Asian Corporate Services (SEA) Pte Ltd v Impact Pacific Consultants Pte Ltd and Others [2005] SGHC 138

Case Number : Suit 834/2004, SIC 5807/2004

Decision Date : 04 August 2005

Tribunal/Court : High Court

Coram : V K Rajah J

Counsel Name(s) : Koh Kok Wah, Andy Leck and Dinesh Dhillion (Wong and Leow LLC) for the plaintiff; Salem Ibrahim and Shankar Kumar (Salem Ibrahim and Partners) for the first, second, and fourth to seventh defendants; Jimmy Yim SC and Kelvin Tan (Drew and Napier LLC) for the third defendant

Parties : Asian Corporate Services (SEA) Pte Ltd — Impact Pacific Consultants Pte Ltd; Impact Pacific Management Pte Ltd; Eastwest Management Ltd (Singapore Branch); Fullcircle Pte Ltd; Duncan Samuel Rothwell Merrin; Norhayati Bt Malek; Mark Justin Baile

Civil Procedure – Anton piller orders – Application to set aside order granted on allegation of conspiracy to injure applicant's business – Whether prima facie case of conspiracy established – Whether very serious damage sustained in absence of grant of order – Whether real risk of destruction of evidence existing – Whether effect of order excessive or disproportionate to its legitimate goal – Whether applicant making proper enquiries before making application for order

4 August 2005

V K Rajah J:

1 Steven Gee in *Commercial Injunctions* (Sweet & Maxwell, 5th Ed, 2004) at para 17.020, p 495 states:

> Search orders unleash consequences which are irreversible and of great importance to everyone involved. It may at a stroke destroy the defendant's business and replace it with a hope of compensation available only at the end of protracted litigation.

Search orders in civil proceedings, commonly known as Anton Piller orders, must be sought only after much deliberation and with the exercise of great circumspection. They will normally only be granted in extreme cases where a grave danger of property being smuggled away or an imminent risk of vital evidence being destroyed prevails: see Lord Denning MR in *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55 at 61. The modern search order was first employed by the sound recording industry in England to combat clandestine counterfeit and bootleg practices. When the usage of these search orders became widespread in other matters in the 1980s, the courts in several jurisdictions took great pains to proscribe the cavalier approach to them as weapons of first resort. Parties and their advisers have been repeatedly admonished for attempting to deploy this unique and potentially devastating remedy without adequate justification. The present application is in some respects illustrative of a somewhat careless and unrestrained approach in employing the search mechanism, given that it has been invoked here as a powerful primary investigatory tool rather than as a safeguard of last resort.

The factual matrix

2 The plaintiff is a private limited company incorporated in Singapore, its principal activity being the provision of business management and consultancy services for companies in Singapore and Southeast Asia. These services include the incorporation of Singapore and offshore companies, opening of bank accounts, provision of nominee directorships, appointment of local agents for foreign

branches of companies, nominee shareholder appointments, company secretarial and administration services, preparation of monthly management accounts and general accounting services. The plaintiff enjoys an annual turnover of approximately $800,000 to $900,000 and has a current staff strength of about six persons.

3 The fifth defendant was the major shareholder and the managing director of the plaintiff until European Trust Company Ltd ("ETC"), a New Zealand company, purchased his shares. The acquisition by ETC was effected progressively over a three-year period from 2000 to 2002. In the meantime, the fifth defendant continued to be employed as the managing director of the plaintiff and he had *de facto* control of all business operations. He remained the managing director of the plaintiff until 30 June 2004. The sixth defendant is the wife of the fifth defendant and was employed by the plaintiff as a marketing coordinator from 10 August 1994 to 31 October 2003. The seventh defendant, a permanent resident, is a director of the first and second defendants and a shareholder of the second defendant. From May to July 2002, the plaintiff employed him on a part-time basis.

