K Solutions Pte Ltd v National University of Singapore
[2009] SGHC 143

Case Number : Suit 5/2007, RA 432/2008

Decision Date : 16 June 2009

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Lok Vi Ming SC, Audrey Chiang and Chu Hua Yi (Rodyk & Davidson LLP) for the plaintiff/appellant; Cavinder Bull SC and Lim Gerui (Drew & Napier LLP) for the defendant/respondent

Parties : K Solutions Pte Ltd — National University of Singapore

Civil Procedure – Striking out – Principles governing court's exercise of discretion – Destruction of documents before and after commencement of action – Basis of court's power to order striking out

Civil Procedure – Striking out – Principles governing court's exercise of discretion – Destruction of documents before and after commencement of action – Factors to be considered in making decision to order striking out – Intention behind destruction

Civil Procedure – Striking out – Principles governing court's exercise of discretion – Destruction of documents before and after commencement of action – Factors to be considered in making decision to order striking out – Whether possibility of fair trial was determinative factor

Civil Procedure – Striking out – Principles governing court's exercise of discretion – Plaintiff deliberately suppressing documents in discovery process – Whether striking out of statement of claim and defence to counterclaim justified

16 June 2009

Woo Bih Li J:

Introduction

1 On 3 October 2008, the defendant, National University of Singapore ("NUS") applied by way of Summons No 4335 of 2008 ("Summons 4335/08") to strike out the Statement of Claim (Amendment No 3) of the plaintiff K Solutions Pte Ltd ("KS") and, in respect of NUS' counterclaim, to strike out KS' defence to counterclaim and for judgment to NUS for damages to be assessed and judgment for specific sums. NUS' grounds were that KS had destroyed and continued to destroy relevant documents in the action, suppressed discovery and/or had been in contumelious disregard of its discovery obligations and/or had lied about its failure to make proper discovery and/or that there was a serious or real risk that a fair trial of the action might no longer be possible. On 14 November 2008, an assistant registrar granted NUS' application. KS then filed an appeal by way of Registrars' Appeal No 432 of 2008 ("RA 432/08") which I heard. On 16 March 2009, I dismissed the appeal.

2 On 23 March 2009, KS' solicitors made a written request for further arguments. At the same time, an application by way of Summons No 1336 of 2009 was filed for KS to adduce additional evidence at the intended hearing of further arguments. NUS opposed the request for further arguments and the application to adduce additional evidence.

3 On 6 April 2009, I heard arguments on KS' application and dismissed it. I also decided that I would not hear further arguments in respect of RA 432/08.

4 KS has appealed against my decision in RA 432/08.

Background

5 I set out below the following additional definitions for easy reference:

"AL"	-	Albert Lim, managing director of KS
"D&N"	-	Drew & Napier, solicitors for NUS
"Faith"	-	Faith Koh, a KS staff
"MCS"	-	Margaret Cato-Smith who was project manager of KS
"M Rasa"	-	Mohan Rasa s/o Rasalingam, finance manager of KS
"R&D"	-	Rodyk & Davidson, the current solicitors of KS
"SLP"	-	Shaw Lay Pheng, deputy registrar at Registrar's Office of NUS
"TKO"	-	Tan Keng Oon, manager of KS
"ISIS"	-	integrated student information system
"WMR"	-	Wayne Michael Revell who was KS' manager for South Asia, Higher Education

6 KS' business includes the development and maintenance of software. NUS, as the name suggests, is a national institution of higher education.

7 In April 2005, KS entered into a contract with NUS for the supply, delivery, development, configuration, installation, testing and commissioning of a fully operational, integrated, web-based ISIS and hardware architecture ("the Project"). This was a fixed price contract for $14,246,645.54.

8 NUS alleged that in mid June 2006, KS had informed it that KS had financial difficulties which prevented it from continuing with the Project. By 31 August 2006, all of KS' staff had moved out of the offices provided by NUS for the Project. NUS also alleged that by 11 September 2006, all but three of KS' staff for the Project had stopped work on the Project.

9 On 20 September 2006, NUS issued a written notice requiring KS to cure its defaults. On 6 October 2006, NUS terminated KS' contract for the Project.

10 On 4 January 2007, KS commenced action against NUS for wrongful termination and claimed primarily damages of $30,773,965 or damages to be assessed. In turn, NUS counterclaimed damages of $6,516,498, or damages to be assessed and various specific sums.

11 NUS' present complaints were in respect of KS' obligation to make discovery of relevant documents for the litigation. The complaints were grouped around four categories of documents:

(a) Documents in AL's email account.

(b) Documents in KS staff's email accounts which were provided by NUS ("NUS email accounts").

(c) Documents in KS staff's email accounts which were provided by KS ("KS email accounts").

(d) Audio recordings of meetings.

12 I should elaborate that the staff of KS who had worked at NUS were provided with email accounts referred to above as "NUS email accounts". In addition, some or all of such staff also had email accounts provided by KS referred to above as "KS email accounts". NUS' complaints were that KS did not disclose any internal email between its staff from the NUS email accounts or from the KS email accounts including non-disclosure of any email from AL's own email account (which was one of the KS email accounts) and that AL had lied about the reasons for non-disclosure. I should add that AL did not have an NUS email account and his email would have been sent from or to the KS email account.

13 For easy reference, I attach a list of relevant applications and affidavits in chronological order as much reference was made to them in respect of the explanations given by AL for KS' alleged omission to comply with its discovery obligations.

AL's email

14 On 14 March 2007, the parties were ordered to give discovery of documents relevant to the issues in the action. On 25 July 2007, both KS and NUS filed their respective lists of documents. In KS' list ("KS' First (25/7/07) LOD"), KS had disclosed 1,303 documents with AL's 4th affidavit of 25 July 2007. On the other hand, NUS had disclosed over 25,000 documents. For the purpose of the present proceedings, email and audio recordings were treated as documents and it was accepted that the discovery obligations of the parties extended to disclosure of relevant email and audio recordings.

15 Out of KS' First (25/7/07) LOD, 807 documents were email but not a single internal email was disclosed even though KS had assigned more than 60 information technology ("IT") consultants and/or sub-contractors to the Project. There was no explanation as to what had happened to the internal email.

16 On 4 September 2007, NUS demanded further discovery from KS. A reply dated 25 September 2007 from KS' solicitors stated that KS had just discovered further documents in its possession, power or control ("the KS' Further (25/9/07) Set").

17 On 1 November 2007, KS filed a supplementary list of documents listing 81 items ("KS' Second (1/11/07) LOD") but the list excluded documents from KS' Further (25/9/07) Set.

18 On 27 November 2007, KS filed the 8th affidavit of AL to disclose two digital video discs ("2 DVDs"). The 2 DVDs contained 27,000 email and attachments from KS' Further (25/9/07) Set.

19 When NUS reviewed the 2 DVDs, it discovered the following:

(a) The email disclosed originated from only one of KS' many staff, *ie*, MCS.

(b) The documents disclosed included a substantial number of email between MCS and AL but such email had not been disclosed in KS' First (25/7/07) LOD.

20 On 7 December 2007, D&N sent a telefax to R&D to state that AL must have known that KS' First (25/7/07) LOD had omitted a substantial number of email which he had sent or received and yet his 4th affidavit (which accompanied KS' First (25/7/07) LOD) had falsely stated that there were no other relevant documents. KS was required to file an affidavit to explain the false or inaccurate statement in AL's 4th affidavit.

21 On 13 December 2007, R&D replied to say that AL had configured his email account to clean out all items which were more than six months old "for housekeeping reasons and also to avoid breach of confidentiality and non-disclosure obligations (eg, in projects which require our client to dispose of confidential information upon conclusion of the engagement)." It was said that AL did not retain copies of email between himself and MCS or between himself and any other employee involved in the Project. Also, KS did not see any need for AL to file another affidavit merely to set out what had been stated in R&D's reply.

22 Such an explanation was inadequate because it is a well-known requirement that a litigant is to disclose not only relevant documents that he has, but also those which he no longer has and to state what has become of the latter. Even if it was true that relevant email in AL's email account had been deleted for the reasons given and no copy kept, it was incumbent on AL to disclose this in KS' First (25/7/07) LOD. He did not and R&D's reply of 13 December 2007 did not explain this omission.

23 D&N then sent a telefax dated 28 December 2007 to state, *inter alia*, that since AL chose not to file an affidavit to explain, NUS would take appropriate steps without further reference to R&D.

24 It was only then that R&D responded on 14 January 2008 to state that KS would file an affidavit "to explain the necessary".

25 On 24 January 2008, AL's 11th affidavit was filed. It repeated what R&D had already said about the deletion of email more than six months old but no reason was given for the omission to disclose this earlier.

26 Thereafter, D&N requested for more information about the destruction and eventually filed Summons No 2245 of 2008 ("Summons 2245/08") on 21 May 2008 to compel KS to provide more of such information among other reliefs sought.

