

Alliance Management SA v Pendleton Lane P and Another and Another Suit
[2007] SGHC 133

Case Number : Suit 511/2005, 522/2005, RA 335/2006, 336/2006
Decision Date : 22 August 2007
Tribunal/Court : High Court
Coram : Belinda Ang Saw Ean J
Counsel Name(s) : Cavinder Bull, Tan Hee Joek and Woo Shu Yan (Drew & Napier LLC) for plaintiffs;
Chandra Mohan and Celia Sia (Rajah & Tann) and Alvin Chang (M & A Law Corporation) for the defendants
Parties : Alliance Management SA — Pendleton Lane P; Newfirst Limited

Civil Procedure – Production of documents – Court's discretion to order production for purposes of inspection – Applicable principles – Access to material stored on computer database – Safeguards to prevent trawling – Order 24 r 12(1) Rules of Court (Cap 322, R 5, 2006 Rev Ed)

Civil Procedure – Production of documents – Whether court having power to order non-party to produce documents for inspection – Order 24 rr 6(2), 11(2) Rules of Court (Cap 322, R 5, 2006 Rev Ed)

22 August 2007

Belinda Ang Saw Ean J:

1 This was an appeal from the decision of the learned Assistant Registrar, Ms Ang Ching Pin ("the AR") given on 24 November 2006 ("the November Order") whereby she, *inter alia*, ordered (a) the first defendant, Lane P Pendleton ("LPP"), to produce and return to the Judicial Manager of Orient Telecommunications Networks Pte Ltd ("the Judicial Manager") the original hard drive of a Dell laptop that was previously assigned to LPP for his use ("the Hard Disk"); and (b) LPP and the second defendant, Newfirst Limited ("Newfirst") to (i) give discovery as in furnishing a list and producing for inspection the various categories of documents described in Annex A of the November Order; and (ii) to produce for inspection documents described in Annex B of the November Order. At the conclusion of the hearing, I dismissed the appeal for the most part and ordered the defendants to pay costs fixed at \$10,000 and disbursements to be taxed, if the parties could not agree on the quantum of disbursements. As for RA No. 335 of 2006 filed in Suit No 522 of 2005, the parties had agreed to follow and abide by the outcome of this appeal (RA No. 336 of 2006). The defendants have appealed against that part of my decision relating to (i) the production and return of the Hard Disk to the Judicial Manager; (ii) the inspection of documents under categories (a) and (e) of Annex B; and (iii) the order on costs. I now publish the detailed grounds for my decision in respect of the issues that are being appealed against.

Background

2 The plaintiff is a company incorporated in Switzerland and a shareholder of Orient Networks Holdings Ltd ("ONH"), a company incorporated in the Cayman Islands. Orient Telecommunications Networks Pte Ltd ("OTN") is the wholly owned subsidiary of ONH. ONH is in liquidation while OTN is still under judicial management. LPP was, at all material times, the Co-Chairman and Executive Director of ONH. He was also, at all material times, a key member of the OTN's management team. Newfirst was the investment vehicle used by LPP to hold shares in ONH.

3 In this action, the plaintiff claims damages from the defendants in respect of three distinct causes of action: fraudulent misrepresentation, breach of duty of care and breach of contract. Essentially, the complaint is that the plaintiff was induced into investing substantial sums of money in ONH having been falsely misled on the performance, state and prospects of ONH and its subsidiaries including OTN. Similarly, the plaintiff was misled into providing guarantees in favour of the bankers of ONH and OTN in 2003, and the plaintiff as guarantor had allegedly suffered loss and damage. It was also alleged that the defendants had breached a duty of care owed to the plaintiff to ensure that the representations made to the plaintiff were true, accurate and not misleading. On the plaintiff's claim for breach of contract, LPP and Newfirst allegedly breached (i) the Agreement to Purchase Shares, (ii) the 2003 Share Purchase Agreement, and (iii) the Amendment Payment Schedule by failing, refusing or neglecting to pay various sums of money to ONH. Additionally, LPP had allegedly breached an agreement to personally indemnify the plaintiff against any loss arising from the provision of an amended banker's guarantee for an increased credit facility to OTN in November 2003. In total, the plaintiff claims, *inter alia*, a sum of US\$5,000,000 from the defendants, and a further and separate sum of US\$3,650,000 from LPP.

The History of Discovery leading up to this Appeal

4 The process of discovery has had a fairly drawn out history. In the course of the proceedings, the defendants provided discovery by filing and serving a List of Documents on 31 March 2006 ("LOD"). However, being dissatisfied with the defendants' LOD, the plaintiff called for further discovery. Three months later, the defendants filed a Supplementary List of Documents ("SLOD"). Dissatisfied with the defendants' discovery efforts, the plaintiff on 13 July 2006, by way of Summons entered no. 3169 of 2006 ("the July application"), sought specific discovery pursuant to O 24 r 5 of the Rules of Court (Cap 322, r 5, 2006 Rev Ed) ("ROC"). The July application was the subject matter of the November Order and the appeal before me. An added, and by far a more important reason for filing the July application was the plaintiff's belief that the Hard Disk was deliberately switched before the Dell laptop was returned to the Judicial Manager, and by all indications, the Hard Disk was and remains in the possession, custody or power of LPP. It was not disputed that LPP had the exclusive use of this laptop since 2001 until it was returned to the Judicial Manager who, in the course of recovering all of OTN's property, called for its return.

