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

[2021] SGHC 214

Suit No 1054 of 2018 (Registrar's Appeal No 135 of 2021)

Between

Saxo Bank A/S

… *Plaintiff*

And

Innopac Holdings Ltd

… *Defendant*

GROUNDS OF DECISION

[Civil Procedure] — [Pleadings] — [Striking out]

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v
Innopac Holdings Ltd

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General Division of the High Court — Suit No 1054 of 2018 (Registrar's Appeal No 135 of 2021)
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28 July 2021

20 September 2021

Andre Maniam JC:

Introduction

1 The defendant repeatedly failed to comply with its discovery obligations, including those subject to an "unless order". As a consequence, the defendant's defence and counterclaim was struck out and judgment was entered for the plaintiff. I upheld that decision, and the defendant appealed. These are my grounds of decision.

Background

The parties

2 The plaintiff is a bank. The defendant is a public company formerly listed on the Singapore Exchange.

The MOUs

3 Two of the defendant's subsidiaries, "Heritage" and "Wang Da", had trading accounts with the plaintiff. By late 2013, there was a negative balance in the accounts, and certain negotiations ensued between the plaintiff, the defendant, Heritage, and Wang Da.

4 On 23 or 24 October 2013, the defendant transferred 23 million shares in Liongold Corp Ltd ("Liongold") into an account ("the SCM Account") with Saxo Capital Markets Pte Ltd, a subsidiary of the plaintiff.

5 On or about 29 October 2013, Heritage and Wang Da each entered into a memorandum of understanding ("MOU") with the plaintiff. The MOUs were signed on behalf of Heritage and Wang Da by Mr Wong Chin Yong ("Mr Wong"), the managing director and chief executive officer ("CEO") of the defendant.

6 On the terms of the MOUs, Heritage and Wang Da agreed to transfer the 23 million Liongold shares, through their parent company – the defendant – and pledge them to serve as collateral in favour of the plaintiff.

7 On or about 24 December 2013, the defendant itself entered into an MOU with the plaintiff (the "Innopac MOU"). This was signed on the defendant's behalf by Mr Wong.

8 The Innopac MOU recited that "[f]urther to the shares as pledged in accordance with the MoU dated 29 October 2013 entered into between Heritage and Wang Da with Saxo Bank respectively, Innopac is also desirous of entering into a repayment arrangement with Saxo Bank to cover Saxo Bank's exposure.

Further details of the payment arrangement are as set out in the Schedule 1 attached."

9 On the terms of the Innopac MOU, the defendant agreed (among other things):

(a) to pay/pledge $5 million in cash and/or shares for the benefit of Heritage and Wang Da, over five months from February 2014 to June 2014; and

(b) on the first business day of July 2014 to pay/pledge a further amount equivalent to the difference between the account value required to be maintained for margin trading purposes for Heritage and Wang Da, and the total value paid/pledged thus far.

10 Thereafter, the defendant transferred to the SCM Account:

(c) 6.8 million Liongold shares in February 2014;

(d) 16 million shares in Blumont Group Ltd ("Blumont") in March 2014; and

(e) 17 million Blumont shares in April 2014 (the defendant says it was on or about 3 April 2014, the plaintiff says it was on 7 April 2014).

The suit

11 In October 2018, the plaintiff sued the defendant for breaching the Innopac MOU by not paying/pledging anything beyond the 29.8 million Liongold shares, and the 33 million Blumont shares mentioned above.

12 In its defence, the defendant asserted that all of the MOUs were not legally binding, and that the plaintiff was not entitled to the Liongold shares and Blumont shares in the SCM Account. The defendant also raised a counterclaim premised on the plaintiff's claims being baseless.

The defendant's breaches of its discovery obligations

13 The defendant first breached its discovery obligations in August 2019.

14 On 19 July 2019, parties were directed to exchange lists of documents verified by affidavits by 13 August 2019. The defendant did not provide its list of documents and verification affidavit in time. On 21 August 2019, the plaintiff applied for an unless order to compel discovery, but the court then granted the defendant an extension of time until 27 September 2019. The defendant filed its list of documents and verification affidavit on 27 September 2019, within the extended time.

15 The defendant's list of documents included no internal correspondence. Twelve emails in the period from 16 April 2015 to 29 June 2015 were disclosed. All of these were emails between the plaintiff's representatives and the defendant's representatives: they involved the defendant's Mr Wong, and the plaintiff's director of institutional sales Mr Ivan Chang ("Mr Chang"); most of them also involved the defendant's group financial controller Mr Stanley Chu ("Mr Chu"). No correspondence – internal or external – was produced for the period prior to 16 April 2015, although that period covered the execution of the three MOUs and the various transfers of shares.

16 On 30 September 2019, the defendant purportedly produced copies of the documents in its list. The documents produced, however, had missing

information (such as the sender, recipient, date and time, and subject, of emails), and missing pages.

17 On 11 October 2019, the defendant was directed to provide complete copies of the documents in its list by 18 October 2019. The defendant did not do so until 21 October 2019 (for most of the documents) and 4 November 2019 (for two of the documents). The documents produced did not, however, match the description in the defendant's list of documents.

18 On 13 November 2019, the defendant's solicitors put forward the explanation that they had only had sight of the complete copies of the documents from the defendant *after* they had filed the list of documents, and so "naturally, the dates of the most recent emails would not correspond with [the] dates listed in the [list]". They asserted that "the description and the content[s] of the documents remain [unchanged]", but there were still discrepancies, and on 15 November 2019, the defendant was directed to file an amended list of documents clarifying the discrepancies by 22 November 2019. On 21 November 2019, the defendant sent a draft amended list to the plaintiff.

19 On 11 October 2019, the court also directed that specific discovery requests be made by 22 October 2019, and be responded to by 4 November 2019. On 22 October 2019 the plaintiff made its request for specific discovery, which included a request for internal documents and correspondence in relation to the Innopac MOU, and the subsequent share transfers.