4 On 30 June 2003, the fifth defendant informed the plaintiff that he intended to leave the plaintiff's employment permanently. The fifth defendant was then asked if he was leaving to join a competitor, as this would naturally affect the plaintiff's decision concerning whether or not to retain him as a director pending the arrival of his replacement. His response was negative.

5 Some of the plaintiff's new management nonetheless entertained suspicions that the fifth, sixth and seventh defendants were siphoning away business from the plaintiff and that they were in effect engaged in directly competing businesses. They came to the conclusion that the fifth defendant was selective with whatever information he chose to provide them with. Acting on this, they began a review of the plaintiff's billings for the preceding three years to identify "lost clients". While a private investigator was employed by the plaintiff to gather evidence against the fifth and sixth defendants in particular, the fifth defendant's electronic mail was also covertly analysed by computer forensic experts. The plaintiff claims that various electronic mail messages and documents it has managed to retrieve prove that the fifth and sixth defendants, while still in the plaintiff's employ, had been actively involved in setting up the first, second, third and fourth defendants as competing entities, thereby diverting business and customers away from the plaintiff. The plaintiff asserts that since January 2003, several of the plaintiff's former customers had transferred their business relationships to one or more of the first, second, third and fourth defendants.

6 The plaintiff's investigations allegedly also reveal the following facts. The first defendant is a limited exempt private company incorporated in Singapore, with its principal activity being business management and consultancy services. The second defendant is a private limited company incorporated in Singapore, its principal declared activity being the development of software and multimedia works (including software maintenance). Both companies share the same registered office. The third defendant is the Singapore branch of a company incorporated in England on 29 May 2003 and registered in Singapore on 22 July 2003. It declares itself a general commercial company offering, *inter alia*, business and management consultancy services. The fourth defendant is a limited private company incorporated in Singapore, its principal activity being that of a business and corporate advisor. Both the third and fourth defendants also share the same registered office that adjoins the office of the first and second defendants. The fifth and sixth defendants have been directors of the third defendants since 26 June 2003. The fifth and sixth defendants have also been directors and shareholders of the fourth defendant since 14 June 2003. The investigations purportedly further reflect that the first defendant and/or the third defendant had, through the fifth defendant, established a business relationship with a corporate service provider in Dubai.

7 The plaintiff contends that the first, second, third and fourth defendants have in their

possession and custody documents shedding light on all seven defendants' conspiracy to injure the plaintiff, on the fifth and sixth defendants' breach of contract and finally on the fifth defendant's breach(es) of fiduciary duty to the plaintiff. Given that the first, second, third and fourth defendants appear to be under the control of the fifth defendant, who assumes a central role in the factual matrix, the plaintiff expresses deep consternation over his conduct. It has voiced what it claims are real and justifiable concerns that upon litigation commencing in Singapore against the defendants for their various breaches of duty, the defendants may very well destroy, conceal or misplace relevant and/or incriminating documents.

8 The plaintiff finally asserts that the actual and continuing damage to its business is *extremely* serious. The plaintiff's customer base, which the defendants have deliberately combined and conspired to divert to one or more of the first to fourth defendants, constitutes a significant source of the plaintiff's business. This in turn has seriously impacted the plaintiff's business and revenue.

The search order application

9 On 15 October 2004, the plaintiff's solicitors applied *ex parte* for search orders against all the defendants. The alleged causes of action were breaches of directors' fiduciary duties and a "conspiracy" to injure the plaintiff's business. Plaintiff's counsel alleged at the initial hearing that the case was primarily against the fifth, sixth and seventh defendants and that the fifth defendant was the key person in the whole matter. The third defendant was perceived merely as the Singapore branch of a foreign company in which the fifth and sixth defendants are directors. The plaintiff claimed that the fifth defendant worked for the third defendant while still in the plaintiff's employ. This was done without disclosure to or consent from the plaintiff".

