IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 13

Suit No 331 of 2013
(Summons No 2275 of 2017)

Between

GRANDE CORPORATION PTE LTD

… *Plaintiff*

And

(2) CUBIX GROUP PTE LTD
(3) TOH WEE PING BENJAMIN
(4) GOH BEE HEONG
(5) CUBIX AND KOSMIC PTE LTD
(6) AXXIS GROUP PTE LTD
(7) AXXIS INTERNATIONAL PTE LTD
(8) AXXIS PTE LTD

… *Defendants*

JUDGMENT

[Civil procedure] — [striking out]
[Civil procedure] — [discovery of documents]

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Grande Corp Pte Ltd
v
Cubix International Pte Ltd and others

[2018] SGHC 13

High Court — Suit No 331 of 2013 (Summons No 2275 of 2017)
Lee Seiu Kin J
19 October 2017

19 January 2018

Lee Seiu Kin J:

Introduction

1 Summons no 2275 of 2017 is the plaintiff's application to have the defences of the third, fourth, sixth, seventh and eighth defendants struck out, and for judgment to be entered in favour of the plaintiff. The striking-out is sought on the grounds that these defendants have been in contumelious breach of their discovery obligations and have breached an unless order, and that a fair trial is no longer possible.

The underlying dispute

Relationship between the parties

2 The plaintiff is Grande Corporation Pte Ltd ("the plaintiff"), a Singapore-incorporated investment holding company.[1]

3 The first defendant is Cubix International Pte Ltd ("Cubix International"), a Singapore-incorporated company in the business of providing business and management consultancy services, and art and graphic design services. On 1 February 2017, the plaintiff discontinued the claim against it.[2] The second defendant is Cubix Group Pte Ltd ("Cubix Group"), a Singapore-incorporated investment holding company.[3]

4 The third defendant is Toh Wee Ping Benjamin ("Ben"). Ben is the sole director and shareholder of Cubix International. He is also the sole director and a 95% shareholder of Cubix Group. The fourth defendant is Goh Bee Heong ("Bee"), who holds 5% of the shares in Cubix Group.[4]

5 The fifth defendant is Cubix and Kosmic Pte Ltd ("C&K"). C&K was incorporated in March 2007 as a joint venture between the plaintiff and Cubix Group, to carry out the business of developing, producing, distributing and exploiting film, television, digital and interactive media. The plaintiff and Cubix Group each held one share out of a total of two shares in C&K. Ben was the sole director of C&K.[5] The plaintiff and Cubix Group entered into a joint venture agreement ("the JV Agreement") on 18 July 2007 to govern the terms of their joint venture. By the terms of the JV Agreement, the plaintiff and Cubix Group undertook not to solicit or entice away any business or custom from any customer or partner of C&K, and not to engage in any business in direct competition with C&K's business ("the non-competition obligations").[6]

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1 Statement of Claim (Amendment No 1), para 1.

2 Notice of discontinuance/withdrawal dated 1 February 2017.

3 Statement of Claim (Amendment No 1), paras 2–3.

4 Statement of Claim (Amendment No 1), paras 2–3.

5 Statement of Claim (Amendment No 1), para 5.

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6 As part of the joint venture between the plaintiff and Cubix Group, the plaintiff claims that between 25 April 2007 and 28 January 2008, it transferred to C&K sums totalling S$291,288.00 and US$458,000 as contributions to, and/or loans for, the operating expenses of C&K.[7] The first, third and fourth defendants disagree that these sums were transferred to C&K as "loans" and characterise these sums as "capital contributions" instead.[8] I will refer to these sums as "funding".

7 The sixth, seventh, and eighth defendants are AXXIS Group Pte Ltd ("AXXIS Group"), AXXIS International Pte Ltd ("AXXIS International") and AXXIS Pte Ltd respectively. They will collectively be referred to as "the AXXIS Companies". Ben and Bee incorporated the AXXIS Companies in February 2008, and are both directors and equal shareholders in each of the AXXIS Companies. The plaintiff claims that the AXXIS Companies were established for the very same aims and objectives for which C&K was established, and are involved in the same business activities.

The plaintiff's claim and the defendants' defence

8 The plaintiff claims that the funding, business, clientele, projects and staff of C&K were wrongfully transferred or diverted to the AXXIS Companies. The plaintiff pleads the following causes of action (among others) against the various defendants:

(a) Cubix Group owed fiduciary duties and duties of good faith and fidelity to the plaintiff. These included the obligation to use funds that

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6 Statement of Claim (Amendment No 1), para 14.

7 Statement of Claim (Amendment No 1), para 16.

8 Defence (Amendment No 2), para 20.

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were extended by the plaintiff to C&K for their intended purpose, a duty to act in the best interests of the plaintiff, and a duty not to defeat the intention and purpose of the joint venture. Cubix Group breached these duties by using and transferring funding, business, clientele, projects and staff that were intended for C&K to the AXXIS Companies. Cubix Group also breached its non-competition obligations under the JV Agreement.[9]

(b) Ben and Bee personally breached their fiduciary duties and duties of good faith and fidelity which they owed to the plaintiff "as joint venture partners". They breached those duties by using and diverting the funding, business, clientele, projects and staff that were intended for C&K towards the AXXIS Companies.[10] Ben and Bee are also liable to account to the plaintiff for any profits derived from such breaches. The plaintiff also claims that Ben and Bee breached s 340 of the Companies Act (Cap 50, 2006 Rev Ed) by conducting the business of C&K with the intention to defraud the plaintiff as its "sole or main creditor".[11] The plaintiff also claims against Ben and Bee in dishonest assistance.[12]

(c) Leading up to the entering of the JV Agreement, Cubix Group, Ben and Bee fraudulently or recklessly made misrepresentations to the plaintiff, including misrepresentations that Cubix Group would match any funding contributions that the plaintiff made to C&K, that any funding which the plaintiff contributed to C&K would be used for the

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9 Statement of Claim (Amendment No 1), para 19.

10 Statement of Claim (Amendment No 1), paras 19A–19B.

11 Statement of Claim (Amendment No 1), para 20.

12 Statement of Claim (Amendment No 1), para 30.

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business and expenses of C&K only, and that these contributions (which the plaintiff describes as "loans") would be repayable by C&K on the plaintiff's demand.[13]

(d) The AXXIS Companies are in knowing receipt of any profits or benefits derived from the wrongful use of C&K's funding, and the transfer of any business, clientele and/or staff of C&K. Further, the corporate veil of the AXXIS Companies should be lifted and Ben and Bee should be made jointly and severally liable for all claims by the plaintiff.[14]

(e) The AXXIS Companies, Cubix Group, Ben and Bee are liable in conspiracy because they conspired together to defraud the plaintiff by causing the plaintiff to enter into the JV Agreement and to transfer the funding to C&K.[15]

9 On 14 June 2013, Cubix International, Cubix Group, Ben, Bee and the AXXIS Companies jointly filed a defence. However, on 20 March 2014, Cubix Group, C&K and the AXXIS Companies filed notices of intention to act in person. I note that it is technically impossible for these defendants to act in person, since under O 12 r 1(2) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("Rules of Court"), a defendant to an action begun by writ which is a body corporate may only defend the action through a solicitor. Further, none of these defendants have applied for leave for their officers to act on their behalf. Since filing these notices of intention to act in person, Cubix Group, C&K and the

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13 Statement of Claim (Amendment No 1), paras 21–23.

14 Statement of Claim (Amendment No 1), paras 26–27.

15 Statement of Claim (Amendment No 1), para 29.

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AXXIS Companies have not taken any further steps in these proceedings. They also did not appear at the hearing of the present application. This is an issue to which I shall return later.

10 On 15 May 2014, Cubix International, Ben and Bee (collectively, "the Represented Defendants") filed an amended defence, which was subsequently amended again on 18 April 2016. By their defence (as amended), the Represented Defendants plead as follows:

> (a) The intention to incorporate the AXXIS Companies was made known to, and agreed to by the plaintiff.[16] The AXXIS Companies were set up as special purpose vehicles in order to receive certain sums raised in connection with a project called the "Singapore Media Hub and Animation Studio project".[17]
>
> (b) Ben and Bee never wrongfully used the moneys provided by the plaintiff to C&K, or transferred any business, clientele or employees of C&K to the AXXIS Companies. The moneys provided by the plaintiff to C&K were used solely and specifically for C&K and its principal project, an animation known as "Fabulous Fat Fish". At all material times, the staff and management of C&K were also working on Fabulous Fat Fish. [18]
>
> (c) Ben and Bee were not in the position of joint venturers vis-à-vis the plaintiff as they were never party to the JV Agreement.