5 I pause here to interrupt the historical narrative to explain how the Judicial Manager found out that the Hard Disk was not returned together with the Dell laptop. The Judicial Manager was required by two Orders of Court dated 14 October 2005 and 22 March 2006 to give discovery of documents including soft copy documents in his possession, custody or power ("the discovery orders"). The laptop in question was then sent to Adroit Data Recovery Centre Pte Ltd ("Adroit") with a view to recovering all electronic data stored in the Hard Disk. The Hard Disk was an Ultra-ATA hard disk with a 20GB capacity. However, the hard disk in the laptop returned to the Judicial Manager by LPP was an IBM DJSA 210 model with a 10GB capacity. Interestingly, the IBM hard disk contained data belonging to a piano teacher, Ng Chew Wan ("Ng"), who never had any dealings with LPP, Ms Celestine Joseph (LPP's secretary), the Orient Networks group or their staff. Ng had gone to a shop at Funan Centre to replace his faulty hard disk and that was done. He had no idea how his faulty hard disk came to be found in the laptop in question. It was the plaintiff's belief, objectively ascertained, that the switch was made by LPP or at his behest before the laptop was returned to the Judicial Manager. It seemed, from an earlier explanation that LPP had wanted the data in the Hard Disk copied, and Ms Joseph had sent the laptop to a shop in Sim Lim for that purpose. Both of them have no idea how the Hard Disk was switched. For the purposes of the July application, the parties filed their respective affidavits. The plaintiff, having detected serious contradictions and gaps in the affidavits the defendants had filed to explain the absence of the Hard Disk, applied for an order to cross-examine LPP and his secretary, Ms Joseph (who had also filed an affidavit in relation to the Hard Disk). This was granted

by the AR on 16 August 2006. An appeal was filed against the AR's decision ordering cross-examination. Andrew Ang J, who affirmed the AR's decision, dismissed the appeal. On the day fixed for cross-examination, the defendants decided not to subject LPP and Ms Joseph to cross-examination. The defendants' solicitors tried, but were not allowed, to withdraw the affidavits filed by LPP and Ms Joseph. The parties then agreed to the order on 13 November 2006 ("the consent order"). By this consent order, the defendants agreed not to rely on the affidavits in question to oppose the July application or in any appeal. The relevant parts of the consent order reads as follows:

1. The Defendants shall not be permitted to rely on the 3rd Affidavit of Lane Pendleton filed on 4 August 2006, the 1st Affidavit of Celestine Joseph filed on 4 August 2006, and the 2nd Affidavit of Celestine Joseph filed on 3 October 2006 at the hearing of the Plaintiff's application for further discovery in Summons No 3169 of 2006/Z, Summons No 5060 of 2006/T and all other related applications and any appeals therefrom.

This consent order has serious implications for the defendants who found themselves beset by it in their efforts to oppose the July application before the AR and the appeal before me. The constraints will become apparent in due course.

6 Returning to the chronology of events, at the hearing of the July application on 20 November 2006, the plaintiff made an oral application for an order that the Hard Disk be returned to the Judicial Manager. The AR heard the oral application and ordered LPP to produce and return the Hard Disk to the Judicial Manager.

7 After the November Order, the defendants amended both the LOD and SLOD on 18 December 2006. The amendments were to clarify that the documents were merely copies except for one which was an original copy. The defendants also filed and served a second Supplementary List of Documents on 22 December 2006 disclosing seven items, including five copies of CD-ROMs containing a large number of e-mails. A third and fourth Supplementary List of Documents were filed on 2 February 2007. The former disclosed a total of 36,740 documents and the latter added seven additional documents to the previous list. In LPP's affidavit verifying the third Supplementary List of Documents, he explained that his solicitors in the United States, Messrs Bondurant, Mixson & Elmore were in possession of a hard disk ("the US Copy"), which he believed was a copy of the Hard Disk. In this affidavit, he clarified that the US Copy was not the Hard Disk and that the e-mails provided in the third Supplementary List of Documents were derived from the US Copy. As for the fourth Supplementary List of Documents, it was to give discovery of the documents that were disclosed in Suit No. 919 of 2004 but were inadvertently left out of the defendants' earlier lists filed in the present action.

Issues on appeal

8 In the light of the orders under appeal to the Court of Appeal in Civil Appeal No. 41 of 2007, the three issues which I need to now address are as follows:

- (i) Whether the AR was right to order LPP to produce and return the Hard Disk to the Judicial Manager of OTN ("Issue 1");
- (ii) Whether the AR was right to order the defendants to produce for inspection the documents under categories (a) and (e) of Annex B ("Issue 2"); and
- (iii) The costs ordered to be paid to the plaintiff ("Issue 3").

9 It is useful to introduce for a better appreciation of the dispute, the electronic documents

under categories (a) and (e) of Annex B required to be produced for inspection. They are:

(a) All emails listed in the 1st and 2nd Defendants' List of Documents dated 31 March 2006 sent or received by the 1st Defendant and/or soft copies thereof;

...

(e) All soft copies of all emails and the attachments thereto listed in the 1st and 2nd Defendants' List of Documents.

