Alliance Management SA v Pendleton Lane P and Another and Another Suit [2008] SGHC 76

Case Number : Suit 511/2005, 522/2005, SUM 5418/2007, 5420/2007

Decision Date : 03 June 2008

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Cavinder Bull SC, Tan Hee Joek and Woo Shu Yan (Drew & Napier LLC) for the plaintiff; Chandra Mohan with Alvin Chang, Intekhab Ahmad Khan and Jean Ang (M & A Law Corporation) for the defendants

Parties : Alliance Management SA — Pendleton Lane P; Newfirst Limited

Civil Procedure – Striking out – Principles governing court's exercise of discretion – Defendants deliberately and persistently failing to comply with court orders – Whether striking out of defence justified

Evidence – Proof of evidence – Inspection – Order for inspection of electronic documents – Whether producing computer printouts without producing original hard disk sufficient – Whether alleged clone of original hard disk acceptable substitute – Section 35(1)(a) Evidence Act (Cap 97, 1997 Rev Ed)

3 June 2008

Belinda Ang Saw Ean J:

1 This application made by way of Summons No 5420 of 2007 was brought by the plaintiff, Alliance Management S.A., to strike out the Defence (Amendment No 1) filed on 11 August 2006 in Suit No 511 of 2005 for, *inter alia*, non-compliance with several court orders to produce and return to the Judicial Managers of Orient Telecommunications Networks Pte Ltd ("OTN") the original hard disk of the Dell laptop bearing service tag number DDXN21S ("the Hard Disk"). According to the plaintiff, this failure to produce and return the Hard Disk had also resulted in non-compliance with several other court orders relating to the disclosure and production for inspection of electronic documents stored in the Hard Disk. Summons No 5418 of 2007 filed in Suit No 522 of 2005 is a similar application and, in the interest of expediency and for saving time and costs, the parties thereto agreed between themselves to follow and abide by the outcome of Summons No 5420 of 2007.

The procedural background

2 Essentially, the first defendant, Lane P Pendleton ("LPP"), and the second defendant, Newfirst Limited, were ordered to produce and return by a stipulated date (which date was from time to time extended) the Hard Disk to the Judicial Managers of OTN. Its return was, *inter alia*, to facilitate discovery and production for inspection of some electronic documents stored in the Hard Disk. The history of how the Order of Court dated 28 March 2007 came to be made is reported at [2007] 4 SLR 343. Suffice it to say that for present purposes, the Assistant Registrar, Ms Ang Ching Pin, concluded that the production and inspection of the Hard Disk was necessary for a fair disposal of the cause or matter in this action or for saving costs. I agreed with the conclusions of the Assistant Registrar, and her decision of 24 November 2006 was upheld on 28 March 2007 with appropriate safeguards added to it. In context, it is necessary to bear in mind that an order for the inspection of documents under O 24 r 13 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) is predicated upon the court being satisfied on the evidence that the Hard Disk was and remained in the

possession, custody or power of LPP. The defendants duly appealed against my decision on 19 April 2007. The Court of Appeal affirmed my decision on 15 November 2007. For convenience, I shall refer to both the Order of 28 March 2007 and the decision of the Court of Appeal as "the Hard Disk order".

3 Following the dismissal of the defendants' appeal to the Court of Appeal, the plaintiff's solicitors, Drew & Napier LLC, on 19 November 2007 duly demanded the production and return of the Hard Disk to the Judicial Managers by 3 December 2007. In reply, M & A Law Corporation as solicitors for the defendants adopted on 3 December 2007 the same position that was taken earlier on to resist the making of the Hard Disk order. They maintained that the defendants' inability to comply with the Hard Disk order was because LPP did not have the Hard Disk as was the defendants' case all along. In pointing out that the Court of Appeal had rejected the very same claim in its dismissal of the defendants' appeal, Drew & Napier LLC, as to be expected, denounced the defendants' bald excuse in their letter of 5 December 2007. The upshot of the exchanges of correspondence was that the defendants took no steps to comply with the Hard Disk order. They were certainly under no illusion as to the consequences to which they were exposing themselves. This led to the plaintiff's present application to strike out the defence.

Principles relevant to Order 24 r 16(1)

4 Order 24 r 16(1) of the Rules of Court clearly deals with the failure to comply with a requirement of discovery or the production of any document for inspection. It provides as follows:

> (1) If any party who is required by any Rule in this Order, or by any order made thereunder, to make discovery of documents or to produce any document for the purpose of inspection or any other purpose, fails to comply with any provision of the rules in this Order, or with any order made thereunder, or both, as the case may be then, without prejudice to Rule 11(1), in the case of a failure to comply with any such provision, 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.

5 Counsel for the plaintiff, Mr Cavinder Bull SC, referred me to the commentary to that rule in *Singapore Court Practice 2006* (Jeffrey Pinsler LexisNexis, 2006), para 24/16/2 at 304 which identifed four instances in which the court may in the exercise of its discretion strike out the pleadings for non-compliance with the Rules of Court or orders of court. They are:

> (i) The defaulting party has deliberately or wilfully failed to comply with an "unless order" (see *SMS v Power & Energy* [1996] 1 SLR 767 at 772).
>
> (ii) 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] 2 SLR 267 ("*Soh Lup Chee*").
>
> (iii) 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.
>
> (iv) 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.