20 The defendant did not respond substantively by the deadline of 4 November 2019. Instead, the defendant's solicitors sent an email that day asking to be given till 13 November 2019 "given the volume of documents

requested". When the defendant's solicitors responded substantively on 13 November 2019, however, they asserted that the documents requested *did not exist*, because the matters in question were the subject of face to face meetings, and no minutes were recorded. They did not have any "volume" of documents to deal with, after all.

21 On 15 November 2019, the court directed (among other things) that any specific discovery application be made by 29 November 2019.

22 On 21 November 2019, the defendant filed an affidavit stating, "all correspondence relating to the Plaintiff's request for specific discovery of the abovementioned documents were done verbally and therefore no records for such correspondence exist".[1]

23 On 29 November 2019, the plaintiff applied by HC/SUM 5989/2019 for specific discovery of eight categories of documents. The plaintiff pointed out the following:

> (a) The absence of disclosed correspondence prior to April 2015 was a clear deficiency, given that the plaintiff itself had disclosed emails between the parties negotiating terms of the Heritage and Wang Da MOUs in late 2013;
>
> (b) a Microsoft Excel worksheet ("the Excel worksheet") with a summary of the defendant's accounts and shares, which had been prepared by the defendant, was not disclosed – that was attached to an email from the defendant's Mr Chu to the plaintiff's Mr Chang;

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[1] Lim Heng Lin's 2nd affidavit affirmed on 21 November 2019 ("Mr Lim's 2nd affidavit") at para 5.

(c) a form prepared by the defendant for the transfer of 17 million Blumont shares from the plaintiff's Central Depository ("CDP") account was not disclosed;

(d) there was an email dated 6 November 2013 from Mr Chu to Mr Chang, copied to Mr Wong, where Mr Chu stated that changes had been made to cl 1.3 of the Heritage and Wang Da MOUs, which indicates that there must have been internal correspondence and/or drafts of the proposed changes;

(e) an email dated 26 November 2013 between the plaintiff's representatives showed that they understood the defendant would be having a meeting "this Thursday [28 November 2013]" to discuss the provision of more collateral to cover the plaintiff's exposure to Heritage and Wang Da,[2] but the defendant disclosed no board minutes or resolutions about the MOUs or share transfers; and

(f) the defendant's 2014 annual report mentioned that it had investments pledged as security for trading accounts with financial institutions – why was nothing disclosed in terms of internal discussions or decisions about those pledges?

24 In response, the defendant filed Lim Heng Lin's ("Mr Lim") 3rd affidavit affirmed on 16 December 2019 ("Mr Lim's 3rd affidavit"), purporting to explain that the defendant did not disclose documents that the plaintiff had itself listed and produced. This explanation does not hold water:

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[2] Ramus Houmann Korfits Andersen's 6th affidavit affirmed on 16 July 2020 ("Andersen's 6th affidavit") at pp 245–246.

(a) the Excel worksheet was not separately listed by the plaintiff, it was an attachment to an email that was listed as such, and the defendant filed its list before the plaintiff produced the documents it listed – the defendant could not have excluded the Excel worksheet just because it was included in the plaintiff's discovery;

(b) the defendant did disclose certain items that were in the plaintiff's list.

(c) if the defendant had deliberately excluded some relevant documents just because the plaintiff had already listed them, paragraph 3 of their list of documents (verified by Mr Lim's 1st affidavit affirmed on 27 September 2019) would have been false – Mr Lim's affidavit claimed that "[n]either the Defendant nor its solicitors nor any other person on its behalf, have now, or [ever] had, in their possession, custody or power any documents of any description whatever relating to any matter in question in this action, other than the documents enumerated in the Schedule hereto";

(d) the defendant would later submit (at the hearing of HC/RA 30/2020) that it had lost possession, custody, or power of all external correspondence prior to 16 April 2015 – if that were true then those would not have been excluded just because the plaintiff had listed them (as Mr Lim's 3rd affidavit claimed); and

(e) a party's obligation to give discovery is independent of what the other party discloses.

25 On 13 January 2020, the defendant was ordered (by ORC 1635/2020) to file and serve a further and better list, verified by affidavit, in respect of six of

the categories requested by the plaintiff. The verification affidavit was to state: whether the documents listed are or have at any time been, in the defendant's possession, custody or power; the steps that the defendant took to locate the documents; and if the said documents have been but are no longer in the defendant's possession, custody or power, when it parted with and what has become of the same. The defendant was given 14 days to comply with this order.

26 The defendant was required to disclose the following categories of documents (numbering retained from the schedule to the plaintiff's application in HC/SUM 5989/2019):

> 1. Other than the documents disclosed pursuant to the Defendant's List of Documents dated 27 September 2019, all Correspondence relating to the matters in this action prior to 16 April 2015;
>
> 2. All Documents and Correspondence between the directors, officers, employees and/or agents of the Defendant (including, but not limited to, Mr Wong Chin Yong and Mr Stanley Chu) relating to the negotiations on the terms of the Heritage and Wang Da MOUs, and their execution;
>
> 3. All Documents and Correspondence between the directors, officers, employees and/or agents of the Defendant (including, but not limited to, Mr Wong Chin Yong and Mr Stanley Chu) relating to the negotiations on the terms of the MOU, and its execution;
>
> 5. All Documents and Correspondence between the directors, officers, employees and/or agents of the Defendant (including, but not limited to, Mr Wong Chin Yong and Mr Stanley Chu) relating to the effect of the MOU;
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> 6. All Documents and Correspondence between the directors, officers, employees and/or agents of the Defendant (including, but not limited to, Mr Wong Chin Yong and Mr Stanley Chu) relating to the transfer of the following shares from the Defendant to the Plaintiff (including but not limited to the purpose for the transfers):
>
> a) 23 million Liongold shares on or about 24 October 2013;
>
> b) 6.8 million Liongold shares on or about 7 February 2014;
>
> c) 16 million Blumont shares on or about 14 March 2014;

> d) 17 million Blumont shares on or about 7 April 2014;
>
> 7. All Documents and Correspondence between the directors, officers, employees and/or agents of the Defendant (including, but not limited to, Mr Wong Chin Yong and Mr Stanley Chu) relating to the Defendant's plans to address the negative account balances of the Wang Da Account and the Heritage Account, including but not limited to the time periods before the execution of the Heritage and Wang Da MOUs, and after the execution of the MOU.