27 Before the hearing of Summons 2245/08, ALs' 18th affidavit was filed. It stated at para 34 that he "did not know the full extent of [his] discovery obligations until the discovery process was in full swing on or around May 2007".

28 This was of no comfort to NUS because KS' First (25/7/07) LOD was filed on 25 July 2007. By AL' own assertion, he would have been fully aware before then of KS' discovery obligations and yet he did not mention the deletion of email from his email account.

29 At the hearing of Summons 2245/08 on 13 June 2008, NUS obtained an order requiring, *inter alia*, AL to provide more information on his deletion. Both sides appealed against that order. In the case of NUS, it wanted wider orders. The appeals were heard by Justice Belinda Ang ("Ang J") on 17 July 2008. She dismissed KS' appeal and allowed NUS' appeal in that she made an order requiring KS to provide more information than was ordered below.

30 AL's 23rd affidavit on 1 August 2008 stated that he had not stopped the deletion of documents in his email account. D&N submitted that this was contrary to the impression given in AL's 18th affidavit.

31 NUS' position was that it was shocking for AL to have deleted all documents from his email account based on his stated policy of deleting documents which were more than six months old, when he had contemplated litigation since early July 2006.

32 NUS had come across an email from AL to MCS dated 6 July 2006 in which he said:

> … we have to plan for the worse where we actually have to litigate.
>
> I don't think it will come to this but we still need to have our stuff in place.
>
> Can you collate what you have over the next week or so.

33 Also, from end September 2006 to the filing of the action on 4 January 2007, KS had repeatedly stated in writing that it would make a claim against NUS.

34 In the circumstances, Mr Bull, counsel for NUS, submitted that there must have been email in AL's email account relevant to the litigation especially since AL was KS' main representative who had negotiated with NUS prior to the contract and after the Project started. Also, AL was KS' representative on the ISIS Steering Committee which oversaw the Project. Furthermore, from June 2006, at the latest, AL was the person directing KS' actions on the Project. Accordingly, AL ought to have known of the significance of relevant email in his email account and stopped the deletion thereof. Mr Bull submitted that AL had admitted to the said description of his role in para 59 of AL's 29th affidavit, contrary to para 9 of AL's 11th affidavit when he said that he was hardly involved in the day-to-day operations of the Project. This earlier assertion (in AL's 11th affidavit) was repeated in his 18th affidavit at para 34 where AL also said he had "no inkling that the emails that [he] had received in [his] email account were somehow relevant or discoverable".

35 In addition, para 17 of AL's 23rd affidavit which was filed to comply with Ang J's order stated that the nature of the email deleted pertained to issues such as the status of the Project, issues affecting the progress of the Project, Project organisation, performance of parties' participants etc.

36 Mr Bull submitted that there was relevant email in AL's email account and AL ought to have stopped the deletion of the documents therein.

37 Mr Bull also submitted that such email was not only relevant but would be likely to contain comments adverse to KS. For example, an email from MCS to AL dated 14 June 2006 stated, *inter alia*:

> However, if we actually got into a wrangle with them (legal or otherwise) then I am not sure that either would come out very well – i.e. I don't believe there'd necessarily be any wins and certainly no win-win. Our team is really very weak and NUS arguments that it takes a longer time to review that we've scheduled will be countered with the fact that the documents were so bad in the first place. Frankly in some cases this is correct. In others, I believe the problems have been more minor than major. However, we have had enough major problems for us to not look very good.

38 Mr Bull also relied on an email dated 3 July 2006 from AL to some staff, including MCS, which stated, *inter alia*:

> We have reached the stage where we have looked at the resources, scope, schedule and finances of the NUS project.

> Based on our earlier discussion i have asked NUS for a steering meeting this Friday to re-scope the project.
>
> This will be the way which we will exit the project without being sued as this will be a mutual agreement to variation on the project.
>
> Please do not communicate this to anyone outside this email.

39 Mr Bull submitted that that email supported NUS' pleaded case that on 7 July 2006, KS told NUS that it could not continue with the Project and that email did not support KS' pleaded case that on 7 July 2006, KS had informed NUS that it was NUS' failures which resulted in the breach of the Project's milestones.

40 In an email dated 17 July 2006, MCS stated, *inter alia*:

> This has been a little difficult for me and I have come up with the attached.
>
> I know you will not present it as I have done – some of it is quite, quite sensitive and for your eyes only.

41 AL then replied on the same day to suggest that they switch to KS email and MCS agreed.

42 Mr Bull submitted that therefore it was disingenuous for AL to say at para 34 of his 18th affidavit that KS had "no inkling" that the email in his email account were "somehow relevant or discoverable."

43 In addition, Mr Bull pointed out that AL had not been truthful in his explanation. At para 10 of AL's 11th affidavit, he had said that email which was more than six months old were no longer in his email account. Then, in the appeal in respect of Summons 2245/08, Ang J had made an order requiring KS to state:

> whether any of the emails deleted from Mr Lim's email account were ***archived and/or stored*** in any server or computer and/or ***in hard copy*** prior to the said deletion, and if so, which emails were archived and/or stored and when this was done.
>
> [emphasis added by D&N]

44 AL's answer was, "No."

45 Mr Bull submitted that that answer was false because among the 807 email previously disclosed by KS in KS' First (25/7/07) LOD, there was a very small number of email which were sent between AL and members of NUS staff only. Such email which KS had disclosed must have originated from AL's email account, because no other member of KS' staff was copied on such email.

46 In the 14th affidavit of SLP filed in support of that application, NUS showed that some email from AL's email account had been kept and disclosed by KS in discovery. After NUS pointed out the above, AL said at para 66 of his 29th affidavit:

> In relation to paragraph 18 of my 23rd Affidavit filed on 1 August 2008 where I had stated "No" in respect of the question whether any of the emails deleted from my email account were archived and/or stored on any server or computer and/or in hard copy prior to the deletion, I maintain that

I do not have a system of filing or archiving the emails from my email account whether in soft copy and/or in hard copy. If however, the question is to be read as including whether I had kept any emails as *hard copy documents*, I confirm that whenever I had received emails which I had deemed important enough, I would either ask my secretary to print and file these or I would do so myself as can be expect [*sic*] of any company. This function is delegated to the relevant staff and I, myself as the Managing Director of the company, seldom, if ever, kept or filed any documents. This was alluded to by the Plaintiff's solicitors' letter dated 22 August 2008 where it was stated that:

> "*it has already been explained that emails which our client may have in its possession (and which has been disclosed) arise out of purely fortuitous events or<u>arise out of particular importance that our client may have placed on specific emails, such as emails awarding the contracts to our client</u> etc*."

[emphasis in AL's 29th affidavit]

47 However, AL was not asked whether he had a system of filing or archiving his email in soft or hard copy but whether he had in fact archived or stored any of the email from his email account in soft or hard copy. Furthermore, since the email in his email account were supposedly deleted if it was more than six months old, where did the email (from his email account) which was disclosed come from? That is why I did not readily accept that AL had simply deleted the same. If he did, it seemed to me that he had kept a copy of those that he wanted to retain somewhere else. This was a point additional to the fact that he had not disclosed his alleged deletion policy at the earliest opportunity when KS' First (25/7/07) LOD was filed.

Email from NUS email accounts

48 As mentioned, even with the late disclosure of the 2 DVDs, KS was disclosing email from only one staff's email account, *ie*, MCS. R&D had stated in its said letter of 13 December 2007 (see para 21 above) the following explanation on this subject:

> 3. As your client would be well aware, the email accounts of our client's staff who were working on the ISIS Project were provided, maintained, and hosted by your client through your client's email server in NUS.
>
> 4. We are also instructed that your client had terminated the email accounts of our client's staff when they had left and/or were released from the ISIS Project. Our client would thereafter have no access whatsoever to these email accounts and/or the contents therein.

49 Mr Bull submitted that (as in the case for AL's email from the KS email account) KS had at one time refused to state the above on oath.

50 More importantly, Mr Bull submitted that the letter from R&D had not disclosed that KS' staff had KS email accounts or the fact that KS' staff had been internally instructed to make backups of their NUS email accounts before the Project ended. As it turned out, NUS had discovered from an email in the NUS email accounts an instruction dated 31 August 2006 from MCS to ten staff of KS which stated, *inter alia*:

> I spoke with some of you at afternoon coffee. Can I please have a yes or no from each of you with respect to whether or not you are finished with your ccev email.

I believe that the only people still needing it are Christina, Sook Ching, Jennifer, Vani and myself.

Please let me know one way or the other and please ensure that you back up your email file to give to Keng Oon before you let me know it's OK to deactivate it.

I don't believe NUS will leave these accounts open for long so please respond ASAP - like now - if per chance you've already left for the day then I'll wait for your reply by early tomorrow.

51 On 1 September 2006, MCS followed up with another email which stated:

Those of you who have not replied could you please do so!!!! I need to know urgently!

52 A reply or two were found. One was from Linda Lu dated 4 September 2006 stating:

It is ok to deactivate mine.