6 I ought at this stage to say that these instances of striking out were in circumstances involving (i) procedural abuse or questionable tactics; (ii) peremptory orders where the basis of the

failure to comply with a peremptory order was contumacious; and (iii) 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. As one would expect, the circumstances in which a court may be asked to strike out the pleadings under the Rules of Court are infinitely varied and distinctly fact-sensitive. Consequently, each decided case should be cited upon its own facts and own merits based on the underlying principle that parties must get on with their case, and that the Rules of Court (which contain prescribed time limits) and orders of court are there to facilitate the progress of the case to trial. The proper administration of justice proceeds on the basis that the Rules of Court or orders of court would be observed. At the core of this principle of obeying court orders is the public interest in the administration of justice, including the dispatch of litigation as expeditiously as justice allows. Thus, the discretion given to the court in O 24 r 16(1) and others like O 19 r 1, O 25 r 1(4), O 28 r 10, O 34 r 2(2) and 34A r 1(2) reflect this principle.

7 Undoubtedly, the power to strike out under O 24 r 16(1) is a powerful tool in the court's case management armoury. The effect of the striking out for procedural defaults is to preclude a trial on the merits of either the claim or defence, as the case may be. This notion of access to the court leads me to the second principle that a party should not in the ordinary way be denied adjudication of his claim or defence on its merits because of procedural defaults such as non-compliance with the Rules of Court or orders of court as to the time by which a particular step or matter is to be taken or done unless the default causes prejudice to his opponents for which an award of costs cannot compensate. The second principle is reflected in the general discretion to extend time under O 3 r 4 in accordance with the dictates of justice in the particular case (see *Costellow v Somerset County Council* [1993] 1 All ER 952, approved and followed by the Court of Appeal in *The Tokai Maru* [1998] 3 SLR 105). The interplay of the two principles is usually resolved in favour of one principle over the other in accordance with the dictates of justice based on the facts and merits of the particular case.

8 In relation to the present application, the starting point is O 24 r 16 (1) which is designed to secure compliance with the Rules of Court and orders of court relating to discovery, and not to punish a party for not having complied with them within the time limited for the purpose (per Stamp LJ in *Husband's of Marchwood Ltd v Drummond Walker Developments Ltd* [1975] 1 WLR 603 at 606). Of particular relevance to this proposition are the observations of Millett J in *Logicrose Ltd v Southend United Football Club Ltd* (1988) Times, 5 March ("*Logicrose*") that striking out a claim or defence, as the case may be, might not be an appropriate order to make in the exercise of discretion if the objective could be ultimately accomplished. This was so even where non-compliance with the orders amounted to contempt for or defiance of the court. There is O 24 r 16(2) which preserves the liability for committal against the party in contempt. Returning to Millett J's observations, the objective of discovery could be accomplished when the breach was remedied by a late production of a document which had previously been withheld. Equally, the objective of the Rules of Court or orders of court as to discovery might still be ultimately achieved where, for example, a substitute of the document ordered to be produced for inspection exists in a verifiable alternative form. I shall elaborate on this later.

9 That said I am mindful that there could be situations where a defaulting party's conduct demonstrates that his total disregard of the Rules of Court or orders of court was such that it could properly be viewed as contumelious conduct so that a continuation with the action would amount to an abuse of the court's process. Notably, any decision not to allow the party concerned to take further part in the proceedings by striking out the pleadings is not from a perceived need to punish the party concerned; rather, it is a proper and necessary response not to allow the court's process to

be used as a means of achieving injustice. The injustice here is not only to the other party in the proceedings but also to other litigants with demands upon the finite resources of the court (see also [15] below).

10 The proposition that a total disregard of the rules or orders of court could amount to contumelious conduct has, as pointed out by Mr Bull, gained general acceptance in Singapore from a line of authority which makes it clear that the courts in Singapore need not find that a fair trial is not possible before striking out the claim or defence where there has been repeated breach of various court orders. In *Soh Lup Chee,* Choo Han Teck J confirmed that a striking out order was justifiable given the numerous obvious omissions of documents that must surely exist or had existed and the fact that the defendants provided no explanation as to the omissions. In explaining the principle that emerged from *Manilal & Sons v Bhupendra KJ Shan* [1989] SLR 1182, Choo J at [10] said that where the court is satisfied from the documents produced that other documents must exist, the party concerned must either produce them or explain on oath what has become of them so that the contest at the trial will be open and fair. However, he did not strike out the pleadings, explaining that an "unless order" was made instead simply out of kindness and nothing else. Besides Choo J's observations in *Soh Lup Chee*, in *Federal Lands Commissioner v Neo Hong Huat* [1998] SGHC 131, Chan Seng Onn JC (as he then was) said at [43]:

> If counsel for the defendant is relying on *Logicrose's* case for the proposition that it is insufficient to show that there was deliberate and contumacious disregard of the court orders but one has to show further that the fair trial of the action is rendered impossible to achieve because of the deliberate suppression of material documents, then I am unable to agree.