10 It is convenient at the outset to re-state the principles that would apply when approaching the issues here. First, it bears noting that Vinelott J in *Derby & Co Ltd v Weldon (No 9)* [1991] 1 WLR 652 ("*Derby No 9*") concluded that material on a computer database constituted a "document" within O 24. The word "document" covers "anything upon which evidence or information is recorded in a manner intelligible to the senses or capable of being made intelligible by the use of equipment" (see *Singapore Civil Procedure* (Sweet & Maxwell Asia, 2003) at para 24/1/2). A "document" is defined in s 3(1) of the Evidence Act (Cap, 97, 1997 Rev Ed) as "any matter expressed or described upon any substance by means of letter, figures or marks or by more than one of those means intended to be used or which may be used for the purpose of recording that matter." Material stored on a computer database is within this definition. Yong Pung How CJ in *Megastar Entertainment Pte Ltd v Odex Pte Ltd* [2005] 3 SLR 91 at 102 reviewed the definition of "document" in the Evidence Act and other statutes and, *inter alia*, concluded that as with the other statutes considered in that case, the Evidence Act definition of the word "document" was broad enough to encompass information recorded in an electronic medium or recording device such as a hard disk drive installed in a desktop computer or server computer. Put simply, the concept of "document" embraces the Hard Disk for the purposes of O 24 of the ROC. Second, as to whether this was a case where there ought to be production and inspection of the documents sought, the court must be satisfied that the Hard Disk was and remains in the possession, custody or power of LPP, and with that, the documents stored on the Hard Disk was and remains within LLP's possession, custody or power (see O 24 rr 9, 11 and 12). Once that particular pre-requisite is established, it is a matter of the court's discretion whether or not to make the order for production and inspection of the documents. Third, the overriding consideration is whether production and inspection could be regarded as necessary for the fair disposal of the cause or matter or, for saving costs (see O 24 r 13). Fourth, the burden of satisfying the court that production and inspection of documents is necessary is on the plaintiff as the party applying for the order (see *Dolling-Baker v Merrett and others* [1991] 2 All ER 890 at 895).

11 Before I address the main focus of this appeal, I must first dispense with a short point made by counsel for the defendants, Mr Chandra Mohan. He asserted that the defendants had given full discovery in their third Supplementary List of Documents. Mr Mohan relied largely on the presence of the US Copy to argue that the present appeal should be allowed. Mr Mohan tried to make capital out of the disclosure of 36,740 documents from the US Copy which he said was retrieved from a computer search of 62 key words. Mr Mohan argued that since documents from the US Copy had been disclosed, there was no longer any basis for the plaintiff's belief that the relevant documents in the Hard Disk would not be disclosed in the present action. Mr Mohan's argument was unfounded for two reasons. First, crucially, there was no information as to when, where and by whom was the US Copy made. LPP's affidavit verifying the third Supplementary List of Documents dated 2 February 2007 was silent on these matters. The US copy was not mentioned anywhere prior to the filing of the July application. The existence of the US Copy came to light only on 2 February 2007. Second, it is not proper to list a large amount of documents (36,740) retrieved from key word searches for such an approach alone is insufficient and requires the other party to sort through them. It is well known that

the basic requirement of discovery is that the party making discovery has to sift through his documents and identify those which are to be made available. I also noted Mr Bull's comment that many of the key words used have nothing to do with this case. Examples of irrelevant key words are "Buensalund.com", "Bibliomed", "Byallaccounts.com" and "Chateau on-line". At the hearing on 28 March 2007, Mr Bull informed the court that a further list reducing the number of documents from the US Copy to 7462 has since been filed.

12 For the sake of completeness, I should mention that I am aware that in the course of the arguments presented on both sides, a number of subsidiary points were ventilated, and many authorities tendered. I have, however, not found it necessary to refer to them in this judgment.

The first two issues

13 The first two issues are inter-related and are best dealt with together. The issues are inter-related and also overlapped for the simple and obvious reason that electronic documents are kept or held in one of the many files on the Hard Disk. Therefore, any order to produce for inspection the electronic documents enumerated under categories (a) and (e) of Annex B must naturally follow the outcome of Issue 1 (see [8] above). As stated, material on a computer database constitutes a "document" within O 24. So, the debate on the sufficiency of the evidence supporting the plaintiff's claim that the Hard Disk was and remains within the possession, custody or power of LPP was pivotal to the outcome of the first two issues. The defendants' stance was that there was good cause for not making the orders sought in the July application as LPP simply did not have the Hard Disk. However, in order to make that point, the defendants had to first find a way around the consent order. I shall elaborate on this shortly.

Oral application for production and return of the Hard Disk

14 The plaintiff on 20 November 2006 made an oral application to the AR for the production and return of the Hard Disk to the Judicial Manager. Mr Mohan prefaced his argument with the observation that the oral application was "sprung on them" and was a surprise. More importantly, as the oral application was akin to the preservation of evidence under O 29 of the ROC, it could hardly be a matter coming within O 24 r 5. As such and being a different application, the plaintiff should have followed the usual procedure by filing a summons with supporting affidavit, and the defendants could have filed an affidavit in answer. Mr Mohan also made the point that the oral application was made on 20 November 2006 after the consent order. I understood Mr Mohan as saying that since the substance of the oral application was markedly different from the discovery application, it was outside the ambit of the consent order and the defendants should have been given an opportunity to file an affidavit. If the usual procedure was to be departed from (so the argument developed), on the authority of *SMS Pte Ltd v Power & Energy Pte Ltd* [1996] 1 SLR 767, good reason must be given, and none was proffered in this case by the plaintiff.