27 The defendant appealed against ORC 1635/2020 by way of HC/RA 30/2020. In advance of the appeal hearing, the defendant put in fresh evidence by filing Mr Lim's 7th affidavit affirmed on 14 February 2020 ("Mr Lim's 7th affidavit") exhibiting an unfiled affidavit affirmed by Mr Wong on 14 February 2020 ("Mr Wong's 3rd affidavit").

28 Mr Wong had left the defendant on or around 31 March 2019, some five months after the plaintiff sued the defendant. Mr Lim, who had been filing affidavits on behalf of the plaintiff, only became a director of the defendant on or around 23 August 2019. Mr Lim said that most of the information in his previous affidavits were based on what Mr Wong briefed him, and documents in his possession.

29 Mr Wong's 3rd affidavit exhibited an email exchange between him and Mr Chu on 19–20 January 2020 (after ORC 1635/2020). Mr Wong posed various queries and Mr Chu responded; that included the following:

> …
>
> [Mr Wong's question:]
>
> (4) can you confirm that all our internal correspondence (between you and I) were done orally, as our offices were near each other.
>
> [Mr Chu's reply:]
>
> Most of discussion were done verbally, but I cannot be 100% certain that there was no written communication.

30 Mr Chu also added: "Clause 6 of the Summons Schedule is about transfer of shares. Is the share transfer effected by Innopac? If yes, please check and show them Innopac's board resolutions on the transfer."

31 Mr Chu's responses are telling:

(a) he was not prepared to confirm that there were no written communications between him and Mr Wong; and

(b) he expected there to be board resolutions in respect of share transfers by the defendant.

32 Notwithstanding Mr Chu's position, Mr Wong asserted:

(a) he and Mr Chu were the only persons involved in the matter, their offices were right next to each other, and "all communications were done orally at all material times."[3]; and

(b) no board meetings were convened for this matter, and so there were no minutes – Mr Wong claimed that there was no need for any board meetings in respect of the share transfers to the SCM Account as the defendant always retained ownership over those shares.[4]

33 Mr Wong's 3rd affidavit (and Mr Lim's 3rd affidavit) also addressed the matter of email records, a topic I will return to at [71]–[90] below.

34 Notwithstanding the fresh evidence, Andrew Ang SJ ("Ang SJ") who heard the appeal was not persuaded that the defendant had no further documents

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3 Mr Wong's 3rd affidavit at para 10.

4 Mr Wong's 3rd affidavit at paras 11 and 31.

in its possession, custody, or power to disclose pursuant to ORC 1635/2020. He upheld the order and dismissed the appeal. He gave the defendant three weeks, until 12 March 2020, to comply with the order. I shall refer to Ang SJ's order of 20 February 2020 (extracted as ORC 1634/2020) as the "Further Discovery Order".

35 The defendant did not seek to appeal against the Further Discovery Order, but it did not comply with it by the deadline of 12 March 2020. On 19 March 2020, the defendant wrote to court to seek an extension of time. The plaintiff agreed to allow the defendant until 26 March 2020 to comply with the Further Discovery Order, but the defendant did not do so.

36 By the time of the pre-trial conference on 19 June 2020, the defendant still had not complied with the Further Discovery Order. This was more than three months after the deadline of 12 March 2020 set by Ang SJ. At that pre-trial conference (which Mr Lim attended), the court made the "Unless Order": that unless the defendant complies with the Further Discovery Order by 1 July 2020, judgment shall be entered in favour of the plaintiff without further attendance with costs to be taxed if not agreed.

37 The defendant purported to comply with the Further Discovery Order (and the Unless Order) by filing Mr Lim's 8th affidavit affirmed on 29 June 2020. The defendant did not disclose any further documents within any of the categories in the Further Discovery Order. Instead, Mr Lim asserted that the defendant did not have (and never had) possession, custody, or power in relation to any such documents, because:

> (a) "communications between Mr Wong Chin Yong and Mr Stanley Chu were mostly done orally at that material time"; and

(b) the defendant's position on the MOUs was that they were not valid, and therefore there was no necessity for them to be discussed by the defendant's representatives.[5]

38 Notably, Mr Lim did not say (as Mr Wong had in Mr Wong's 3rd affidavit) that *all* communications between Mr Wong and Mr Chu were done orally; instead Mr Lim said those communications were *mostly* done orally.

39 Mr Lim did not specifically address whether there were resolutions in respect of share transfers (as Mr Chu had expected there to be, which Mr Wong disagreed with).

40 Mr Lim addressed the matter of there being no backup of emails by Exabytes Sdn Bhd ("Exabytes"), the company that was hosting the defendant's innopacific.com emails at the time. I will deal with this in greater detail below.

41 Mr Lim's affidavit did not satisfy the plaintiff – on 16 July 2020 the plaintiff applied by HC/SUM 2941/2020 for the defendant's defence and counterclaim to be struck out pursuant to O 24 r 16 of the Rules of Court (2014 Rev Ed) ("Rules of Court"), and for judgment to be entered for the plaintiff. The plaintiff's striking-out application was heard, and granted, on 30 April 2021.

