Dirak Asia Pte Ltd and another *v* Chew Hua Kok and another [2013] SGHCR 1

Case Number	: Suit No 109 of 2010 (Summons No 4323 of 2012)
Decision Date	: 09 January 2013
Tribunal/Court	: High Court
Coram	: Shaun Leong Li Shiong AR
Counsel Name(s)	: Mr Johnson Loo and Mr Gary Low Wee Chong (Drew & Napier LLC) for the plaintiffs; Mr Jimmy Yap (Jimmy Yap & Co) for the defendants.
Parties	: Dirak Asia Pte Ltd and another — Chew Hua Kok and another

Civil Procedure – Discovery of documents – Contextual approach in understanding "power" in Order 24, Rules of Court (Cap 322, R 5, 2006 Rev Ed)

Civil Procedure – Discovery of documents – Electronic Discovery – Discovery of emails in email accounts – Whether the email user has possession and custody of the emails in the email accounts – Whether the emails in the possession of the email service provider are in the power of the email user

9 January 2013

Shaun Leong Li Shiong AR:

Introduction

1 With the institutionalised use of emails and email attachments in the modern working environment, the inevitability of electronic discovery, in one form or another, would become increasingly evident when commercial disputes arise. At the same time, the proliferation of cloud computing brings about unique challenges to the practice of electronic discovery. The resolution of these challenges calls for a nuanced consideration of seemingly preconceived notions of possession, custody and power over documents found in "the cloud". The present decision examines the extent in which an email user can be said to have power over emails in the possession and custody of the email service provider, a task which mandates a contextual understanding of "power" in Order 24 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) (see [34] – [37] below).

Factual Background

2 This matter involves an application for the discovery of emails, in a dispute between ex-employers and ex-employees over alleged breaches of fiduciary duties and contractual clauses under their employment contracts.

3 The 1st plaintiff ("Dirak Asia"), is a Singapore incorporated company, and the 2nd plaintiff ("Suzhou Dirak") is a company incorporated in the People's Republic of China. Both are in the business of designing, manufacturing and distributing locking and hinging systems. The 1st defendant ("Chew") was employed by Dirak Asia as its regional sales and operations manager from 23 August 2004, under an employment agreement dated 26 July 2004. He was also appointed a director and legal representative of Suzhou Dirak on 20 November 2006. The 2nd defendant, ("Soo") was employed by

Dirak Asia from 12 April 2004 as a sales engineer under an employment agreement dated 19 April 2004.

4 According to the plaintiffs, the defendants had, in the course of their employment, made unauthorised disclosure of the plaintiffs' confidential information to various third-party competitors, including Suzhou Euro-Locks, which is a wholly owned subsidiary of U.K. based Euro-Locks & Lowe & Fletcher Ltd. It was alleged that the plaintiffs have suffered loss as a result. It was further alleged that Soo had, on behalf of Suzhou Euro-Locks, accepted orders from the plaintiffs' customers, and diverted orders for the plaintiffs' goods from an existing customers to Suzhou Euro-Locks, whilst in the course of the plaintiffs' employment.

5 After Chew's employment with Dirak Asia ended on 8 May 2009, he was employed by Suzhou Euro-Locks as its general manager in June 2009. In addition, Soo joined Suzhou Euro-Locks after his employment with Dirak Asia ended on 21 July 2009. The defendants had allegedly continued to misuse and disclose confidential information of the plaintiffs' without authorisation. It was further alleged that the defendants had, in breach of the non-solicitation and non-compete clauses in their respective employment agreement with Dirak Asia, facilitated the solicitation of the plaintiffs' customers.

6 The plaintiffs obtained an order for discovery on 7 April 2011 against the defendants for documents relating to, *inter alia*, the defendants' employment agreement with Suzhou Euro-Locks; invoices and purchase orders that would disclose the revenue earned by Suzhou Euro-Locks from sales of competing products made from the use of the plaintiffs' designs; as well as relevant communications between the defendants and the plaintiffs' customers relating to the sales of competing products made from the use of the plaintiffs' designs.