53 One was from Chia Boon Hoon dated 31 August 2006 stating:

My email account has been backed up and can be deactivated.

54 Accordingly, D&N's said telefax dated 28 December 2007 (see para 23 above) to R&D stated that KS' staff had created backup files or copies of the email in their NUS email accounts and R&D replied on 14 January 2008 (see para 24 above) that KS would file an affidavit "to explain the necessary." This was the 11th affidavit of AL which stated:

How the Plaintiff's staff dealt with documents and/or emails

4. The email accounts of the Plaintiff's staff working on the ISIS Project were provided by the Defendant and maintained and hosted by the Defendant's server. The Plaintiff never had and does not have any control whatsoever over this server.

5. Whenever the Plaintiff's staff were instructed to archive their emails and/or to store documents in relation to the operations of the ISIS Project, these emails and documents would be downloaded from their email accounts and stored in:

(1) the ISIS Project shared server located in the project site within the Defendant's premises; and/or

(2) the laptops provided to them by the Plaintiff.

6. In this regard and for good order, the Plaintiff had instructed its staff to archive and store the emails and documents relating to operations in the ISIS Project, be it in electronic form or in actual physical copies.

7. Some members of the Plaintiff's staff complied with this instruction and forwarded copies of relevant documents and emails to key personnel of the Plaintiff's team tasked with consolidating such documents. These documents and emails have already been disclosed by the Plaintiff in its first List of Documents dated 25 July 2007.

8. However, not all of the Plaintiff's employees diligently went about archiving and storing their emails and documents. Further, as some of the Plaintiff's employees were asked to leave in

abrupt and less than amicable circumstances, they were unable to or less than diligent in backing-up copies of emails and/or documents.

9. …

10. …

The ISIS Project shared server has been cleaned out

11. The ISIS Project shared server located in the project site belonged to the Plaintiff's subcontractor, Thothe Technologies Pte Ltd.

12. To the best of my knowledge, information and/or belief, the said shared server belonging to Thothe Technologies Pte Ltd was cleaned out and reformatted when the ISIS Project was terminated.

13. Accordingly, all back-up files and/or copies of documents and emails stored in the ISIS Project shared server were discarded.

Laptops used by the Plaintiff's staff were cleansed

14. In the course of the ISIS Project, members of the Plaintiff's staff were provided with laptops to enable them to carry out their work on the ISIS Project.

15. After the termination of the employment of the Plaintiff's staff, these laptops were returned to the Plaintiff; save for [MCS'] laptop which was given to her for her personal use.

16. The laptops which were returned to the Plaintiff were subsequently cleansed of all data contained in the hard-disk so that the laptops could be sold to the Plaintiff's staff and/or third parties. In the process of cleansing the laptops, all data contained in the hard-disk, other than the operating system, were deleted.

17. …

18. None of the Plaintiff's staff who were involved in the day-to-day operations of the ISIS Project remains in the Plaintiff's employment today.

19. The Plaintiff's acts in deleting all data in relation to the ISIS Project were undertaken as a matter of caution, pursuant to the obligations of confidentiality and non-disclosure undertaken by the Plaintiff to the Defendant.

20. The Plaintiff hence does not now have possession, custody or power over the emails or documents (including any back-up files) downloaded and/or archived by the Plaintiff's staff onto their laptops, except for those found in [MCS'] laptop.

55 However, it will be re-called that KS' First (25/7/07) LOD did not mention that any internal email between KS' staff had been destroyed. Subsequently, NUS made the application in Summons 2245/08 and obtained various orders (see para 29 above). In purported compliance with the orders, AL's 22nd affidavit was filed on 1 August 2008. Mr Bull summarised this affidavit as stating the following:

(a) KS' staff were instructed to archive and store their emails and documents relating to the operations of the Project when they first joined the Project and/or at periodic intervals during the course of the Project.

(b) During the Project, Faith was tasked to consolidate documents from KS' staff. She saved the documents into the Project shared server.

(c) Towards the end of the Project, TKO was tasked by AL to consolidate project documents from KS' staff.

(d) KS did not know which of its staff had complied with its instructions and forwarded copies of their emails and documents to the Plaintiff's key personnel tasked with consolidating such documents. Neither did KS know which of its staff had not complied with its instructions.

56 Mr Bull submitted that it was unbelievable that KS staff had been told to archive and store email at the beginning and during the Project but not at the end especially when AL had told MCS that KS should get its stuff in place in case there was litigation (see para 32 above). He also submitted that it was inconceivable that although instructions had been given for email to be archived and stored, KS was not able to specifically identify a staff who had complied or not complied. He added that it was inconsistent for AL to have tasked TKO to collate project documents towards the end of the Project while on the other hand, AL was maintaining his policy of destroying documents more than six months old.

57 On 18 August 2008, NUS filed another application by way of Summons No 3619 of 2008 ("Summons 3619/08") to seek discovery from KS of:

(a) email from its staff's KS email accounts, and

(b) backup of its staff's laptops.

58 On 22 August 2008, before the hearing of Summons 3619/08, R&D wrote to say:

> … whilst Mr Lim may have applied his mind to collating project documentation, it has been made manifestly clear that such collation did not include the collation of emails but pertained mainly to documents such as BSDs and drafts thereof, project management plans and the like… Mr Lim has already explained that at that point he had deemed emails as purely private and confidential and he did not issue a general instruction to collate them. It has already been explained that any emails which our client may have in its possession (and which have been disclosed) arise out of purely fortuitous events…

59 On 2 September 2008, the day of the hearing of Summons 3619/08, NUS was served with the 24th affidavit of AL (filed on 1 September 2008). The 24th affidavit stated at paras 8, 9, 18 and 19 that:

> 8. … ***At the end of the Project, all the Plaintiff's said staff were instructed to collate and handover*** to the Defendant, where it was relevant as required by our Non-disclosure Agreement with the Defendant, or ***to the Plaintiff all documents and files relating to the ISIS Project***. For the avoidance of doubt, ***the consolidation of documents pertained mainly to documents such as business solution documents and drafts thereof, project management plans and***

the like.

9. I believe there was ***no general instruction given at the end of the Project for the staff to collate all their emails*** since, as I have explained in paragraph 36 of my 18th affidavit, I have always treated staff emails as purely private and confidential even if they were from the Plaintiff's email accounts. …

18. … At paragraph 8 of my 23rd affidavit, I had stated that it was my belief that *during the Project* it was the Plaintiff's project office manager, Faith Koh, who was tasked with and who would have consolidated documents from the Plaintiff's Project staff and saved them into the Project office shared drive in the Project office. For the avoidance of doubt, the consolidation of documents pertained mainly to documents such as business solution documents and drafts thereof, project management plans and the like. ***To the best of my knowledge, there was no general collation of staff emails during the Project***.

19. I then went on further in paragraph 9 of my 23rd affidavit to say that *towards the end of the project*, I had tasked Mr Tan Keng Oon to collate the project documents. These documents have already been disclosed to the Defendant in the Plaintiff's List of Documents dated 25 July 2007.

[emphasis added by D&N]

60 The above was subsequently reiterated in the 26th affidavit of AL filed pursuant to the order of court dated 2 September 2008 made in Summons 3619/08.

61 Mr Bull noted that KS' latest explanation was that it had not given general instructions to its staff to collate and handover their email, whether during or towards the end of the Project. KS was claiming that its only instructions were to collate project documents (which it was claiming were distinct from the email), which were in fact disclosed in KS' First (25/7/07) LOD. Mr Bull submitted that such an explanation was a complete reversal from KS' previous positions in AL's 11th, 18th and 23rd affidavits and in particular, AL's 18th affidavit.

62 This explanation was contradictory to MCS' email of 31 August 2006 exhorting ten staff to ensure that they backup their email before their NUS email account was deactivated and the response from, at least, two KS' staff stating that their NUS email accounts could be deactivated (see paras 52 and 53 above). Indeed, when NUS referred to MCS' email dated 31 August 2006 in an affidavit of SLP, AL's 18th affidavit stated:

21. ***I note that the Defendant relies strongly on an email dated 31 August 2006 in which Margaret had reminded some of the Plaintiff's staff to back-up their emails…***

22. The Defendant's reliance on the said email is clearly misguided. ***It is not the Plaintiff's position that it had not given instructions to its staff to back-up the emails***. On the contrary, the Plaintiff position, as stated in the Plaintiff's solicitors' letter dated 13 December 2007 is that:-

> … 3. … the email accounts of our client's staff who were working on the ISIS Project were provided, maintained and hosted by your client through your client's email server in NUS.
>
> 4. … your client had terminated the email accounts of our client's staff when they left and/or were released from the ISIS Project.

Our client would thereafter have no access whatsoever to these email accounts and/or the contents therein. …

23. When asked to provide further explanation, the Plaintiff had also reiterated its position in my 11th affidavit filed on 24 January 2008 that:-

6. In this regard and for good order, ***the Plaintiff had instructed its staff to archive and store the emails and documents*** relating to operations in the ISIS Project, be it in electronic form or in actual physical copies.