42 It took some nine and a half months for the striking-out application to be heard, for in the interim:

(a) the defendant applied (by HC/SUM 3122/2020 on 28 July 2020) for Mr Lim to be granted leave to represent the defendant; and

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5 Mr Lim's 8th affidavit at para 8(a).

(b) the defendant applied (by HC/OS 787/2020 on 13 August 2020) to be placed in judicial management.

43 On 22 February 2021, HC/SUM 3122/2020 was withdrawn, with Mr Lim acknowledging that he would not be able to represent the defendant adequately; and HC/OS 787/2020 was dismissed – the defendant had not even met the formalities of advertising its application, as required.

44 At the first instance hearing of the striking-out application, the registrar noted that the only new matter the defendant had raised since the registrar's appeal hearing before Ang SJ, were:

(a) the position in relation to Exabytes; and

(b) saying that discussions between Mr Wong and Mr Chu were "mostly" oral, rather than "all" oral.

45 The registrar held:

(a) the defendant had failed to comply adequately with the Further Discovery Order;

(b) the defendant had deliberately failed to preserve possibly relevant documents and/or had failed to take reasonable steps to comply with the Further Discovery Order;

(c) the defendant did not have any intention of complying with the Further Discovery Order and/or its failure/inability to comply was a result of its own acts;

(d) there was a real risk that the defendant's conduct had prejudiced the conduct of the trial; and

(e) the breaches of the Further Discovery Order and the Unless Order were intentional and contumelious, and the defence and counterclaim should be struck out.

46 The defendant sought by way of HC/SUM 2545/2021 to adduce fresh evidence before the hearing of the appeal against the striking out of its defendant and counterclaim. The application was supported by the 5th affidavit of Mr Wong affirmed on 31 May 2021 ("Mr Wong's 5th affidavit"), and it was followed by the 6th affidavit of Mr Wong affirmed on 25 June 2021 ("Mr Wong's 6th affidavit"), which exhibited the 7th affidavit of Mr Wong affirmed on 25 June 2021 ("Mr Wong's 7th affidavit").

47 Mr Wong exhibited to his 7th affidavit:

(a) an affidavit from Exabytes' CEO, Mr Chan ("the Exabytes affidavit"); and

(b) "potentially relevant" documents from a clone image of the hard disk of Mr Wong's laptop that had been seized by the Commercial Affairs Department ("CAD").

48 Although the matters in Mr Wong's 5th, 6th and 7th affidavits could have been obtained with reasonable diligence before the hearing of the striking-out application, I allowed the defendant to rely on the fresh evidence as the defendant was contending that – with the fresh evidence – it would have complied with its discovery obligations (if it had not already done so).

My decision

49 I agreed with the reasons given by the registrar for striking out the defendant's defence and counterclaim (as set out at [45] above), as I elaborate below.

50 Order 24 rule 16 of the Rules of Court provides that where there is failure to comply with discovery obligations, "the Court may make such order as it thinks just including, in particular, an order that the action be dismissed or, as the case may be, an order that the defence be struck out and judgment be entered accordingly."

51 In *Alliance Management SA v Pendleton Lane P and another and another suit* [2008] 4 SLR(R) 1 ("*Alliance Management 2008*"), the court noted (at [5]) four instances in which the court may in the exercise of its discretion strike out pleadings for non-compliance with the Rules of Court or orders of court:

> (a) The defaulting party has deliberately or wilfully failed to comply with an "unless order" (see *SMS v Power & Energy* [1996] 1 SLR(R) 121 at [17]).
>
> (b) The defaulting party has failed to comply with successive non-peremptory orders for discovery so that the default is clearly contumacious (see *Soh Lup Chee v Seow Boon Cheng & Anor* [2002] 1 SLR(R) 604 ("*Soh Lup Chee*").
>
> (c) The consequence of the failure to comply with a rule of court or order requiring discovery is such that there is a serious or real risk that a fair trial may no longer be possible.
>
> (d) The failure to comply with a rule of court or order requiring discovery is due to the deliberate suppression of evidence which justifies a striking out of the pleadings even where a fair trial was still possible.

52 The court went on to say (at [6]):

> [T]hese instances of striking out were in circumstances involving (a) procedural abuse or questionable tactics; (b) peremptory orders where the basis of the failure to comply with a peremptory order was contumacious; and (c) repeated and persistent defaults of the rules of court or non-peremptory orders amounting to contumacious conduct. At the opposite end of the spectrum of seriousness are cases of ordinary procedural defaults of a technical complexion that are unlikely to give rise to the exercise of this discretionary power to strike out.

53 The plaintiff contended that there had been a deliberate or wilful failure to comply with the Unless Order, and in any case the defendant's failures to meet its discovery obligations justified striking out its defence and counterclaim.

54 The defendant acknowledged that there had been "some procedural defaults" (para 4 of the defendant's submissions), but it contended that its failures were not deliberate or wilful. It submitted that it had provided discovery of all that it could provide discovery of, and so notwithstanding its earlier defaults, its defence and counterclaim should not be struck out.

The defendant had breached the Unless Order

55 The defendant had breached both aspects of the Unless Order (which the defendant had till 1 July 2021 to comply with):

(a) to file and serve a further and better list, verified by affidavit, in respect of six of the categories requested by the plaintiff; and

(b) the verification affidavit was to state: whether the documents listed are or have at any time been, in the defendant's possession, custody or power; the steps that the defendant took to locate the documents; and if the said documents have been but are no longer in the

defendant's possession, custody or power, when it parted with and what has become of the same.

The failure to file a further and better list

56 The defendant did not file any further and better list – it insisted that it had no documents to put into such a list.

57 An order requiring a further and better list to be filed does not necessarily preclude the party in question from responding that it has no other relevant documents to disclose. The order might simply have been made on the basis of a *prima facie* case that there were relevant documents to disclose – see, *eg*, *The Management Corporation Strata Title Plan No 689 v DTZ Debenham Tie Lung (SEA) Pte Ltd and another* [2008] SGHC 98.