10 The plaintiff insisted that there was an imminent risk of destruction of the documents, as the fifth defendant had already erased material information from his personal computer before returning it to the plaintiff. The application was adjourned to 18 October 2004 to allow the plaintiff to provide further and more precise information of the alleged breaches. This was duly supplied and search orders against all the defendants were granted on 18 October 2004. In so far as the plaintiff's allegations against the third defendant are concerned, the plaintiff alleged in its "summary of key evidence" that there were two documents suggesting the deliberate transfer of its business to the third defendant. First of all, a BizNet Instant Information search showed that the fifth and sixth defendants were the third defendant's Singapore directors as from 26 June 2003, while still in the plaintiff's employ. Secondly, in an electronic mail dated 3 September 2003, the fifth defendant identified himself as "m-director" of the third defendant. This presumably meant that the fifth defendant was holding himself out as its "managing director".

11 The execution of the search orders was uneventful. The supervising solicitors confirmed that the defendants had co-operated with them. The seized documents and computer records were thereupon retained by the supervising solicitors as directed.

12 The defendants subsequently appointed solicitors. Except for the third defendant who was separately represented, the other defendants collectively employed a single solicitor. Counsel for the third defendant, Mr Jimmy Yim SC, emphasised that the fifth and sixth defendants neither owned nor controlled the third defendant and were in point of fact merely its employees. The third defendant, he added, was not in competition with the plaintiff and purely serviced related entities.

13 The third defendant's application to set aside the search order was eventually heard on 17 February 2005. At the conclusion of the hearing, I agreed with Mr Yim's persuasive arguments and

set aside the order against the third defendant. I also directed that an inquiry be made as to any damage sustained by the third defendant, such inquiry to be held after the trial. The plaintiff now appeals against my decision setting aside the search order apropos the third defendant. In so far as the remaining defendants are concerned, the parties have reached an agreement to allow the original orders to stand, while preserving their respective positions pending the trial.

The third defendant's case

14 The third defendant claims to belong to a stable of companies ("the Group") with substantial online and investment business interests. These interests purportedly cover diverse jurisdictions stretching from Fiji to Africa. The administrative support centres for the Group are in London and Singapore. The Group claims to have spent some 24 million Swiss francs on information technology infrastructure and services alone in 2003 and 2004. In addition, it also incurred expenses during the same period to the tune of about S$5m on advisory, legal and accounting services for a proposed initial public offering. As part of its due diligence, the third defendant obtained legal opinions from a number of well-known international law firms to test waters on the viability of its proposals. In short, the Group unequivocally claims that given its very substantial and legitimate business interests of its own, it is not a competitor of the plaintiff and has no commercial interest in the business or clients of the plaintiff.

15 The third defendant steadfastly maintains that it is essentially a non-profit-generating cost centre for the Group providing corporate secretarial and accounting services, legal services, public relations and strategic business consultancy services exclusively to the Group. It is one of the Group's four operating divisions and though funded by the Group, operates on a shared costs model with other entities within the Group. The third defendant employs a financial controller and accountants who supervise and collate the accounts and budgets of the various entities in the Group. In addition, the third defendant unequivocally asserts that it does not offer corporate secretarial and accounting services to entities outside the Group and that the plaintiff would never have been awarded the Group's business; to that extent, the fifth defendant's appointment to the third defendant's branch in Singapore is immaterial. In support of its contentions, the third defendant cites a Group policy dictating that this variety of services is to be performed in-house, whenever possible. The fifth defendant, it claims, is employed merely to assist in corporate and administrative functions, while the Group also employs three legal counsel to attend to its legal affairs. It emphasises that the documents seized during the search order conclusively demonstrate that the third defendant does not offer corporate, secretarial or accounting services to third parties. The third defendant repeatedly stresses that the plaintiff's concerns and assertions about it being a competitor are wholly misplaced. It claims that the plaintiff is tilting at windmills.