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16 Defence (Amendment No 2), para 5.

17 Defence (Amendment No 2), para 7.

18 Defence (Amendment No 2), para 8.

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The relevant procedural history

11 In this summons, the plaintiff seeks to strike out the defences of Ben, Bee and the AXXIS Companies broadly on the basis that these parties have breached their discovery obligations and certain court orders. As I shall elaborate on later, the particular breaches which the plaintiff relies on relate to three separate categories of documents. I shall first set out an overview of the key events in the procedural timeline leading up to this application, before I discuss the detailed chronology relating to each category of documents.

Overview

The plaintiff's requests for specific discovery

12 After the plaintiff commenced its claim on 15 April 2013, the defendants entered appearances from 22 April 2013 to 27 April 2013. They were all represented by solicitors at the time.[19] Since 7 April 2014, the Represented Defendants have been represented by the same set of solicitors, Messrs MG Chambers LLC ("MG Chambers").

13 On 18 November 2014, the plaintiff's solicitors, Messrs Characterist LLC ("Characterist"), sent MG Chambers a letter ("the 18 November 2014 Letter") requesting specific discovery of several categories of documents set out in an annex. One of the classes of documents requested was the "AXXIS Documents". These included the following:[20]

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19 Bee's Memorandum of Appearance, 22 April 2013; Memorandum of Appearance for Cubix Group, C&K, and the AXXIS Companies, 24 April 2013; Ben's Memorandum of Appearance, 27 April 2013.

20 6th Affidavit of Sim Bee Har, 17 May 2017, pp 133–136.

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(a) All bank account statements of the AXXIS Companies ("Item 1(2)").

(b) All annual financial statements of the AXXIS Companies (including but not limited to the balance sheets of the AXXIS Companies) ("Item 1(3)").

(c) All documents evidencing or summarising the costs and expenses incurred and revenue generated or received by the AXXIS Companies in respect of the production, distribution and reproduction of each and every project ("Item 1(5)").

14 On 24 December 2014, MG Chambers responded via a letter to Characterist, which stated as follows:[21]

> Our clients instruct that they are only able to locate the documents listed in Items 1(2), 1(3) and 1(5) from 2010 onwards. Our clients instruct that the documents prior to 2010 *were thrown away sometime in the first quarter of this year* when the AXXIS companies became dormant. [emphasis added]

15 Subsequently, several letters were exchanged between Characterist and MG Chambers. In gist, the plaintiff took the position that the documents it had requested were relevant and necessary, and that it was within the Represented Defendants' power to obtain those documents by enquiring with the banks and the accountants of the AXXIS Companies.[22] MG Chambers said that the Represented Defendants would "endeavour to make the necessary enquiries".[23] On 25 March 2015, the Represented Defendants disclosed *some* documents

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21 6th Affidavit of Sim Bee Har, 17 May 2017, pp 167–169.

22 6th Affidavit of Sim Bee Har, 17 May 2017, pp 174–179.

23 6th Affidavit of Sim Bee Har, 17 May 2017, pp 181–182.

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falling within Item 1(2) – specifically, AXXIS International's bank statements from HSBC bank for the months of April 2008 to December 2008. It did not, however, disclose any other documents in Items 1(2), 1(3) and 1(5).

The plaintiff's application for specific discovery

16 On 6 April 2015, the plaintiff took out Summons no 1531 of 2015 for specific discovery of several categories of documents, including documents in Items 1(2), 1(3) and 1(5) ("the SD Application"). The SD Application was heard by assistant registrar Melissa Mak ("AR Mak") on 13 July 2015. AR Mak granted the plaintiff an order for specific discovery in respect of, *inter alia*, the Item 1(2) documents for the period of 2008–2009, the Item 1(3) documents for the period of 2008–2009, and the Item 1(5) documents ("the SD Order"). AR Mak's order was subsequently amended on 31 August 2016 ("the Amended SD Order") to correct certain "clerical mistakes and/or errors arising from accidental slip or omission".[24] I reproduce the material portions of the Amended SD Order:

> It is ordered that:
>
> 1. [The Represented Defendants] do by 21 August 2015, 4pm, file and serve on [the plaintiff] a List of Documents and an Affidavit verifying the following documents … which are or have been in the possession, custody or power of [the Represented Defendants], and insofar as they are no longer in their possession, custody or power, explaining when and how they parted with the said documents and what has become of them (if such document(s) have at any time been but are no longer in their possession, custody or power):
>
> …
>
> b. Category 1(2): All bank account statements of the AXXIS Companies for the period of 2008 to 2009.

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[24] 1st Affidavit of Law Shiwei Jenna, 29 June 2016, para 4.

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> Further, [the Represented Defendants] are to file an affidavit as to their possession, custody and/or power of the said bank account statements and explaining why [AXXIS International's HSBC bank statements for April to December 2008] only emerged later;
>
> c. Category 1(3): All annual financial statements of the AXXIS Companies (including management accounts, including but not limited to the balance sheets of the AXXIS Companies), if there are no audited financial accounts) (*sic*) for the period of 2008 to 2009. In the alternative, [the Represented Defendants] to file and [*sic*] affidavit to state that such documents are not within their possession, custody and/or control and the reasons why;
>
> d. Category 1(5): All documents, including but not limited to invoices, receipts, payment slips, summary sheet(s), list(s), etc, evidencing or summarizing the costs / expenses incurred and revenue generated or received by the AXXIS Companies (including all contracts entered into with external parties) in respect of the production, distribution and reproduction of each and every project. In the alternative, [the Represented Defendants] to file an affidavit to state that such documents are not within their possession, custody and/or control and the reasons why;
>
> …

I shall refer to the various categories of documents according to the terms used in the Amended SD Order.

17 On 3 September 2015, the Represented Defendants filed a list of documents, purportedly in compliance with the SD Order ("the Third LOD").

The First Unless Order Application

18 On 6 September 2016, the plaintiff took out summons no 4362 of 2016, seeking an order that Ben and Bee comply with the Amended SD Order and provide discovery of the Category 1(2) and 1(5) documents within seven days, failing which their defence be struck out ("the First Unless Order Application").

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On 23 September 2016, the Represented Defendants filed a list of documents ("the Fourth LOD") by which they provided discovery of the remaining Category 1(2) documents and some Category 1(5) documents.

19 The First Unless Order Application was heard by assistant registrar Lim Sai Nei ("AR Lim") on 21 November 2016. She ordered, *inter alia*, that:[25]

> (a) Ben and Bee were to explain why the Category 1(2) documents had emerged late, and, if they had only obtained the documents after making enquiries with HSBC bank, they were to explain why the enquiries to HSBC bank were not made earlier. This was to be done within 14 days, failing which Ben and Bee's defences were to be struck out and interlocutory judgment entered in favour of the plaintiff.
>
> (b) Ben and Bee were to produce the Category 1(5) documents for the AXXIS Companies' projects prior to 18 December 2009 within 14 days, failing which Ben and Bee's defences were to be struck out and interlocutory judgment entered in favour of the plaintiff.

The date for compliance with this order ("the Unless Order") was 5 December 2016. I note for completeness that AR Lim also made certain orders in relation to another category of documents, "Category 5", which orders were successfully appealed against by the plaintiff. However, the Category 5 documents are not the subject of the present application. AR Lim's orders in relation to the Category 1(2) and 1(5) documents are undisturbed.

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[25] 7th Affidavit of Sim Bee Har, 8 June 2017, pp 22–23.

