[39] where His Lordship, when emphasising the importance of free speech and expression in a democratic society, spoke of this balancing element between competing interests of the individual's freedom and his duty to society. His Lordship writes:

> The freedom of the individual, which is so dear to us, has to be balanced with his duty; for, to be sure every one owes a duty to the society of which he forms part. By personal freedom I mean the freedom of every law-abiding citizen to think where he will on his lawful occasions without let or hindrance from any

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32 Susanna Moore, "The Challenge of Internet Anonymity: Protecting John Doe on the Internet" (2009) 26 J Marshall J Computer & Info L 469, 478.
33 775 A 2d 756 (NJ Super Ct App Div 2001).
34 ibid 760-761.
35 ibid 761.
36 [1971] 2 MLJ 108, 111.
37 AIR 1950 SC 27.
38 [2014] 2 MLJ 145, 158.
39 'Freedom under the Law' (Hamlyn Lectures, First Series) 4, 5, 35 and 36.

> other persons. It must be matched, of course, with social security, by which I mean the peace and good order of the community in which we live.[40]

In another Court of Appeal decision, the court speaks of the balancing element in *Nik Nazmi bin Nik Ahmad v Public Prosecutor*,[41] when dealing with the Peaceful Assembly Act. The court commented as follows:

> In essence, in the name of security of the federation or public order the Legislature cannot enact provisions which will impinge on the constitutional framework without fulfilling the strict criteria set out in the constitution. The courts are obliged to ensure the law promulgated are not enacted on illusory threat of public order or security of the federation by speculation or surmise, etc.; to change the character of rule of law to rule by law. In this respect the court has a sacrosanct role to play to *balance the state as well as public interest* within the framework of constitutional jurisprudence as applied in civilised nation, which are not subject to authoritarian rule. The courts task in doing so is no easy task but when done within jurisprudence it promotes and enhances democratic values which will ensure peace, prosperity and harmony to the state and bring great economic success to the public. And it will also anchor public confidence in judicial determination. (Emphasis added)[42]

> *The doctrine of proportionality when used in the context of fundamental rights involves a balancing and the necessity test.* The balancing test means scrutiny of excessive onerous penalties or infringements of rights or interest and a manifest imbalance of relevant consideration. The necessity test means that the infringement of fundamental rights in question must be by the least restrictive alternative (see article by Dr Poonam Rawat Doctrine of Proportionality Dehradun Law Review). (Emphasis added)[43]

From the above pronouncement, it can be inferred that the balancing exercise is undertaken when applying the test of proportionality.

**Concluding Remarks**

With the lowering of the threshold in pre-action discovery, anonymous speakers and commentators may not be able to meaningfully enjoy the protection of free speech and expression facilitated by the anonymity of the various platforms on the Internet and to exercise the fundamental freedom of free speech and expression. A defendant in objecting to the Order may be able to raise constitutional arguments in the non-disclosure of the identity of an anonymous speaker and commentator. The courts, on the other hand, cannot look away from countervailing arguments against the making of such orders since more than ever, the call for balancing interests of the parties involved is a fundamental exercise so as not to erode constitutional protection of the liberty enshrined in the Constitution.

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40 ibid.
41 [2014] 4 MLJ 157.
42 ibid 194 [123].
43 *Nik Nazmi* (n 40) 211 [146].