

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

[2023] SGHC 150

Originating Application No 288 of 2023

In the matter of Section 3 and 4 of the
Evidence (Civil Proceedings in Other
Jurisdictions) Act 1979

Between

Proofpoint, Inc

... Claimant

And

Maiwand Youssoftay

... Respondent

EX TEMPORE JUDGMENT

[Civil Procedure — Discovery of documents — Production of documents in
aid of foreign proceedings]

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Proofpoint, Inc
v
Maiwand Youssoftay

[2023] SGHC 150

General Division of the High Court — Originating Application No 288 of 2023

Goh Yihan JC
18 May 2023

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Goh Yihan JC:

1 This is Proofpoint, Inc's ("the claimant") application pursuant to ss 3 and 4 of the Evidence (Civil Proceedings in Other Jurisdictions) Act 1979 (2020 Rev Ed) ("the Act") for an order requiring the respondent to produce documents in aid of foreign proceedings in the Superior Court of California. In particular, s 3 of the Act provides as follows:

Application to General Division of High Court for assistance in obtaining evidence to be used abroad

3. Where an application is made to the General Division of the High Court for an order for evidence to be obtained in Singapore and the General Division of the High Court is satisfied that —

(a) the application is made pursuant to a request issued by or on behalf of a court or tribunal (called in this Act the requesting court) exercising jurisdiction in a country or territory outside Singapore; and

(b) the evidence to which the application relates is to be obtained for the purposes of civil proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated,

the General Division of the High Court has the powers conferred on it by this Act.

2 After hearing the parties before me, I dismiss the claimant’s application. I do so because I am not satisfied, pursuant to s 3(a) of the Act, that the present application is made pursuant to a “request” issued by a court or tribunal exercising jurisdiction in a country or territory outside Singapore (“foreign court or tribunal”). As the conditions in s 3 of the Act are not met, the court does not have the powers conferred on it by the Act and consequently cannot make the necessary orders pursuant to s 4. While this may be a technical point, it remains that I cannot exercise the powers conferred by the Act unless there has been a proper “request” consistent with its terms.

3 By way of background, on 10 December 2021, the claimant commenced legal proceedings against Abnormal Security, Inc (“Abnormal”) in the Superior Court of California (“the Californian Proceedings”). The claimant sought relief for, among others, alleged intentional interference with contractual relations, inducement of breach of contract, misappropriation of trade secrets, and unfair competition. As part of the Californian Proceedings, the claimant alleged that Abnormal had “engaged in a scheme to replicate [the claimant’s] success by recruiting key employees and improperly using the information misappropriated by those individuals to engage in unlawful and unfair business practices”.

4 The respondent, Mr Maiwand Youssoftay, resides in Singapore and is employed in Abnormal’s Singapore office. While the respondent is not part of the Californian Proceedings, the claimant has alleged that he “was central” to Abnormal’s scheme as detailed above. In that regard, the claimant has obtained

a subpoena from the Superior Court of California requiring the respondent to produce 12 categories of documents (“the Documents”). Against this background, the claimant has therefore filed the present application pursuant to s 3 of the Act seeking an order to compel the respondent to produce the Documents.

5 As I said above, I find that the claimant has not shown that the present application is made pursuant to a “request” issued by or on behalf of a foreign court or tribunal, as required by s 3(a) of the Act. In furtherance of s 3(a), O 55 r 2(2) of the Rules of Court 2021 sets out the way in which a claimant can show that s 3(a) is satisfied:

Application for order (O. 55, r. 2)

...

(2) There must be exhibited to the affidavit in support *the letter of request, certificate or other document* evidencing the desire of the court or tribunal to obtain for the purpose of a matter pending before it the evidence of the witness to whom the application relates or the production of any documents and, if that document is not in the English language, a translation of that document in that language.

[emphasis added]

In other words, the claimant must produce before the court a document to show that a foreign court or tribunal has requested for the evidence to be obtained in Singapore that is the subject of the application for purposes of pending proceedings.