7. Some members of the Plaintiff's staff complied with this instruction and forwarded copies of relevant documents and emails to key personnel of the Plaintiff's staff tasked with consolidating such documents …

24. By reason of the above, ***it is clear that it was never the Plaintiff's position that it did not instruct its staff to backup the emails***.

[emphasis added by D&N]

63 Mr Bull also submitted that in AL's 24th affidavit, AL had stated:

9. I believe that there was no general instruction given at the end of the Project for the staff to collate their emails …

10. Even if there are copies of emails that were separately saved by any individual project staff (of which I have no knowledge), these are no longer in the Plaintiff's possession, custody or power since all the Plaintiff's staff have left the Plaintiff's employment. Notwithstanding this, the Plaintiff, though not obliged to, has taken the extra step of writing to the Plaintiff's former staff who purchased their laptops to ask if these staff still have possession of any documents, files or emails relating to the ISIS Project. ***All of the staff who responded to these letters have confirmed that they do not have such documents, files or emails in their possession***.

[emphasis added by D&N]

64 However, KS did not exhibit the correspondence with its ex-staff in AL's 24th affidavit. After the hearing of Summons 3619/08 on 2 September 2008, KS was served with a Notice to Produce Documents Referred to in Affidavit dated 3 September 2008. NUS was demanding inspection of KS' correspondence with its staff and the staff's confirmations which AL's 24th affidavit had referred to.

65 Inspection subsequently took place on 16 September 2008. NUS discovered that KS had sent identical letters dated 29 July 2008 to its staff by registered post and/or as attachments to email. In its letters, KS had asked its staff to confirm whether any email from their NUS or KS email accounts were still stored in the laptops which the staff had previously purchased from KS.

66 During inspection, KS produced four email confirmations from its ex-staff which were dated from 30 July 2008 to 4 August 2008. Mr Bull submitted that three of the four email confirmations produced for inspection revealed that KS' statements in AL's 24th affidavit were wholly misleading.

67 One email confirmation dated 30 July 2008 from Chia Boon Hoon stated, *inter alia*:

I did purchase the laptop assigned to me during the project on behalf of Tan Sheng Heng. ***But***,

as instructed, all emails were backed up and handed over, together with any documents, to the office before I left K Solutions. I do not have any other emails or documents relating to the project in my possession.

[emphasis added by D&N]

68 Another email confirmation dated 30 July 2008 from Christina Yik stated, *inter alia*:

I bought the laptop as a gift for our pastor, all documents were deleted from it at the point of my departure. ***Whatever documents that were in the laptop had already been copied by Vani on behalf of K Solutions***.

[emphasis added by D&N]

69 Kalyan Samaddar's email confirmation dated 4 August 2008 stated the following:

I do not have any backup of my K Solutions emails. ***I have handed over all the documents***, ***emailsto Mohan and Kheng Wei during our handover session***, prior to my last working day with K Solutions.

[emphasis added by D&N]

70 So, these staff no longer had copies of email because the email had already been handed over to KS. Their confirmations were exhibited only in AL's 26th affidavit which was filed on 12 September 2008, before the inspection on 16 September 2008 but after KS had been served with the Notice to Produce of 3 September 2008.

71 Mr Bull submitted that NUS then applied in Summons 4335/08 to strike out KS' statement of claim and defence to counterclaim and that the 14th affidavit of SLP filed on 3 October 2008 in support of that application had pointed out various inconsistencies in KS' explanation for the missing email. In AL's 29th affidavit filed on 20 October 2008, he said:

82. …While for good order, instructions to the Plaintiff's staff working on the ISIS Project were ***given at the beginning of the Plaintiff's staff's involvementwith the ISIS Project to archive and store the emails*** and documents relating to the operations in the ISIS Project, there was ***no general instructions to the Plaintiff's staff to collate and handover their emails during or towards the end of the ISIS Project...***

83. It is to be noted that ***without me being aware of it*** (as I was not involved in the day-to-day operations of the Project), ***Margaret may have asked the Plaintiff's consultants (or whoever is left) to collate certain emails***. This does not change the Plaintiff's position that it does not now have any of those documents.

[emphasis added by D&N]

72 This explanation seemed to be similar to an earlier explanation in which AL had said that instructions had been given at the beginning and during the Project (but not at the end) to archive and store the email. However, there was a shift in this latest explanation because it said that there was no general instruction during the Project unlike the earlier explanation. Also, the explanation before this explanation was that there was no general instruction to collate email but only project documents and yet, this explanation was saying that there was such an instruction for email but only

at the beginning of the Project.

73 It seemed to me that AL's explanation that he was not aware that MCS had asked for collation of certain email was not convincing. Firstly, MCS was generally in communication with AL as the email I have referred to above shows. Secondly, MCS' requirement for collation did not appear restricted to a few people. Thirdly, there was no affidavit from MCS to corroborate what AL was saying and to explain what had happened to all her efforts. Fourthly, why were there so many varying explanations?

Email from KS email accounts

74 Each of KS' staff who were involved in the Project had an email account with the domain name "kxsolutions.com". In KS' First (25/7/07) LOD, some email from the KS email accounts was disclosed but no internal email.

75 After various developments, AL mentioned in his 24th affidavit that any email with the domain name "kxsolutions.com" stored in the staff's laptops would have been cleansed from the laptops. In his 26th affidavit, AL said that such email accounts were hosted by another party, Webvisions Pte Ltd and that party had confirmed that it did not archive the contents of KS' staffs' email accounts. According to Mr Bull, it was only then that NUS had learned that KS had knowingly destroyed the only source of email from the KS email accounts by cleansing the laptop. He submitted that such cleansing was egregious for two reasons.

76 First, such email accounts would contain relevant information. For example, in the earlier exchange of email between AL and MCS on 17 July 2006 regarding sensitive material (see para 41 above), AL had suggested that they switch to KS email in future. She had agreed.

77 Secondly, while KS had given instructions to backup email from the NUS accounts before cleansing, no such instructions were issued in respect of email from the KS email accounts (see para 241 of his written submission).

78 There might have been some confusion over the facts with regard to the second reason. The email from MCS on 31 August and 1 September 2006 to ten staff was to backup their email from the NUS email accounts before the NUS accounts were deactivated. This was not a cleansing exercise of the staff's laptop as such.

79 Secondly, there was evidence of a procedure for backup generally before the laptops were cleansed. In an email dated 21 July 2006 to KS' staff, M Rasa had said that KS was agreeable to disposing the excess laptops/notebooks at certain prices. This was met by a response from MCS the same day to ask M Rasa to be careful "not to release any laptop until we are sure we have the files we need off of it." M Rasa then replied to MCS, also on the same day, that all units would be "sent to office first for cleansing before we release them. Also, the usual handover process of work and backups need to be carried out at your end." It seemed to me that the handover process and backup would cover the backups of email from KS email accounts.

80 In AL's 24th affidavit (of 1 September 2008), he said at para 22 that he had checked with M Rasa who had confirmed that he (M Rasa) had left it entirely to MCS to backup the necessary files. This was confirmed by M Rasa in his affidavit (of 1 September 2008) at para 3.

81 In AL's 26th affidavit, he said at para 16 that he had checked with MCS and M Rasa and they had informed him as follows:

(a) MCS had informed him that she was concerned with the backup of project documents (that is, business solution documents, the drafts thereof and the like) and had given a general instruction to make backups of the project documents and each individual staff was tasked to do such backup.

(b) However, neither MCS nor M Rasa had taken steps to check with any individual staff whether the staff had complied.

(c) Neither of them knew or could re-call which staff had complied, the extent of compliance and where the backup was stored.

82 Para 16 of AL's 26th affidavit was reiterated in para 91 of his 29th affidavit.

83 AL also added at para 17 of his 26th affidavit that the "project documents (the backups of which Margaret was concerned) have already been disclosed …" in KS' First (25/7/07) LOD.

84 Yet, it was clear to me from the evidence which Mr Bull was relying on that MCS was concerned not only with the backup of project documents but with email as well and I noted that there was no affidavit from MCS to confirm that no internal email of other staff was ever backed up or that she was unaware of what happened to any backup email.

85 As for TKO, AL said in para 85a of his 29th affidavit that TKO had confirmed by TKO's first affidavit (of 1 September 2008) that he (TKO) had not received any email from MCS or any of KS' staff by way of collation.

86 Mr Bull also submitted that KS had failed to disclose email from the KS email accounts of M Rasa and TKO who were stationed at KS' office. Like AL, these two were not provided with NUS email accounts and all correspondence would have been through their KS email accounts.

87 According to AL's 24th affidavit at para 11, AL had spoken to M Rasa and TKO and they had confirmed that from time to time, they had deleted email relating to the Project for good housekeeping practice. M Rasa's deleted email related mainly to payment or human resource matters and TKO's was related mainly to administrative matters.