Millett J in *Logicrose* was not concerned with either a situation of the kind that arose in the present case, or with the consequence of failing to comply with an "unless order". The judge was concerned with an application to dismiss the action for failure to comply with the rules of court relating to discovery. It was during the trial of the action, shortly before the conclusion of the plaintiff's case, that the defendant applied for an order that the action be dismissed on the ground that the plaintiff had failed to comply with its duty in relation to discovery by deliberately suppressing a crucial document.

11 Lai Kew Chai J in *Lee Kuan Yew v Tang Liang Hong (No 2)* [1997] 2 SLR 833 at [6] said:

> All court orders must be obeyed promptly and punctiliously. A litigant who *mocks* a court of law cannot in principle be allowed to invoke the assistance or the adjudicative facilities of the court.
>
> (Emphasis added)

12 In *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [2001] 4 SLR 1, LP Thean JA (delivering the judgment of the Court of Appeal) at [26] and [33] adopted the observations of Parker LJ in *Culbert v Stephen G Westwell & Co Ltd & John Bryant* [1993] PIQR P54 at 65-66 not only as to the meaning of "contumelious conduct" which is conduct that "involves an element of scorn and intentional disregard of the rules of the court or court order" but also as to the types of conduct that may be regarded as contumelious and may justify a striking out order. Parker LJ at 65-66 said:

> There is however in my view another aspect of this matter. An action may also be struck out for contumelious conduct, or abuse of the process of the court or because a fair trial in action is no longer possible. Conduct is in the ordinary way only regarded as contumelious where there is a deliberate failure to comply with a specific order of the court. In my view, however a series of separate inordinate and inexcusable delays in complete disregard of the Rules of the Court and

with full awareness of the consequences can also properly be regarded as contumelious conduct or, if not that, to an abuse of the process of the court. Both this and the question of fair trial are matters in which the court itself is concerned and do not depend on the defendant raising the question of prejudice. In my judgment the way in which the action has been conducted does amount to an abuse of the process of the court and it would be a further abuse of process if the action were allowed to proceed. In my judgment also, a fair trial is no longer possible.

13 On Parker LJ's suggestion that a complete disregard of the rules of court is an abuse of process, Thean JA accepted this in his reiteration of the principle in a want of prosecution case, which is similar to a striking out order under O 24 r 16. Thean J at [29] said:

> *In addition, an action would be struck out on the ground of abuse of court process, such as wholesale disregard of the rules of court or flagrant disregard of the court procedure,* and in this connection the fact that the period of limitation applicable to the action has not expired is irrelevant. *Nor, in such application [sic], is there a need to show that the defendant will suffer prejudice or that a fair trial is no longer possible.*
>
> (Emphasis added)

14 Significantly as the local cases I have referred to illustrated, what is needed to justify a striking out order is where the defaulter's conduct demonstrates his total disregard of the court's orders. The question the court has to ask is whether, on the facts, there was a total disregard of the rules or orders of court as to amount to contumelious conduct, or an abuse of the process as explained in [9] to [13] above. If the answer is in the affirmative, a striking out order is appropriate without considering the question whether a fair trial is possible or is dependent on the need to show prejudice to the other party (see *Arbuthnot Latham Bank Ltd v Trafalgar Holdings* [1998] 1 WLR 1426 at 1436 and *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* at [29]) .

15 In exercise of the discretion given to it by O 24 r 16(1), the court has to weigh up all the facts and circumstances of the particular case and then balance the interests of the applicant against the interests of the defendants and the interests of the public. As for the "interests of justice" in general, Ward LJ in *Hytec Information Systems Ltd v Coventry City Council* [1997] 1 WLR 1666 ("*Hytec Information*") at 1675 explained this consideration in the following terms:

> The interests of justice require that justice be shown to the injured party for the procedural inefficiencies caused by the twin scourges of delay and wasted costs. The public interest in the administration of justice to contain those twin blights upon it also weighs very heavily. Any injustice to the defaulting party, though never to be ignored, comes a long way behind the other two.

16 I must mention that the Hard Disk order in the present case is not a peremptory order. The unfettered terms of O 24 r 16(1) give the court power to strike out as it thinks just, and as a matter of principle, the court in the exercise of discretion may, in a proper case, make such an order even for breach of a non-peremptory order. As stated, what is needed is disregard of the court's orders and it does not matter that the disregard was not deliberate. Auld LJ in *Hytec Information* at 1677 stated:

> [T]here is no need to confine the test to that of an intentional disregard of a court's peremptory order, whether or not it is characterised as flouting, contumelious, contumacious, perverse, obstinate or otherwise. Such an intent may be the most usual circumstance giving rise to the exercise of this jurisdiction. But failure to comply with one or a number of orders through negligence, incompetence or sheer indolence could equally qualify for its exercise.

The test as enunciated by Auld LJ was expressed by the Court of Appeal in *Syed Mohamed Abdul Muthaliff v Arjan Bhisham Chotrani* [1999] 1 SLR 750 at [14] in simplified terms as follows:

> The crux of the matter is that 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.