15 Mr Mohan's line of argument was the only one he could make considering what transpired before the AR as gathered from the AR's Notes of Arguments. It was also his way of getting around the consent order. Counsel for the plaintiff, Mr Cavinder Bull, rightly pointed out that the defendants on 20 November 2006 did not object to the application being made orally. Counsel who appeared on behalf of the defendants at the hearing before the AR, Mr Justin Koh, was content to confine his challenge to the substantive merits of the oral application rather than take issue with its form. In other words, he did not protest on grounds of procedural irregularity. I did not accept Mr Mohan's argument that the oral application for the Hard Disk to be produced and returned to the Judicial Manager was not within O 24. I was of the view that it was too late in the day to take issue with the form of the application. By the time the oral application was made, the real issue between the parties

was whether production and inspection could be regarded as necessary for the fair disposal of the action once the evidence *prima facie* pointed to LPP being still in possession of the Hard Disk. It was open for the AR to form her own conclusions. The corollary of the AR's conclusions - that (i) LPP was and remains in possession of the Hard Disk and, (ii) inspection was necessary for a fair disposal of the case or to save costs - is to order the Hard Disk to be returned to the Judicial Manager. It bears repeating that it was common ground that the Hard Disk belonged to OTN, and the Hard Disk should be returned to the Judicial Manager as he was the rightful person to retain the Hard Disk. Under these circumstances, the nature and manner of inspection and the return of the Hard Disk was very much a matter of discretion, practicality and convenience (see [26] below). The appeal before me must necessarily be confined to the correctness of the order to produce and return the Hard Disk to the rightful owner.

16 I accepted Mr Bull's counterpoints. Mr Bull first argued that the defendants' procedural objections were entirely technical. In developing his contention, Mr Bull explained that the July application could be amended at any stage of the proceedings under O 20 r 8 of the ROC to include the order sought orally, and such an application to amend could be made orally. In any case, *SMS Pte Ltd v Power & Energy Pte Ltd* is distinguishable. That case concerned an application made orally to strike out a defence on the day of the trial for non-compliance with the order for discovery that was outstanding for five months and the court ruled that a formal application made by way of summons-in-chambers (as it was then known) with supporting affidavit was necessary. The rationale for that is simple enough. I said in *Koh Toi Choi v Lim Geok Hong and Another* [2007] 3 SLR 340 that if an action has reached the day of trial without having been struck out, it has to be in an exceptional case that such an application will be granted and on receipt of a valid explanation for the lateness of the application. The factual explanation for the delay and circumstances to justify a late application can only be properly set out in an affidavit. It was not surprising that the court in *SMS Pte Ltd v Power & Energy Pte Ltd* insisted that a formal application be taken out. Moving on to Mr Bull's next point, the real consideration, Mr Bull argued, was whether such an oral application would cause any prejudice to either party (*Roberto Building Material Pte Ltd and Others v Overseas Chinese Banking Corp Ltd and Another* [2003] SGCA 18). In this regard, Mr Bull submitted that there was no prejudice to the defendants as they were well aware at all times that the July application revolved around the Hard Disk and the documents stored on the Hard Disk. Looking at the facts of this case, I accepted Mr Bull's arguments despite Mr Mohan's efforts at persuading me to his way of thinking. I was satisfied that the defendants appreciated that the July application concerned the Hard Disk. It must be so given the history of discovery, and even from the orders sought in the July application. It was a fact that affidavits pertaining to the Hard Disk were filed by LPP and Ms Joseph to oppose the July application and there was also an order for the deponents of the affidavits to be cross-examined. The main point of the cross-examination as Mr Bull said was to return the Hard Disk to the Judicial Manager, and this purpose was undoubtedly appreciated by the defendants by the time of the appeal before Andrew Ang J (see [5] above). Notably, orders for inspection of discovered documents were sought in prayer 6 of the July application. In addition, Tarek Ismail, a director of the plaintiff, in his affidavit of 13 July 2006 deposed (and this was not disputed) that many of the documents listed in Annex A of the July application by their nature would be stored on the Hard Disk. It was not disputed that LPP used the Dell laptop for business matters. Consequently, the plaintiff drew up prayers 4 and 6 of the July application in the following terms:

4 That there be inspection of the documents listed in the aforesaid Supplementary List of Documents filed pursuant to paragraph 3 above.

...

6 That the 1st and 2nd Defendants [are] to allow for inspection of the documents set out in

Annex B hereto.

...

17 Mr Bull drew my attention to the decision of *Playboy Enterprises Inc v Terri Welles*, 60 F. Supp. 2d 1050 (1999) to illustrate the point that so long as the application for specific discovery and inspection was for documents which might be on the hard drive of a computer, it was not necessary to mention the hard drive itself in the application. As a statement of principle, that is correct given the broad meaning of the word "document". Furthermore, it is true that the July application only mentioned O 24 rr 1 and 5 and not O 24 rr 9 and 12 being the other provisions under which, Mr Bull said, the application was brought. However, I did not see this as giving any difficulty. At any rate, I was of the view that the true objective of prayer 6 of the July application as drafted was clear enough to a reasonable reader with the same knowledge of the background facts as the defendants that the plaintiff wanted production of the Hard Disk for inspection of the discovered documents. Mr Mohan's submissions did not address the proposition that the Hard Disk embraces the concept of a "document" for the purposes of the discovery and inspection obligations under O 24 of the ROC. That is trite law and bears no reiteration. Earlier in this judgment, I referred to *Derby No 9*, a decision affirmed in *Megastar Entertainment Pte Ltd v Odex Pte Ltd* [2005] 3 SLR 91 at [35] to [37]. Vinelott J in *Derby No 9* at 658 said:

In the simple case of a word processor, if I am right in my conclusion that the memory or database of the word processor is the original document, the court must have power to permit the party seeking discovery to inspect the word processor's memory by reading from the console or screen or by taking hard copy in any case where there is a real doubt whether the print outs supplied comprise a complete and accurate copy of all relevant and non-privileged information stored on the word processor's memory.