7 Subsequent to the order for discovery made on 7 April 2011, the plaintiffs filed the present application to extend the terms of the 7 April 2011 order, to include discovery of the same documents found in the defendants' respective Euro-Locks email accounts. In opposing the present application, counsel for the defendants argued in para [10] of its written submissions of 29 October 2012 that the defendants do not have possession or custody of the emails sought to be discovered as these emails are stored in the server of Euro-Locks & Lowe & Fletcher Ltd, and neither of the defendants have power to allow the server to be searched. This position is reiterated in Chew's affidavit dated 7 September 2012, where he deposed (at paras [4] and [5]):

> This email account is assigned to me solely for the purpose of my employment with my present employer, Euro-Locks & Lowe & Fletcher Ltd, a company incorporated in the United Kingdom. The server in which all emails emanating from or delivered to this email account is not owned by me. …
>
> As I am not the owner of the server, the server is not in my custody or control. As a mere employee of the owner of the server, I have no power to allow the server to be accessed by people who are not authorised by my employer.

8 The same position is echoed in para [25] of Soo's affidavit dated 14 September 2012.

9 Counsel for the plaintiffs, on the other hand, contend that the defendants have power and control over the emails, given that they have the practical ability to access the emails in their Euro-Locks emails accounts (see plaintiffs' written submissions dated 20 November 2012).

Issue

10 In the above circumstances, the issue before this court was whether the defendants have

possession, custody and power over the emails in their email accounts with Euro-Locks & Lowe & Fletcher Ltd.

The question of possession and custody of the emails

11 The issue at hand is deceptively simple. One may assume as a matter of course that the defendants have possession and custody over the emails that they access in the course of their employment with Euro-Locks. Complications, however, arise upon further examination. The plaintiffs are not seeking discovery of *physical printouts* of emails kept by the defendants, neither are they seeking discovery of *soft copies of emails saved* in the defendants' computers, smart phones or other compound documents [note: 1] (storage devices or database). If this was the case, the defendants can be found to be in possession and custody of these physical printouts, or the saved softcopies kept in their computers. Instead, the plaintiffs are seeking discovery of the emails ***in*** the defendants' *email accounts.* When one asks the defendants, "where are the emails?", the defendants would necessarily have to reply that "they are in my *email accounts*." What happens then, when one asks, "*where are* the email accounts?"

12 The answer to this question may lie in "the cloud". This is because, in so far as emails accessed using web browsers are concerned (such as Gmail, Yahoo, Hotmail, and web-based/off-site corporate email accounts), the email user does not technically have possession and custody over the emails, as the emails are stored on mail servers and data centres sited in remote locations. In this case, the user may still download and save a copy of the emails in his computer, hard disk, smart phone, tablet device, or some other compound document. However, unless the user has saved his emails in his computer or in similar devices, what the user has in his possession is not the email itself, but the username and password *to access* the emails in the possession of the email provider. To this end, the email provider is in effect a custodian of the electronically stored information in the user's email account.

13 Where the emails are accessed using an email program installed on the user's computer (such as proprietary email systems in Microsoft Office Outlook and Microsoft Exchange), the emails are stored in remote servers until the email user activates his email client to send a request for these emails to be sent through (several) routers and be downloaded from the server to the user's computer. Nevertheless, even in such cases, the email program may be configured to store a copy of each email in a "virtual mailbox" located in the remote mail server, or to store all emails in the server instead of the user's computer (see *Fermin Aldabe v. Standard Chartered Bank* [2009] SGHC 194 at [15] – [16]). Depending on the terms of service, the email provider may also keep a copy of each email in the server for a specified period as a default position to act as a back-up repository for the user.

14 In the present case, the plaintiffs did not assert on affidavit, nor did they submit that the defendants have saved any of the emails in their personal or work computers, smart phones or any other compound documents in the defendant's possession and custody. Neither are they seeking discovery of such compound documents. Rather, the plaintiffs are seeking discovery of the emails in the *email account itself*. The plaintiffs also did not dispute that the emails are indeed stored in the servers of a third party, Euro-Locks & Lowe & Fletcher Ltd, as is the position asserted by the defendants. What the plaintiffs argued, was the fact that the emails are stored in the servers of a third party is no bar to the granting of a discovery order, given that the defendants have the practical ability to access the emails in their email accounts. In this regard, the real question before this court is whether emails in the possession and custody of Euro-Locks & Lowe & Fletcher Ltd is in the defendants' "power". To the extent where "cloud computing" refers to the access and use of software, platforms and infrastructure over the internet to do one's computing, [note: 2] the answer to

this question has implications on the interesting and more general inquiry on the extent in which a cloud user can be said to have "power" over the electronically stored information in the possession and custody of a cloud provider.