16 The third defendant explains that the fifth defendant has been employed by the third defendant primarily because of his existing personal relationship with the Group's chairman, Mr Gregg Kennedy ("Mr Kennedy"). Mr Kennedy spends a substantial amount of time in London and Singapore where he has permanent offices. The fifth defendant has also been entrusted with the primary task of managing the Group's substantial offshore funds. His role, it is claimed, is "entrepreneurial" and not "administrative". The Group, it reiterates, is not engaged in any manner of strategic competition with the plaintiff; it has no interest in entering the general corporate secretarial and services market; and the fifth defendant was not engaged to "divert" the plaintiff's business to the third defendant.

17 I am persuaded and satisfied, *prima facie*, that the fifth defendant is by no means the operating mind of the third defendant. He is an employee – a functionary attending to administrative tasks and policy directives from the Group's management. The monetary returns from the third defendant's contributions to the Group arising from its administrative services for the relevant period

appear to be valued at a mere $19,000.

18 When I queried plaintiff's counsel, Mr Andy Leck, whether he was in a position to refute the third defendant's assertions, his response was at best non-committal. He stated, "We do not know." He candidly conceded, however, that the fifth defendant is an "employee" of the third defendant. I pause here to highlight that when the plaintiff initially obtained the Anton Piller orders against, *inter alia*, the third defendant, the plaintiff's present general manager affirmed facts to the contrary. In an affidavit, he claimed that the "1st, 2nd, 3rd and 4th defendants appear to be under the control of the 5th defendant". Mr Leck also acknowledged that there was no evidence of the third defendant providing services to companies or entities outside the Group. Mr Leck nevertheless contends that the fifth defendant was duty-bound to make disclosure to the plaintiff of his activities *vis-à-vis* the third defendant at the material time. He omitted to do this. He also reiterated that the third defendant shared the same premises as the first, second and fourth defendants. This, Mr Leck argues, pointed incontrovertibly to the third defendant's inextricable involvement and complicity in the fifth defendant's conspiracy to divert business to the third defendant from the plaintiff. I was not impressed by these contentions, as they appear to be grounded more in legal Micawberisms than in reality.

Legal criteria for a search order

19 It is stated in the report of a committee appointed by the Judges' Council to report on "the practical operation of Anton Piller orders" and chaired by Staughton LJ (Lord Chancellor's Department, 1992) at para 2.3 that:

> *The overriding principle upon which the grant of these orders ought … to be based is that of necessity*. No such order ought to be made unless it is necessary in the interests of justice. No order ought to be made in wider terms than is necessary to achieve the legitimate object of the order. [emphasis added]

Steven Gee ([1] *supra*) points out at para 17.017, pp 491–492 of his book:

> In *Anton Piller KG v Manufacturing Processes Ltd*, Ormrod L.J. specified "three essential pre-conditions" for the making of the order, namely:
>
> (1) there must be "an extremely strong *prima facie* case";
>
> (2) the damage, "potential or actual", must be "very serious" for the applicant;
>
> (3) there must be "clear evidence" that the defendants have in their possession "incriminating documents or things" (which was the subject-matter sought to be preserved in that case) and that there is a "real possibility" that the defendants may destroy such material before any application *inter partes* can be made.
>
> The Staughton Committee report (para.2.8) added a fourth precondition, namely that "The harm likely to be caused by the execution of the Anton Piller order to the respondent and his business affairs must not be excessive or out of proportion to the legitimate object of the order."

Is there a prima facie case?