18 Adding to what I have stated in [10] above on *Derby No 9*, in the context of this appeal, what is pertinent is that the court has to approach the appeal on the basis that the order for inspection of documents under categories (a) and (e) of Annex B is a matter of discretion. There is a distinction between the court's power to order discovery of information contained in the Hard Disk and its discretion to order production for the purposes of inspection. This crucial distinction was captured succinctly by Vinelott J at pg 652:

"The data base of a computer ... is a *document within the meaning of R.S.C Ord 24* and that the court accordingly had *power to order discovery of what was in that database*; but that *the discretion* to order production for inspection and copying would not be exercised so as to give *unrestricted access to the other party's computer*, and inspection would be ordered only to the extent that the *party seeking it could satisfy the court that it was necessary for disposing fairly of the cause or matter or for saving costs...*".

(Emphasis added)

19 First, it is clear from the passage quoted above that the burden is on the requesting party to establish that inspection of the documents is necessary for disposing fairly the cause or matter, or for saving costs. Second, and this follows from the first proposition, the inquiry in respect of production of the documents for inspection is a far more intricate one involving judicial balancing of the competing interests of the parties; *ie* the requesting parties' right to reasonable access to documents that are necessary to conduct his case without unduly burdening the other party in terms of time and expense and to prevent unauthorised "trawling" through the database. A protocol has to be put in place to ensure that the requesting party only has access to inspect documents that are found to be

necessary for the conduct of his case and is not allowed to trawl through the entire database on the guise of an inspection order. In my view, on the overall evidence before me, inspection of the files stored on the Hard Disk under O 24 r 12 read with r 13 was an appropriate exercise of discretion for such an order given the unsatisfactory outcome of the inspection as described by the plaintiff. I will elaborate on this later including the safeguards necessary to, *inter alia*, protect the integrity of the Hard Disk and privilege matters.

AR's finding that the original hard disk was and remains in the possession of LPP

20 Mr Mohan made two related criticisms about the AR's decision. First, he submitted that the AR, at an interlocutory stage, should not have made such an important finding of fact based on affidavit evidence of one party. Second, the AR should not have phrased the order as she did for LPP was not permitted at all to explain why he did not have possession of the Hard Disk. From a legal stand point, the criticisms are directed at one particular prerequisite to the court's power to make the order (*i.e* possession, custody or power of the Hard Disk and the documents stored on the Hard Disk).

21 On his first criticism that the AR made a finding of fact based on only the affidavit evidence of one side as the defendants by the consent order could not rely on any affidavits they had filed, Mr Bull was able to succinctly point to the cogent evidence to support the AR's conclusion that the Hard Disk was and remains within the possession of LPP. I must emphasise the special circumstances of the present case, such that, regardless of the form of the proceeding, the proper question in relation to the overall evidence on the issue as aired in the interlocutory hearing was whether, after the interlocutory hearing, there had been a determination on the merits in the decision challenged. The defendants in their objections, as Mr Bull submitted, were attempting by the "back-door" to circumvent the consent order, by requesting a fresh opportunity to file an affidavit to explain the whereabouts of the Hard Disk or give reasons why it could not be produced. Their second criticism was to the phrasing of the AR's order, and it was similarly devoid of merit in the light of my conclusion that the AR's order for the Hard Disk to be produced and returned to the Judicial Manager was amply justified on principle and discretion, which I will now examine.

22 The situation here was unique and I stress that the absence of an explanation on the "missing" Hard Disk was LPP's undoing which started with LPP's reluctance and, finally, decision not for both he and Ms Joseph to be cross-examined. That then led to the consent order whose terms were wide enough to include "other related application" (see [5] above) such as the oral application for production and return of the Hard Disk to the Judicial Manager. The fact of the matter was that the defendants passed up the opportunity to provide their explanation on the Hard Disk by not taking the stand to be cross-examined on the affidavits in question.

23 In the light of the combination of all the factors considered above, all of which the defendants were entirely to blame for their predicament, Mr Mohan's submission that LPP did not have the Hard Disk was not only evidence from the Bar, but was an attempt to circumvent the implications arising from the consent order. At best, it was a bare assertion. The consent order was a special feature of this appeal, and in the light of the objective evidence adduced by the plaintiff, it was plainly open to the court to reject Mr Mohan's submission that LLP did not have the Hard Disk. Significantly, cogent evidence was adduced by the plaintiff in affidavits that made Mr Mohan's submission inherently improbable. LPP was interviewed by the Liquidators of ONH on 8 June 2006. The liquidators from Messrs Foo Kon Tan Grant Thornton interviewed LPP to ask him various questions regarding the business and affairs of ONH. Mr Bull explained that LPP, at this interview, on his own accord raised the issue of the swapped Hard Disk. The interview was recorded and the transcript of the interview recorded LPP's knowledge that the Hard Disk had been removed. LPP had explained that he wanted his personal data and received a hard disk which he downloaded onto his home computer. LPP was

recorded as stating that he still had the Hard Disk in his possession, custody or power. The transcript was exhibited in the affidavit of Aw Eng Hai filed on 14 August 2006.

24 In summary, the *prima facie* evidence is that the Hard Disk was and remains within LPP's possession, custody or power, there being no other evidence to rebut this conclusion. The AR did not in exercise of discretion fall into error in ordering LPP to produce and return the Hard Disk (see also [15] above). The court is specifically empowered by O 24 r 12 of the ROC to make the order that the AR did, subject to the qualifier in r 13 that the document is necessary for the fair disposal of the case or matter or for saving of costs. I did not think, given the special circumstances of this case, that it was open to the defendants to maintain at the appeal that no order on a factual basis should be made when all the facts were not known to the court. If anything, such a stance would have meant allowing the defendant to unravel the consent order and to backtrack to the time before the events leading to the consent order.