The question of power over the emails

15 The question of whether the defendants have power over the documents found in the possession and custody of a third party, illustrates the unique challenges to the practice of electronic discovery brought about by the increasing use of cloud computing. The plaintiffs may choose to seek discovery against the third party, Euro-Locks & Lowe & Fletcher Ltd, given that it has possession and custody over the emails kept in its server. However, a third party cloud provider, not being a party to the dispute at hand, may not be able to provide meaningful discovery as it is unlikely to know what are the documents which could adversely affect the cloud user's (the producing party's) case, or documents which could adversely affect or support the discovering party's case. Nor would the third party cloud provider be in a position to effectively conduct privilege review over the documents or to make proper objections based on privilege. Where the third party cloud provider is based in a different jurisdiction (Euro-Locks & Lowe & Fletcher Ltd is based in the U.K.), there could be practical difficulties in cooperating or complying with the discovery, inspection and production of documents. In addition, any attempt at discovery may be complicated if the third party cloud provider is prohibited to do so by the mandatory laws found in the jurisdiction where the cloud provider was incorporated in or where the server is located in, or even by the private obligations owed to the cloud user. In such cases, to comply with a discovery order made in our courts could result in a breach of the private obligations owed to the user, or a violation of the laws in the country in which the cloud provider is based in (for example, the Electronic Communications Privacy Act, 18 U.S.C. § 2510 et seq (2006), and the Stored Communications Act, § 2701 et seq (2006), in the U.S.). Furthermore, the situation may be made more complex by the fact that the cloud provider may outsource partially or fully its computing operations to third party vendors or network service providers for networked storage facilities, dedicated processing and computing resources, and enhanced cloud infrastructure; such that these network service providers become the *de facto* cloud providers, with a service agreement made with the *de jure* cloud providers who owns the data found in the cloud.

16 The complications described above are compounded by the perceived rigidity over the conception of "power" in so far as the obligation to make discovery is concerned. The oft-cited authority in this regard is Lord Diplock's exposition in the House of Lords decision in *Lonrho Ltd v. Shell Petroleum* [1980] 1 WLR 627 (at [635]) ("*Lonrho*"):

> …in the context of the phrase "possession, custody or power" the expression "power" must, in my view, mean a *presently enforceable legal right* to obtain from whoever actually holds the document inspection of it without the need to obtain the consent of anyone else. Provided that the right is presently enforceable, the fact that for physical reasons it may not be possible for the person entitled to it to obtain immediate inspection would not prevent the document from being in his power; but in the absence of a *presently enforceable right* there is, in my view, nothing in Order 24 to compel a party to a cause or matter to take steps that will enable him to acquire one in the future. [emphasis added].

17 A *rigid adherence* to the above exposition would be unduly restrictive, and may be especially inadequate to meet the needs of electronic discovery in the context of cloud computing. Where the cloud provider is the domain administrator of the cloud service (the email account), or where the employer is the administrator of the employee's work email account (as is typical in the usual employer-employee scenario), the employee could hardly be said to have an enforceable legal right to obtain the emails, as the employees' terms of use confer upon the employer-administrator the legal

right to suspend or terminate the employee's access to his email account. In addition, most terms of service prescribed by cloud providers would contain an express term to allow the cloud provider the legal right to modify existing terms or add new terms, such as a term to restrict the cloud user's legal right to obtain the emails without the cloud provider's consent. Any "legal rights" to the emails would also have to be determined in accordance with the law expressed to govern the terms of service between the cloud provider and the cloud user.

18 Such difficulties are highlighted by the U.S. decision of *Tomlinson v. El Paso Corp* 245 F.R.D. 474, 477 (D. Colo. 2007), where a third party cloud provider having custody of the documents refused to produce the material documents. The employees had sought discovery against their employer for electronic documents relating to pension records and data. The employer contended that it did not have the power to compel production of these electronic documents, as they were held by a third party human resources company in a "computerised infrastructure" (essentially a cloud database) that the company uses to administer and maintain the employees' pension and benefits records. The employer did not have the legal right to access the information kept in the "computerised infrastructure". In addition, the company had refused to produce the material documents even though these were in its custody. The court was unsympathetic to these contentions, and held that the employer's obligation to ensure that the pension records were accessible to the employees under the Employee Retirement Income Security Act was imperative. However the difficulty with this approach is that it does not address the fact that the employer had no *power*, in so far as it is understood as an *enforceable legal right*, over the documents held in the human resources company's cloud database.