17 There is one other case which I should mention. In *SMS v Power & Energy* (see [5] above), the defence was struck out as the defendants had failed to file their list of documents pursuant to a summons for directions. On appeal from the District Court, the High Court judge ("the judge") distinguished non-compliance with an "unless order" which would be a ground for termination of a party's case and non-compliance with a non-peremptory order in respect of which the court will strike out pleadings only if in all the circumstances there is a serious risk that a fair trial would not be possible by reason of the defendant's breach. The judge accepted that there was no suppression of documents by the defendants and that they ought to have filed a "nil list" giving particulars of what they could of the documents that were once in their possession. Applying the test – whether failure to file the list of documents would have rendered a fair trial of this action impossible – the judge concluded that the failure to file a "nil list" did not justify the striking out of the defence for the plaintiffs would have been in a no better or worst position than they were before the list was filed. On the test applied by the judge, with respect, and for the reasons explained in [9] to [14] above, I do not accept as a general principle that the court will strike out the pleadings for failure to comply with non-peremptory orders only if there is a risk that a fair trial is not possible. Ultimately, it all depends on the individual circumstances and the existence and degree of fault found by the court after hearing representations to the contrary by the party whose pleading it is sought to strike out (per Auld LJ in *Hytec Information* at 1677).

Basis of the application to strike out

18 The plaintiff's application presented the court with two alternatives: to strike out the defence, or to give an extension of time by way of a peremptory order which if not complied with would have justified the sanction of a striking out. The hearing proceeded on the first option in the light of the stance taken by the defendants. Mr Mohan to his credit was obliged to confine his arguments to the first option.

Non-compliance with the Hard Disk order and whether the failure was excusable

19 The defendants admitted that the Hard Disk was not produced and returned to the Judicial Managers as ordered. In the absence of the Hard Disk, other orders for inspection of the various categories of electronic documents stored in the Hard Disk did not take place. As an aside, the Judicial Managers for the same reason could not comply with the discovery and inspection order dated 22 March 2006. The plaintiff therefore submitted that this conscious decision not to comply with the Hard Disk order for no valid reason had frustrated inspection and stopped the plaintiff from establishing the authenticity of the electronic documents.

20 A key issue is the explanation provided by the defendants for their non-compliance with the Hard Disk order. It is well-established that if a party can clearly demonstrate that the failure to obey was due to extraneous circumstances, then such failure to obey is not to be treated as contumacious and, therefore, does not disentitle the defendant to defend the claim. Mr Mohan maintained that there was a good explanation for the absence of the Hard Disk. The defendants' position from the very beginning of these proceedings had been that LPP did not have possession of the Hard Disk. The defendants' inability to produce the Hard Disk had stemmed from that reason alone. LPP had also

denied, on oath, the plaintiff's allegation that the Hard Disk was switched and concealed by LPP as the hard disk on the Dell laptop was replaced with a hard disk that had previously belonged to a piano teacher. As far as LPP was aware, the Hard Disk was returned to the Judicial Managers together with the Dell laptop in early October 2005. Mr Mohan submitted that the defendants' non-compliance, reviewed in the circumstances, was not on account of deliberate suppression of the evidence. The non-compliance with the Hard Disk order was excusable, and as early as 3 December 2007, the plaintiff's lawyers were informed of the real situation. Mr Mohan strenuously argued that there is before the court, LPP's account of what had happened to the Dell laptop before it was returned to the Judicial Managers. He said that affidavit evidence was now available because LPP was no longer constrained by the Consent Order of 13 November 2006 ("the Consent Order") which by its terms did not apply to the present striking out application. It is not necessary for me to narrate the procedural history as the events leading to the making of the Consent Order and its terms and effect are reported at [2007] 4 SLR 343. Mr Mohan stressed that LPP's explanation on oath, like the case of discovery affidavits, was conclusive for the purposes of this striking out application made under O 24 r 16(1) of the Rules of Court.

21 In response, Mr Bull advanced a simple and cogent argument that went to the heart of the issue. He submitted that it was no longer open to the defendants to continue to assert that LPP did not have the Hard Disk in his possession, custody or power. In particular, LPP would be prevented from contesting possession by the operation of the doctrine of issue estoppel. In Mr Bull's view, any argument on this matter was tantamount to re-litigating the issue on LPP's possession, custody or power of the Hard Disk which had already been determined. In any case, it was absurd that the same reasons that were advanced by the defendants to the court for not making the Hard Disk order were now being used to excuse themselves from non-compliance with the very same order.

22 Mr Bull cited the case of *Wee Soon Kim Anthony v UBS AG* [2003] 2 SLR 91 in support of the proposition that the doctrine of issue estoppel may be raised to stop re-litigation of an issue decided in an interlocutory application. In that case, the respondent bank applied to the court for discovery of banking documents relating to the appellant's accounts with six other banks. The appellant argued that the documents were irrelevant. The judge disagreed and held that they were relevant. Thereafter, the appellant did not produce the documents arguing that he had misplaced them. The respondent bank then applied directly to the six banks for the documents previously ordered to be disclosed. The appellant again put into issue the relevance of those documents. The judge rejected the argument and held that the issue pertaining to the relevance of the documents could not be re-litigated. The appellant appealed. The Court of Appeal dismissed the appeal on the ground that the issue of relevance had already been decided and the appellant was estopped from re-litigating that issue.