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The Second Unless Order Application

20 On 8 February 2017, the plaintiff took out summons no 569 of 2017 seeking an order that Ben and Bee comply with the Amended SD Order and provide discovery of the Category 1(3) documents within seven days, failing which their defence be struck out ("the Second Unless Order Application"). On 6 March 2017, the Represented Defendants filed another list of documents ("the Fifth LOD") disclosing certain Category 1(3) documents. On 7 April 2017, the plaintiff wrote to court to withdraw the Second Unless Order Application. The letter stated as follows:

> The [plaintiff] had initially applied for the Unless Order to compel the Represented Defendants to disclose the category of documents listed in order 1(c) of [the Amended SD Order]. As it appears that the Represented Defendants have now complied with the terms of the Unless Order, we therefore write to withdraw the Unless Order with costs of $800 (all-in) to be paid by the Represented Defendants to the [plaintiff]…

The present striking out application

21 On 18 May 2017, the plaintiff filed the present application, summons no 2275 of 2017, to have Ben, Bee and the AXXIS Companies' defences struck out. At a hearing before me on 8 August 2017 ("the 8 August Hearing"), counsel for the plaintiff Mr Dominic Chan highlighted that the Represented Defendants have, at various junctures, claimed that they did not have certain documents in their possession because they were allegedly destroyed by a bookkeeper known as "Ms Khoo". I ordered the Represented Defendants to file an affidavit by the person who caused the AXXIS documents in Categories 1(2), 1(3) and 1(5) to be destroyed or otherwise disposed of, setting out the reasons, date and manner in which the disposal took place. On 28 August 2017 and 29 August 2017, Ben and Bee filed affidavits purportedly in compliance with my orders given on

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8 August 2017. I will discuss these affidavits in greater detail later in this judgment.

22 To summarise, the following table sets out a timeline of the significant stages in the procedural history leading up to this striking out application. I also include in this table the key letters and affidavits which the Represented Defendants have written or filed in connection with the plaintiff's various applications. I will frequently be referring to these letters and affidavits in the following sections of this judgment.

Date	**Event**	**Represented Defendants' letter or affidavit**
The request for specific discovery		
18 Nov 2014	Characterist requests discovery of the documents in Categories 1(2), 1(3) and 1(5) through the 18 November 2014 Letter.	MG Chambers responds by letter dated 24 December 2014 ("the 24 December 2014 Letter").
The application for specific discovery		
6 Apr 2015	The plaintiff files the SD Application.	Ben affirms an affidavit dated 25 May 2015 to resist the SD Application ("Ben's sixth Affidavit").
13 Jul 2015	AR Mak issues the SD Order. In purported compliance with the SD Order, the Represented Defendants file the Third LOD on 3 September 2015.	Ben affirms an affidavit dated 3 September 2015 to verify the Third LOD ("the Affidavit Verifying the Third LOD").
The First Unless Order Application		
6 Sept 2016	The plaintiff files the First Unless Order Application in respect of the Category 1(2) and Category 1(5) documents. The Represented Defendants file	Ben affirms an affidavit dated 23 September 2016 which includes the Fourth LOD ("Ben's tenth Affidavit").

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	the Fourth LOD on 23 September 2016.	
21 Nov 2016	AR Lim issues the Unless Order.	Ben affirms an affidavit dated 2 December 2016 in purported compliance with the Unless Order ("Ben's eleventh Affidavit").
The Second Unless Order Application		
8 Feb 2017	The plaintiff files the Second Unless Order Application in respect of the Category 1(3) documents. The Represented Defendants file the Fifth LOD on 6 March 2017. The plaintiff writes to Court to withdraw the Second Unless Order Application on 7 April 2017.	MG Chambers writes a letter to Characterist dated 1 March 2017 ("the 1 March 2017 Letter"). Ben affirms an affidavit dated 6 March 2017 to verify the Fifth LOD ("Ben's Affidavit Verifying the Fifth LOD").
The striking out application		
18 May 2017	The plaintiff files the present striking out application.	Ben affirms an affidavit dated 30 May 2017 to resist the striking out application ("Ben's fifteenth Affidavit").
8 Aug 2017	I order the Represented Defendants to file an affidavit sworn or affirmed by the person who caused the documents in Categories 1(2), 1(3) and 1(5) to be destroyed or disposed of.	Ben affirms an affidavit dated 28 August 2017 ("Ben's seventeenth Affidavit") and Bee affirms an affidavit dated 29 August 2017 ("Bee's second Affidavit") in purported compliance with my orders.

Having set out an overview of the procedural history leading up to this striking out application, I now turn to a more detailed chronology of the exchanges

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between the parties and the positions taken with respect to each category of documents. I shall first deal with Categories 1(2) and 1(5) which were the subject of the First Unless Order Application, before I address Category 1(3), which was the subject of the Second Unless Order Application.

Category 1(2)

23 It will be recalled that the Category 1(2) documents are bank account statements of the AXXIS Companies for the period of 2008 to 2009.

24 After the plaintiff initiated the request for specific discovery in the 18 November 2014 Letter, MG Chambers stated in the 24 December 2014 Letter that the Represented Defendants had "thrown away" these documents for the years prior to 2010 sometime in the "first quarter of this year".[26] In response, the plaintiff insisted that the Represented Defendants could obtain the statements by making enquiries with the banks (see [15] above).

25 The Represented Defendants wrote to HSBC on 16 March 2015 to request only for AXXIS International's bank statements for 2008. On 25 March 2015, the Represented Defendants disclosed AXXIS International's bank statements for April to December 2008.

26 After the plaintiff filed the SD Application, Ben filed his sixth Affidavit to resist the SD Application on 25 May 2015, in which he explained that "the Represented Defendants obtained the HSBC bank statements for that *particular period* ie, 2008 for reasons described in the section above".[27] It appears that the

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[26] 6th Affidavit of Sim Bee Har, 17 May 2017, p 167.

[27] 6th Affidavit of Sim Bee Har, 17 May 2017, p 279, para 26(c).

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"section above" refers to an earlier portion of Ben's sixth Affidavit in which he had stated:[28]

> …the time frame relevant to the discovery of documents should relate to the time when the AXXIS Companies were incorporated, i.e. in 2008. I am advised and verily believe that the documents relating to the years after incorporation are merely *indirectly relevant* to the Plaintiffs' case against the Represented Defendants and are not necessary for the purpose of disposing of the matter fairly and/or saving costs. [emphasis in original]

27 After AR Mak issued the SD Order on 13 July 2015, the Represented Defendants filed the Third LOD on 3 September 2015. In Ben's Affidavit Verifying the Third LOD, he stated as follows:[29]

> Category 1(2): When the AXXIS Companies closed its office on or around December 2012, the other bank statements were disposed of by the bookkeeper, one Ms Khoo. Ms Khoo wanted to minimise warehousing costs and made the error of disposing these documents. Therefore, bank statements for years other than 2011 are no longer in the Represented Defendants' possession, custody or control.

28 I note that at this stage, the Represented Defendants had *already* requested and successfully obtained AXXIS International's bank statements for April to December 2008 from HSBC in March 2015 (see [25] above). That raises the question of why they did not also do the same in respect of the other AXXIS Companies' bank statements that they claimed were no longer in their possession, custody or control, even after AR Mak had issued the SD Order.

29 On 19 August 2016, Characterist wrote to MG Chambers complaining that the Represented Defendants had not disclosed any further Category 1(2)

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[28] 6th Affidavit of Sim Bee Har, 17 May 2017, p 276, para 20.

[29] 6th Affidavit of Sim Bee Har, 17 May 2017, p 337, para 4(b).

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documents. In their reply dated 25 August 2016, MG Chambers stated: "Our clients instruct that AXXIS Pte Ltd and [AXXIS Group] were dormant companies with no substantive business. Therefore there are *no bank account statements* for these companies." [emphasis added].[30] Yet on 19 September 2016, about two weeks after the plaintiff filed the First Unless Order Application, the Represented Defendants wrote to HSBC to request bank statements for *all* of the AXXIS Companies for the year of 2009.[31] Indeed, when the Represented Defendants filed the Fourth LOD on 23 September 2016, they disclosed HSBC bank statements for AXXIS Group for the period of May 2008 to December 2009. This suggests that the Represented Defendants were, at best, careless, or at worst, dishonest when they instructed MG Chambers that there *were no bank account statements* for AXXIS Pte Ltd and AXXIS Group as stated in their letter of 25 August 2016.

30 In the Fourth LOD, the Represented Defendants also disclosed AXXIS International's HSBC bank statements for the year 2009.

31 On 21 November 2016, AR Lim issued the First Unless Order, which required Ben and Bee to explain why certain Category 1(2) documents had "only emerged later", and "why the enquiries to HSBC bank were not made any earlier".[32] Ben's eleventh Affidavit which was purportedly filed in compliance with the Unless Order proffered the following explanation:[33]

> 4. With regards [*sic*] to why the HSBC bank documents only emerged later, I already explained in my affidavit dated 25 May

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30 6th Affidavit of Sim Bee Har, 17 May 2017, pp 376–377.