19 Indeed, this court takes the view that Lord Diplock did not, in *Lonrho*, set out to prescribe an *exhaustive definition* of the expression "power" in Order 24, rule 2(1) of the English Rules of the Supreme Court ("Order 24"), which is in *pari materia* with Order 24, rule 1 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("Singapore Rules of Court"), nor is there anything in the decision of *Lonrho* to suggest that Lord Diplock's exposition ought to be given the effect of statute. On the contrary, His Lordship was expounding upon the court's *understanding* of what "power" entailed in accordance with the *facts* of the case at hand. Lord Diplock was himself quick to limit the general purport that would be attached to the House of Lords' decision (at [631 -632] and [636 – 637]):

> The circumstances which have given rise to the disputes about discovery are quite exceptional; they are unlikely to recur in any other case and, for that reason, *they do not in my view provide a suitable opportunity for any general disquisition by this House upon the principles of law applicable to the discovery of documents*.
>
> …
>
> In dismissing the subsidiaries appeal *on its own special facts*, I expressly decline any invitation to roam any further into the general law of discovery. In particular, I say nothing about one-man companies in which a natural person and/or his nominees are the sole shareholders and directors. It may be that, depending upon their own particular facts, different considerations may apply to these.
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> [emphasis added].

20 In *Lonrho*, the applicant had wanted discovery of the documents in the possession of Shell Petroleum's (and BP's) subsidiaries in Rhodesia and South Africa. The House of Lords had to decide whether the fact that Shell Petroleum and BP could alter the articles of association of their subsidiaries to grant themselves the legal entitlement to obtain relevant documents in the possession of the subsidiaries and sub-subsidiaries, had meant that Shell Petroleum and BP have "power" over

the relevant documents (at [636]):

> …Shell Mocambique's documents are not in my opinion within the "power" of either of Shell or B.P. within the meaning of R.S.C., Ord. 24. They could only be brought within their power either (1) by taking steps to alter the articles of association of Consolidated and procuring Consolidated through its own board of directors to take steps to alter the articles of association of Shell Mocambique, which Order 24 does not require them to do; or (2) by obtaining the voluntary consent of the board of Shell Mocambique to let them take copies of the documents. It may well be that such consent could be obtained; but Shell and B.P. are not required by Order 24 to seek it, any more than a natural person is obliged to ask a close relative or anyone else who is stranger to the suit to provide him with copies of documents in the ownership and possession of that other person, however likely he might be to comply voluntarily with the request if it were made.

21 While Lord Diplock's conception of "power" under Order 24 would, in general, hinge upon the question of whether the producing party (the party whom the discovery application is made against) has a presently enforceable legal right to obtain the relevant documents, it is evident that His Lordship's analysis above would be consistent with an understanding of "power" based on the *degree of control* that Shell Petroleum and BP have in accessing and obtaining the relevant documents from the subsidiaries and sub-subsidiaries. Shell Petroleum and BP could not be said to have the sufficient degree of control over the documents if the only way in which they could have access to the documents were, either by altering the articles of association of the subsidiary company or by procuring the board of the subsidiary company to alter the articles of association of the sub-subsidiary company, or if it depended upon the voluntary consent of the sub-subsidiary company which has possession over the documents. In other words, the disclosure obligations under Order 24 did not require the producing party to go to such lengths to produce documents *so far outside of its control*. There is some suggestion that this was indeed the English Court of Appeal's understanding of the circumstances in which Shell Petroleum and BP can be said to have "power" over the documents, i.e, the expression of "*power*" was analysed in the realm of "*control*", where Lord Denning MR said in *Lonrho Ltd v. Shell Petroleum* [1980] 1 QB 358 at [371]:

> … to my mind, a great deal ***depends on the facts of each individual case*** . For instance, take the case of a one-man company, where one man is the shareholder – perhaps holding 99% of the shares, and his wife holding 1% - where perhaps he is the sole director. In those circumstances, *his* ***control over that company may be so complete – his "power" over it so complete*** – that it is his alter ego. …But in the case of multi-national companies, it is important to realise that their position with regard to their subsidiaries is very different from the position of one-man companies.
>
> [emphasis in bold italics added].

22 A similar approach was adopted by Shaw LJ (at [375 – 376]):

> … I have come to view that a document can be said to be in the power of a party for the purposes of disclosure only if, at the time and in the situation which obtains at the date of discovery, that party is, *on the* ***factual realities of the case virtually in possession*** (as with a one-man company in relation to documents of the company) *or otherwise* has a present indefeasible legal right to demand possession from the person in whose possession or control it is at that time.
>
> …

There are no doubt situations, such as existed in *B v B* (Matrimonial Proceedings: Discovery) [1978] Fam 181, where on the established facts a company is so utterly subservient or subordinated to the will and the wishes of some other person (whether an individual or a parent company) that compliance with that other person's demands can be regarded as assured. ***Each case must depend upon its own facts and also upon the nature*** , ***degree and context of the control*** it is sought to exercise.