20 The primary planks of the plaintiff's arguments in seeking to maintain the relief against the third defendant are encapsulated in the following paragraphs pleaded in the Statement of Claim:

> [T]he Plaintiff discovered that since the Plaintiff *has lost customers* to the 1st and/or 2nd and/or *3rd* and/or *4th Defendants* as a result of the 1st to 7th Defendants' breaches and/or unlawful acts and means by which the Plaintiff was injured.
>
> …
>
> Since on or about 2002 todate, the *1st to 7th Defendants* (or any two or more together) wrongfully and with intent to injure the Plaintiff and/or to cause loss to the Plaintiff *by unlawful means conspired and combined together to injure the Plaintiff*.
>
> [emphasis added]

These particular assertions are devoid of any pertinent particulars pertaining to the third defendant's specific complicity in the alleged conspiracy. In any conspiracy allegation, it is essential that the claimant asserts and proves that the tortfeasors involved agreed to injure the claimant and that acts done in execution of the agreement have resulted in damage to the claimant: *Halsbury's Laws of England*, vol 45(2) (Butterworths, 4th Ed Reissue, 1999) at para 697. Particulars ought to accompany and substantiate any such claim. It is quite apparent that the plaintiff has considerable difficulty in pinpointing what its precise claim against the third defendant is.

21 Upon closer analysis, it is apparent that the sum total of the plaintiff's evidence against the third defendant appears, at best, threadbare. At the *ex parte* stage, the allegations against the third defendant were that:

> The investigations and review revealed, amongst others, that since January 2003, several of the *Plaintiff's customers had moved over* to the 1st and/or 2nd and/or 3rd and/or 4th Defendants …
>
> … The 5th Defendant also chose to direct *potential new business* away from the Plaintiff to the 1st, 2nd, 3rd and 4th Defendant[s].
>
> [emphasis added]

22 In opposing the third defendant's application to set aside the order, the plaintiff attempted diffidently to elevate these allegations and tentatively asserted in an affidavit that:

> *[T]he 3rd Defendant chose to engage the 5th Defendant to conduct its business whilst they were well aware that he was in the Plaintiff's employ*. Furthermore, the 5th Defendant utilised the time and resources of the Plaintiff in servicing the 3rd Defendant. Surely it cannot lie in the mouth of the 3rd Defendant to contend that their activities are confidential to the Plaintiff in these circumstances. …
>
> *[T]he 3rd Defendant's activities are corporate secretarial and accounting functions*. These services are provided by the Plaintiff. Hence, *it is clear that the 5th Defendant by accepting a Directorship position in the 3rd Defendant was placing himself in a position of conflict with the Plaintiff. He claims that the Group would never have engaged the services of the Plaintiff. What efforts did the 5th Defendant undertake to bring the business to the Plaintiff?* Why did the 5th Defendant not disclose this opportunity to provide corporate secretarial services to the Group to the Plaintiff's board? *The Defendants conspired to keep this business within the so called Group at the expense of the Plaintiff*.
>
> [emphasis added]

23 I do not find these contentions particularly helpful. While the plaintiff is certainly entitled to query the fifth defendant, this does not in itself afford a legitimate foundation for a charge of conspiracy to divert related work away from the plaintiff. Admittedly, such queries posed by the plaintiff may well culminate in demonstrating that the fifth defendant was not completely candid with the plaintiff and might arguably also be in breach of his general fiduciary obligations to the plaintiff. It is however quite another matter to allege that the third defendant itself was at the heart of a conspiracy and/or played a role in diverting the plaintiff's business. There is simply no cogent evidence that the plaintiff serviced the Group prior to the fifth defendant joining it. Nor has the plaintiff been able to adequately counter the third defendant's stance that it is merely serving related entities and would have done so regardless of the fifth defendant's role in its Singapore branch. That said, I want to establish that I am not expressing any concluded views on this issue. This much, however, is plain: The plaintiff's hypotheses, suppositions, assumptions and concerns cannot cumulatively add up to a *prima facie* case of conspiracy involving the third defendant. I am not satisfied at this juncture that the third defendant's provision of services to the Group can even begin to ground a legitimate claim against it as distinct from any claims that may be levelled against the fifth and sixth defendants in their personal capacity.