31 6th Affidavit of Sim Bee Har, 17 May 2017, p 676.

32 7th Affidavit of Sim Bee Har, 8 June 2017, p 23, para 1.

33 6th Affidavit of Sim Bee Har, 17 May 2017, p 416.

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> [2015] (at paragraph [26]) that the Represented Defendants did not have possession of these documents for the period prior to 2010, and the HSBC bank statements were obtained after making enquiries with HSBC.
>
> …
>
> c. Since the bank statements prior to 2010 were no longer in the Represented Defendants actual possession, requests had to be made to HSBC. …
>
> d. Further, I am advised and verily believed that the Plaintiff's solicitors letter 18 November 2014 was the first request for the bank statements of the AXXIS Companies. ...
>
> e. Therefore, the HSBC bank statements could not be disclosed earlier since the Represented Defendants did not have actual possession, and had to request copies from HSBC.

Whether or not this explanation amounted to "compliance" with the Unless Order is a point that I will return to later in this judgment.

32 On 30 May 2017, about two weeks after the plaintiff had filed the present striking out application, Ben affirmed his fifteenth Affidavit, in which he again attempted to explain the Represented Defendants' delay in disclosing the Category 1(2) documents:[34]

> i. We only made the enquiries in 2016 as we were focused on the striking out of part of the Plaintiff's claim (in relation to the USD 900,000) and the subsequent amendments to the Statement of Claim.
>
> ii. Also, we had mistakenly thought that we had given copies of the 2009 bank statements to our solicitors, and we then made the enquiries after confirming that they did not have such copies. This resulted in the 2009 bank statements being disclosed only in the [Fourth LOD] filed on 23 September 2016.

33 After I directed the Represented Defendants to file an affidavit by the person who caused the AXXIS documents in Categories 1(2), 1(3) and 1(5) to

[34] 15th Affidavit of Toh Wee Ping Benjamin, 30 May 2017, para 8(b).

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be destroyed or disposed of, Ben filed his seventeenth Affidavit on 28 August 2017, and Bee filed her second Affidavit on 29 August 2017. Ben's 17th Affidavit stated as follows:[35]

> 6. My statements in my past affidavits were based on my limited memory of the events, without checking with any other persons or contemporaneous documents. I also made certain assumptions based on my limited knowledge of the administration and operation of the [AXXIS] Companies, but I am not sure if these assumptions are true.
>
> 7. …
>
> b. The [AXXIS] Companies had a policy of discarding documents which were not needed for income tax reporting purposes. Bee will elaborate as she instituted this policy, and was in charge of determining which documents were not necessary and therefore could be thrown away.
>
> 8. I actually cannot recall
>
> a. When the [AXXIS] documents were thrown away;
>
> b. Who threw them way; and
>
> c. If the AXXIS documents were simply thrown away, destroyed in any particular matter or lost.

34 Ben also stated that he had contacted a former employee of the AXXIS Companies, Ms Khoo Chok Theng ("Ms Khoo"), by phone. According to Ben, Ms Khoo told him that she had been serving her notice period "shortly before the lease for the [AXXIS] Companies' premises expired".[36] According to Ben's version of events, this would have been some time shortly before 31 July 2012.[37] Ben also stated that Ms Khoo had denied destroying any documents which were "5 or more years old". Ben had requested that she make herself available for an

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35 17th Affidavit of Toh Wee Ping Benjamin, 28 August 2017, paras 6–7.

36 17th Affidavit of Toh Wee Ping Benjamin, 28 August 2017, para 9(a).

37 17th Affidavit of Toh Wee Ping Benjamin, 28 August 2017, para 7(a).

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interview with MG Chambers and to affirm an affidavit. However, she had ignored his attempts to contact her since 21 August 2017.

35 Ben's seventeenth Affidavit stated that Bee would "elaborate" on his own statements, because she had instituted the policy of throwing away documents not needed for income tax reporting purposes, "and was in charge of determining which documents were not necessary and therefore could be thrown away". However, in Bee's second Affidavit she stated that she "cannot recall who actually threw away or destroyed the [AXXIS] documents for 2008 and 2009, or *if [she] had instructed any of the [AXXIS] Companies' staff to shred the documents*" [emphasis added].[38]

36 Having set out the above sequence of events relating to the Category 1(2) documents, I now turn to Category 1(5).

Category 1(5)

37 The Category 1(5) documents are those evidencing or summarising the costs, expenses and revenue of the AXXIS Companies in relation to the production, distribution and reproduction of its projects.

38 As with the Category 1(2) documents, Characterist requested discovery of the Category 1(5) documents in the 18 November 2014 Letter. MG Chambers replied via the 24 December 2014 Letter, stating that these documents had been thrown away in the first quarter of 2014.[39] However, on 5 January 2015, MG Chambers sent Characterist a letter and provided discovery of the Category 1(5)

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[38] 2nd Affidavit of Goh Bee Heong, 29 August 2017, para 4(c).

[39] 6th Affidavit of Sim Bee Har, 17 May 2017, p 167.

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documents for the year 2010 and onwards.[40] The plaintiff was however dissatisfied that no Category 1(5) documents had been provided for the years prior to 2010.

39 After the plaintiff filed the SD Application on 27 April 2015, Ben filed his sixth Affidavit in which he averred that disclosure of the Category 1(5) documents was unnecessary.[41] He also stated that "the Represented Defendants are no longer in possession, custody and power of the requested [Category 1(5)] documents within the timeframe in question ie, 2008".[42] Ben re-iterated this same position when he filed his Affidavit Verifying the Third LOD on 3 September 2015, purportedly in compliance with AR Mak's SD Order:[43]

> Category 1(5): The Represented Defendants do not have [the Category 1(5) documents] in their possession, custody or control, as these items in respect of each and every project done by the AXXIS Companies *do not exist anymore.* All other remaining and relevant documents relating to the AXXIS Companies have been disclosed. [emphasis added]

40 Notwithstanding the above position, about two weeks after the plaintiff had filed the First Unless Order Application on 6 September 2015, the Represented Defendants filed the Fourth LOD, which included 134 items falling within Category 1(5) including payment vouchers and invoices.[44] The vast majority of these documents, however, were dated from 2010 onwards, save for one document, an "Invoice from Steven LeClair", dated 18 December 2009.[45]

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40 6th Affidavit of Sim Bee Har, 17 May 2017, pp 171 and 252.

41 6th Affidavit of Sim Bee Har, 17 May 2017, pp 280–281.

42 6th Affidavit of Sim Bee Har, 17 May 2017, p 282.

43 6th Affidavit of Sim Bee Har, 17 May 2017, p 337.

44 6th Affidavit of Sim Bee Har, 17 May 2017, p 395.

45 6th Affidavit of Sim Bee Har, 17 May 2017, p 399.

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41 At the hearing of the First Unless Order Application on 21 November 2016, counsel for the Represented Defendants, Mr Ng Boon Gan, informed the court that he had "no instructions as to whether there are further [Category 1(5)] documents". When AR Lim queried whether there were other documents dated before 18 December 2009, Mr Ng stated that the Category 1(5) documents the Represented Defendants had disclosed thus far "were the documents provided after reasonable efforts", and "if further efforts are required, [he would] need to take [his] client's instructions."[46] AR Lim was evidently satisfied that there *were* other Category 1(5) documents dated before 18 December 2009, since she remarked that in respect of Category 1(5), "what is missing is the documents for the projects (including ledgers) prior to 18 December 2009".[47] Under the terms of the First Unless Order, she directed that Ben and Bee were to produce these "missing" documents dated before 18 December 2009 within 14 days, failing which their defences would be struck out.[48]

42 In purported compliance with the First Unless Order, Ben filed his eleventh Affidavit on 21 December 2016, in which he stated as follows:

> There are no other documents in this category and within the Represented Defendants possession, custody and control, as they were thrown away for the same reasons stated at paragraphs [4(a)] and [4(b)] above.

This was a reference to an earlier portion of the eleventh Affidavit in which Ben stated that, in order to reduce storage costs, when the AXXIS Companies

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46 6th Affidavit of Sim Bee Har, 17 May 2017, p 410.

47 6th Affidavit of Sim Bee Har, 17 May 2017, p 411.