58 If, however, a party has sought to resist the application for a further and better list on the basis that it has no other relevant documents to disclose, and the court rejects that and orders a further and better list, it may not be open for that party thereafter to maintain that it has no documents to put into a further and better list.

59 In *Alliance Management SA v Pendleton Lane P and another and another suit* [2007] 4 SLR(R) 343, the High Court upheld the first instance decision requiring the first defendant to produce a certain hard disk. The first defendant had asserted that he did not have the hard disk, but this was rejected by the court. The High Court's decision was then affirmed by the Court of Appeal.

60 The first defendant continued to maintain that he did not have the hard disk, and so could not comply with the production order. In those circumstances,

the High Court struck out the first defendant's defence for non-compliance with the production order (*Alliance Management 2008*). The court held that issue estoppel applied and the first defendant could no longer maintain that he did not have the hard disk; and even if there were no issue estoppel, there would be an abuse of process in the form of a collateral attack on the earlier decisions that were premised on the first defendant having the hard disk.

61 In the present case, the defendant had in HC/RA 30/2020 contended that the Further Discovery Order should not be made because it had no other relevant documents to disclose, relying on Mr Wong's 3rd affidavit in which he asserted that to be the case. Ang SJ evidently was not persuaded on that point, and made the Further Discovery Order.

62 In the circumstances, it was not open to the defendant to maintain that it did not have any other relevant documents to include in a further and better list. In any event, that was not the true position either – the defendant's subsequent conduct shows that there *were* other relevant documents, which it had failed to disclose pursuant to the Further Discovery Order, even by the deadline in the Unless Order.

63 In Mr Wong's 7th affidavit, he disclosed various emails retrieved from the laptop that CAD had seized, which he described as "potentially relevant". The defendant could, and should, have requested a clone image of the hard disk from the laptop with CAD at an earlier stage of the process, but it only did so *after* its defence had been struck out for non-compliance with the Unless Order – the request to CAD was only made on 6 May 2021, six days after the striking-out order.[6] The defendant did not do so earlier because of Mr Wong's insistence

6 Wong's 7th affidavit at para 28.

that no relevant internal documents existed – but that position was incorrect. Mr Wong's 7th affidavit exhibited copies of several internal emails from the clone image of the laptop provided by CAD (described at para 32 of his affidavit).

64 I agreed with the plaintiff that at least the following internal emails disclosed in Mr Wong's 7th affidavit would fall within the Further Discovery Order (in particular categories six and seven thereof):

(a) 7–8 October 2013 emails between Mr Chu and Mr Wong (copied to Ms Jenny Soh) on addressing the negative account balances with the plaintiff;

(b) 16 October 2018 emails between Mr Wong and Mr Chu about "[the] transfer of additional LionGold shares" in relation to the account balances of Heritage and Wang Da with the plaintiff;

(c) 30 October 2013 emails between Mr Chu and Mr Wong about the timeline for repayment to the plaintiff;

(d) 11 December 2013 emails between Mr Chu and Mr Wong about arranging a meeting with the plaintiff to discuss repayment; and

(e) 20 December 2013 email from Mr Chu to Mr Wong about the plaintiff calling twice to ask whether Mr Wong had signed the MOU.

65 The defendant had taken the position in six earlier affidavits that all internal "correspondence" on the matter was verbal, and there would thus be no internal documents reflecting or recording such communications: Mr Lim's 2nd affidavit at para 5, Mr Lim's 3rd affidavit at para 9(a), Mr Lim's 4th affidavit affirmed on 8 January 2020 ("Mr Lim's 4th affidavit") at paras 9(b) and 9(d),

Mr Lim's 6th affidavit at paras 7(b), 7(c) and 7(e), Mr Lim's 7th affidavit at para 4(b), and Mr Wong's 3rd affidavit at paras 4(f), 9 and 10.

66 This categorical statement was, however, qualified later on. Mr Lim's 8th affidavit stated that "communications between Mr Wong Chin Yong and Mr Stanley Chu were mostly done orally at that material time". In similar vein is Mr Wong's 4th affidavit affirmed on 6 April 2021 ("Mr Wong's 4th affidavit"):

> (a) "I would discuss the MOU issue with Chu orally on *most* occasions" (at para 48);
>
> (b) "*[a]part from this Excel Sheet*, I aver that all matters relating to the MOU was discussed orally between Chu and myself" (at para 53);
>
> (c) "*most* of the discussions were through oral communications and were not recorded down" (at para 72);
>
> (d) "discussions relating to the MOU were done *mainly* through oral communications between Chu and me and were not recorded in writing or emails" (at para 73); and
>
> (e) as at 27 September 2019, when the defendant filed its first list of documents, its email hosting service with Exabytes had not been terminated; however, "none of the emails were disclosed because they did not touch on the MOU issue since this was something that was discussed *mainly* between Chu and me orally in 2013 and 2014." (at para 74).
>
> [emphasis added]

67 A further qualification appears in Mr Wong's 7th affidavit, where he says that "Chu and I never discussed the *substance* of the MOU over email correspondence" (at para 33) and "Chu and I did not write emails to each other to discuss the *substance* of the MOU" [emphasis added] (at para 35). However, the Further Discovery Order was not limited to documents about the "substance" of the MOU, nor had the defendant similarly qualified its earlier claims that it had no internal documents to disclose.

68 It is clear from Wong's 7th affidavit and the internal emails disclosed in it, that the defendant had breached the Further Discovery Order and the Unless Order in not filing a further and better list of documents.

The failure to file a proper verification affidavit

69 The defendant also breached the Further Discovery Order and the Unless Order by not providing a satisfactory explanation in the verification affidavit, *ie*, Lim's 8th affidavit.