6 In the present case, the claimant relies on a document titled “Commission to Take Deposition Outside California” dated 21 December 2022 (“the Commission”). While s 2 of the Act provides that a “request” includes “any commission ... issued by or on behalf of the requesting court”, I am of the view that the “commission” or any other document evidencing a request must

on its face *unambiguously* evidence the desire of the foreign court or tribunal to obtain evidence in Singapore.

7 In this regard, the Commission appears on its face to be ambiguous for two reasons.

8 First, the Commission contains no words indicative of a request for the purposes of s 3(a) of the Act. In this regard, the Act was enacted to give effect to Singapore’s accession to the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (“the Hague Convention”) (see *Singapore Parliamentary Debates, Official Report* (7 September 1979), vol 39 at col 406 (Mr E W Barker, Minister for Law and Science and Technology)). The Hague Convention contains model letters of request. In fact, there is a form titled “Form of Letter of Request to Take Deposition in Foreign Nation” that is apparently used by the Californian Courts (“the Form”), and which was adapted in part from the Hague Convention model letters. The Form states clearly that it is issued “for international judicial assistance, in accordance with the Hague Convention of 18 March 1970, on the taking of evidence in civil or commercial matters”. This stands in contrast to the absence of similar words in the Commission, which suggests that it is a document governing only the taking of evidence within the United States, and not beyond that. As such, it is not clear to me that the Commission, despite being of a type of document that can be regarded as a “request” under s 2 of the Act, is meant to be used to make requests to other states for the purposes of obtaining evidence in aid of pending proceedings in the Superior Court of California.

9 Second, on its face, the Commission plainly relates to the taking of a deposition within another “state of the United States, territory or insular possession subject to its jurisdiction”. Indeed, the Commission states that it is

issued pursuant to the California Code of Civil Procedure §2026.010. Consistent with what is provided for in the Commission, §2026.010 is about a deposition “in another state of the United States, or in a territory or an insular possession subject to its jurisdiction”. In other words, the Commission only relates to the taking of a deposition *within the United States*. More specifically, I note that the Commission has “Singapore” filled in as the place in which “[t]he deposition is to be taken in (*state of the United States, territory, or insular possession subject to its jurisdiction*)” [emphasis in original]. While “Singapore” is filled in as such, this is erroneous as Singapore is plainly and indisputably *not* a state, territory, or insular possession of the United States. Accordingly, even if the Commission can be taken as a “request” for the purposes of s 3(a), it is not safe to regard the Commission as concerning the taking of a deposition *outside of the United States*.

10 At the hearing before me, Ms Ling Yuanrong, who appeared for the claimant, said that her client was advised by counsel in the United States that the Commission would be sufficient for present purposes. Be that as it may, the claimant has not tendered any affidavit to this effect which can explain away the ambiguities in the Commission that I have pointed out above.

11 In the circumstances, I find that the claimant has not satisfied the threshold requirement under s 3(a) of the Act. Since the claimant has not done so, it follows that I need not consider whether s 3(b) is satisfied, or whether I should exercise the power conferred to the court by s 4. This is for the simple reason that, unless s 3 of the Act is satisfied, this court will not be conferred with the powers provided by the Act. It necessarily follows that I have no power under the Act to make any order to compel the respondent to produce the Documents under s 4. My conclusion remains the same even if respondent has indicated that he may be willing to disclose the Documents on, among others,

the condition that the claimant making an undertaking not to use them for any other collateral purpose. This is because the court's power to make the orders under s 4 of the Act comes from the Act and cannot be derived from the parties' agreement to such effect. Indeed, the present application is plainly taken out pursuant to ss 3 and 4 of the Act.

12 For all these reasons, I dismiss the claimant's application. I fix costs at \$5,000 to be paid by the claimant to the respondent.

Goh Yihan
Judicial Commissioner

Tham Wei Chern, Wang Chunhua and Ling Yuanrong
(Fullerton Law Chambers LLC) for the claimant;
Siraj Omar SC and Chan Yun Wen Charmaine
(Drew & Napier LLC) for the respondent.