88 However, Mr Bull submitted that in an email dated 1 September 2006 which M Rasa sent to, *inter alia*, the KS email accounts of ten members of the plaintiff's staff, M Rasa had written:

Dear All

It has been a practice in K Solutions that staff prepare a brief diagnostic when exiting a project. As the NUS ISIS Project comes to a close, we would like you to prepare such a document in the following format:-

Name:

Project Role:

Start date on the project:

List out items that were well done during the project: (Be it participation from NUS or K Solutions)

List out items that could be improved upon during the project: (Including delays from NUS and K Solutions)

(To include attachments like emails and documents to support)

Eg: General Analysis of NUS participation in the project and also specific incidents of NUS participation in the project that may have caused delays. Any comments on project progress/delays over the period of their involvement/lack of it.

Any comments on the project facilities provided by NUS.

Please complete this assignment as soon as you can (before you leave K Solutions). If you need more clarifications, feel free to call me.

[emphasis added by D&N]

89 Mr Bull submitted that it was inconceivable that M Rasa would have deleted the request for a brief diagnostic ("the Diagnostic Request") for "housekeeping purposes", given the nature and the circumstances of the request, as well as the timing of the alleged deletion. Furthermore, the Diagnostic Request did not relate to "payment or human resource matters" as alleged in AL's 24th affidavit. Mr Bull also submitted that it was unbelievable that KS did not receive any response to the Diagnostic Request as was also alleged in AL's 29th affidavit.

90 Mr Bull made a similar point as regards TKO. He submitted that MCS had sent an email dated 23 August 2006 to eight staff of KS telling them that AL wanted a project diary showing all project events. For the analysts, MCS wanted a list of meetings by modules. MCS also stated that TKO was collating all such information and these staff were to send it to him with a copy to her and the exercise was confidential and had to be kept to KS consultants only. NUS had learned from the remaining email left on KS' staff's NUS email accounts an email in which one Tan Shen Heng had replied to this project diary request and TKO then sought further information. That email was not disclosed by KS. It was deleted by TKO without any backup (if TKO was to be believed) even though it was relevant.

91 According to AL's 29th affidavit, the project diary was never constituted, a claim which Mr Bull rejected as being false.

Audio recordings

92 Mr Bull said that at the start of the Project, KS had purchased a digital recorder which was used by Faith to record, *inter alia*, Project Management and also Steering Committee meetings between KS and NUS. Towards the end of the Project, MCS also used the recorder at a special Steering Committee meeting on 7 July 2006. Yet, not a single audio recording was disclosed in KS' First (25/7/07) LOD. On 4 September 2007, D&N wrote to request discovery of the same. Two months later, AL's 6th affidavit stated that the recordings of various meetings no longer existed as "they were erased and/or otherwise destroyed or disposed by the plaintiff as would be in the ordinary course of business after the respective meeting minutes were prepared."

93 Even then, Mr Bull pointed out that the minutes of the 7 July 2006 were not disclosed. D&N then wrote on 6 August 2007 to demand that KS disclose those minutes but KS did not do so. Accordingly, in Summons 3619/08, NUS also sought discovery of the minutes of the 7 July 2006 meeting. In response to that application, AL's 24th affidavit was filed. At para 16 thereof, AL alleged

that no minutes were prepared because NUS had orally instructed NUS not to prepare the minutes. This was disputed by NUS and accordingly, at the hearing of Summons 3619/08, KS was ordered to file a supplementary list of documents to include, *inter alia*, the audio recording of the 7 July 2006 meeting.

94 Pursuant to that order, AL's 26th affidavit was filed. In it, AL confirmed that KS had made an audio recording of that particular meeting but that that recording was no longer with KS because MCS had taken the recorder to Australia for her personal use and she could not recall what had happened to the recording of that meeting and/or whether the tape was discarded or written over when she used it in Australia.

95 Mr Bull again rejected such an explanation. He pointed out that in the email of 3 July 2006 from AL (see para 38 above), AL had said he had asked for a Steering Committee meeting as a way in which KS would exit the Project without being sued. Two days later, on 5 July 2006, MCS sent an email to Faith asking for the recorder and a lesson on how to use it and saying also "it crossed my mind that we may need some evidence of things said". Therefore, it was unlikely that MCS would accidentally misplace the recording or write over it.

96 Furthermore, NUS had uncovered an exchange of email between Faith and MCS, all dated 19 July 2006. The first from Faith stated that,

> "I have the recordings of meetings for both PMT and Steering Committee. What should I do for people to access the recordings? … ."

97 To Mr Bull, this email contradicted AL's assertion that all recordings were destroyed after minutes had been prepared. MCS replied to Faith to ask if the recordings could fit into a single compact disc ("CD") and added,

> "I would not intend to hand these over to NUS, but they could be filed by KS."

98 Faith then replied to tell MCS that the minutes of three or four could fit into one CD and MCS responded by saying that she did not want to make many CDs. MCS added,

> "I wonder if we can make a secure area on the samba driver. That way, when KS leaves, they will take all the samba info and it will automatically be taken. Could you ask Kalyan… it must be available to only you and me and mohan and albert…"

99 There was then a follow-up email discussion on whether the minutes should be stored in the samba server and kept in a separate folder.

100 Mr Bull stressed that the recordings would be more reliable than the minutes which had been prepared by KS. He illustrated this by pointing out that the minutes of a Steering Committee meeting on 31 May 2006 omitted an admission made by AL (although it was captured in the audio recording) that KS had not expected NUS to provide full time resources as part of the overall project team.

The law

101 Order 24 r 1 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) stipulates that the court may at any time order any party to give discovery by making and serving on any other party a list of documents.

102 Rule 3 states that the list is to be in Form 37 ("the standard form"). Para 3 of the standard form requires the party making discovery to include documents which he "has had, but has not now, in his possession, custody or power". Para 4 of the standard form requires that party to state when the documents he no longer has were last in his possession, custody or power and what has become of them.

103 Order 24 r 16(1) states:

> If any party who is required by any Rule in this Order, or by any order made thereunder, to make discovery of documents or to produce any document for the purpose of inspection or any other purpose, fails to comply with any provision of the Rules in this Order, or with any order made thereunder, or both, as the case may be, then, without prejudice to Rule 11 (1), in the case of a failure to comply with any such provision, the Court may make such order as it thinks just including, in particular, an order that the action be dismissed or, as the case may be, an order that the defence be struck out and judgment be entered accordingly.

104 Order 92 r 4 states:

> For the avoidance of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

105 There are various stages in which the destruction of documents may occur:

(a) Before action is commenced.

(b) After action is commenced but before discovery is ordered.

(c) After action is commenced and after discovery is ordered.

106 While it is true that there is no specific provision in the Rules of Court prohibiting any party from destroying relevant documents in his possession, custody or power, I am of the view that it is implicit in the scheme of discovery that he should not do so especially if he knows that they are relevant to the issues in the litigation. I stress that discovery is concerned only with the disclosure of documents relevant to the issues and not documents at large. Hence, any reference to the disclosure of documents is to those which are relevant.

107 In the first place, if a litigant has destroyed documents but does not disclose that he once had them, he would be in breach of para 3 of the standard form. I would have thought that even if he discloses that he once had them but it is established that the destruction was deliberate and had occurred in stage (b) or (c) above, then he would still be in breach of his discovery obligations and his conduct would come under O 24 r 16 even though such conduct does not fall under the express words of O 24 r 16. Here, "deliberate" is to be contrasted with "intentional". While the latter does not mean accidental, there is no intention to put the documents out of reach of the other party. By "deliberate", I mean that the destroyer intends to put the documents out of reach of the other party in pending or anticipated litigation.

108 Even if deliberate destruction in stages (b) or (c) above does not come within O 24 r 16, it is not disputed that the court's inherent jurisdiction would enable the court to impose the appropriate sanction.

109 As for destruction in stage (a), Jeffrey Pinsler ("Pinsler") is of the view that O 24 r 16 does not apply for reasons stated in his article "Destruction of Evidence Prior to the Commencement of Civil Proceedings: How is a Court to Respond?" in the *Singapore Journal of Legal Studies* (2004) 20-36 at pp 21 to 22. I will refer to this article as "Pinsler's Article". Even if deliberate destruction in stage (a) is not caught by O 24 r 16, it is also not disputed that the court is empowered under its inherent jurisdiction to respond with the appropriate sanction to such a deliberate destruction.

110 Nevertheless, the question arises as to whether the court should be more restrained in its sanction for pre-action as opposed to post-action deliberate destruction. The question also arises whether the court's discretion to dismiss an action for deliberate destruction should be limited to situations where a fresh trial is no longer possible. I will deal with these questions together.