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became dormant in 2014, documents before 2010 were discarded as they were not required for accounting purposes.[49]

43 A further exchange between the parties concerning the Category 1(5) documents occurred between April and May 2017. To provide some context, in or around April 2017, the Represented Defendants disclosed to the plaintiff some unaudited general ledgers falling within *Category 1(3)*.[50] Seeing that these unaudited general ledgers revealed certain transactions between the AXXIS Companies and other entities, the plaintiff took the view that it was entitled to further discovery of *Category 1(5)* documents relating to those transactions. However, after Characterist wrote to MG Chambers on 19 April 2017 to request such further discovery, MG Chambers replied on 3 May 2017, essentially reiterating its position that the Represented Defendants had already fully complied with their obligations to disclose the Category1(5) documents.

44 The plaintiff filed the present striking out application on 18 May 2017. Ben filed his fifteenth Affidavit on 30 May 2017 to resist the striking out. Before I discuss the contents of this affidavit, I should explain that when Ben filed his Affidavit Verifying the Third LOD in September 2015, he had alluded to the existence of an old computer ("the Old Computer") which possibly contained documents under Category 1(3):[51]

> Category 1(3): The 4th Defendant is in possession of an old computer that may or may not contain soft copies of the documents under this category. The files can only be opened by an outdated, off-the-market version of an accounting software

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49 6th Affidavit of Sim Bee Har, 17 May 2017, p 415.

50 Minute Sheet for Pre-Trial Conference before Senior Assistant Registrar Christopher Tan Pheng Wee, 12 April 2017.

51 6th Affidavit of Sim Bee Har, 17 May 2017, p 337.

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> called "Peachtree". The Represented Defendants are in the process of retrieving the data contained on said computer and will endeavour to produce the management accounts and internal balance sheets upon successful retrieval.

45 Up until Ben's fifteenth Affidavit was filed on 30 May 2017, the Represented Defendants had only mentioned the possibility that the Old Computer contained Category *1(3)* documents. The plaintiff therefore says the Represented Defendants took a "completely new position" when Ben stated the following in his fifteenth Affidavit:[52]

> d. With regards (*sic*) to Category 1(5),
>
> > i. The only possible source of documents, which may fall within this category, and is still in our possession, custody or control is the CPU containing the Peachtree documents.
> >
> > …
> >
> > ii. The CPU has not been accessed by either of us since the [AXXIS] Companies went dormant and it was put in storage. …
> >
> > iii. I am advised and verily believe that there was a risk, if we took the initiative to extract the Peachtree documents, that the Plaintiff's solicitors could raise the issue of the documents not being authentic. This was the reason why the suggestions for the Plaintiff to appoint an expert, and later to appoint a joint expert, in order to access the CPU, were made.
> >
> > iv. We then had no choice but to start up the CPU when the plaintiff took out [the present striking out application]. That is when we discovered that the CPU had a copy of the Peachtree software.
> >
> > v. I now disclose a copy of the directory listing of the Peachtree folder, in order to show the Plaintiff that we are not hiding any documents that might fall into Category 1(5). As to why this was not provided earlier, I am advised and verily believe that the Plaintiff's solicitors did not agree to an electronic discovery process, and also did not conduct inspection of the CPU.

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52 15th Affidavit of Toh Wee Ping Benjamin, 30 May 2017, para 8(d).

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46 What is clear is that while the Represented Defendants had previously suggested that only Category 1(3) documents were possibly stored on the Old Computer, that position appears to have been arrived at without the Represented Defendants ever having started up the Old Computer.

47 While Ben's fifteenth Affidavit states that the directory listing of the Peachtree folder ("the Peachtree Directory") "show[s] … that [the Represented Defendants] are not hiding any documents that might fall into Category 1(5)", the plaintiff takes the view that the Peachtree Directory *does* disclose documents which may fall into Category 1(5).[53] This is on the basis that the directory listing includes files such as "Aged Payables v9.rpt", "Aged Receivables v9.rpt", "Customer Balance Graph v9.rpt", "Customer Detail List v9.rpt", "Customer Sales by Item v9.rpt" and "Customer Sales by Month v9.rpt".[54]

48 As I have mentioned at [33]–[35] above, Ben's seventeenth Affidavit filed on 28 August 2017 revealed that he had made the previous statements in his affidavits without being able to recall whether the documents requested by the plaintiff were actually thrown away, when they were thrown away, and who threw them away. Bee also was unable to recall if she had ordered the destruction of the requested documents, and if so, who had disposed of or destroyed the requested documents. These facts are worth noting with respect to Category 1(5), since the Represented Defendants had initially taken the position that the Category 1(5) documents had been destroyed or disposed of (see [38] and [42] above).

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53 7th Affidavit of Sim Bee Har, 8 June 2017, para 25; Plaintiff's skeletal submissions for Summons 2275/2017, para 46.

54 Plaintiff's skeletal submissions for Summons 2275/2017, para 46.

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Category 1(3)

49 The Category 1(3) documents are the annual financial statements of the AXXIS Companies for the period of 2008 to 2009. As with Categories 1(2) and 1(5), the plaintiff requested discovery of these documents in the 18 November 2014 Letter, and the Represented Defendants stated in their reply of 24 December 2014 that documents in this category prior to 2010 had been "thrown away sometime in the first quarter of [2014] when the [AXXIS] Companies became dormant".[55]

50 On 24 March 2015, the Represented Defendants filed a supplementary list of documents in which they disclosed the corporate secretarial documents of the AXXIS Companies from the time of their incorporation to 2013.[56] This evidently did not satisfy the plaintiff who nevertheless proceeded to include the Category 1(3) documents in the SD Application which they filed on 27 April 2015.

51 After AR Mak issued the SD Order (which included the Category 1(3) documents), the Represented Defendants filed the Third LOD on 3 September 2015, which list included a balance sheet for AXXIS Pte Ltd dated 31 December 2008, and balance sheets for AXXIS Group, AXXIS International and AXXIS Pte Ltd dated 31 December 2009. However, the plaintiff complains, and the Represented Defendants do not appear to dispute, that the actual documents produced were only the fourth pages of each of these balance sheets.[57]

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55 6th Affidavit of Sim Bee Har, 17 May 2017, p 167.

56 6th Affidavit of Sim Bee Har, 17 May 2017, p 280.

57 Plaintiff's skeletal submissions for Summons 2275/2017, para 62; 15th Affidavit of Toh Wee Ping Benjamin, 30 May 2017, para 8(h)(i).

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52 It should also be noted that in Ben's Affidavit Verifying the Third LOD, he did not explain how the Represented Defendants had managed to obtain these documents despite their earlier statement in the 24 December 2014 Letter that the Category 1(3) documents had been disposed of or destroyed.

53 As alluded to earlier, it was also in Ben's Affidavit Verifying the Third LOD that he first mentioned the Old Computer which "may or may not contain copies of documents under [Category 1(3)]" (see [44] above). Notwithstanding Ben's statement that the Represented Defendants were "in the process of retrieving the data contained on [the Old Computer]" and would "endeavour to produce the management accounts and internal balance sheets upon successful retrieval", no further Category 1(3) documents were disclosed until the Represented Defendants filed their Fifth LOD (see [55] below). As mentioned at [45] above, in December 2016, the Represented Defendants stated that they wanted the plaintiff to appoint, and bear the cost of appointing, an expert who would be able to gain access to the contents of the Old Computer.[58] The plaintiff took a different view and the parties were unable to agree.

54 On 8 February 2017, the plaintiff filed the Second Unless Order Application in respect of the Category 1(3) documents. On 1 March 2017, the Represented Defendants wrote to the Plaintiff, stating as follows:

> Our clients instruct that they have obtained the password for the Peachtree software on the hard drive, and the documents falling under [Category 1(3)] are now accessible despite being stored in a proprietary format.

55 Subsequently, on 6 March 2017, the Represented Defendants filed the Fifth LOD, by which they provided discovery of the remaining Category 1(3)

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[58] 6th Affidavit of Sim Bee Har, 17 May 2017, p 431.

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documents. That same day, Ben affirmed the Affidavit Verifying the Fifth LOD, in which he stated:[59]

> The documents in the [Fifth LOD] are disclosed at this time because they were contained in a hard drive and were stored in a format which can only be read by the Peachtree software. The hard drive contained a copy of the Peachtree software, but was password-protected. We only obtained the password from a former employee on 28 February 2017, which then allowed us to access and disclose the documents.

