

## CASE NOTE: SINGAPORE

### CASE CITATION:

**Alliance Management SA v Pendleton Lane P and Another (The First Case: [2007] SGHC 133), (The Second Case: [2008] SGHC 76)**

### DATE OF VERDICT:

**22 August 2007, 3 June 2008**

### JUDGE:

**Belinda Ang J**

**The plaintiff was a shareholder of Orient Networks Holdings Ltd (ONH), a company with a wholly-owned subsidiary, Orient Telecommunications Networks Pte Ltd (OTN). ONH was in liquidation while OTN was under judicial management. The first defendant (LPP) was the co-chairman and executive director of ONH and a significant member of OTN's management team.**

The plaintiff sought to claim damages from the defendants for false misrepresentation for being induced into investing substantial sums of money in ONH and providing guarantees for ONH and OTN. Not satisfied with the discovery provided by the defendants, the plaintiff sought specific discovery pursuant to Order 24 rule 5 of the Rules of Court (ROC). The assistant registrar made an order (the Order) for:

- (a) LPP to produce and return to the judicial manager of OTN a hard drive previously assigned to him for his use (the Hard Disk); and
- (b) the defendants to:
  - (i) furnish a list and produce for inspection the documents described in Annex A of the Order; and
  - (ii) produce for inspection the documents described in Annex B of the same.

### The First Case

In the first case, the defendants brought an appeal against the Order which, amongst other things, entailed the inspection of material stored on the Hard Disk to OTM's judicial manager. Addressing the issue as to whether the assistant registrar was right to order the defendants to produce for inspection the Hard Disk and (as documents) e-mails received by the defendants, the judge restated the principles that material on a computer database constituted a 'document' within Order 24. The word 'document' therefore covered 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. Citing past cases, Ang J said that 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 or server computer. Therefore, put simply, the concept of 'document' embraced the Hard Disk for the purposes of Order 24 of the ROC.

The court must also 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 were and remain within LLP's possession, custody or power. Last, the court must be satisfied that the production and inspection was necessary for the fair disposal of the case or to save costs. In this regard, because of an earlier consent order made by the parties, the defendants were unable to offer explanations as to why the Hard Disk was not in LPP's custody. Based on the evidence, the court was satisfied that the Order was properly made. As the inspection of documents up to that point were not satisfactory, the exercise of the court's discretion to order the production of the Hard Disk was proper.

There is, however, 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. The burden is on the requesting party to establish that inspection of the documents is necessary for disposing fairly of the cause or matter, or for saving costs. Second, following from the first proposition, the inquiry in respect of the production of the documents for inspection is a far more intricate one, involving judicial balancing of the competing interests of the parties: that is, the requesting party's 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 sufficient 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.

Recognising difficulties with the discovery of documents within a computer database, Ang J however

placed safeguards to the Order, namely:

- (a) the plaintiff appoint a computer expert to make an exact copy of the hard disk under the supervision of the parties;
- (b) there be liberty to the defendants to object to the choice of appointment of the computer expert nominated by the plaintiff;
- (c) the computer expert is to give an undertaking of confidentiality to the court;
- (d) 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.

The judge declined to make any orders for meta-data requested by plaintiff's counsel until the documents had been inspected.

This decision was affirmed by the Court of Appeal.

### **The Second Case**

In the second case, because the defendants continued to be unable to produce the Hard Disk, the plaintiff filed to have the defence struck off. Ang J restated the law that the court's discretion to order 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.

The doctrine of issue estoppel prevented the defendants from further raising the issue on their inability to produce the Hard Disk. The defendant's unwarranted continued attack on the Court of Appeal decision constituted an abuse of process. The second matter that was taken into consideration was the defendant's deliberate attempt not to comply with the Hard Disk order. The learned judge concluded that there was a 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. Ang J concluded that the conduct of the defendants in the circumstances amounted to a contumacious disregard of the Hard Disk order and was grounds for regarding the defendants' overall conduct as an abuse of the process of the court. Accordingly, the defence was struck out and interlocutory judgement for the plaintiffs was entered with damages to be assessed.

### **Commentary**

The discovery of electronic documents including computer databases is clearly set in Singapore. However, the implementation of appropriate safeguards is also necessary. In addition, the status of meta-data has not been settled in Singapore. Finally, the consequence of non-compliance with discovery orders can have severe consequences.

*Bryan Tan is a member of the editorial board.*