Mondial Assistance (Asia) Pte Ltd *v* Eric Jean Raymond Morazin
[2015] SGHC 160

Case Number : Suit No 814 of 2014 (Registrar's Appeal Nos 139 and 140 of 2015)

Decision Date : 29 June 2015

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : N Sreenivasan SC, Liow Wang Wu Joseph, Nicole Oon Siew Sien and Charlene Cheam Xuelin (Straits Law Practice LLC) for the plaintiff; Tito Isaac Shane, Chan Yew Loong Justin and Neo Wei Chian Valerie (Tito Isaac & Co LLP) for the defendant.

Parties : Mondial Assistance (Asia) Pte Ltd — Eric Jean Raymond Morazin

Civil Procedure – Discovery of documents – Electronic discovery

29 June 2015 Judgment reserved.

Choo Han Teck J:

1 The plaintiff is a company engaged in the assistance insurance business, and is a member of the Allianz Global Assistance ("AGA") group of companies. The main business lines of AGA include automotive services, travel insurance, health and life care services and property services. The defendant was employed by the plaintiff as Chief Sales Officer for the Asia-Pacific region from on or about 1 August 2012, and was a director of the plaintiff from 1 November 2013 till on or about 30 June 2014. The exact date is disputed by the parties, but is not relevant at present. The defendant has since left the employ of the plaintiff and is currently working for AXA Travel Insurance ("ATI") which is part of the AXA Assistance group. The plaintiff claims that AXA Assistance is a major competitor of AGA.

2 At the outset, it is helpful to set out the plaintiff's case against the defendant. It can be summarised as follows:

(a) The defendant breached his obligations under the employment contract and/or his fiduciary obligations by collaborating with AXA Assistance and/or ATI whilst still employed by the plaintiff as a director, sometime between September 2013 and March 2014;

(b) Sometime between 29 December 2013 and 31 March 2014, the defendant breached his express and/or implied obligations under his employment contract and duty of confidence to the plaintiff by misappropriating proprietary and confidential information belonging to the plaintiff and failing to return them thereafter; and

(c) The defendant breached his post-employment restrictive covenants set out in his employment contract with the plaintiff by joining ATI and engaging in business activity that is in competition with the AGA group.

3 The plaintiff has previously appointed forensic experts to carry out an examination of the company laptop computer that the defendant had returned to the plaintiff after his resignation. From that forensic examination, the plaintiff discovered that the defendant had installed Dropbox, a file

hosting service, and had stored more than 17,000 files in the Dropbox folder. The plaintiff has further identified that out of these files, 5992 contain commercial information relating to the plaintiff's business or operations. It has further identified that at least 168 of these documents are highly sensitive and confidential information relating to, *inter alia*, client proposals, client contracts, and client presentations. The plaintiff was also able to identify the 12 Universal Serial Bus ("USB") file storage devices that had been connected to the plaintiff's computer laptop since September 2013. The defendant states that it has also engaged forensic experts to look into the documents in the defendant's Dropbox account.

4 The plaintiff sought electronic discovery of documents downloaded onto the defendant's personal devices, email accounts and personal computer by way of High Court Summons No 68 of 2015 ("HC/SUM 68/2015"). In particular, it sought electronic discovery of the following:

(a) The defendant's personal computer;

(b) The defendant's USB file storage devices;

(c) The defendant's Dropbox; and

(d) The defendant's email accounts, namely, [*e-mail address redacted*] ("the Gmail account"), [*e-mail address redacted*] ("the Wanadoo account"), and [*e-mail address redacted*] ("the AXA account").

5 Parties appeared before the Assistant Registrar ("AR") in respect of HC/SUM 68/2015 on 28 April 2015. The AR granted the plaintiff's application for electronic discovery of the various repositories except in respect of the Gmail account and the AXA account. The AR granted the plaintiff liberty to apply if the search into repositories allowed reveals documents that point to the existence of other relevant documents in the defendant's Gmail and AXA accounts. The AR did not allow some of the plaintiff's revised keywords as set out in its letter to the defendant's solicitors dated 25 March 2015. The plaintiff appealed against the decision by way of Registrar's Appeal No 139 of 2015 ("RA 139/2015") in respect of the email accounts and keywords which were denied. The defendant appealed against the whole of the AR's decision by way of Registrar's Appeal No 140 of 2015 ("RA 140/2015").