56 In letters to MG Chambers dated 19 April 2017 and 2 May 2017, Characterist stated that the Represented Defendants had "yet to explain who was their mysterious and unnamed "employee" who suddenly provided the password for the Peachtree program". The plaintiff also remarked on the "impeccable timing" of the "employee" coming forward only after the plaintiff had filed the Second Unless Order Application.[60] MG Chambers did not, however, respond to these portions of the letters from Characterist.

57 The plaintiff wrote to court on 7 April 2017 to withdraw the Second Unless Order Application on the basis that it "appeared" that the Represented Defendants had now provided discovery of the Category 1(3) documents (see [20] above). However, I note that in the written submissions for this application, the plaintiff maintains that it has only been given disclosure of the AXXIS Companies' *unaudited* general ledgers, whereas it believes that audited financial statements and accounts are still being suppressed. The plaintiff also highlights that it has only been given p 4 of the balance sheets, which indicates that there are many more pages which the Represented Defendants are withholding.[61]

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59 6th Affidavit of Sim Bee Har, 17 May 2017, p 481.

60 6th Affidavit of Sim Bee Har, 17 May 2017, pp 489, 494.

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58 Again, since the Represented Defendants initially took the position that the Category 1(3) documents had been destroyed or disposed of, it is relevant to note Ben's latest position in his seventeenth Affidavit that that he had made the statements in his previous affidavits without being able to recall whether the documents requested by the plaintiff were thrown away, when they were thrown away, and who threw them away.

Inconsistencies in the Represented Defendants' position

59 Before I discuss the parties' arguments, I pause to summarise the significant inconsistencies and variations in the Represented Defendants' position with regard to the AXXIS documents.

60 First, the Represented Defendants have taken shifting positions regarding when, and by whom the documents were destroyed. In the 24 December 2014 Letter, it was said that the documents in Categories 1(2), 1(3) and 1(5) were destroyed "in the first quarter of *this year* when the AXXIS Companies became dormant" [emphasis added].[62] This must refer to 2014, since that is both (a) the year during which the 24 December 2014 Letter was sent, and (b) the year when the Represented Defendants themselves say the AXXIS Companies became dormant. However, Ben's Affidavit verifying the Third LOD suggests that the destruction of documents (or at least those in Category 1(2)) occurred in or around December *2012*, when the AXXIS Companies closed their office premises (see [27] above).

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61 Plaintiff's skeletal submissions for Summons 2275/2017, para 63.

62 6th Affidavit of Sim Bee Har, 17 May 2017, p 166.

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61 Secondly, the Represented Defendants have taken shifting positions regarding who was responsible for the destruction of the AXXIS documents. Ben's Affidavit Verifying the Third LOD stated that the Category 1(2) documents "were disposed of by the bookkeeper, one Ms Khoo" (see [27] above). Yet Ben's seventeenth Affidavit suggests that Ms Khoo was already "serving her notice period" sometime shortly before *July 2012* (see [34] above), five months before December 2012, which is the earliest of the dates on which the Represented Defendants variously claim the Category 1(2) documents were destroyed. Finally, in Ben's seventeenth Affidavit and Bee's second Affidavit, Ben and Bee admit that they simply cannot recall who threw the AXXIS documents away.

62 Thirdly, the Represented Defendants have taken shifting positions regarding whether some of the documents even existed to begin with. With respect to Category 1(2), the Represented Defendants stated in a letter on 25 August 2016 that there were simply "no statements" for AXXIS Pte Ltd and AXXIS Group. However, in their Fourth LOD, the Represented Defendants *did* disclose bank statements for AXXIS Group for the period of May 2008 to December 2009.

63 Fourthly, the Represented Defendants have taken inconsistent positions regarding whether they had any undisclosed AXXIS documents remaining in their possession, custody or control. For example, in the Affidavit Verifying the Third LOD dated 3 September 2015, Ben stated that the Represented Defendants had no more Category 1(5) documents in their possession, custody or control, and whatever Category 1(5) documents there were had already been disclosed (see [39] above). However, on 6 September 2015, after the plaintiff had filed the First Unless Order Application, the Represented Defendants

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suddenly gave disclosure of 134 items under Category 1(5). Then, at the hearing of the First Unless Order Application on 21 November 2016, counsel for the Represented Defendants stated that the Category 1(5) documents that had been disclosed so far were those obtained by "reasonable efforts", and that he had "no instructions" about whether there were any others yet to be disclosed.

64 At the broadest level, the most significant shift in the Represented Defendants' position is that they initially gave the impression that Ben and Bee *actually knew* what became of the AXXIS documents, but much later revealed that this was not the case at all. In the 24 December 2014 Letter, the Represented Defendants refused disclosure on the basis that the documents in categories 1(2), 1(3) and 1(5) had been thrown away. Then, in successive affidavits, Ben spoke in considerable detail about when, by whom, and for what reason they were disposed of or destroyed. These statements were made in no uncertain terms. None contained the slightest indication that Ben was unsure of what had happened to the AXXIS documents, or that he was speaking based on his "limited memory". [63] Yet in August 2017, Ben conceded in his seventeenth Affidavit that he cannot recall when and by whom the documents were thrown away. In fact, he revealed that he cannot even recall *whether they were thrown away or destroyed at all*, or simply lost. Even Bee, whom Ben said was responsible for deciding which documents were unnecessary and could be disposed of, cannot recall whether she instructed any staff to dispose of the documents.

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[63] 17th Affidavit of Toh Wee Ping Benjamin, 28 August 2017, para 6.

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The parties' submissions

The plaintiff's submissions

65 The plaintiff argues that Ben, Bee and the AXXIS Companies' defences should be struck out on three grounds. First, a fair trial is no longer possible because the Represented Defendants have destroyed core or essential documents:[64]

> (a) The Category 1(5) documents are essential because they would reveal the name of the projects undertaken by the AXXIS Companies, which would allow the court to determine whether projects intended to be carried out by C&K were in fact carried out by the AXXIS Companies. The Category 1(5) documents would also reveal the resources used by the AXXIS Companies to generate revenue for themselves, and whether such resources are traceable to C&K.[65]
>
> (b) The Category 1(3) documents are essential because they would show "what the AXXIS Companies were all about, and what they did", including the AXXIS Companies' revenue, costs and expenses, what assets they held, what liabilities they owed. This would all go towards establishing whether the AXXIS Companies had misused the resources of C&K.[66]

The plaintiff says that the Represented Defendants' deficiencies in discovery "simply cannot be remedied" and that a fair trial is "objectively not possible".[67]

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64 Plaintiff's skeletal submissions for Summons 2275/2017, paras 16–28.

65 Plaintiff's skeletal submissions for Summons 2275/2017, paras 20–22.

66 Plaintiff's skeletal submissions for Summons 2275/2017, para 24.

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66 Secondly, the plaintiff argues that the defences of Ben, Bee and the AXXIS Companies ought to be struck out because the Represented Defendants have breached the Unless Order, and have not proven that such breach was unintentional or a result of extraneous circumstances.[68] In this regard, the plaintiff highlights that AR Lim must have granted the Unless Order on the basis that the Represented Defendants had further Category 1(5) documents in their possession. Otherwise she would not have remarked that the Category 1(5) documents for the period prior to 18 December 2009 were "missing", and would not have ordered the Represented Defendants to produce Category 1(5) documents for that period. In view of this, the plaintiff says that the Represented Defendants were not entitled to simply repeat their position in Ben's eleventh Affidavit that no further Category 1(5) documents were in their possession, custody and control because they had been "thrown away".[69] The plaintiff further argues that if the Represented Defendants had truly disposed of the Category 1(5) documents for 2008 and 2009, such disposal was "deliberate and selective, to prevent the [plaintiff] from having access to such core and essential documents."[70] The plaintiff also submits that the Represented Defendants have breached the Unless Order because the Peachtree Directory discloses further documents falling under *both* Category 1(3) and Category 1(5), but the Represented Defendants had failed to disclose such documents until Ben filed the Affidavit Verifying the Fifth LOD on 6 March 2017.[71]

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67 Plaintiff's skeletal submissions for Summons 2275/2017, para 27.