70 The fact that the defendant put forward Mr Wong's 4th, 5th, 6th affidavits (all of which came after the Unless Order deadline of 1 July 2020) is tacit recognition that Lim's 8th affidavit – filed on 29 June 2020 in purported compliance with the Unless Order – was not good enough:

(a) Mr Wong's 4th affidavit contained correspondence in March 2021 between the defendant's solicitors and Exabytes about Exabytes' data retention policy;

(b) Mr Wong's 5th affidavit exhibited further correspondence with Exabytes, as well as correspondence with the CAD (which showed that a request was belatedly made on 6 May 2021 for a copy of data in

Mr Wong's laptop that was with the CAD, which CAD promptly acceded to within a month);

(c) Mr Wong's 6th affidavit exhibited his 7th affidavit, which:

(i) provided a fuller explanation of the position regarding Exabytes;

(ii) exhibited the Exabytes affidavit;

(iii) exhibited internal documents obtained from a clone image of the hard disk from the laptop with CAD; and

(iv) gave an account of Mr Wong's review of the defendant's board minutes (which Mr Wong only did on or after 28 May 2021).

Did the defendant have other internal emails that were relevant?

71 All innopacific.com email data with Exabytes was lost as of 25 November 2019, after Exabytes confirmed the termination of the email hosting arrangement because of non-payment, and the email data was erased by Exabytes: see [75]–[76] and [84]–[88] below.

72 That loss of email data with Exabytes begs the question whether the defendant had other internal emails that were relevant.

73 In Lim's 3rd affidavit at para 9(h), he had said, "[o]ur steps to discover the requested documents were to physically trace the records on file and through the email records of the employees involved in the dealings with the Plaintiff. Our email servers do not retain such records." He did not then say his reference

to "[o]ur email servers" meant someone else's email servers, for the defendant did not have email servers of its own.

74 In Mr Wong's 3rd affidavit at para 35, he referred to para 9(h) of Mr Lim's 3rd affidavit, and referred to the servers simply as "*the* email servers". He went on to say at para 36:

> I confirm that there are no longer such [email records of the employees involved] because the Defendant's server was outsourced to a third party, and the service agreement between the Defendant and the third party has since been terminated and they are unable to restore the data.

75 Exabytes was the third party that hosted innopacific.com emails. The hosting arrangement was allowed to lapse as of 11 September 2019 for non-payment, and after that was confirmed by 25 November 2019, Exabytes ceased to keep email data relating to innopacific.com emails. Although this happened shortly before Mr Lim's 3rd affidavit was filed on 16 December 2019, he did not mention it in his affidavit.

76 Mr Lim then said in his 8th affidavit that he had contacted Exabytes on 9 March 2020 to ask how long Exabytes maintained a backup for – his email to Exabytes stated that in response to a verbal request earlier, Exabytes had said data was only kept for a maximum of six months. Exabytes' email did not address Mr Lim's point as to how long it kept data for; but it confirmed that the hosting arrangement for innopacific.com had expired and been terminated due to non-payment, and no back up was available any more.

77 In Mr Wong's 4th affidavit, he provided correspondence between the defendant's solicitors and Exabytes in March 2021 about Exabytes' data retention policy. However, he then said at para 76 that "the Defendant had looked through the emails prior to the account's termination on

9 November 2019 and confirmed that the emails do not discuss the MOU issue". That is a curious assertion: who in the defendant had looked through emails, and what emails were looked through?

78 In submissions during the hearing on HC/SUM 2941/2020, the defendant's counsel said this was a reference to Mr Wong looking through his own emails in his laptop. But which laptop?

79 Mr Wong said he had three laptops in the period from 2013 to 2015:

(a) his first laptop was seized by CAD on or around 2 April 2014, and a clone image of its hard disk was obtained by a request made only in May 2021 – Mr Wong could not have looked through that for discovery purposes prior to the Exabytes hosting arrangement being terminated in November 2019;

(b) his second laptop was acquired after the first one was seized, and so it could not have contained emails for the period prior to 2 April 2014; Mr Wong says that that second laptop crashed in late 2015, he tried to repair it but no data could be retrieved from it (Mr Wong's 4th affidavit at para 75(a)) – so that too could not have been what Mr Wong had looked through for discovery purposes;

(c) his third laptop was the one he still had, but it would only have emails from late 2015 onwards, and looking through it would not have revealed if there were relevant emails from an earlier period.

80 What remains a mystery is how the defendant could disclose 12 emails from the period from 16 April 2015 to 29 June 2015, a period after Mr Wong's first laptop was seized, when he was using the second laptop, and before he

acquired his third laptop. Until now there is no explanation where those emails came from. Compounding the problem is Mr Wong's 4th affidavit at para 30 where he says that a third-party software had been used to extract the 12 disclosed emails in ".eml" format, and due to compatibility issues, that process led to certain information such as the sender/recipient, time, and date, being eliminated from the extracted emails. That begs the question – what was the source of the emails to which the third-party software was applied, to produce documents in ".eml" format for disclosure?

81 On the defendant's evidence, the 12 disclosed emails could not come from Mr Wong's first laptop (then with CAD), nor his second laptop (crashed with data irretrievable), nor his third laptop (which was acquired after the date of the emails.

82 When I raised this at the hearing, the response from the defendant's counsel was: she could not proffer a guess where those emails came from. She said, perhaps those were from Mr Wong's replacement laptop, *ie*, his second laptop, but she noted that that suggestion went against Mr Wong's evidence. The defendant was in an invidious position:

(a) if the 12 emails came from Mr Wong's second laptop, then Mr Wong had lied about being unable to retrieve any data from it; and

(b) if the 12 emails did not come from Mr Wong's second laptop, they must have come from some other source that the defendant was not revealing.