Absence of serious damage

24 It is incumbent upon a party seeking either to procure or maintain a search order to demonstrate that "very serious" damage would be sustained in the absence of such a remedy: *Anton Piller KG v Manufacturing Processes Ltd* ([1] *supra*) at 62. In this case, the apparent loss to the plaintiff is the business of the Group represented by the fees collected by the third defendant. The plaintiff does not dispute that this adds up to a grand total of $19,000 for the relevant period. This cannot, in the present context, be characterised by any measure as serious and/or irremediable damage to the plaintiff. At the very most, this might, if anything, represent a modest proportion of the plaintiff's annual turnover. Furthermore, such an alleged loss is something that can be both objectively measured and ultimately financially assessed if the plaintiff's claim against the third defendant is upheld. At or before the trial, the third defendant will have to make proper disclosure of the relevant facts. It appears to me that even using the most generous yardstick, any alleged loss of business to the plaintiff as a result of the third defendant's role in the alleged conspiracy can only be regarded, in the final analysis, as quite inconsequential.

Real risk of destruction of evidence

25 The plaintiff has to persuade the court that there is "solid evidence" of a real risk that the third defendant would destroy or remove documents if not for the search order: *Petromar Energy Resources Pte Ltd v Glencore International AG* [1999] 2 SLR 609.

26 Generally speaking, the fact that a party has acted inappropriately in one context does not *per se* inexorably lead to the conclusion that it will destroy evidence as a matter of course. For example, in *Expanded Metal Manufacturing Pte Ltd v Expanded Metal Co Ltd* [1995] 1 SLR 673 at 683, [24] and [27], it was observed that the mere fact that the defendant was selling infringing items did not ineluctably lead to the conclusion that it would then go on to destroy evidence should litigation against it be initiated. Significance was also accorded to the fact that the defendants were carrying on their business openly.

27 In this case, it would also appear that the fifth and sixth defendants' involvement with the third defendant is not, strictly speaking, a clandestine affair. They have, broadly speaking, made no attempt to conceal their relationship. It is a matter of public record that they have been directors of the third defendant since 26 June 2003. Most of the documents generated by the third defendant in

relation to its statutory corporate and secretarial functions must as a matter of obligation be properly maintained. Simply because the fifth defendant may have deleted *his* personal computer records and may not have been completely candid with the plaintiff, does not mean that I am prepared to conclude, or even to assume, that the third defendant will similarly either tamper with or destroy relevant evidence. In the absence of contrary evidence from the plaintiff, I accept the third defendant's assertion that it is in effect controlled by its London office and Mr Kennedy and not by the fifth defendant.

Disproportionate effect of search order

28 The effect of a search order must not be excessive and/or disproportionate to the legitimate goal of the order. In *Lock International Plc v Beswick* [1989] 1 WLR 1268 at 1281, Hoffmann J (as he then was) observed with his customary acuity:

> [T]here must be *proportionality* between the perceived threat to the plaintiff's rights and the remedy granted. The fact that there is overwhelming evidence that the defendant has behaved wrongfully in his commercial relationships does not necessarily justify an *Anton Piller* order. *People whose commercial morality allows them to take a list of the customers with whom they were in contact while employed will not necessarily disobey an order of the court requiring them to deliver it up. Not everyone who is misusing confidential information will destroy documents in the face of a court order requiring him to preserve them*. [emphasis added]

Hoffmann J's observation was approved by L P Thean J (as he then was) in *Computerland Corp v Yew Seng Computers Pte Ltd* [1991] SLR 247 at 257–258, [22]–[23].

