

SUPREME COURT OF SINGAPORE

21 February 2020

Case summary

Singapore International Commercial Court Suit Nos 7 to 9 of 2018 (Summons No 49 of 2019)

Hai Jiao 1306 Ltd and others v Yaw Chee Siew

Decision of Kannan Ramesh J

Outcome: The court ordered that the defendant comply with an order previously made on 30 September 2019 for discovery of documents in four repositories, failing which an adverse inference would be drawn. The defendant's position was that two of the four repositories were in fact the same device. The adverse inference was to be drawn against the assertion made by the defendant that he had used best endeavours to procure a mortgage over a hotel in Bintulu, East Malaysia ("the Hotel"), as well as the corresponding denial that any such breach had caused the plaintiffs to suffer loss and damage.

Background

1 This was an application by the plaintiffs for a peremptory order arising from the defendant's failure to comply with the Order of Court dated 18 July 2019 ("ORC 38/2019"). ORC 38/2019 was made in an earlier application by the plaintiffs for a peremptory order against the defendant. Both applications arose from the defendant's non-compliance with his obligations to give eDiscovery pursuant to an order made on 17 April 2019 ("the eDiscovery Order"). The eDiscovery order required the defendant to give specific discovery of electronically stored documents contained in a defined list of electronic repositories, including the defendant's email accounts. The search of the repositories was to be done using a search protocol which contained a list of specified search terms. The search terms included, *inter alia*, terms that were identified with a view to retrieving information related to the Hotel. The plaintiffs' case was that the Hotel was owned by a company related to Perdana ParkCity Sdn Bhd ("Perdana"). The defendant was the Executive Chairman of Perdana, which is a subsidiary of Yaw Holding Sdn Bhd, a company substantially owned by the defendant's family members.

2 The defendant was ordered to provide discovery in compliance with the eDiscovery Order by 2 May 2019, but failed to do so. Subsequently, despite the defendant's multiple requests for extensions of time, and the confirmations he provided both on affidavit and through his counsel that he had in fact complied with his eDiscovery obligations, it became apparent that he had not done so. This was considered in the context of the defendant's breaches of a further discovery order requiring that he disclose, *inter alia*, his assets, tax returns and bank account records.

3 The application was heard over three separate hearings; the hearings on 30 September 2019 and 10 October 2019 were relevant to the court's decision.

The court's decision

4 The court found on 30 September 2019 that the defendant's breaches of his discovery obligations were wide-ranging and egregious. One such breach pertained to two email

accounts he had at Perdana. The defendant argued for the first time that the information in these two email accounts were not within his power, such that he could not give discovery without Perdana's permission ([43]). The court held that the argument that the email accounts were not in his possession, custody or power was not open to the defendant, as one of the email accounts had been specifically referred to in ORC 38/2019. Any argument as to possession, custody or power ought to have been made then at the very least, if not even earlier when the eDiscovery Order had been made. ORC 38/2019 had been made on the basis that the email account was in the defendant's possession, custody or power. If this was the case, the defendant's other email account, which was also a Perdana email account, would be similarly regarded (at [43] to [45]).

5 In any event, the court found that the evidence showed the defendant did have power over the email accounts at Perdana. The defendant had an unfettered right and the practical ability to access the email accounts. The discovery order had also been made against the defendant personally, and it was for him to procure any approvals that may be necessary as a matter of corporate policy. The affidavits that had been filed did not present any basis to conclude that Perdana's permission was necessary or would be refused. The failure to disclose the documents contained in the email accounts at Perdana was therefore one way in which the defendant had breached his discovery obligations (at [46] and [47]).

6 ORC 38/2019 also required the defendant to provide discovery of the Apple Mac Desktop computer in his office (at [28]). He claimed that he had no recollection of this computer, which was not in his possession. This was not satisfactory as it had been incumbent on the defendant to take reasonable steps to locate the device (at [42(d)]).

7 Accordingly, on 30 September 2019, the court ordered ("ORC 51/2019") that the defendant state on affidavit the steps taken to locate or obtain the repositories no longer in his possession, custody and/or control. These included the Apple Mac Desktop computer as well as an "Apple-Mac computer using the operating system OS X 10.10". Further, in respect of eight specified repositories or categories of documents, including the email accounts at Perdana, the defendant was ordered to provide discovery by 7 October 2019. No order was made on the consequences of non-compliance at this point (at [49] and [50]).

8 In an affidavit filed in an attempt to comply with ORC 51/2019, the defendant stated that the Apple Mac Desktop in his office and the "Apple-Mac computer using the operating system OS X 10.10" were the same device ("the Apple desktop computer"), which was located in his Perdana office (at [52]). By the 10 October 2019 hearing, with the exception of the email accounts at Perdana, the Apple desktop computer and two other repositories, the remaining repositories had been provided to PricewaterhouseCoopers Malaysia (at [53]). The defendant maintained that the email accounts at Perdana could not be disclosed because Perdana had not allowed him to. As multiple orders had been made requiring that discovery be provided of the electronically stored documents in the email accounts at Perdana, the defendant was estopped from making the argument that the email accounts at Perdana were not in his possession, custody or control (at [55]). The same analysis would also apply to the Apple desktop computer (at [52]) as it was located in the defendant's office at Perdana.

9 The court ordered that the defendant provide discovery of the email accounts at Perdana and the Apple desktop computer by 18 October 2019 (at [56]). The court accepted that the information contained in the email accounts at Perdana would have been relevant to the efforts made by the defendant to obtain the mortgage over the Hotel. As such, the court ordered that the consequence of non-disclosure of the repositories with Perdana would be the drawing of an adverse inference that the defendant failed to exercise his best endeavours to procure the mortgage over the Hotel in favour of the plaintiffs, and that, but for such failure,

the mortgage would have been procured. The consequential inference was that such failure had occasioned loss and damage to the plaintiffs (at **[58]**).

This summary is provided to assist in the understanding of the Court's grounds of decision. It is not intended to be a substitute for the reasons of the Court. All numbers in bold font and square brackets refer to the corresponding paragraph numbers in the Court's grounds of decision.