68 Plaintiff's skeletal submissions for Summons 2275/2017, para 29.

69 Plaintiff's skeletal submissions for Summons 2275/2017, paras 35–40.

70 Plaintiff's skeletal submissions for Summons 2275/2017, para 40.

71 Plaintiff's skeletal submissions for Summons 2275/2017, para 46.

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67 The plaintiff also argues that the Represented Defendants breached the Unless Order not only with regard to the Category 1(5) documents but also with regard to Category 1(2). AR Lim had ordered that the Represented Defendants were to "explain why the HSBC bank documents had only emerged later", and to "explain why the enquiries to HSBC bank were not made any earlier". However, the explanation given in Ben's eleventh Affidavit "completely misse[d] the point and is irrelevant and mischievous".[72] On this basis, the plaintiff says that the Represented Defendants failed to comply with the Unless Order.

68 Thirdly, the plaintiff argues that Ben, Bee and the AXXIS Companies' defences should be struck out because the Represented Defendants are in contumelious breach of their discovery obligations. In this regard, the plaintiff says that the Represented Defendants have shown a pattern of making only "incomplete" disclosure of the documents in each category, taking inconsistent and changing positions, lying about the existence of documents, and acting to disclose documents only when they are forced to do so by the plaintiff's applications for specific discovery and unless orders.[73]

Ben and Bee's submissions

69 Although the plaintiff is also seeking to strike out the defences of the AXXIS Companies, as I have mentioned (see [9] above), only Ben and Bee were represented at the hearing of this application.

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72 Plaintiff's skeletal submissions for Summons 2275/2017, para 55.

73 Plaintiff's skeletal submissions for Summons 2275/2017, paras 62–79.

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70 Ben and Bee argue that the plaintiff is attempting to avoid a full trial of the issues in the main action because there are gaps and "obvious loopholes" in the plaintiff's case which would be exposed if the matter proceeded to a full trial.[74] They argue that there are "issues which ought to be tried", including whether there were any transfers of money from C&K to the AXXIS Companies, and whether the Represented Defendants owe fiduciary duties to the plaintiff.[75] It should be noted that a large part of Ben and Bee's arguments are focused on the merits of the plaintiff's claim. Their written submissions descend into the details of whether the plaintiff has adduced sufficient evidence to support various aspects of its claim, and point out "flaws" in the plaintiff's case.[76]

71 Ben and Bee also deny that the Represented Defendants have intentionally destroyed any documents, and re-iterate their previous explanations that any documents which had been destroyed were destroyed "to reduce warehousing costs and for accounting reasons".[77]

72 Ben and Bee further argue that a fair trial remains possible. While the plaintiff has complained that the Represented Defendants have not explained the facts behind the delayed disclosure of the Category 1(2) documents, these are merely "background facts". The plaintiff has not demonstrated that it cannot have a fair trial without knowing the reasons behind the delayed disclosure of the Category 1(2) documents, or without knowing the identity of the employee who provided the password to the Peachtree documents. In Ben and Bee's

74 3rd and 4th Defendants' written submissions for Summons 2275/2017, para 6.

75 3rd and 4th Defendants' written submissions for Summons 2275/2017, para 7.

76 3rd and 4th Defendants' written submissions for Summons 2275/2017, paras 7 and 14.

77 3rd and 4th Defendants' written submissions for Summons 2275/2017, para 11.

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words, "These are not issues that have been pleaded or will be tried, and they only arose tangentially out of ongoing discovery proceedings".[78] It would be disproportionate to strike out their defences "for the late disclosure of *background facts*, as these background facts are not required for a fair trial of the issues in the action." [emphasis added].[79]

73 Finally, with regard to the plaintiff's allegation that the Represented Defendants have provided incomplete disclosure of the Category 1(3) documents, Ben and Bee argue that this position is "untenable". While the plaintiff claims that the Represented Defendants must have selectively disclosed only the fourth page of each of the balance sheets for the AXXIS Companies (see [51] above), this argument "is simply *non-sequitur*, since the essential part of the balance sheets, being assets and liabilities, are displayed in documents already disclosed."[80]

The issues

74 The plaintiff has relied on three separate arguments to found its attempt to strike out the defences of Ben, Bee and the AXXIS Companies: that a fair trial is no longer possible, that there has been a breach of the Unless Order, and that Ben, Bee and the AXXIS Companies are in contumelious breach of their discovery obligations. It should be noted, however, that these are not distinct arguments and there is considerable overlap between some of them. In particular, the considerations relevant to whether the defendants are in "contumelious" or "inexcusable" breach of their discovery obligations are

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78 3rd and 4th Defendants' written submissions for Summons 2275/2017, para 20.

79 3rd and 4th Defendants' written submissions for Summons 2275/2017, paras 18–20.

80 3rd and 4th Defendants' written submissions for Summons 2275/2017, para 17.

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equally relevant to whether their breach of the Unless Order (if any) warrants a striking out of the defence. Similarly whether Ben and Bee have breached the Unless Order is relevant to whether the defendants are in "contumelious" or "inexcusable" breach of their discovery obligations. I therefore propose to discuss these two arguments together, and will structure my decision according to the following issues:

(a) Whether Ben, Bee and the AXXIS Companies' defences should be struck out on the basis that a fair trial is no longer possible.

(b) Whether Ben, Bee and the AXXIS Companies' defences should be struck out on the basis that Ben, Bee and the AXXIS Companies have inexcusably breached their discovery obligations. Within this issue I shall discuss whether Ben and Bee's breach of the Unless Order (if any) warrants the striking out remedy sought by the plaintiff.

Applicable law

75 The court's power to strike out a defence or action for failure to make discovery of documents is enshrined in O 24 r 16(1) of the Rules of Court ("ROC"), which provides:

> **Failure to comply with requirement for discovery, etc**
>
> **16.** – (1) 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 of 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.*
>
> [emphasis added in italics]

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76 It is well established that the classic case for striking out an action under O 24 r 16 of the ROC is where there is a real or substantial risk that a fair trial will no longer be possible as a result of the failure to provide discovery (*Mitora Pte Ltd v Agritrade International (Pte) Ltd* [2013] 3 SLR 1179 ("*Mitora*") at [48], citing *Singapore Civil Procedure 2013* vol 1 (G P Selvam eds) (Sweet & Maxwell Asia, 2013) at para 24/16/1). It is also clear, however, that the impossibility of a fair trial is neither a determinative factor nor a pre-requisite for striking out, and that a court may order a striking out even if a fair trial is still possible (*K Solutions Pte Ltd v National University of Singapore* [2009] SGHC 143 ("*K Solutions*") at [126]). However, the Court of Appeal in *Mitora* (at [48]) stated that this would take place in "exceptional circumstances", where the breach is "inexcusable" (at [47]).

77 In deciding whether there are such "exceptional circumstances" justifying a striking out, the court is entitled to look at all the circumstances (*Mitora* at [48]). The cases have commonly used terms such as "contumelious" and "contumacious" to express the idea that something beyond ordinary procedural default is required (see for example, *Alliance Management SA v Pendleton Lane P* [2008] 4 SLR(R) 1 ("*Alliance Management*") at [6] and *K Solutions* at [112], citing *Landauer Ltd v Comins & Co* The Times (7 August 1991)). It is not the law, however, that *wilful* disobedience is required. Even a failure to comply with court orders "through negligence, incompetence, or sheer indolence" may justify striking out, as noted by the Court of Appeal in *Mitora* at [40], endorsing the remarks of Auld LJ in *Hytec Information Systems Ltd v Coventry City Council* [1997] 1 WLR 1666 at 1677.

78 The courts draw a distinction between breaches of simple orders for discovery, and breaches of unless orders which specify the consequences of

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failure to comply (see *Singapore Civil Procedure 2017*, Vol 1 (Foo Chee Hock gen ed) (Sweet & Maxwell, 2017) at para 24/16/3). The breach of an unless order is more likely to be regarded as "contumelious" conduct (*Von Roll Asia Pte Ltd v Goh Boon Gay and others* [2015] 3 SLR 1115 ("*Von Roll Asia*") at [49]). Once an unless order is breached, the onus is on the defaulting party to demonstrate that the breach was not intentional and contumelious so as to avoid the specified consequences (*Mitora* at [35]).

79 However, even where there has been an intentional, contumelious breach of an unless order, the court must determine what sanction should be imposed as a result (*Mitora* at [37]). The Court of Appeal in *Mitora* stressed the importance of proportionality and judiciousness in deciding whether to enforce an unless order according to its strict terms (at [39]).