29 On the present facts, it appears that the plaintiff cannot now dispute the amount of Group business currently undertaken by the third defendant. Further information can be sieved or gleaned through the various procedural mechanisms integral to the framework of the interlocutory regime. There is no pressing or compelling reason to maintain the search order purely to preserve evidence of these facts. Neither the Group nor the third defendant has given the plaintiff any legitimate basis to conclude that relevant records will not be properly maintained. To reiterate a point made earlier, the fact that the fifth defendant may have consciously erased records of his relevant dealings and communications from the plaintiff's computer does not *per se* afford compelling evidence that the management of the third defendant and/or the Group will follow suit. The Group appears to have spent considerable effort and money in its exploratory attempts to seek an initial public offering. This was done well before the execution of the search order. The Group also appears to be willing to place itself under the scrutiny of the court in these proceedings. In the circumstances I am persuaded that the potential damage to the Group, should the search order be maintained, is wholly disproportionate to any "benefit" that the plaintiff might conceivably receive, should the plaintiff succeed hereafter in cobbling together a *prima facie* case against the third defendant. Given that the third defendant has unambiguously declared its independent standing and its precise relationship with the Group, I cannot help but be perturbed by the plaintiff's inability to elevate its variegated and vague contentions into more concrete and precise claims.

30 In its written skeletal submissions, the plaintiff states that it is "only interested in seizing documents that show the 5th Defendant was working with the 3rd Defendant while still in the Plaintiff's employ. … The 3rd Defendant had clearly conspired in this because Greg Kennedy was all along aware that the 5th Defendant was still the Plaintiff's Managing Director". This hardly forms a justifiable basis for the granting and/or preservation of a search order. The plaintiff has not adduced any persuasive reasons why the third defendant may not make available pertinent evidence at the trial. If the third defendant fails at that juncture to produce the relevant documents, the court could

and would rightly make every presumption in favour of the plaintiff: see *Computerland Corp v Yew Seng Computers Pte Ltd* ([28] *supra*) at 255, [16], *per* L P Thean J. It is plain that the plaintiff has failed to appreciate and/or is unwilling to acknowledge that the third defendant has unambiguously declared that it was indeed servicing the Group while the fifth defendant was concurrently employed by both the plaintiff and by it.

Absence of proper enquiries

31 It is trite law that an applicant must make proper enquiries before making an application. As Ralph Gibson LJ stated in *Brink's Mat Ltd v Elcombe* [1998] 1 WLR 1350 at 1356–1357:

> The applicant *must make proper inquiries* before making the application: see *Bank Mellat v. Nikpour* [1985] F.S.R. 87. The duty of *disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.*
>
> …
>
> The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J. of the possible effect of an *Anton Piller* order in *Columbia Picture Industries Inc. v. Robinson* [1987] Ch. 38; and (c) the degree of legitimate urgency and the time available for the making of inquiries: see *per* Slade L.J. in *Bank Mellat v. Nikpour* [1985] F.S.R. 87, 92–93.
>
> [emphasis added]

This duty of enquiry extends not only to known material facts but also to facts that ought to be known if proper and/or adequate enquiries had been carried out: see also *Tay Long Kee Impex Pte Ltd v Tan Beng Huwah* [2000] 2 SLR 750 at [21].

32 It appears that the plaintiff all too readily concluded, alas with regrettable alacrity and a sheer lack of diligence, that the directorships of the fifth and sixth defendants in the third defendant were *per se* sufficient to taint it with complicity in the alleged conspiracy. This is a wholly insufficient premise to proceed on. It is apparent that the plaintiff had more than ample time to make proper enquiries about the Group. Indeed, the third defendant points out that the Group structure was outlined in one of the documents which the plaintiff's forensic expert retrieved from the fifth defendant's personal computer. The plaintiff and its advisers ought to have more painstakingly inquired into and evaluated the ownership structure of the third defendant, not to mention the precise relationships between the various defendants and the Group. The plaintiff further contends, rather alarmingly, that the search order "is a legitimate attempt to *investigate and to determine what exactly* is the business that the third defendant does on behalf of the Group" [emphasis added]. I categorically reject such a proposal. Such a purpose does *not* by any means provide a legitimate basis for the making and/or preservation of a search order. A search order is meant, *inter alia*, to secure evidence when there is a real and imminent risk that such evidence might be destroyed or tampered with. It should never be deployed as a primary investigatory tool to prise open facts that might otherwise be obtained with proper recourse to conventional civil procedure processes. To allow a search order to be used purely or even primarily as an investigatory procedure amounts to nothing short of an abuse of process.