[emphasis in bold italics added].

23 This emphasis on "control" was echoed in the English Court of Appeal decision of *Re Tecnion Investments Ltd* [1985] BCLC 434 ("*Re Tecnion*"), decided about 5 years after the House of Lords decision of *Lonrho*. In *Re Tecnion*, a petitioner, who was a minority shareholder in a company, had commenced proceedings against the majority shareholders on the allegation that they have diverted business from the company to five other entities that the majority shareholders have interests in. The petitioner sought discovery against the majority shareholders for documents in the possession and custody of these three entities. The Court of Appeal suggested that discovery could be ordered if these five entities were under the "*unfettered control*" of the majority shareholders so as to be their "*alter egos*".

24 Following from the above, the recent English Court of Appeal decision of *North Shore Ventures Limited v. Anstead Holdings Inc.* [2012] EWCA Civ 11 ("*North Shore Ventures*") illustrates that a rigid adherence to Lord Diplock's perceived definition of "power" as an "enforceable legal right to obtain documents" should give way to a more flexible contextual analysis. In that case, the claimant had granted a loan to the defendant, and the defendant's assets were subsequently transferred to various trusts set up by the guarantors of the loan, under which the guarantors were discretionary beneficiaries. The claimant sought discovery against the guarantors under, *inter alia*, Civil Procedure Rule ("CPR") 31.8, the successor of Order 24, for documents relating to the trusts. CPR 31.8 provides:

(1) A party's duty to disclose documents is limited to documents which are or have been in his control.

(2) For this purpose a party has or has had a document in his control if –

(a) it is or was in his physical possession;

(b) he has or has had a ***right to possession*** of it; or

(c) he has or has had a ***right to inspect or take copies*** of it.

[emphasis in bold italics added].

25 It was not in dispute that the documents were not in the guarantors' possession. The guarantors contended that the trustees had removed them as beneficiaries, such that they did not have the relevant documents under their control. Floyd J allowed the application at the High Court. The court adopted a practical approach in finding that the guarantors were so closely connected in the setting up the trusts, and with the beneficiaries of the trust (who were the guarantors' wives and children), that they were in a practical position to obtain and produce the documents sought for. On appeal, it was argued that Floyd J had misdirected himself to the meaning of control, in taking the wrong view that documents were within the producing party's control if he was in a *position to obtain the documents*, or had the *ability* to obtain the documents or copies thereof (see *North Shore Ventures* at [22]). The House of Lords decision of *Lonrho* was relied upon as authority to support the

submission made on appeal that, with regard to the meaning of "control" under CPR 31.8, a document which is not in a party's physical possession cannot be said to be within his control unless he has a currently enforceable legal right to obtain the documents or copies thereof (see *North Shore Ventures* at [23]).

26 The English Court of Appeal decided that "[w]hether Floyd J had jurisdiction to make the [discovery] order … depends on what conclusion he was properly entitled to draw on the material before him as to the *true nature of the relationship* between the [guarantors] and the trustees" [emphasis added] (see *North Shore Ventures* at [37]). The English Court of Appeal refused to accept a narrow understanding of "control", and rejected counsel's submission that the expression was confined by *Lonrho* to only refer to a legal right to possession or a legal right to obtain copies (at [40]):

> … even if there were on a strict legal view no "right to possession", for example, because the parties to the arrangement caused the documents to be held in a jurisdiction whose laws would preclude the physical possessor from handing them over to the party at whose behest he was truly acting, it would be open to the English court in such circumstances to find that ***as a matter of fact*** the documents were nevertheless within the control of that party within the meaning of CPR 31.8(1).
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> [emphasis in bold italics added].

27 The English Court of Appeal had essentially adopted a contextual approach in analysing the relationship between the producing party and the third party in possession of the documents. The fact that the guarantors had no legal right to obtain possession of the documents held by the trustees, did not bar the court from finding, as *a matter of fact*, that they have control over such documents. In the end, Floyd J's finding that the guarantors had control over such documents as they were in a position which granted them the *practical ability* to obtain the documents, was upheld. The court in *Schlumberger Holdings Ltd v. Electromagnetic Geoservices AS* [2008] EWHC 56 at [21], adopted the same approach, where, although the expression "practical ability" to obtain the documents was not actually used, this was the very basis of the court's finding that the producing party has *control* over the documents. The factual evidence revealed that the company in question had, as shown by its past conduct, routine access to the documents in the possession of other companies in the same group, and the court found this to be a sufficient basis for deciding that the company has control over the documents.