25 Order 24 r 12 reads as follows:

(1) At any stage of the proceedings in any cause or matter the Court may, subject to Rule 13(1), order any party to produce to the Court any document in his possession, custody or power that falls within one of the following descriptions:

(a) documents on which a party applying relies or will rely:

(b) documents which could –

(i) adversely affect a party's case; or

(ii) support a party's case; and

(c) documents which may lead to a train of inquiry resulting in the obtaining of information which may –

(i) adversely affect a party's case; or

(ii) support a party's case.

(2) The Court may deal with the document when produced in pursuance of an order made under paragraph (1) in such manner as it thinks fit.

26 Mr Bull argued that, at any stage of the proceedings, the court has power under O 24 r 12 to order any party to produce the Hard Disk. The court first orders the production of any documents which can be produced under rr1 and 5 and then follows that with an order to deal with the documents in such manner as it thinks fit. As stated, the word "document" would encompass the Hard Disk. Mr Mohan's attack was on the words "produce to the Court" in r 12 (1) which, he argued, was not the case here as the Hard Disk was ordered to be produced and returned to the Judicial Manager. Mr Bull's response was that the Judicial Manager was a court appointed officer and as such r 12(1) was satisfied. I was not persuaded by either Mr Mohan's literal interpretation or Mr Bull's answer. Occasionally, r 12 is invoked when the court is required to look at the disputed document in the course of adjudicating whether to grant the order for discovery or that an objection to production on grounds of privilege is real. However, r 12(1) is not limited to the examples given. From the language of r 12(1), the words "produce to the Court" of specified documents (including material stored on the Hard Disk) in the possession, custody or power of the opposite party must be for the overall purpose

of carrying into effect the provisions of rr 1 and 5 and hence, should be given a wider and not a literal interpretation. In principle, r 12(1) is capable of wider application. Allied to that is the court's discretion to redirect production. Rule 12(1) can apply here when the court wants to incorporate safeguards to protect the integrity of the Hard Disk and confidentiality of the defendants to the documents stored on the Hard Disk. To this extent, the court does not as a matter of practicality, convenience and discretion require the Hard Disk to be handed over directly to the court. The computer expert appointed as part of the safeguards will be the best person to have the Hard Disk (see [35] below). As Mr Bull correctly stated, the return of the Hard Disk to the Judicial Manager was premised on the Hard Disk belonging to OTN and hence, justifying the order for return to the Judicial Manager. Order 24 r 12(2) gives the court the unfettered power to deal with the Hard Disk "in such manner as it thinks fit", and that sub-rule fits in with the wider interpretation given to r 12(1). In this context, and in the light of the provisions of O 24 r 13, a fair disposal of the cause or matter was best served by the AR's order for the Hard Disk to be produced and returned to the Judicial Manager.

27 Mr Bull made the additional point that in the absence of an agreement envisaged by s 35(1) (a) of the Evidence Act, the plaintiff would have to satisfy the requirements of s 35(1)(c) if it wanted to make use of any computer output (as defined in s 3(1) of the Evidence Act) at the trial to prove authenticity of the electronically generated documents. It was a valid point and an added reason for affirming the AR's exercise of discretion ordering the production and return of the Hard Disk to the Judicial Manager. The AR's order was as such the right course. Given the regime in the Evidence Act on computer output, more attention and consideration should be given to the value of a Notice of Non-Admission and the operation of O 27 r 4.

28 Mr Bull further explained that the AR's order to produce and return the Hard Disk to the Judicial Manager was also made under O 24 r 9. In my view, r 9 does not strictly apply as LOD and SLOD were not filed in compliance with an order of court. Up to that stage, the defendants appeared to have given discovery voluntarily. Be that as it may, the defendants' lists did contain the usual notice to inspect. It follows that the plaintiff is entitled to inspect the documents disclosed and inspection connotes looking at the documents disclosed. The plaintiff's objection was that inspection was insufficient. Mr Bull further contends that the court has inherent jurisdiction to give directions to make suitable orders that are necessary in order for justice to be done or to prevent any abuse of the process of the court. His fallback argument is valid if the existing rules of court do not cover the situation at hand (see *Wellmix Organic (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR 117). Having reached the conclusion that the court has power under O 24 r 12, it was not necessary to discuss the court's inherent jurisdiction to make directions to give effect to orders of court or those that are reasonably necessary for justice to be done or prevent abuse of process (see *UMCI v Tokio Marine & Fire Insurance Co (Singapore) Pte Ltd* [2006] 4 SLR 95).

29 I now come to the court's powers under O 24 r 11(2) which reads as follows:

Without prejudice to paragraph (1), but subject to Rule 13 (1), the Court may, on the application of any party to a cause or matter, order any other party to permit the party applying to inspect any documents in the possession, custody or power of that other party in respect of which discovery has been given under any Rule in this Order or in pursuance of any order made thereunder.