6 Electronic discovery is appropriate and necessary in the digital information age where information is stored electronically and is retained for indefinite periods of time. The large numbers of electronic documents relevant to disputes in court require too much time and effort to conduct an ocular review. But courts must avoid the mentality that Jacob LJ cautioned against, namely, that one has to "leave no stone unturned" in the pursuit of "perfect justice" in every case because that would, ironically, defeat justice (*Nichia Corporation v Argos Ltd* [2007] EWCA Civ 741 at [50] – [51] and affirmed in *Global Yellow Pages Ltd v Promedia Directories Pte Ltd* [2013] 3 SLR 758 ("*Global Yellow Pages*") at [31]). Thus, it must be emphasised that the traditional tests of relevance and necessity must be followed in the electronic discovery procedure. Disclosure is not necessary where it does not go toward the fair disposal of the matter or results in parties incurring greater costs. Electronic discovery has merely developed in response to advancements in technology, it has not superseded the rules of procedure in non-electronic discovery.

7 The defendant argues that electronic discovery is not appropriate in this case as only 168 documents have been identified to be highly sensitive and confidential, and this is not voluminous. Even if the court considers the 5992 documents that have been identified to contain commercial information proprietary to the plaintiff, the defendant argues that the discovery of such documents

may be provided by simply extracting those from the defendant's Dropbox into a CD-ROM, thus vitiating the necessity of electronic discovery. But the Dropbox account is merely one of the repositories which contain confidential information. The defendant's various email accounts and USB storage devices hold even more electronic documents which the plaintiff has shown to be relevant to the dispute at hand, and to conduct an ocular review of such repositories would incur too high a cost. I am of the view that electronic discovery is necessary in this case.

8 At the hearing on 28 April 2015, the plaintiff did not claim that the defendant had used the Gmail account to transfer the plaintiff's information to unauthorised persons, nor that the defendant had used the Gmail account to communicate with his would-be employer and related companies. The plaintiff had merely stated that the Gmail account was used to set up the Dropbox account. As such, the AR had refused to allow a search into the Gmail account at that stage, and rightly so. Since then, counsel for the plaintiff has filed an affidavit dated 22 May 2015 to exhibit an e-invitation received by the defendant at his Gmail account from AXA Assistance and/or ATI personnel. In his affidavit in reply dated 2 June 2015, the defendant has admitted that this invitation was for a conference call scheduled between himself and representatives of AXA Assistance, and was part of the recruitment interview that he had with them prior to joining. Further, the plaintiff has also provided documents which show that the Gmail account contains documents belonging to the plaintiff which the defendant had forwarded from his work email with the plaintiff. The evidence provided, which need not have been included in the plaintiff's initial statement of claim, are relevant to the claims that the defendant has misappropriated information proprietary and confidential to the plaintiff, and that the defendant may have collaborated with AXA Assistance prior to leaving the employ of the plaintiff. I am thus satisfied that, in the defendant's negotiation with his would-be employer AXA Assistance whilst he was still employed by the plaintiff, the defendant is likely to have used his personal Gmail account to contact them. I would thus order a search into the [*e-mail address redacted*] email account.

9 In refusing to grant electronic discovery of the defendant's email account with AXA and/or ATI, the AR noted that there was a countervailing interest of protecting the property of AXA and/or ATI, especially since the plaintiff has not added them as parties to this action. The plaintiff argues that the AXA account is relevant and necessary as information relating to the defendant's customers, travel for induction programs, and job scope may be found in the email account. In response, the defendant states that this amounts to a fishing expedition, and the plaintiff is proceeding on the basis of a mere suspicion. At the time of the hearing before the AR, the plaintiff had not satisfied the court that relevant documents containing the plaintiff's confidential information, may reside in the AXA account. This remains to be the case. The plaintiff also has not furnished evidence to support its claim that the defendant has breached the restraint of trade clause under his employment agreement with the plaintiff because of his current job scope with AXA. I thus am of the view that it is not necessary for the fair disposal of the matter or for saving costs, to order electronic discovery of the AXA account and dismiss the appeal.