111 In *Logicrose Ltd v Southend United Football Club Ltd*, The Times, 5 March 1988 ("*Logicrose*"), an application was made by the defendant during a trial, for the action and the defence to counterclaim to be struck out and judgment be entered on its counterclaim on the ground that the plaintiff had failed to comply with its obligation of discovery. Millet J said:

> … Deliberate disobedience of a peremptory order for discovery is no doubt a contempt and, if proved in accordance with the criminal standard of proof, may, in theory at least, be visited with a fine or imprisonment. But to debar the offender from all further part in the proceedings and to give judgment against him accordingly is not an appropriate response by the Court to contempt.
>
> It may, however, be an appropriate response to a failure to comply with the rules relating to discovery, even in the absence of a specific order of the Court, and so in the absence of any contempt, not because that conduct is deserving of punishment but because the failure has rendered it impossible to conduct a fair trial and would make any judgment in favour of the offender unsafe.
>
> In my view a litigant is not to be deprived of his right to a proper trial as a penalty for his contempt or his defiance of the Court, but only if his conduct has amounted to an abuse of the process of the Court which would render any further proceedings unsatisfactory and prevent the Court from doing justice. Before the Court takes that serious step, it needs to be satisfied that there is a real risk of this happening.

112 However, a few years later, the English Court of Appeal suggested that an action might be struck out even if a fair trial was still possible. So, in *Landauer Ltd v Comins & Co*, The Times, 7 August 1991, Lloyd LJ said:

> The Logicrose, The Times, 5 March 1988, Millett J said that it was no part of the function of the court in exercising its discretion under Order 24, rule 16 to punish the party in default. In all ordinary cases that must be so. But I can imagine cases of contumacious conduct, such as the deliberate suppression of a document, which might justify the striking out on the analogy of striking out for want of prosecution under Order 25, rule 1(4) even if a fair trial were still possible. I use the word "contumacious" with the encouragement of my Lord Sir John Megaw, since it expresses the required meaning more accurately than "contumelious", the word more commonly used and originally, I believe, used by Diplock LJ in this connection. But cases of contumacious conduct in relation to discovery must necessarily be extremely rare.

113 Then in *Federal Lands Commissioner v Neo Hong Huat* [1998] SGHC 131 ("*Neo Hong Huat*"), Chan Seng Onn JC expressed the view that it was not necessary to show that the fair trial of the action is impossible where there was deliberate and contumacious disregard of court orders. He said

at [43]:

> If counsel for the defendant is relying on *Logicrose*'s case for the proposition that it is insufficient to show that there was deliberate and contumacious disregard of the court orders but one has to show further that the fair trial of the action is rendered impossible to achieve because of the deliberate suppression of material documents, then I am unable to agree.

114 In *McCabe v British American Tobacco Australia Services Ltd* [2002] VSC 73, Eames J in the Supreme Court of Victoria found that documents had been deliberately destroyed and that the strategy was successful. Accordingly, he concluded that the appropriate order was to strike out the defence and enter judgment for the plaintiff with damages to be assessed.

115 However, the Court of Appeal in *British American Tobacco Australia Services Ltd v Cowell* (representing the estate of Rolah Ann McCabe, deceased) [2002] VSCA 197 took a different approach and said at [173] and [175]:

> 173 As indicated at the outset, it seems to us that there must be some balance struck between the right of any company to manage its own documents, whether by retaining them or destroying them, and the right of the litigant to have resort to the documents of the other side. The balance can be struck, we think, if it be accepted that the destruction of documents, before the commencement of litigation, may attract a sanction (other than the drawing of adverse inferences) if that conduct amounts to an attempt to pervert the course of justice or (if open) contempt of court, meaning criminal contempt (inasmuch as civil contempt comprises wilful disobedience of a court order and will ordinarily be irrelevant prior to the commencement of proceedings). Such a test seems to sit well with what has been said in the United States as well as what has been said in England. Whether contempt, even criminal contempt, is possible before any proceeding has been instituted need not be examined on this occasion …
>
> 175 Accordingly, there being no authority directly in point, we consider that this court should state plainly that where one party alleges against the other the destruction of documents *before the commencement* of the proceedings to the prejudice of the party complaining, the criterion for the court's intervention (otherwise than by the drawing of adverse inferences, and particularly if the sanction sought is the striking out of the pleadings) is whether that conduct of the other party amounted to an attempt to pervert the course of justice or, if open, contempt of court occurring before the litigation was on foot. We say nothing about the drawing of adverse inferences because that is not raised for consideration on this appeal. Nor, for the reason already given, do we express any opinion at all on whether the conduct which was under challenge in this instance, and which the defendant sought to justify by reference to its document retention policy, did or did not amount to an attempt to pervert the court of justice. That it did was not the case raised and considered below and so for the purpose of this appeal it must be taken that at first instance the court was not entitled to impose any sanction on that ground. More particularly it must follow too, contrary to his Honour's conclusion, that the destruction of documents by the defendant in March–April 1998, and before, was not shown to be in breach of any rules relating to discovery in this proceeding.

116 As is obvious, the above passages related to destruction before the commencement of an action. I will refer to the requirement of an attempt to pervert the course of justice or, if open, contempt of court as "the *McCabe* test".

117 In *Douglas v Hello! Ltd (No 3)* [2003] EMLR 29, Sir Andrew Morritt VC adopted the *McCabe* test at [86]. Yet, he also mentioned at [90] that the "issues are whether the rules have been

transpressed, if so, whether a fair trial is achievable and if not what to do about it". As he considered that a fair trial was still possible, he declined to strike out the whole or any part of the defence there.

118 In *Fuji Xerox Australia Pty Ltd v Lee* [2003] QSC 303 ("*Fuji Xerox*"), Chesterman J of the Supreme Court of Queensland cited the *McCabe* test with apparent approval and emphasized at [15] and [16]:

> [15] The remedy sought by the defendant's application is drastic. It is to preclude the plaintiff from pursuing what is an arguable right to recover a substantial sum of money. I apprehend that a court would only accede to such an application where it is clear that there cannot be a fair trial and that that consequence is a result of the deliberate action of a party to the litigation.
>
> [16] In this regard *the intention of the person who destroys evidence* or *puts it beyond the reach of his opponent is critical*. Actions which are themselves lawful may amount to a contempt of court if done with the intention to interfere with the course of justice. …
>
> [emphasis added]

119 In *Tan Chor Chuan v Tan Yeow Hiang Kenneth* [2004] SGHC 259, the plaintiffs had applied to strike out a defence. The plaintiffs' alternative ground was that the defendants had abused the court's process by destroying email passing between the defendants themselves and also email passing between the defendants and the Singapore Chess Foundation. Joyce Low Wei Lin AR declined to impose any sanction against the defendants because she found nothing sinister in their explanation for the deletion of the email. Nevertheless, she endorsed Pinsler's Article in that the court's inherent power to respond to any pre-action destruction of documents should not be circumscribed by strict adherence to the *McCabe* test and that the exercise of its power should be governed by the usual touchstones of 'need', 'justice of the case' and 'prevention of abuse'.

120 On the other hand, she also said at [22]:

> In assessing whether there is a 'need' for intervention, some relevant considerations are the extent to which the destruction of evidence has compromised the conduct of a fair trial and the culpability of the person who destroyed the evidence. The court is concerned with striking the same balance identified by the Court of Appeal in *McCabe*, *ie* the right of a party to manage his own documents and the right of a litigant to have resort to his opponent's document. The form of intervention should be proportionate and address the injustice suffered by the innocent party. With respect to the imposition of the draconian remedy of terminating a party's action, it is useful to remember the following words of Millet J in *Logicrose Ltd v Southend United Football Club Ltd*, The Times, 5 March 1988:
>
> > I do not think that it would be right to drive a litigant from the judgment seat without a determination of the issues as a punishment for his conduct, however deplorable, unless there was a real risk that the conduct would render the further conduct of proceedings unsatisfactory. The court must always guard itself against the temptation of allowing its indignation to lead to a miscarriage of justice.
>
> This warning was made in the context of an application pursuant to O 24 r 16 but is equally applicable to the exercise of the court's inherent power in response to pre-action destruction of evidence.

121 The endorsement of Millet J's view might suggest that AR Low was also of the view that a

striking out will only be ordered if a fair trial is no longer possible. That, of course, is different from the view expressed by Chan JC in *Neo Hong Huat* (see para 113 above).

122 Furthermore, in *Alliance Management SA v Pendleton Lane P & anor* [2008] 4 SLR 1, Ang J accepted at [10] that there is a line of authority which makes it clear that a Singapore court may order a striking out without finding that a fair trial is not possible. She referred to *Soh Lup Chee v Seow Boon Cheng* [2002] 2 SLR 267 and *Neo Hong Huat* as well as to *Lee Kuan Yew v Tang Liang Hong* (No 2) [1997] 2 SLR 853 and *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [2001] 4 SLR 1.