30 Order 24 r 11(2) was not raised at the hearing, but since then I have had a closer look at this rule in the course of writing this judgment. Now that this decision is under appeal, it is useful to touch on the relevance of this rule. Needless to say, it is for the parties, if they so wish, to ventilate this point before the appellate court. Order 24 r 11(2), at least on a literal interpretation, is appropriate to cover the present situation where a non-party like the Judicial Manager was ordered to give discovery

in this action but was unable to properly comply with the discovery orders because all or some of the documents were in the possession, custody or power of a party to the proceedings; in this case LPP. In context, the words "in respect of which discovery has been given under any Rule in this Order or in pursuance of any order made thereunder" are not restrictive and can comfortably without verbal gymnastics include an order of discovery made against a non-party under O 24 r 6(2). The Judicial Manager gave discovery pursuant to order of court dated 14 October 2005 and filed an affidavit verifying the list of documents on 26 October 2005. As for order of court dated 22 March 2006, no discovery has been given. It must also be implicit from the broad language of O 24 r 11(2) being fair, reasonable and necessary, that the court, in order to give effect to the discovery orders, is empowered to order the Hard Disk be produced and returned to the Judicial Manager. My reading of O 24 r 11(2) will assist in seeing to courts' orders being carried out as effectively and economically as possible. The reading is tempered by the fact that it does not follow that the court is bound to make an order merely because it has power to do so. It has discretion to make or refuse the order sought or to modify or limit its terms. By all counts, once the court is satisfied that the Hard Disk was and remains within the possession, custody or power of LPP, it is not difficult to satisfy the requirements of O 24 r 13. Apart from the Judicial Manager being the rightful person to receive the Hard Disk since the laptop belonged to the company, retrieval of the Hard Disk would facilitate compliance with the discovery orders against the Judicial Manager.

31 A related argument was that the defendants would be put in an impossible position if the AR's order was allowed to stand. Mr Mohan explained that LPP was bound to be in breach of the November Order since the Hard Disk was not with LPP. LPP would invariably be faced with either contempt proceedings or have their defence struck out for non-compliance with the November Order. He argued that for these reasons, the appeal ought to be allowed or, at the least, the AR's order be amended to allow LPP to state whether he was in possession of the Hard Disk. I did not see how the arguments would help the defendants who had created the difficult circumstance for themselves. More importantly, the court is not deterred from granting the order otherwise appropriate simply because the order would likely be disobeyed for one reason or another.

32 In *Rafidain Bank v Agom Universal Sugar Trading Co Ltd and another* [1987] 3 All ER 860, the English Court of Appeal was faced with a similar argument by counsel that the defendants would be faced with the prospect of a default judgement being entered against them. It is apposite to set out the judge's comments at 864:

Finally, pervading the whole of counsel's resistance to the master's order is the peril which he says the first defendant will be in if the order stands and the application to strike out the defence proceeds. As to that, I wish to say as little as is possible. I would merely observe, first that the master's order was not an 'unless' order and, second, that nothing which is decided on this appeal will be in any way conclusive of the application to strike out the defence. That is something which will have to be considered entirely on its own merits and with regard to all the circumstances of the case, albeit that those circumstances may well include a failure to comply with the order for production. I think that is neither necessary nor desirable to say anything more about that matter.

In the same vein, in the present case, the November Order was not a peremptory one, and if or when proceedings for contempt or a striking out application is brought, that is a matter for separate consideration. At this stage, such considerations do not offer a sound reason for not making the order sought. I said earlier that the court is not deterred from granting the order otherwise appropriate simply because the order would likely be disobeyed for one reason or another. As such, it is not necessary, at this juncture, to consider the potential impact of a failure to comply with the AR's order. Having evaluated the facts and evidence before the AR, I saw no valid basis, whatsoever, to

reverse the order made below.

Inspection of two categories of documents in Annex B

33 Mr Mohan submitted that soft copies of Annex B documents were given on 11 August 2006 and as such the AR was wrong to have allowed inspection of documents set out in Annex B when that had already been done. In reply, Mr Bull stated that as the Hard Disk was all the while retained by LPP, documents under category (a) would be stored on the Hard Disk. In the case of documents under category (e) of Annex B, the plaintiff's solicitors inspected the soft copies of the documents disclosed by the defendants on 31 May 2006. The defendants had provided hard copies of e-mails in their LOD. Some of those hard copy e-mails came with hard copies of attachments to the e-mails. However, when inspection was conducted, the soft copies of these e-mails did not have attachments. Woo Shu Yan, an associate of Mr Bull, attended inspection of the soft copies of the documents disclosed by the defendants in their LOD and SLOD. She filed an affidavit on 14 August 2006 to explain that the format of e-mails disclosed in the LOD and SLOD were different. The e-mails were created and sent in Microsoft Outlook format. Some 5,000 e-mails were produced by the Judicial Manager of OTN from the records of OTN in Microsoft Outlook format. According to Mr Bull, 55 of the 56 soft copy e-mails from the LOD which the defendants provided for inspection were in "text" or "html" formats that suggested that there was some reformatting of the original e-mails. It was contended that the change in format into "text", "notepad" or "html" format enables the e-mails to be altered. If original e-mails were produced in Microsoft Outlook format, it would have been possible to check when the e-mails were created and modified. It was also stated in Woo Shu Yan's affidavit that the defendants had not given proper inspection of the attachments to some e-mails. According to the plaintiff, the defendants have refused to produce the soft copies of the attachments. Consequently, the soft copies of the e-mails produced for inspection were not the same as the printouts. In response, Mr Mohan said that the e-mails were sent to the plaintiff. So it should have a copy of the e-mails received to compare for authenticity. That, in my view, was not a proper answer to inspection orders sought against the defendants.

34 Having affirmed the AR's finding that the Hard Disk was within the possession of LPP, on the overall evidence before me, an order for inspection of the files on the Hard Disk was an appropriate exercise of discretion given the unsatisfactory outcome of the inspection as described by the plaintiff (see [33] above). For the purpose of ordering inspection of discovered documents stored on the Hard Disk, it was necessary to produce the Hard Disk for disposing fairly of the cause or matter or for saving costs under O 24 r 13. Moreover, this was hardly a case in which consideration of inspection of the Hard Disk could be said to have been unnecessary for a fair disposal of the case in light of the plaintiff having complained openly that inspection thus far was unsatisfactory.

