

CASE NOTE: SINGAPORE

CASE CITATION:

Surface Stone Pte. Ltd. v Tay Seng Leon and another [2011] SGHC 223

NAME AND LEVEL OF COURT:

High court

DATE OF DECISION:

5 October 2011

MEMBERS OF THE COURT:

Shaun Leong Li Shiong AR

Electronic discovery; discovery and inspection of compound documents; principle of proportionality; inspection protocol

Facts

The first defendant is a former director and shareholder of the plaintiff. The second defendant is a former employee of the plaintiff. The plaintiff commenced action against the defendants for breach of duties which include misuse of confidential information, unlawful interference with the plaintiff's business, and acting against the interests of the plaintiff. The plaintiff subsequently made an application for specific discovery and inspection of the first defendant's personal laptop, hard disk and iPhone on the ground that the devices contained many undisclosed documents that would be material for the disposal of the issues at trial.

Issues

The High Court was called upon to decide on three significant issues. Issue 1: the relevancy of the devices sought to be discovered and inspected; Issue 2: whether there is a need to identify the classes of documents sought within the devices; and Issue 3: whether and when an inspection protocol would be implemented.

Holding

The court allowed the application for discovery and inspection of the first defendant's laptop and hard disk. The court held that there were grounds to believe that discovery of these devices had the potential to set off the train of inquiry, resulting in the obtaining of evidence that was directly relevant and necessary to resolve the pleaded issues.

However, it is significant to note that the discovery and inspection were not granted without limitations. The plaintiff's application was granted together with the requirement to implement an inspection protocol. In

particular, the court restricted the extent of discovery and inspection of the devices to relevant keyword searches.

As for the iPhone, discovery and inspection were not granted because the court was satisfied that the device was no longer in the first defendant's possession, custody or power.

Issue 1

The court decided that the laptop and hard disk were relevant and necessary as they contained directly relevant evidence that went towards resolving the pleaded issues. In arriving at this conclusion, the court first set out the analytical framework for determining the relevancy of documents sought to be discovered under O 24 r 5(3)(c) (the "train of inquiry" limb).

A document can be discovered under O 24 r 5(3)(c) if it is a document that may lead the party seeking discovery of it to a train of inquiry resulting in his obtaining information which may adversely affect his own case; adversely affect another party's case; or support another party's case. An applicant seeking for specific discovery must therefore show:

- (a) First, that the train of inquiry is one that would result in obtaining directly relevant evidence; and
- (b) Second, that the document sought to be discovered is one that may lead the party to that train of inquiry as set out above.

The court found that the test above was satisfied. Even though the devices sought to be discovered belonged to the first defendant personally, he had used them in the course of his employment. Hence, the devices would contain undisclosed e-mails and business documentation that were material for the disposal of the issues at trial.

Issue 2

The question arose as to whether and when applications for specific discovery pursuant to O 24 r 5(3)(c) must identify the class of documents sought after, failing

which the court would consider the application a fishing expedition. In addressing this issue, the difference between compound documents (storage mediums such as USB drives or iPhones), and discrete documents (distinct and individual documents) was highlighted.

The court held that although the essential document sought to be discovered was not the compound document itself, but the discrete documents found within it, the Rules of Court do not make any express distinction between a compound document and discrete documents. Hence, there is no requirement to specify the classes of documents sought for within the compound documents. It was sufficient that the plaintiff had specified the compound documents (the laptop, hard disk and iPhone) sought to be discovered. Also, given that compound documents often contain voluminous documents, it would not be practicable to require the plaintiff to specifically set out each and every classification of discrete documents sought for.

Issue 3

Finally, the court considered the issue of whether and under what circumstances it could and might be inclined to implement an inspection protocol on the parties.

Where the parties have agreed (either expressly or tacitly by conduct) to apply Part IVA Supreme court Electronic Practice Directions 3/2009 (“PD 3/2009”) to their discovery and inspection proceedings, the requirement of an inspection protocol is mandatory.

Even though the parties in the present case have not agreed to opt in to PD 3/2009, the court nevertheless exercised its common law discretion to require an inspection protocol to be applied. In cases where compound documents are sought to be inspected, the court will adopt a rebuttable presumption that an inspection protocol is necessary, since a review of the compound document in its entirety would be likely to be prejudicial to the party giving discovery in protecting his confidential and privileged information. The burden will be on the party seeking inspection to justify why the

protocol should not be required. The court justified this by drawing heavily on comparative jurisprudence and concluding that such a presumption accorded with the principle of proportionality. This presumption can be rebutted, for example, by showing that there are only a handful of documents in the compound document and the use of an inspection protocol would be costly and time-consuming. The principle of proportionality goes to the exact protocol to be implemented as well: the procedure applied will be tailored to the size of the dispute.

The court found that the plaintiff did not have sufficient grounds to rebut the presumption. The plaintiff had failed to adduce evidence from a digital evidence specialist to support its assertions that keyword searches are unlikely to effectively capture relevant information such as drawings and image files.

Commentary

This case clarifies the scope of discovery in relation to storage devices. More importantly, it portrays the court’s emphasis on ensuring that the discovery and inspection of compound documents are done proportionately. It is clear that the court is inclined to implement filtering mechanisms in the form of keyword search terms where compound documents are involved. In cases where parties have not agreed to opt in to PD3/2009, the court may nonetheless decide to exercise its powers to order compliance with the inspection protocol if it would reduce the likelihood of recovering voluminous electronic documents that are of marginal or of no relevance.

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