23 Likewise, I agreed with Mr Bull that the doctrine of issue estoppel was applicable on the particular facts of this case. There was also nothing in Mr Mohan's point that one of the pre-requisites of the doctrine of issue estoppel – that there must be a final and conclusive judgment on the merits of the issue – was not satisfied, and as such he was, therefore, entitled to argue in the present striking out application that LPP did not have the Hard Disk. I have made it clear in the written grounds of decision in relation to the Order of 28 March 2007 (see [21] of the report at 355) that a prerequisite to the court's power to order inspection was possession, custody or power of the Hard Disk and of the documents stored on the Hard Disk. A finding that the Hard Disk was in the possession, custody or power of LPP was the outcome of the hearing on the merits of that very legal prerequisite and based on the overall evidence before the court on that issue.

24 For the sake of argument, even if, as Mr Mohan had canvassed, the requirements of issue estoppel were not established, LPP's explanation that he did not have the Hard Disk, was nonetheless

tantamount to a collateral attack on the decision of the Court of Appeal dated 15 November 2007, which is an abuse of process. An abuse of process of this type may arise when there is no issue estoppel. This was a point to which Mr Mohan would have no answer in the light of two matters that have to be borne in mind. First, it is a fundamental principle of common law that the outcome of litigation (*ie* the decision of the Court of Appeal on the production and return of the Hard Disk) should be final. Needless to say, there is public interest in the finality of litigation. Second, the law allows judgments to be attacked only on the ground of fraud and where the facts to justify this exception could be proved. These principles are of public importance in determining where the interests of the administration of justice lay. The instant case is not one which falls within the exception.

25 Indeed, Mr Mohan had again advanced exactly the same case that was heard in 2007 and rejected by me and, later in the same year, by the Court of Appeal. In effect, the defendants' approach was an undisguised effort to re-argue the correctness of the decision of the Court of Appeal. Any evidence to rebut the conclusion of the Court of Appeal that the Hard Disk was and remains with LPP at the time of the hearing of the appeal must be rejected. Having reached the conclusion on this point, it is obvious that on any view, Mr Mohan's arguments on the scope of the Consent Order and the alleged conclusiveness of LPP's affidavits filed in opposition to the present application were simply irrelevant and a distraction from the real issue.

26 It is not disputed that there was no evidence of extraneous circumstances *after* the 15 November 2007 to explain the non-compliance with the Hard Disk order. But that is not the end of the matter. The court has to consider whether there is other material upon which the court could exercise its discretion in the defendants' favour. There was exiguous material in the affidavits in relation to the withdrawal of affidavits which were the subject of the order for cross-examination. However, it is no answer for the defendants to here argue that the state of affairs was the result of unforeseen consequences of the tactics adopted to avert the Order of Court dated 4 October 2006 to cross-examine LPP and his secretary, Celestine Joseph (see [24] to [25] of LPP's 24th Affidavit filed on 22 January 2008). First, the tactics and everything associated with its outcome contradicted the finding of fact that formed the basis of the Hard Disk order. Besides, the underlying motive and rationale for entering the Consent Order was also irrelevant. Second, it mattered not even if, for the sake of argument, the course adopted was only taken because of poor legal advice, for as far as the court was concerned the ill-judged decision to withdraw the affidavits remained squarely on the litigant himself (see *Hytec Information* at 1675 and approved by the Court of Appeal in *Syed Mohamed Abdul Muthaliff v Arjan Bhisham Chotrani* [1999] 1 SLR 750 at [21] and *Changhe International Investments Pte Ltd (formerly known as Druidstone Pte Ltd) v Dexia BIL Asia Singapore Ltd (formerly known as Banque International A Luxembourg BIL (Asia) Ltd)* [2005] 3 SLR 344 at [12]).

27 In the ordinary way, the next consideration would have been whether the defendants should be shut out from defending the proceedings since the Hard Disk order was not a peremptory order. I was mindful that it was not Mr Mohan's case that the defendants were in a position to comply given more time. So extension of time was not sought by the defendants. That stance did not mean that I am precluded from making an "unless order", if it was a just order to make. As Auld LJ explained in *Hytec Information* at 1676:

> [An unless order] is, by its nature, intended to mark the end of the line for a party who has failed to comply with it and any previous orders of the court.

28 In my judgment, this was not a case of the defendants being slow to act and missing the deadlines. This was a case where no amount of time or indulgence to the defendants would remedy the default as the defendants continue to maintain that LPP did not have the Hard Disk. An "unless order", which is intended to ensure compliance with the inspection obligation of the defendants, even

if it was made, would serve no practical purpose. Mr Bull pressed the point that, in the circumstances, it would not be disproportionate to strike out the defence. I agreed with Mr Bull that there was deliberate and persistent disregard of the Hard Disk order and it was conduct sufficient to fall within the category of contumelious conduct justifying a striking out of the defence. The defendants' unwarranted collateral attack on the decision of the Court of Appeal clearly formed part of the overall assessment of the merits of the application, and is a factor to be taken into account. A second matter that gave weight to the finding of deliberate and persistent disregard of the Hard Disk order was the defendants' conscious decision not to comply with the Hard Disk order, which was the result of the defendants' desire to gain an advantage. Any desire by the party concerned to gain advantage by not complying with orders of court is impermissible. The defendants' calm assertion that whatever the Hard Disk order mandated, the defendants would agree to the admissibility into evidence of any computer printouts from the defendants which the plaintiff wished to rely upon is a specious assertion. If accepted, it would have enabled the defendants to use their default of the Hard Disk order to gain an advantage, for it papers over the problem of authenticity. I will now turn to the impossibility of authenticating the computer printouts without the Hard Disk.