123 Ang J also said at [5] and [6]:

> 5 Counsel for the plaintiff, Mr Cavinder Bull SC, referred me to the commentary to that rule in *Singapore Court Practice 2006* (Jeffrey Pinsler gen ed) (LexisNexis, 2006) at para 24/16/2 which identifed four instances in which the court may in the exercise of its discretion strike out the pleadings for non-compliance with the Rules of Court or orders of court. They are:
>
> > (a) The defaulting party has deliberately or wilfully failed to comply with an "unless order" (see *SMS Pte Ltd v Power & Energy Pte Ltd* [1996] 1 SLR 767 at 772, [17]).
> >
> > (b) The defaulting party has failed to comply with successive non-peremptory orders for discovery so that the default is clearly contumacious (see *Soh Lup Chee v Seow Boon Cheng* [2002] 2 SLR 267 ("*Soh Lup Chee*").
> >
> > (c) The consequence of the failure to comply with a rule of court or order requiring discovery is such that there is a serious or real risk that a fair trial may no longer be possible.
> >
> > (d) The failure to comply with a rule of court or order requiring discovery is due to the deliberate suppression of evidence which justifies a striking out of the pleadings even where a fair trial was still possible.
>
> 6 I ought at this stage to say that these instances of striking out were in circumstances involving (a) procedural abuse or questionable tactics; (b) peremptory orders where the basis of the failure to comply with a peremptory order was contumacious; and (c) repeated and persistent defaults of the rules of court or non-peremptory orders amounting to contumacious conduct. At the opposite end of the spectrum of seriousness are cases of ordinary procedural defaults of a technical complexion that are unlikely to give rise to the exercise of this discretionary power to strike out. As one would expect, the circumstances in which a court may be asked to strike out the pleadings under the Rules of Court are infinitely varied and distinctly fact-sensitive. …

124 The *McCabe* test has been criticised by Cameron and Liberman in "Destruction of Documents Before Proceedings Commence: What is a Court To Do?" (2003) 27 Melb U L Rev 273, by Pinsler's Article and by Professor Peter A Sallmann, Crown Counsel for Victoria, in his report "Document Destruction and Civil Litigation in Victoria" (http://repositories.cdlib.org/tc/reports/AU2004) which was commissioned by the Victorian Attorney-General following the *McCabe* test enunciated by the Court of Appeal. It was also doubted by Crispin J in *Russell Vance v Air Marshall Errol John McCormack in His Capacity as Chief of Air Force and others* [2007] ACTSC 80 at [35].

125 Let me first say that I see no reason in principle to distinguish between pre-action and post-action destruction where it is established that the destruction is deliberate. It may be more difficult to establish that the destruction was deliberate in the case of pre-action destruction but that is a different point. If the deliberate intent is established, then the consequence should be the same as

for post-action deliberate destruction.

126 Accordingly, like Chesterman J, I was and am of the view that the intention behind the destruction is crucial but I also caution that even a deliberate destruction will not necessarily lead to a striking out. All the circumstances have to be considered. It may be that notwithstanding the deliberate destruction, a striking out should not be ordered because, for example, there is other evidence of the document destroyed or the document destroyed is not critical in the totality of all the available evidence. This is not to say that the test is whether a fair trial is possible. I agree that the court may order a striking out even if a fair trial is still possible.

127 However, where there is both deliberate destruction and a fair trial is no longer possible, then a striking out would appear to be the appropriate sanction.

128 I would add that the notion of a fair trial does not envisage that all relevant evidence is before the court. That is the ideal situation. However, the reality is that for many cases which require a trial, not all the relevant evidence is before the court for various reasons, such as the passage of time, which have nothing to do with deliberate destruction. In *Fuji Xerox*, Chesterman J said at [14]:

> It is not the case that a trial will only be fair if all possible evidence relevant to the issues in dispute is available to the parties. It is common experience that witnesses die or cannot be found, or that documents are lost or that objects or scenes which may help to determine a disputed course of events change or are obliterated. The parties must do the best they can with what is available. A trial in which a witness, even a critical witness cannot be called can still be fair.

129 Mr Lok, counsel for KS, had submitted that KS had already disclosed many documents of various categories and the only category missing was that of internal email between the staff of KS. Even then some internal email was available. It seemed to me that Mr Lok was conflating a fair trial with a trial *per se*. Of course, the parties could still proceed with a trial. If the internal email was not available because, say, of the passage of time and the non-deliberate destruction thereof, I doubt if Mr Bull would have attempted the application to strike out. In many cases, such internal documents are unavailable due to the non-deliberate destruction thereof whether over time or otherwise. I would not say that a fair trial then is not possible. What then may make the distinction? I would venture to come full circle and say that the distinction lies in the intention behind the destruction. If a party deliberately destroys a document in order that it may not be used against him in pending or anticipated litigation, then it may not lie in his mouth to say that a fair trial is still possible unless, as I have said, evidence of the contents of the document is otherwise available or the contents are not critical in the totality of all the available evidence.

130 On the other hand, it must be rare for a court to order a striking out if the destruction is entirely innocent. The cases in between of negligent or reckless conduct resulting in destruction will be more difficult and will be part of the infinitely varied circumstances which Ang J alluded to.

The court's conclusion

131 I was of the view that the evidence which Mr Bull had relied on demonstrated that clearly KS had anticipated litigation some time before its action was filed on 4 January 2007.

132 I reiterate the email dated 3 July 2006 from AL to some staff of KS wherein he mentioned that he had asked NUS for a meeting of the Steering Committee to re-scope the project and that would be the way for KS to "exit the project without being sued" (see para 38 above).

133 Again, in AL's email of 6 July 2006 to MCS, he had mentioned that KS had to plan for the worse, "… where we actually have to litigate. I don't think it will come to this but we still need to have our stuff in place" (see para 32 above).

134 Furthermore, the evidence which Mr Bull had relied on demonstrated that KS was preserving and/or collating evidence in anticipation of litigation. Firstly, there was the request to MCS to get their stuff in place. Secondly, there was the request for staff to backup email from the NUS email accounts before the accounts were deleted. Thirdly, there was the request to backup documents from the staff's laptops before the laptops were cleansed. Fourthly, there was the Diagnostic Request from M Rasa and MCS' request for a project diary.

135 In the circumstances, I agreed that it was unbelievable that all internal email (including any response to the Diagnostic Request) of KS was deleted without backup because of some alleged housekeeping policy or that the email from whoever had responded to the instruction to backup was misplaced. I also did not believe that no project diary was constituted. I agreed that KS was suppressing documents. It might be that some of the documents were privileged from discovery like any response to the Diagnostic Request or a project diary but that was a different point which KS was not relying on.

136 As for the audio recordings, it was clear to me that KS had stored and kept them somewhere but had suppressed them too.

137 KS had lied again and again as demonstrated by the evidence which Mr Bull had relied on. According to Mr Bull, there were more than 20 affidavits for KS to explain its failure to comply with its discovery obligations and to further explain its initial explanations. I was of the view that KS' suppression and lies were deliberate.

138 This was a case of a plaintiff who wanted to make a huge claim but had deliberately sought to destroy and suppress documents and recordings adverse to it. It did not lie in Mr Lok's mouth to say that many documents were disclosed and only one category was missing. In the first place, more than one category was missing, *ie*, the internal email and the audio recordings were missing. Secondly, while a trial was still possible, it seemed to me that a fair trial was not. Numerous documents were still unavailable. NUS would not know precisely what the documents contained and what damaging material was in fact contained in them.

139 I would mention another point raised by KS. It suggested that the internal email could be obtained from the storage capabilities of NUS' email system which NUS in turn denied for reasons I need not elaborate on.

140 This possibility was raised rather late in the day by affidavit just before KS' appeal was heard by me. It was strange, to say the least, that KS being the IT contractor to NUS, should only realise this possibility so late if indeed there was some merit to the suggestion.

141 In any event, even if such internal email could be obtained, it would only mitigate but not erase KS' conduct. Furthermore, such email would still not include internal email contained in the KS email accounts and would not address the issue about the missing audio recordings.

142 Therefore, I was of the view that it was too late for KS to raise this possibility and a striking out of its claim and defence to counterclaim was warranted. I therefore dismissed KS' appeal. I was also of the view that the judgment in favour of NUS for certain sums was warranted as it was clearly entitled to such sums. Indeed, there was no real contest over those sums. As ordered below, NUS'

damages were to be assessed.

143 However, that was not the end of the saga. After my decision on 16 March 2009, R&D made a request on 23 March 2009 for further arguments as I have mentioned. The basis of the request was that in the few days after I had given my decision, KS had discovered 13 CDs in the possession of WMR in Melbourne.

144 AL's position was that he had previously been in touch with MCS who was the most likely person to have documents as she was the project manager. MCS had said that she had no documents other than those she had given to AL. After my decision, AL contacted her again and she maintained her position. AL then decided to call one Alan Davidson ("AD") and WMR, both of whom he had contacted before and had informed him that they did not have any documents with them. AL said that he was not able to contact AD but he managed to contact WMR. AL said he disclosed that KS' claim had been struck out because the court was of the view that KS had deliberately destroyed and/or suppressed documents. He told WMR he was perplexed as he had no idea what happened to such documents. He pleaded with WMR to check again for the same. It was then that WMR recalled that he had visited Singapore over the Chinese New Year in January 2009 and brought back with him to Australia some of his personal belongings which he had left at his in-laws' home in Singapore. A few days after this conversation, WMR contacted AL to say that he had found some CDs which he had brought back. He had quickly reviewed them and found that they related to the Project. He then sent the CDs by express courier to AL.