83 Either way, these 12 emails must have come from some source, a source that could contain other relevant documents which the defendant had failed to disclose, and may have even failed to look through properly.

84 Returning to the arrangement with Exabytes, further light was shed by Mr Wong's 6th affidavit which exhibited the Exabytes affidavit (from Mr Chan, CEO of Exabytes). Mr Chan explained that the relevant hosting contract was not with the defendant, but rather with the defendant's subsidiary PG Communication Sdn Bhd ("PG Comms"), which Mr Wong was also a director of. Exabytes had provided website hosting of the innopacific.com domain, and email hosting of innopacific.com emails.

85 The last two-year period of the hosting contract was 11 September 2017 to 10 September 2019. Termination of the hosting contract by non-payment was confirmed on 25 November 2019 (the Exabytes affidavit at para 20) and Exabytes erased all innopacific.com email data on its servers then.

86 Exabytes had maintained a backup of data in its servers until 25 November 2019. Contrary to what Mr Lim had said in his 7th affidavit, that backup was not limited in time to a six-month period; instead, it was an ongoing, weekly backup. However, the setup was such that once email data was downloaded to a local storage device (when the recipient accessed that email), that email data would no longer reside on Exabytes servers, and it would consequently not be captured by Exabytes' weekly server backup.

87 Exabytes said that it was "unable to confirm whether PG Comms' Email Data was downloaded directly onto the PG Comms or Defendant's local host storage devices". Exabytes quite properly identified two possibilities: that data from its server had gone to storage devices of PG Comms, or storage devices of the defendant. The arrangement as between PG Comms and the defendant may have been one whereby innopacific.com emails were downloaded through a PG Comms proxy server, rather than directly by recipients from Exabytes. Given that the defendant was a listed company, it may not have wanted an arrangement

where an email would only reside on a particular device of a recipient, once that recipient accessed it (which would lead to a situation – as claimed by Mr Wong – that neither the defendant nor Exabytes nor Mr Wong would have any record of emails he had accessed with his second laptop, after that crashed in late 2015). Exabytes could not, however, shed light on whether the email data had gone to PG Comms devices, or the defendant's devices, as Exabytes no longer had the relevant logs. At the hearing before me, counsel for the defendant acknowledged that what may have happened on the PG Comms side of things, had not been fully explained.

88 In any event, Exabytes would have maintained a backup of email data that had *not* been downloaded. For instance, if Mr Chu had emailed Mr Wong and copied in Ms Jenny Soh, if either Mr Wong or Ms Jenny Soh had not read that email, a copy would still be retained in Exabytes' servers. But all such email data with Exabytes was lost as of 25 November 2019 due to the hosting contract being terminated by non-payment, and Exabytes consequently erasing the email data.

89 As for PG Comms (which Mr Wong is a director of), Mr Wong's 7th affidavit acknowledges that it was a licenced Application Service Provider (a business that provided computer-based services to customers over a network) in Malaysia and employed a team of information technology ("IT") personnel which also assisted the defendant with its IT infrastructure (*ie*, website and emails). Mr Wong's 7th affidavit does not expressly say if PG Comms only provided services to the defendant, or if it also provided hardware, in particular servers or other storage devices in which innopacific.com email data might be stored; he simply says PG Comms was used to sign up for the hosting plan with Exabytes, and that with the termination of the arrangement with Exabytes all innopacific.com email data has been lost.

90 Framing this within the context of the suit: the plaintiff sued the defendant in October 2018, on 19 July 2019 general discovery was ordered to be given on 13 August 2019, and the defendant filed its first list of documents (late) on 27 September 2019. Throughout this period, and until the email data with Exabytes was lost on 25 November 2019, the defendant took no steps to check what email data Exabytes had. The defendant stubbornly maintained that it had no relevant internal emails to disclose, a position shown to be false by the internal emails from Mr Wong's first laptop (belatedly disclosed in Mr Wong's 7th affidavit). The defendant had failed to preserve relevant (or at least, potentially relevant) documents, namely the email data with Exabytes.

Did the defendant have relevant internal documents relating to board discussions and resolutions?

91 In Mr Wong's 7th affidavit, he says that he (belatedly) reviewed the board minutes, on or after 28 May 2021, and could confirm that there was nothing in them about the Innopac MOU. These minutes ought to have been reviewed by the defendant much earlier, rather than only after the striking-out order.

92 In any event, there is still at least reasonable suspicion that the board minutes do not show the full picture, and that there are yet other documents relating to board discussions and resolutions about the MOUs and share transfers that have not been disclosed:

> (a) the 26 November 2013 email between the plaintiff's representatives shows that they understood that the defendant's board would – on 28 November 2013 – be discussing the provision of further collateral to cover the plaintiff's exposure to Heritage and Wang Da (see [23(e)] above);

(b) there is a 3 December 2013 email from the plaintiff's Mr Chang to Mr Wong and Mr Chu saying, "[w]e hope that there will be a suitable resolution in your board meeting tomorrow to reduce this deficit";[7] and

(c) Mr Chu – the defendant's group financial controller – expected there to be board resolutions in relation to the share transfers by Innopac (see [29]–[31] above).

93 Mr Wong's insistence that there did not need to be any board discussions or resolutions for the share transfers, because the defendant continued to be the owner of the shares, begs the question: why were the shares transferred, if that had nothing to do with the MOUs or the provision of collateral to the plaintiff? Why not just leave the shares in the defendant's CDP account, or wherever they were before they were transferred to the SCM Account? In particular, why were transfers made *after* the Innopac MOU, when it would be clear from the Innopac MOU that the plaintiff would be looking to those transferred shares (and the 23 million Liongold shares already transferred) as collateral? Mr Wong provides no answer to any of these questions, he simply denies the existence of any board discussions or resolutions about the MOUs or the transfers. This denial did not convince Ang SJ, and it did not convince me either.

Should the defence and counterclaim be struck out?