Authenticity of electronic documents

29 Mr Bull submitted that the Hard Disk was needed in order to establish authenticity of the computer printouts disclosed by the defendants. The plaintiff's computer forensic expert, Mr Wilfred A. Nathan, deposed that the process of determining the authenticity of the electronic documents involves an examination of the meta data of the electronic documents and the other application output files and their meta data that are located in the Hard Disk. I note that Mr Nathan was with the Singapore Police Force and his last held appointment was as Head, Technology Crimes Forensic Branch, Technology Crimes Division, Criminal Investigation Department. Mr Nathan is now employed by TecBiz FRisMan Pte Ltd as the Senior Manager of Digital Investigation Team and has for the past 12 years been working in the digital investigation and computer forensics line. The defendants did not file an affidavit to challenge Mr Nathan's opinion. Even though there is, at the moment, no order to examine the meta data of the electronic documents located in the Hard Disk, the fact remains that the Hard Disk order requires the Hard Disk to be produced and returned to the Judicial Managers. Besides, LPP appeared to have agreed with the point that the Hard Disk is needed to prove the authenticity of the computer printouts. In his 23rd Affidavit sworn on 13 November 2007, LPP at [15] stated:

> I am advised that the Replies to the Letter will not affect the admissibility and weight of the emails at all. This is because the emails constitute evidence of computer output and any doubts as to their admissibility may properly be resolved only by the inspection of the original electronic source which the emails may be said to have originated from. This points to the original hard disk belonging to the Dell laptop bearing service tag number DDXN21S ("the Original Hard Disk") and the copy of the Original Hard Disk held by my US solicitors between July 2006 and July 2007 ("the US Copy").

30 Mr Bull also took me through some material which highlighted the importance of the Hard Disk for without it, the computer printouts discovered thus far remain unauthenticated. In a consultation paper on "Computer Output as Evidence" by Daniel Seng and Sriram Chakravarthi, published under the auspices of the Technology Law Development Group, Singapore Academy of Law, September 2003, the authors, commenting on the role of authentication evidence at para 3.68 said:

> The crucial role that authentication evidence plays in our trial process is not to be discounted… Authentication provides the proponent of any evidence the opportunity to discharge the burden that is placed upon him: that the evidence sought to be adduced is what the proponent claims it

is.

At para 3.70, the authors reminded the reader that:

> the language used in sections 35 and 36 [of the Evidence Act] is the language of authentication.

31 In another paper entitled, "A Practitioner's Primer on Computer – Generated Evidence" 41 U Chi L Rev 254 (1973-1974) at 274, Jerome J Roberts pointed out that computed-generated evidence has to be properly evaluated and this exercise requires a careful evaluation of the original source (*ie* the hard drive).

32 Christopher Nicoll's article, "Should Computers be Trusted? Hearsay and Authentication with Special reference to Electronic Commerce", published in [1999] JBL, July Issue 332 at 338, is helpful for highlighting the difference between inspection of paper documents and electronic documents. He commented as follows:

> However, concepts evolved in the context of physical media such as paper do not always migrate happily to the world of computers. Sometimes an analogy is drawn between hard copy (paper documents) and electronic records. It is contended that printouts are "copies" of "original" data entries on the hard drive of a computer leading to the conclusion that printouts may be admitted as copies because the originals cannot, for practical purposes, be produced.
>
> The problem with this analogy is that it fails to recognise the transitory nature of the "original". An electronic original can be altered without leaving a trace whereas alterations in a paper document are perceptible. So while it is correct to say that a printout is always a copy of what is on the hard drive, that begs the question: a copy of what? The answer is: copy of what happened to be there at the time or, typically, a record of the latest combination of key strokes!

33 The author in drawing attention to the importance of authentication at 340 said:

> Here the emphasis ought to be upon authentication, that is, the steps taken to satisfy the court that what is proferred is what it purports or is claimed to be.

34 Mr Mohan argued that there was no merit in the plaintiff's claim that without the Hard Disk, the plaintiff would be unable to admit documents disclosed by the defendants and on which it wished to rely on at the trial. This was because no evidential hurdle exists in relation to the documents disclosed by the defendants for they have agreed to the admissibility of the computer printouts that have been disclosed in the several lists of documents filed by them. In this way, the plaintiff would be able to select and freely admit into evidence whichever computer printout it wished to utilise in making out the plaintiff's claims for fraudulent misrepresentation and breach of contract against the defendants. This submission missed the point that authenticity, which is based on the best evidence rule, is distinct from the admissibility of documentary evidence. Section 35(1)(a) of the Evidence Act (Cap 97, 1997 Rev Ed) refers to both authenticity and accuracy of the contents being expressly agreed. The twin requirements have to be satisfied before secondary evidence may be relied upon under s 35(10) of the Evidence Act. The authenticity of printouts is very much in issue in the absence of the Hard Disk. Mr Bull explained that the defendants have been notified pursuant to O 27 r 4(2) that the authenticity of the documents in the defendants' lists of documents is not admitted. With the issue of authenticity in the way, the defendants' purported agreement on the admissibility of the documents in evidence will not take the matter within s 35(1)(a) of the Evidence Act.