145 WMR and AL surmised that the CDs were probably left in WMR's office in KS' office premises. When WMR had cleared his office desk (after his services were terminated in September 2006 by KS), he had simply brought the CDs along with the rest of his personal belongings to his in-laws' home in preparation for his eventual return to Australia.

146 AL stressed that WMR was employed by Monash University since August 2007 and was not beholden to him or KS in any way.

147 KS also filed a formal application to adduce the CDs as evidence (see para 2 above). This was supported by an affidavit from KS and one from WMR. WMR's affidavit disclosed how in early November 2007, he had had several meetings in Melbourne with Edric Pan, a solicitor from R&D to discuss the Project. He told Mr Pan that he did not have any document relating to the Project. On 22 July 2008, WMR received a call from Audrey Chiang of R&D and he also told her that he did not have any document relating to the Project. In August 2008, he received a call from AL and he told AL that he did not have email relating to the Project anymore.

148 I also set out paras 14 to 15 and 17 to 20 of WHR's affidavit:

> 14. Sometime in or about November 2008, I was informed by Margaret Cato-Smith (K Solutions' former project manager for the ISIS project, and who was by this time my colleague at Monash University) that she had been told by Mr Lim that the Court had struck out K Solutions' claim. From this conversation I assumed that the case was over.
>
> 15. In January 2009, I travelled to Singapore with my wife to visit her parents, and also to pack up and retrieve whatever belongings of ours which remained at their home. I returned to Melbourne on 28 January 2009 (immediately after the Chinese New Year holiday), and among the things which we retrieved and brought back to Melbourne with us, were the rest of my belongings including some of the items I had taken back from the K Solutions office after the termination of my employment. In the course of packing up the items from my in-laws' home, I noticed that

there were some unmarked CDs among the items, but I did not at that point give it much thought as I did not deem them to be of any significance as I assumed the case to have been over.

16. …

17. Subsequently on or about 17 March 2009, I received another call from Mr Lim. He informed me of the proceeding case and appeals he was lodging. He asked me to try my very best to remember if I had kept any documents or emails at all from the ISIS project, and that this was extremely important.

18. After the telephone call with Mr Lim and after mulling over the matter, I remembered the CDs that I had noticed among the items which my wife and I had retrieved from her parents' home.

19. I emailed Mr Lim on the morning of 20 March 2009 to tell him that I had found some CDs containing documents relating to the ISIS project, and that I would be sending them to him. A copy of this email is exhibited as "WMR-2" herein. That same day, I sent the CDs to K Solutions via Express Post.

20. I did not have the time to investigate what these CDs contained, only that they were from K Solutions. I cannot verify what is on the CDs I sent to K Solutions.

149 After stating that he had no reason to retain backups of email accounts, WMR also said at para 24 of his affidavit:

24. It is possible that these CDs may have been inadvertently left by someone on my desk or somewhere in my room and in the midst of the packing process, these CDs had been packed away together with everything else in the room. This is entirely possible as there were many employees who were terminated during that period, and with so many documents and items being returned to K Solutions and with everyone occupied with packing their own belongings and saying their goodbyes, it would have been easy for items to be inadvertently misplaced in the confusion.

150 WHR's affidavit also exhibited an email he sent to AL on 20 March 2009. The email stated, *inter alia*:

Thanks for you [*sic*] call the other night. I'm glad you haven't given up.

When I moved to Australia with my wife, Joyce, I had stored some of our items at her parent's place. This last Chinese New year I sorted through them and brought a fair bit of it back to Melbourne (I returned on 28 Jan this year). I wnet [*sic*] through them the other night.

I've found a number of CDs relating to NUS – I've sent these via Express Post to you. I don't know what's on them as I haven't had time to look through them, but maybe there might be something relevant.

151 A copy of the set of CDs was apparently forwarded to D&N a few days before the hearing of KS' application to adduce them as evidence. According to Mr Bull, a quick check of the CDs showed that a large number of the email emanating to or from some email accounts of KS staff did not relate to the Project. The email disclosed was selective. Mr Bull also stressed that the provenance of the CDs was not established.

152 Coming back to WMR's affidavit, I found para 15 thereof troubling. He said that the CDs were unmarked but he did not say that he had assumed that they had contained personal information. Instead, it appeared, from his own explanation, that he knew that they pertained to KS matters but that he did not consider them to be significant as he had assumed KS' case to have been over. I was of the view that since he had learned that KS' case had been struck out, his natural reaction would surely have been to have asked himself whether the CDs could somehow help KS and whether or not it was too late to help. Instead of disclosing the discovery then to KS or its solicitors, he was saying that he was contented to do nothing. Worse still, according to him, he knew that the CDs related to KS matters but yet he took the trouble to bring them back with him to Australia instead of contacting KS or its solicitors.

153 If in fact what WMR meant was that he did not know what the unmarked CDs contained and that he did not bother to find out since KS' case was over, it was still remarkable that he did not try to find out what they contained or to discuss them with anyone else. Instead, as mentioned, he claimed he simply brought them back with him to Australia.

154 Also, as Mr Bull submitted, if WMR did not know the contents of the CDs, as he asserted in para 20 of his affidavit, and he only knew that they related to KS, how would he know that they related to the Project as indicated in his email to AL of 20 March 2009?

155 It was also too convenient for WMR to say that someone must have inadvertently left the CDs in his room even though he was not in charge of the backup of internal email. Besides, as Mr Bull submitted, WMR said in paras 4 to 6 of his affidavit as follows:

> 4. My services were terminated by K Solutions in September 2006. I was informed of the termination of my employment via a letter from Mr Albert Lim.
>
> 5. At the time I received my notice of termination, I had recently returned from the Cook Islands where I honeymooned with my wife (I was married on 1 June 2006, we travelled overseas for a ceremony in Brisbane Australia on 3 June 2006 and thence onto the Cook Islands).
>
> 6. It was approximately two months or so after I returned to Singapore from my honeymoon that I packed up and cleared my belongings from the K Solutions office.

156 According to Mr Bull, AL's 23rd affidavit disclosed that the employment of various staff, including WMR, was terminated on 10 July 2006, 28 July 2006 or 7 August 2006. If WMR had cleared his office two months after the latest date of 7 August 2006, this would have been sometime in September or October 2006. Yet, among the documents found in the 13 CDs was a folder created on 21 December 2006. How did such a folder find its way into the CDs purportedly removed by WMR before 21 December 2006?

157 I found WMR's explanation as well as the timing of his discovery to lack credibility. I was not persuaded by his assurance of independence in his affidavit. This latest development reinforced my conclusion about the deliberate conduct of KS. This was not just a state of disorganisation as Mr Lok was suggesting. Accordingly, I dismissed KS' application to adduce the CDs as evidence for the appeal and I declined to hear further arguments in respect of the appeal proper.

List of relevant applications and affidavits (Suit No 5 of 2007)

S/N	Date	Description

1.	25 July 2007	4th affidavit of AL
2.	01 November 2007	6th affidavit of AL
3.	27 November 2007	8th affidavit of AL
4.	24 January 2008	10th affidavit of AL
5.	24 January 2008	11th affidavit of AL
6.	14 May 2008	13th affidavit of AL
7.	21 May 2008	Summons 2245/08
8.	21 May 2008	8th affidavit of SLP
9.	28 May 2008	11th affidavit of SLP
10.	04 June 2008	17th affidavit of AL
11.	05 June 2008	18th affidavit of AL
12.	09 June 2008	12th affidavit of SLP
13.	11 June 2008	19th affidavit of AL
14.	27 June 2008	20th affidavit of AL
15.	15 July 2008	21st affidavit of AL
16.	29 July 2008	22nd affidavit of AL
17.	01 August 2008	23rd affidavit of AL
18.	18 August 2008	Summons 3619/08
19.	18 August 2008	13th affidavit of SLP
20.	01 September 2008	1st affidavit of M Rasa
21.	01 September 2008	1st affidavit of TKO
22.	01 September 2008	24th affidavit of AL
23.	01 September 2008	25th affidavit of AL

24.	12 September 2008	26th affidavit of AL
24.	12 September 2008	27th affidavit of AL
25.	15 September 2008	2nd affidavit of M Rasa
26.	15 September 2008	2nd affidavit of TKO
27.	03 October 2008	Summons 4335/08
28.	03 October 2008	14th affidavit of SLP
29.	13 October 2008	28th affidavit of AL
30.	20 October 2008	29th affidavit of AL
31.	21 October 2008	30th affidavit of AL
32.	24 October 2008	15th affidavit of SLP