Conclusion

33 A court is entitled to look collectively at all the failings in a search application in order to determine whether or not to discharge it: *The Gadget Shop Limited v The Bug.Com Limited* [2001] FSR 383.

34 It appears that the crux of the plaintiff's grievance against the third defendant is that it knowingly employed the fifth defendant while he was in the plaintiff's employ and while the third defendant itself appeared to be providing secretarial cum corporate services. Unfortunately, the bare facts boldly tendered by the plaintiff to substantiate its claim lack against the third defendant resemble the emperor's new clothes. They lack substance.

35 A search order is an exceedingly serious remedy – never to be granted and/or preserved as a matter of course. In the vast and varied armoury of civil procedure remedies, the search order has been rightfully likened to a nuclear weapon. Like a nuclear weapon it leaves in its wake massive and sometimes irreversible repercussions. Such a remedy should never be resorted to without very careful consideration and due diligence. The amount of due diligence will of course have to depend on the time available and/or the urgency involved. A party seeking such recourse should wherever and whenever possible rely on unassailable, established facts, as opposed to mere conjecture or nebulous "reading between the lines".

36 Inferences, assumptions and suppositions must never be allowed to become the hallmark of an application for a search order. An overly suspicious stance compounded by hazy inferences is hardly an adequate or satisfactory substitute for concrete credible facts. A blunderbuss approach indiscriminately targeting all parties connected with an alleged wrongdoer must be avoided at any cost. On the contrary, the identification of alleged wrongdoers mandates something akin to a laser-like approach. The remedy must be carefully tailored to precisely fit and suit the circumstances. The plaintiff completely fell short of such requirements in its application against the third defendant. It appears to me that it has, with neither adequate nor proper diligence, concluded that all those associated with the fifth defendant are fellow travellers. This is an entirely misguided assumption. The plaintiff's case rests primarily on what it perceives as the critical fact that the fifth defendant was concurrently a director of both the plaintiff and the third defendant, while he was transacting business for the Group and/or the third defendant. The point that the plaintiff has altogether missed is that the fifth defendant is neither the controlling mind nor even a key player in the third defendant and/or the Group. He is but an employee. To that extent, neither this critical fact nor any of the other circumstances alleged by the plaintiff stacks up to inculpate the third defendant in the alleged conspiracy to injure the plaintiffs.

37 The plaintiff must now face the consequences of its erroneous approach and make reparation to the third defendant. The failure to adequately delve into and present actual facts has mortally impaired the plaintiff's ability to fairly and credibly present all the relevant facts. It is not enough that there may have been a basis to obtain search orders against some of the other defendants. There must be adequate justification to procure such an order against each and every one of the defendants in these proceedings. In so far as the third defendant is concerned, any such justification appears to be conspicuously absent. The search order is an *extreme* remedy to be invoked only in *extreme* cases. The plaintiff's present contentions against the third defendant do not measure up cumulatively to create so much as an illusion of a reasonable case, let alone an extreme case.

38 I conclude, as I began, by once again referring to the classical exposition of the appropriate principles as succinctly summarised by Lord Denning MR in *Anton Piller KG v Manufacturing Processes Ltd* at 61:

> [A search order] should only be made *where it is essential that the plaintiff should have inspection so that justice can be done between the parties*: and when, *if the defendant were forewarned, there is a grave danger that vital evidence will be destroyed*, that papers will be burnt or lost or hidden, or taken beyond the jurisdiction, and *so the ends of justice be defeated*: and when *the inspection would do no real harm to the defendant or his case.* [emphasis added]

Order against the third defendant set aside.

Copyright © Government of Singapore.