35 As for Mr Mohan's assertion that it is trite law that discovery cannot be justified on the ground that the authenticity of the documents disclosed needed to be verified, he cited in support of his proposition *Hyman Mackenzie & Partners Inc v Constellation Development Inc* [1990] ACWSJ 434439. In that case, the Supreme Court of Ontario was asked to order the production of the diary containing other irrelevant entries to verify the authenticity of the entries relevant to the issue and those entries have already been disclosed. The Supreme Court refused to make the order on the basis that "authenticity was not questioned at discovery". I do not see how that case assists the defendants. In this particular case, orders for inspection had been made and they have not been complied with. Inspection involves the examination of the originals and in this case that means the Hard Disk where the electronic documents ordered to be discovered are stored.

Hitachi hard disk

36 I now turn to the Hitachi hard disk produced by the defendants. It was alleged to be a clone of the Hard Disk that was despatched to Singapore by LPP's lawyers in Philadelphia. In these proceedings, the parties had identified and referred to the Hitachi hard disk as the "US Copy". Mr Bull's simple point was that in light of the finding that the Hard Disk was and remains in the possession, custody or power of LPP, the matter of a substitute hard disk would not arise for consideration. That may be so, but, as part of the examination of all circumstances as to whether striking out is an appropriate response to the non-compliance, the court has to ask itself – "Are there are any other circumstances that need to be taken into account to assess the overall circumstances in order to exercise its discretion under O 24 r 16(1)?". While the court would have an eye on any desire by the party concerned to gain advantage by not complying with orders of court, which is impermissible, the Hitachi hard disk produced by the defendants was one "other circumstance" which the court ought to look into as part of the overall circumstances that it has to assess. What weight the court gives to the existence of a substitute relative to any other factor is a question for the court.

37 As it transpired, the US copy which was initially thought to be a possible substitute was not to be. I would have some sympathy with Mr Mohan's contrary submissions were I satisfied that there was in existence a mirror image of the Hard Disk and that it could be properly given so that the objective of the rule as to discovery (which includes the Hard Disk order) is achieved despite the defendants' disobedience. This point is distinct from any consideration of O 24 r 16(2) which I have mentioned in [8] above.

38 LPP swore two affidavits (his 21st and 22nd Affidavits) confirming that to the best of his knowledge, the US Copy is the Hitachi hard disk. Paragraph 8 of his 21st Affidavit filed on 19 September 2007 states:

> As the Dell Laptop contained a large amount of my personal information, I wanted to retain a copy of the data contained within the Dell laptop. Consequently, in or about early October 2005, I instructed Ms [Celestine] Joseph to pick up the Dell laptop from my home for purposes of returning it to the Judicial Manager. I told her that I wanted the data contained within the Dell laptop back for my record and reference, Ms Joseph then picked up the Dell Laptop from my home and brought it away. The next day, she returned the Dell Laptop to the Judicial Manager. At the same time, she sent by courier to my home a package containing a hard disk stored within a casing. She informed me that this hard disk contained a copy of the data in the Dell laptop. This hard disk is what both parties have referred to throughout these proceedings as the US Copy.

39 On 18 July 2006, LPP flew over to Philadelphia with the US Copy and handed it to his US

lawyers there, M/s Bondurant, Mixson & Elmore. The US Copy remained in his lawyers' possession since then till 9 July 2007. John Floyd, a partner of M/s Bondurant, Mixson & Elmore, confirmed in his affidavit of 22 January 2008 that LPP handed to his firm a Hitachi hard disk bearing the serial number X2DZR9ZM and he was told that this hard disk was a copy of the original hard disk belonging to LPP's Dell laptop. He also deposed that the Hitachi hard disk was couriered back to Singapore and it reached Singapore on 9 July 2007.

40 According to LPP, this Hitachi hard disk, which is the US Copy, was on 10 and 11 September 2007 produced to facilitate inspection of the documents stored in the Hitachi hard disk. It is not disputed that the outer casing of the Hitachi hard disk was opened in the presence of the respective lawyers for the plaintiff and defendants and two sets of computer experts. At the hearing, the plaintiff sought to show that the Hitachi hard disk was not the US Copy. The labels on the Hitachi hard disk showed a discrepancy in the dates it was manufactured and sold. Those dates were well after the US Copy was made in early October 2005 and later handed over to LPP's lawyers in the USA. Two labels were seen on the inside of the Hitachi hard disk. The first label, the manufacturer's label, showed that the Hitachi hard disk was manufactured in November 2005 in Thailand by Hitachi Global Storage Technologies (Thailand) Ltd. Mr Nathan was present when the outer casing was removed and his understanding of the manufacturer's label – "Nov-05" which indicates that the Hitachi hard disk was manufactured in November 2005 – was confirmed by Ong Boon Keng ("Ong") who worked in the computer peripheral industry for the past 17 years. Ong is a director and major shareholder of Multiquest Technology Pte Ltd ("Multiquest"), which is in the business of wholesale of computer peripherals such as hard disks. The second and smaller label on the Hitach hard disk has the letters "MQ" on it. Ong confirmed that this smaller label is a Warranty label and it was specially printed for Multiquest's use. This Warranty label was affixed to the Hitachi hard disk by Multiquest to indicate the commencement of the date of the warranty. The blue ink stroke over the printed figure "05" referred to the year 2005; the red inked dot placed on the figure "12" was to signify the month of December and the number "2" in blue was the second week of December. In short, Ong confirmed that Multiquest sold the brand new Hitachi hard disk in the second week of December 2005. Ong's evidence is consistent with the manufacturer's email evidence which was to the effect that the Hitachi hard disk was shipped to its distributor on 21 November 2005. The manufacturer's email is exhibited in the affidavit of Cheng Chen Har, a senior consultant of the Digital Investigation Team of TecBiz FRisMan Pte Ltd. The defendants have not explained why the manufacturer's label and warranty label indicated that the Hitachi hard disk was manufactured in November 2005 and sold in December 2005. Logically by deduction, the Hitachi hard disk could not have been the second hard disk that Ms Joseph said she procured for LPP. The evidence adduced by the plaintiff was not rebutted. In my judgment, the provenance of the Hitachi hard disk had not been made out and remained dubious.