28 In a similar vein, this contextual approach that takes into consideration not only the legal right to obtain documents, but also the practical ability to do so, can be found in the U.S. decisions, such as that of *re NTL Securities Litigation* 244 F.R.D. 179 (S.D. N.Y. 2007) ("*NTL Securities*"). The plaintiffs had commenced proceedings against NTL Inc for violations of federal securities laws. NTL Inc subsequently went into bankruptcy, and two companies were set up. NTL Europe was set up as the successor of NTL Inc, and to replace the company in the law suit. A separate second company known as New NTL was established, and it became the surviving operational company with control of the assets that previously belonged to NTL Inc. The plaintiffs made a request for discovery against NTL Europe pursuant to Rule 34(a) of the Federal Rules of the Civil Procedure, which allows a party to serve on any other party to the litigation a request for documents in that party's possession, custody or control. NTL Europe denied that it has control over the documents in New NTL's possession. The court held that (at [59] – [60]):

> 'control' does not require that the party have legal ownership or actual physical possession of the documents at issue; rather, documents are considered to be under a party's control when that

party has the *right, authority, or practical ability* to obtain the documents from a non-party to the action. [emphasis added]

29 The court examined the contextual relationship between the producing party, NTL Europe, and the third party that was in possession of the relevant documents, New NTL. It found that NTL Europe had the legal right to obtain the documents due to a document sharing clause in an agreement between the parties which made it clear that New NTL was to make available to NTL Europe "any documents that it needed to comply with its legal obligations, such as [the attendant] lawsuit", (see *NTL Securities* at [61]). More significantly, the court held that, even without this document sharing agreement which gave NTL Europe the legal right to obtain the documents, the discovery application will be allowed as it has been shown that NTL Europe has the practical ability to obtain documents from New NTL, including its emails (see *NTL Securities* at [65]). The CEO of NTL Europe gave evidence that "whenever there was a document that [NTL Europe] needed [from New NTL], [they] would call [New NTL] and ask if they had it, and if they had it, they'd send it" (see *NTL Securities* at [62]).

30 The emphasis on the producing party's *legal right* to obtain documents was accorded its due consideration in *NTL Securities*. However, as shown in the U.S. court's contextual analysis of the relationship between the producing party and the third party in possession of the documents, that may not necessarily be the *only factor* to determine whether the producing party has control of the documents sought to be discovered.

31 The approach in *NTL Securities* was adopted in *Goodman v. Praxiar Services Inc*, 632 F. Supp. 2d 494, 515 (D. Md. 2009) ("*Goodman*"), where the court found that the applicant had failed to show "the existence of facts that would demonstrate a relationship between [the party purported to have control over the documents] and [the party in possession of the documents] comparable to the cooperative, file-sharing relationship between NTL Europe and New NTL".

32 In *Flagg v. City of Detroit*, 252 F.R.D. 346, 353 (E.D.Mich. 2008), the question before the court was whether the text messages sent by the employees of the City of Detroit ("the City"), which were kept in a system maintained by a third party vendor, can be said to be within the City's control. The court examined the relationship between the City and the third party, and found that the City had "control" over the electronic information kept by the third party; the examination of the relationship between the parties revealed that the City could withhold consent to the production of the data, and the court made a determination of fact that the City equally had the ability to consent to the production of the data as well.

33 Such a contextual approach may take the form expressed by the court in *Ice Corp v. Hamilton Sundstrand Corp*, 245 F.R.D. 513, 518 (D. Kan. 2007), where multiple factors are considered and balanced, such as; who had access to the documents; how the documents were used; who had generated, acquired or maintained the documents; the extent to which the documents serve the producing party or third party's interests; any evidence of transfer of ownership or title of the documents; and the ability of the producing party to obtain the documents upon request. The fact intensive nature of this inquiry is also reflected in other U.S. decisions, such as that of *Mercy Catholic Medical Center v. Thompson*, 380 F. 3d 142, 160 (3d Cir. 2004), and *Bifferato v. States Marine Corp.*, 11 F.R.D. 44, 46 (S.D.N.Y. 1951), where the courts examined the factual relationship between the producing party and the third party in possession of the documents; as well as the decision of *Am. Rock Salt Co. v. Norfolk S. Corp*., 228 F.R.D. 426, 460 (W.D.N.Y. 2005), where the court determined from the documents that were already disclosed by the producing party, as well as the information contained in the producing party's website, that the producing party has, as a matter of fact, routinely accessed documents held in the possession of third parties.