35 Finally, the only remaining issue that has to be considered is the appropriate safeguards or protocol for the access to and inspection of those electronic documents. A useful starting point in this inquiry is the case of *Derby No 9*, where Vinelott J noted as follows at 659:

*However, these problems arise not at the initial stage of discovery when disclosure must be made of the extent of relevant information recorded in a computer database, but when application is made for the production for inspection and production of a document. It is clear that in the light of the decision of the Court of Appeal in *Dolling-Baker v Merrett* [1990] 1WLR 1205, that the court has a discretion whether to order production and inspection and that the burden is on the party seeking inspection to satisfy the court that it is necessary for disposing fairly of the case or cause or matter or for saving costs. At that point, the court will have to consider, if necessary in the light of expert evidence, what information is or can be made available, how far it is necessary for there to be inspection or copying of the original document*

(the database) or whether the provision of print-outs or hard copy is sufficient, and what safeguards should be incorporated to avoid damage to the database and to minimise interference with everyday use, if inspection is ordered ... (Emphasis added).

36 In this connection, it would not be proper to order production for inspection of the Hard Disk to the plaintiff without safeguards being provided. Distilling the principles from recent cases, (particularly *Sony Music Entertainment (Australia) Ltd and Others v University of Tasmania and Others* [2003] FCA 532), at the end of the hearing, I included the following safeguards to para 5 of the November Order:

(i) the plaintiff do appoint a computer expert to make an exact copy of the hard disk of the Dell Laptop bearing service tag no. DDXW21S under the supervision of parties;

(ii) there be liberty to the defendants to object to the choice of appointment of the computer expert nominated by the plaintiff;

(iii) the computer expert is to give an undertaking of confidentiality to the Court;

(iv) the computer expert is to create an electronic copy from the cloned copy of the hard disk of the documents ordered to be discovered. This electronic copy is to be first made available to the defendants for review for the purpose of claiming privilege, if any, before release to the plaintiff for inspection. The defendants are to list the documents to which privilege is claimed; and

(v) liberty to apply.

37 Before I leave this topic under discussion, I would like to comment on Mr Bull's submission that inspection of the Hard Disk should include accessing the meta-data for electronic information on the discovered documents. In *Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd* (2006) FCA 1802, Tamberlin J helpfully at [11] explained what the term "meta-data" meant. He said:

The expression "meta-data", which is the subject of a substantial part of the claim for discovery in relation to electronic records, is a reference to electronic information created by and embedded in electronic documents in the form of electronic data. The term describes data contained within an electronic file relating to the identification, origin or history of the file itself. It is, in effect, electronic information about other electronic data. Meta-data can be used to ascertain the author and origin of a document, the existence of any attachments, and whether the document was sent or received by any particular individual. The information which is contained in the meta-data is not visible on a print-out of the relevant document, which shows only the fact content and does not disclose the layers of electronic data beneath the visually readable information.

38 Continuing, Tamberlin J went on to explain the utility of meta-data information:

[12] In the processing of the meta-data, advanced software may assist in ascertaining the provenance of a document and whether any alterations or deletions have been made to a document's original format. A new sector of the software industry has developed which provides methods of searching large fields of meta-data in a matter of seconds. These applications have proven invaluable to lawyers, particularly in complex litigation involving the collection and analysis of vast numbers of electronic communications.

[13] In addition, meta-data can also provide substantial assistance in managing large volumes of

documents and assisting with de-duplication, an electronic process by which software identified absolutely identical documents and “clusters” those which look like they are almost duplicates of each other. Evidence from Mr McCormack, a computer expert for Jarra, states that the provision of meta-data reduces the need to check for duplicate copies because it can be filtered electronically to ensure that similar documents are clustered. This eliminates the need for documents that only have immaterial difference to be examined for production.

39 Despite the nature and utility of meta-data information, I was not persuaded that, at this stage, there exists evidential basis for meta-data information. I was mindful that the court has to weigh the benefit and burden of the request and balance the needs of the cause or matter. It may be something for Mr Bull to reconsider after the documents under categories (a) and (e) of Annex B have been inspected and I say no more on the matter.

Issue 3: Costs order

40 There had been exchanges of correspondence between the respective law firms representing the plaintiff and the defendants regarding the various issues emerging out of the discovery process. The defendants appealed against 13 out of the 48 categories of documents ordered to be discovered by the AR as well as the order for inspection of five categories of documents. Although the appeal could have been conducted over a shorter period, it was not. At each adjourned hearing, the arguments exceeded the allotted hearing time. Supplemental submissions were tendered at each adjourned hearing. In the end, the plaintiff filed four sets of written submissions and the defendants filed five. I must clarify that I contributed in one respect to the workload having asked counsel to assist the court on the safeguards that could be put in place. I record my thanks and appreciation to counsel for their diligence and assistance in this matter. The all important issue of the Hard Disk was obvious. The plaintiff had identified the categories of documents in Annex A and Annex B that were stored on the Hard Disk. I awarded costs to the plaintiff as I had assessed the plaintiff to be the winning party. The costs order reflected the outcome, both overall on either side as well what was fair and reasonable in the circumstances. I hasten to add that there was no argument about the proportion of costs as between the parties. In addition, nothing significant that would have impinged on the principle of “costs to follow the event” was advanced. The challenge was on the quantum of costs payable to the plaintiff.

Conclusion

41 Accordingly, for the reasons set out above, I dismissed the appeal and ordered costs to be fixed at \$10,000 with disbursements to be taxed, if parties were unable to agree on the quantum of disbursements.

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