Principles

94 The principles relating to the striking out of pleadings for breaches of discovery obligations may be summarised as follows:

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7 Mr Wong's 6th affidavit at p 77 (Exhibited to Mr Wong's 7th affidavit).

(a) The exercise of the discretion whether to strike out is a fact-sensitive inquiry (*Alliance Management 2008* at [6]), taking all circumstances of the case into account, including prejudice suffered by the innocent party (*Mitora Pte Ltd v Agritrade International (Pte) Ltd* [2013] 3 SLR 1179 ("*Mitora*") at [38] and [48]), and considerations of proportionality are relevant in assessing the consequence of a breach (*Mitora* at [35]–[41]);

(b) Cases sit on a spectrum between procedural defaults of a technical complexion (unlikely to warrant striking out) and striking out being justified by (i) procedural abuse or questionable tactics; (ii) contumacious failure to comply with peremptory orders; or (iii) persistent defaults amounting to contumacious conduct (*Alliance Management 2008* at [6]);

(c) "It is self-evident that the breach of an "unless order" will automatically trigger its specified adverse consequences" (*Mitora* at [35]);

(d) When an "unless order" has been breached, "[t]he onus will then be on the defaulting party to demonstrate that the breach had not been intentional and contumelious so as to avoid those consequences (*Mitora* at [35]); more fundamentally "the party seeking to escape the consequences of his default must show that he had made positive efforts to comply but was prevented from doing so by extraneous circumstances" (*Syed Mohamed Abdul Muthaliff and another v Arjan Bhisham Chotrani* [1999] 1 SLR(R) 361; *Mitora* at [36]);

(e) "[E]ven where it has been established that an intentional and contumelious breach of an "unless order" had been committed, the court

must nevertheless determine what sanction should be imposed as a result" (*Mitora* at [37]);

(f) It is relevant whether, notwithstanding earlier breaches, all discoverable documents have subsequently been disclosed (*Mitora* at [41]); however, "an action or defence can be struck out for failure to make discovery of documents even if the defaulting party rectifies his non-compliance" (*Mitora* at [47]);

(g) "The court's power to strike out an action may be properly invoked in cases involving an inexcusable breach of a significant procedural obligation. It follows that the breach of an "unless order" which compels discovery will be susceptible to such an order." (*Mitora* at [47]);

(h) "Although the normal prerequisite for the striking out of an action under r.16 is the existence of a real or substantial or serious risk that a fair trial will no longer be possible, in cases of contumacious conduct, the deliberate destruction or suppression of a document or the persistent disregard of an order of production would engage the court's jurisdiction and justify a striking-out order even where a fair trial was still possible. Wilful disobedience is not required, as a failure to comply with court orders through negligence, incompetence or sheer indolence may justify a striking out": *Singapore Civil Procedure 2021* vol 1 (Cavinder Bull gen ed) (Sweet & Maxwell, 2021) at para 24/16/1; *Mitora* at [48].

Application of principles

95 In the present case:

(a) the defendant persistently breached its discovery obligations since August 2019;

(b) the defendant's breaches included:

(i) missing court deadlines;

(ii) failing to provide its solicitors with copies of the documents in its list, such that what its solicitors produced was discrepant and incomplete;

(iii) failing to take steps to obtain the data in Mr Wong's first laptop that was with CAD, until after the striking out;

(iv) failing to take steps to preserve or review the innopacific.com email data with Exabytes, before the hosting arrangement was terminated for non-payment in September 2019, and that email data with Exabytes was lost in November 2019;

(v) failing to check its board minutes until after the striking out;

(vi) maintaining that it did not have internal documents to disclose, which was demonstrated to be false by the belated production of internal emails from Mr Wong's first laptop (exhibited to Mr Wong's 7th affidavit, after the striking out);

(c) the defendant approached its discovery obligations in a drip-feeding manner – it took chasers, applications, orders, unless orders, and ultimately striking out, to extract incremental (but still unsatisfactory) responses from the defendant;

(d) the defendant took positions which have proven to be untrue, such as insisting that all discussions between Mr Wong and Mr Chu were oral, and that there were no internal emails between them; or which raise more questions than answers, such as Mr Wong's claim that the defendant had reviewed emails before the loss of the email data with Exabytes (see [77]–[83] above);

(e) the defendant breached the Further Discovery Order and the Unless Order;

(f) the defendant's breaches were intentional and contumelious; it is not the case that the defendant had made positive efforts to comply but was prevented from doing so by extraneous circumstances;

(g) I am not satisfied that the defendant has since provided discovery of all the relevant documents it could have been expected to disclose, especially given:

(i) the loss of the email data with Exabytes;

(ii) the unexplained source of the 12 emails disclosed in the defendant's list of documents;

(iii) the doubt as to whether PG Comms may have some relevant email data, either in a proxy server or other storage device; and

(iv) the inexplicable lack of any documents about board discussions or resolutions concerning the MOUs and share transfers;

(h) the documents in question go to the heart of the dispute between the parties: they relate to the effect of the MOUs, and the reason for the share transfers;

(i) there is a real or substantial or serious risk that a fair trial will no longer be possible; and

(j) not only is judgment in favour of the plaintiff the stipulated consequence of a breach of the Unless Order, it is proportionate to the defendant's breaches of its discovery obligations for its defence and counterclaim to be struck out, and judgment to be entered for the plaintiff accordingly.

Conclusion

96 In the circumstances, I upheld the striking out of the defendant's defence and counterclaim, and the entry of judgment in favour of the plaintiff.

Andre Maniam
Judicial Commissioner

Harish Kumar, Daniel Quek, Low Weng Hong and Edina Lim (Rajah & Tann Singapore LLP) for the plaintiff/respondent;
Tan Weiyi and Brian Ho (Harry Elias Partnership LLP) for the defendant/appellant.