The Decision

34 Analogous to the approach adopted in the decisions discussed above, it is clear to this court that the question of whether a producing party has "power" over documents in the possession and custody of a third party is necessarily a *fact intensive exercise* which requires a contextual and nuanced appreciation of the relationship between the producing party and the third party in possession and custody of the documents. As can be seen from the discussion above at ([24] – [33]), this approach was adopted in decisions which dealt with the disclosure obligations under rules which use the expression "control" and not "power". Nonetheless, the fact that Order 24 in the Singapore Rules of Court uses the expression "power" instead of "control" does not make it any less important for the court to examine the *contextual relationship* between the producing party and the third party in possession of the documents. As shown at ([21] – [23]) above, the English Court of Appeal in both *Lonrho* and *Re Tecnion* examined the expression "power" in the realm of "*control*". Significantly, although CPR 31.8 uses the expression "control" and not "power" (see [24] above), as the latter expression is used in Order 24 of the English Rules of the Supreme Court as well as that in the Singapore Rules of Court, the English Court of Appeal in *North Shore Ventures* expressly opined that the treatment given by the English Court of Appeal in *Lonrho* to the expression "power", would not have been different from the English Court of Appeal's understanding of "control" in *North Shore Ventures* (at [34] – [36]):

> There is some tension between the different passages … from the speech of Lord Diplock in *Lonrho v Shell*. On the one hand he gave a definition of the expression "power" in the phrase "possession, custody or power"; on the other hand he indicated that he regarded the facts of the case as so exceptional that it was not an appropriate occasion for "a general disquisition", and he expressly declined to say anything about one-man companies beyond commenting that "depending upon their own particular facts, different considerations may apply to these".
>
> If one asks the question what "different considerations" may apply in the case of the one-man company, the answer lies in the fact that a person with such domination over a company has or is likely to have the real say whether to produce the document. To obtain the "consent" of the company requires obtaining the consent of himself and no one else.
>
> We do not have to decide whether in such a case the documents would have been within the power of the owner/controller of the company for the purposes of RSC Order 24, rule 2(1), although Lord Denning and Shaw LJ [in the Court of Appeal decision in *Lonrho*] would have given an affirmative answer, for we are concerned with CPR 71.2 and 31.8. *The word "control" was not used in RSC Order 24 rule 2(1), but* ***as a matter of ordinary English*** *it would be apt to describe the type of case which* ***Lord Denning and Shaw LJ*** [in the Court of Appeal decision in *Lonrho*] ***had in mind*** *.*
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> [emphasis in italics and bold italics added]

35 The conception of "power" under Order 24 of the Singapore Rules of Court cannot be understood in a vacuum, and must necessarily be considered in light of the facts at hand. As expounded in *Lonrho*, a party can be found to have power over the documents in the hands of a third party if it has an enforceable legal right to obtain possession of those documents. Whether the party has that legal right may, of course, be proved by evidence, such as the proof of a document sharing agreement between a cloud user and a cloud provider. However, in so far as the inquiry is *essentially* a *factual one*, that would not be the *only way* in which Order 24 contemplates that a party may be shown to have power over documents in the possession of third parties. A party found to have no presently enforceable legal right to obtain possession of the documents held by a third party would

not necessarily conclude the question of whether that party has power over those documents. Where an examination of the relationship between the producing party and the third party reveals that the former has the *practical ability* to access or obtain documents held in the possession of the third party, and *having regard to the context* in which that practical ability is found, the producing party may indeed be found to have the *sufficient degree of control* that falls within the conception of "power" as contemplated under Order 24 of the Singapore Rules of Court.

36 One must, however, be careful not to *equate* the practical ability to access documents with *having power* over those documents such as to automatically render the party subject to a discovery order. While the practical ability to access documents may be one measure to determine the *factual inquiry* of whether one has power over the documents, it does not mean that a party with the practical ability to access documents would, *no matter the factual circumstances*, have power over those documents. Sufficient regard must be accorded to the *context* in which the practical ability is found, and as said above, this requires a nuanced appreciation of the *relationship* between the producing party and the third party in possession of the documents. An employee who works in an obscure department in a company, and *who just so happens* to have access to electronic documents stored in that company's cloud network, but who is not in the least remotely connected to the dispute in question, may not arguably be said to have *power* over the documents. Likewise, a party who can hack into a database may have the practical ability to *access* to the documents stored therein, but it is questionable if the Singapore Rules of Court contemplates such a situation as constituting "power" over the documents. It is significant that such parties may not be able to make meaningful discovery, for it is unlikely that they would be in a position to know what are the documents which could adversely affect the producing party case, or documents which could adversely affect or support the discovering party's case. Nor would it be likely that they could make proper objections to discovery based on privilege.