41 Mr Bull pointed out that LPP's instructions were for a copy of the Hard Disk to be made. A clone is different from having data copied onto a second hard disk. As late as 20 August 2007, M & A Law Corporation said that they were unable to confirm on behalf of the defendants that the US Copy is a "forensic image copy" of the Hard Disk and that their instructions were that "our client is not aware of the tools or methods used to produce the exhibit", meaning the US Copy. Yet in his 24th and 25th Affidavit both filed on 22 January 2008, LPP deposed that the US Copy is a clone of the Hard Disk. It is worth setting out the relevant portions of his affidavits. In his 24th Affidavit filed on 22 January 2008, LPP at [41] stated:

> As far as I am aware and to the best of my belief, the Hitachi Hard Drive flown back to Singapore by my solicitors in the US on 9 July 2007 is the same and the only hard drive cloned directly from the Original Hard Disk which Ms Joseph procured for me in late 2005.

42 In his 25th Affidavit filed on 22 January 2008, LPP claimed at [6] that:

> To the best of my knowledge, ability and belief, the US Copy is the first clone and the only hard disk that was directly cloned from the original hard disk of my Dell Laptop.

43 There are two material discrepancies in the statements. First, the disk procured by Ms Joseph was said to have been handed to LPP in early October 2005 and not late 2005 as LPP now claims. Second, the Hitachi hard disk was said to be a clone of the Hard Disk. Both those statements on oath contradicted his statements in earlier affidavits. In earlier affidavits, LPP had categorically stated on oath that the hard disk procured by Ms Joseph was a copy (and not a clone) of the Hard Disk. The statements are at odds with what M&A Law Corporation stated in reply on 20 August 2007. Hence, LPP's assertion that to the best of his knowledge, ability and belief, the US Copy is a clone of the Hard Disk is unsubstantiated and inherently inconsistent. That the US Copy was to the knowledge of LPP not a clone is reconfirmed by his own letter of 21 June 2007 to his former lawyers. LPP wrote as follows:

> 11. The Plaintiffs' complaints are as follows:
>
> (a) There are emails for which soft copies were previously provided to the Plaintiffs by your firm but for which my current lawyers have not been able to locate the soft copies on the copy disk [*i.e.* the US Copy]. These are items 61, 67, 76, 79, 88, 89 and 92 of the LOD.

Other matters

44 The defendants argued that the striking out for failure to comply with the Hard Disk order could not be justified as the defendants have a reasonable prospect of success in the defence of the plaintiff's claims based, *inter alia*, on fraudulent misrepresentation. Mr Mohan attempted to make good his submissions by introducing documents which he had put together in a bundle. Mr Bull objected to this manner of placing documents before the court without an accompanying sworn affidavit (see *WBG Network (S) Pte Ltd v Sunny Daisy Ltd* [2007] 1 SLR 1133 at [5]) which he said was not only improper, it was litigation by ambush. I did not immediately rule on Mr Bull's objection as I preferred to hear all the arguments first for, as suspected, it turned out that my decision was not in anyway dependent on the documentation which Mr Mohan said was capable of supporting a case for the defence.

Result

45 In summary, I considered whether the conduct of the defendants had taken the form of deliberate and persistent disregard of the Hard Disk order. In my judgment, it did and the conduct of the defendants in the circumstances amounted to a contumacious disregard of the Hard Disk order. There were, in my view, grounds for regarding the defendants' overall conduct in this case as an abuse of the process of the court. There was continual disobedience designed to procure some procedural or other advantage for the defendants. The position reached by the defendants was that no steps would be taken to comply with the Hard Disk order or that the lapses would not be rectified. In the light of this finding, an appropriate response to the default was to debar the defendants' on liability, but to permit them to take part on the question of quantum. Consequently, I struck out the defence and entered interlocutory judgment for the plaintiff with damages to be assessed. The costs of the action up to this stage of the proceedings were to be taxed and paid by the defendants to the plaintiff. The defendants were also ordered to pay the costs of this application fixed at $17,500 plus reasonable disbursements.