10 I am of the view that the AR's order of a search into the defendant's Wanadoo account was appropriate as the plaintiff has demonstrated that information confidential and proprietary to the plaintiff has been found in the defendant's email account. The AR's order of a search into the 12 USB file storage devices was also appropriate as they had been connected to the laptop which the defendant had used whilst employed by the plaintiff, and are part of the property and information of the plaintiff. To this end, I note that the plaintiff has specifically pleaded in its statement of claim (as amended) for the defendant to return these storage devices to the plaintiff. The AR also held that if the device is no longer in the defendant's possession, custody or power, he is to file an affidavit to state what has happened to any such device when the list of documents is filed. The defendant has referred to [43] of his first affidavit dated 16 February 2015 which states that only one of the 12 USB devices are still in his possession and he is "unaware of the whereabouts of the remaining 11 USB

devices". It is thus no longer necessary for the defendant to file a further affidavit stating the same.

11 For the purpose of these appeals, the relevant keywords which were ordered by the AR had previously been modified by the defendant and agreed upon by the parties. Those revised keywords which remained in dispute were not ordered by the AR. The plaintiff now seeks to introduce 27 search terms of names of locations in the Asia-Pacific region which allegedly relate to the geographical scope of the defendant's current employment with ATI (at [50] of the plaintiff's submissions dated 22 May 2015). The plaintiff states that this is relevant to its claim that the defendant has breached its post-employment restrictive covenants set out in its employment contract with the plaintiff. The plaintiff also appeals against some of the search terms that were denied by the AR, and as annexed to its Notice of Appeal dated 12 May 2015 ("Annex A").

12 Keyword searches are potentially both over-inclusive and under-inclusive. Lee Seiu Kin J has very helpfully provided suggestions to parties in determining appropriate keywords that can be used, based on a concept of "accuracy", rather than relevance. He states at [53] of *Global Yellow Pages* that "[t]he best keyword searches are those that maximise the number of relevant documents and minimise the number of irrelevant documents within the subset." The subset was defined as documents which contain the keywords used, within the larger universal set comprising of all the documents in the relevant electronic devices. The accuracy of the keywords is also considered against the importance of the documents sought and the financial cost that has already been incurred. In this case, both parties have engaged forensic experts to conduct examinations of certain documents, including those in the USB devices and the Dropbox folder. Electronic discovery by way of keyword searches is not to disadvantage the party giving discovery, but rather to benefit the party, so that the cost of complying with his discovery obligations is lessened. If the party giving discovery complies with the court order for discovery by way of particular keywords, that will discharge his discovery obligations at that stage (*Global Yellow Pages* at [63]).

13 I am of the view that the 27 keyword searches relating to geographical locations in the Asia Pacific region do not possess a high degree of accuracy as they are too broad. These search terms will generate a high number of irrelevant documents that may relate to AXA's work in these geographical locations but may not involve the defendant, and the process of sieving out the relevant documents will result in increased costs. With regard to the search terms that were previously denied, the AR states that it would be "sufficient for the Defendant to disclose his employment contract with ATI and all other employment related documents" and thus did not order these keywords to be used to ascertain the defendant's current scope of employment. Part of the plaintiff's claim against the defendant is that the defendant has breached its post-employment restraint clause through the scope of its employment with ATI. Although I have not made an order for electronic discovery of the plaintiff's AXA account, I am satisfied that defendant did use his personal email accounts to communicate with his current employer, which would have included communications about his future job scope and position description. I thus allow the search terms as set out in serial numbers 1 to 5, 10, and 11 of Annex A. As for the terms set out in serial numbers 6-9, I only order the search terms which include "AGA" or "Allianz" or "Mondial". The rest of the search terms are not accurate and are likely to generate a high number of irrelevant documents.

14 The defendant does not appeal against the search terms as ordered by the AR, but disagrees with the relevant time frame to be used. The AR had used the time period between 1 July 2013, taking into account the policy of the plaintiff dated July 2013 as to the use of information or IT resources of AGA, and 2 January 2015, being the approximate date on which the Restraint Period lapsed. I am of the view that the starting date of 1 September 2013 is more appropriate, given that this is the period from which the plaintiff alleges the defendant started to collaborate with AXA and ATI without the knowledge and consent of the plaintiff. I am of the view that the end date of 2

January 2015 is appropriate, taking into account the end of the trade restraint period. Thus, the search terms will be carried out limited to the period between 1 September 2013 and 2 January 2015.

15 For the reasons above, RA 140/2015 is allowed in part, in regard to the relevant time period of the keyword searches, and RA 139/2015 is allowed in part, to allow for some of the search terms contained in Annex A to be used, and an order for electronic discovery of the defendant's Gmail account is made. Costs in both appeals are reserved to the trial judge.