37 Furthermore, where a party has shown from its past practice or course of dealing that it routinely obtains consent from a third party to access and obtain documents, and hence is in a position with the "practical ability" to obtain the documents, it may not *necessarily* have power over the documents, especially if the third party has the real say over whether to confer consent or not, and when it can be shown that such consent may no longer be granted. As opined by the court in *Chaveriat v. Williams Pipe Line Co*, 11 F3d 1420, 1427 (7th Cir 1993) 32, "the fact that a party could obtain a document if it tried hard enough and maybe if it didn't try hard at all does not mean that the document is in its possession, custody or control; in fact, it means the opposite." Notably, the court in *Goodman* (at reference note 11 of the decision) expressed its reservations on a straightforward application of any test based on the producing party's practical ability to obtain the documents, and was acutely aware of the inadequacies of finding the presence of control from the *mere fact* that the producing party had been able to obtain documents from a third party due to the cooperation given to past requests for documents. The court preferred the broader contextual approach used by the court in *NTL Securities*, which takes into consideration both the legal right and practical ability to obtain documents, while examining the whole relationship between the producing party and the third party in possession of the documents.

38 In the present case, the defendants did not deny nor dispute, on affidavit and in the submissions before me, the plaintiffs' assertion that they have practical access to the emails from their email accounts with Euro-Locks & Lowe & Fletcher Ltd. The emails exhibited in Teo Cher Koon's (the managing director of Dirak Asia and director of Suzhou Dirak) affidavit of 27 August 2012 (see pages 29 and 30, and 43 to 52) reveal that the defendants have routine access to their email accounts in the course of their employment. Instead of adducing evidence to show that the defendants' practical access to their email accounts with Euro-Locks & Lowe & Fletcher Ltd has been or will be terminated, the plaintiffs' position was in fact reinforced by the admissions made in the

defendants' respective affidavits. Chew admitted that the Euro-locks email account is assigned to him for the purpose of his employment with his present employer, Euro-Locks & Lowe & Fletcher Ltd (see para [4] of Chew's 7 September 2012 affidavit). This is reiterated in Soo's 14 September 2012 affidavit that his Euro-locks email account is assigned by his present employer to him (at para [16]). In fact, Soo's assertions at paragraphs [18] to [21] showed that customers had routinely contacted him at that email address during the course of his employment. Based on the evidence before me, this is a case where the employer has provided each defendant with a work email account in which they have ready and easy access on a routine basis to their emails, as and when their work requires so in the course of their employment. The strong degree of *control* over the emails is evident; the defendants' *practical ability* to access these documents in the course of their employment could *readily translate into actual possession*, either by saving a soft copy of the email in their storage devices, or by keeping a printed hard copy of the email. In these circumstances, I found that the defendants have power over the emails in their email accounts with Euro-Locks & Lowe & Fletcher Ltd.

39 I am also of the view that the emails sought for are relevant and necessary for the fair disposal of the case. As shown in the thread of emails exhibited in Teo Cher Koon's affidavit of 27 August 2012 (at pages 29 and 30, and 43 to 52), Chew has been using his email account with Euro-Locks & Lowe & Fletcher Ltd to deal with requests for purchases made by Dirak Asia's customers, such as Dirak Taiwan. The thread of emails and invoice attachments from the emails also revealed that Soo has been using his email account with Euro-Locks & Lowe & Fletcher Ltd to sell products (for example, gaskets) which had been produced using Dirak Asia's confidential designs and specifications. On the other hand, Chew's reply affidavit dated 7 September 2012 states a mere assertion, without any elaboration, that the emails sought for are not relevant. Also, Soo's reply affidavit of 14 September 2012 had dedicated a substantial portion to disputing the merits of the substantive dispute at hand, the resolution of which is not within the jurisdiction of the present court, and had failed to discharge its burden of showing that the documents sought for are irrelevant or unnecessary.

Conclusion

40 For the reasons above, the application was allowed with costs.

[note: 1] For more information on the discovery and inspection of documents known as "compound documents", see the decision of *Surface Stone Pte Ltd v. Tay Seng Leon and another* [2011] SGHC 223.

[note: 2] See David D. Cross and Emily Kuwahara, *E-Discovery and Cloud Computing: Control of ESI in the Cloud* (EDDE Journal, Spring 2010, Vol 1, Issue 2) at page 2.