80 In exercising the discretion under O 24 r 16 of the Rules of Court, the factors which the courts have taken into account include the following:

(a) Whether a fair trial remains possible, which may include an inquiry into whether the defaulting party's conduct shows that they are unlikely to pursue their claim honestly and fairly if the action is not struck out (*Lee Chang Rung* at [34]).

(b) Whether the defaulting party's delay has caused any "irremediable prejudice" to the other parties to the litigation (*Mitora* at [41]).

(c) Whether there has been any deliberate suppression of highly relevant documents (*Lee Chang-Rung v Standard Chartered Bank* [2011] 1 SLR 337 ("*Lee Chang-Rung*") at [35]).

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(d) Whether the defaulting party's conduct demonstrates a total disregard of the Rules of Court or orders of court (*Alliance Management* at [9]). Factors relevant to this inquiry include whether the defaulting party has shown that it has taken any reasonable positive efforts to locate or obtain the documents which it is required to disclose (*Von Roll Asia* at [52]), and whether the defaulting party has shown an "unrepentant attitude" (*Lee Chang-Rung* at [35]). Where an unless order requires a party to file a list of documents and an accompanying affirmation, that party's claim or action may be struck out if the list is "wilfully defective" and displays no evidence of conscientious effort to give proper discovery (see *Singapore Civil Procedure 2017*, Vol 1 (Foo Chee Hock gen ed) (Sweet & Maxwell, 2017) at para 24/16/1, citing *Ka Wah Bank Ltd v Low Chung-song* [1989] 1 HKLR 451, CA).

(e) Whether the delay or default was due to any extraneous circumstances (*Mitora* at [41]).

81 It is also worth noting that a failure to disclose need not be continuing before it is capable of attracting a remedial response from the courts. A court may strike out an action or defence even where the defaulting party has rectified his non-compliance (*Mitora* at [47], citing *Tan Kok Ing v Ang Boon Aik* [2002] SGHC 215 at [30]).

82 Finally, a litigant cannot obtain the remedy of a striking out under O 24 r 16 by raising a "formalistic declaration" that the allegedly defaulting party has provided inadequate disclosure. So, in *Mitora*, the Court of Appeal held that the Appellant's action ought not to have been struck out despite the Respondent's contention that the Appellant had provided inadequate disclosure, because the

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requested documents appeared not to exist, and in any event, an "adequate substitute had been disclosed in their stead" (*Mitora* at [25]).

My decision

Whether the defences should be struck out on the basis that a fair trial is no longer possible

83 As mentioned, the courts will strike out a defence or action where a failure to comply with the rules on discovery has created a real risk that a fair trial will not be possible (*Mitora* at [48]). The underlying reason for this is that in such circumstances "any judgment in favour of the offender [would be] unsafe" (*Logicrose Ltd v Southend United Football Club Ltd* The Times (5 March 1988) ("*Logicrose*"), as endorsed in *K Solutions* at [111]).

84 *Landauer Ltd v Comins & Co* The Times (7 August 1991) ("*Landauer*") provides an example of a situation where a claim was struck out on the ground that there was a real risk that a fair trial would be impossible as a result of a breach of discovery obligations. The plaintiff in that case was the parent company of three subsidiaries. The plaintiff and its subsidiaries engaged the defendants to act as its auditors. The plaintiff alleged that it was its policy to protect itself and its subsidiaries against foreign currency fluctuations by buying or selling forward. Its claim was that the defendants had on two occasions failed to draw the plaintiff's attention to the existence of substantial uncovered liabilities in US dollars, which in turn led to the plaintiff failing to take measures to avoid substantial losses. An essential element of the plaintiff's case was that it was wholly unaware of its foreign currency exposure. The defendants argued that the plaintiff's managing director, a Mr Axford, knew or should have known of the fact and extent of the plaintiff's foreign currency exposure. Lloyd LJ, who

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delivered the judgment of the English Court of Appeal, noted that Mr Axford's state of knowledge would be "of critical importance" to the plaintiff's claim.

85 The plaintiff was ordered to furnish discovery of, *inter alia*, "files containing documentation prepared by the management of the subsidiaries and of [the plaintiff] in connection with the accounts and trading figures insofar as the same relates to dollar transactions" for a specific period between 1981 and 1985. However, it transpired that Mr Axford had destroyed certain documents circulated in connection with management and board meetings of the plaintiff and the subsidiaries ("management files"). The judge below struck out the plaintiff's claim on the basis that Mr Axford's destruction of the management files had created a real risk that a fair trial was no longer possible.

86 The English Court of Appeal upheld the decision to strike out the plaintiff's claim. Lloyd LJ noted that based on the available evidence, it was clear that Mr Axford's management files would contain the types of documents which would be "directly relevant to the question of foreign currency exposure and the steps taken to cover that exposure". These were also the types of documents "which could prove vital in cross-examination of the plaintiff's witnesses on the all-important question of their knowledge". Without those documents, there was a real risk that a fair trial was no longer possible.

87 *Landauer* was a case concerning the *destruction* of relevant documents. As I alluded to at [80(a)] above, there are also cases in which the *withholding* of relevant documents has led to a similar conclusion that a fair trial may not be possible. For example, in *Lee Chang-Rung*, Tay Yong Kwang J noted that the plaintiffs' "deliberate suppression of highly relevant documents", their "selective disclosures" and "hide and seek strategy" disclosed a "serious risk"

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that a fair trial would not be possible because there was no indication that the plaintiffs would pursue their claim honestly and fairly (*Lee Chang-Rung* at [30]–[32]). In this regard there is some overlap between this ground for striking out a claim or defence under O 24 r 16 and the ground of "contumelious" conduct.

88 In the present case, the plaintiff claims that there is a real risk that a fair trial is no longer possible based on the destruction and incomplete disclosure of documents in Categories 1(3) and 1(5). Having considered the arguments, I am not satisfied that there is a real risk that a fair trial is not possible. I say this because I do not think that the allegedly missing or destroyed Category 1(3) and 1(5) documents are so "vital" to the plaintiff's case such that their non-disclosure has foreclosed the possibility of a fair trial.

89 It bears repeating that the crux of the plaintiff's claim is that the defendants wrongfully diverted the funds, clientele, projects and manpower of C&K to the AXXIS Companies. I can well see that the balance sheets of the AXXIS Companies (Category 1(3)) and documents showing the costs, expenses and revenue of the AXXIS Companies in relation to their projects (Category 1(5)) are relevant and may lead to a train of inquiry which would result in the discovery of other relevant evidence. No doubt that is why they were included in the SD Order. This does not mean, however, that these documents are so central to the issues that without them there cannot be a fair trial.

90 In *Landauer*, the specific issue of Mr Axford's state of knowledge concerning the plaintiff's foreign currency exposure was described as "all-important", and the management files were said to be "directly relevant" to this

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very issue. In my view the present case is quite different. The "all-important" issue in the plaintiff's claim is more broadly whether or not funding, clientele, projects and manpower intended for C&K were wrongfully diverted to the AXXIS Companies. It was not clear to me that the balance sheets (Category 1(3)) and the costs, expenses and revenue in relation to each project of the AXXIS Companies (Category 1(5)) were "directly relevant" to this issue, at least not in the sense that the management files were directly relevant to Mr Axford's state of knowledge in *Landauer*. The assets and liabilities of the AXXIS Companies, and the costs and expenses incurred and revenue generated for each of their projects would not show directly whether any wrongful diversion had occurred. In concluding that a fair trial is still possible I have also considered that the plaintiff has already obtained a significant amount of evidence relating to its claim, including evidence showing what projects the AXXIS Companies were marketing or pitching as their own,[81] the bank statements of AXXIS International and AXXIS Group falling under Category 1(2),[82] and the financial documents and ledgers of C&K. This is obviously not to say that I am satisfied that there are no further undisclosed, relevant documents under Category 1(3) and 1(5) which may well have a bearing on the issues in this suit. Nevertheless, having regard to the totality of the circumstances I do not think that this is a situation where the defences should be struck out on the basis that a fair trial is no longer possible.

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81 Plaintiff's skeletal submissions (Summary & Supplementary) for Summons 2275/2017, para 5.

82 Plaintiff's skeletal submissions for Summons 2275/2017, para 71.

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Whether the defences should be struck out on the basis that Ben, Bee and the AXXIS Companies are in inexcusable breach of their discovery obligations

91 The plaintiff has argued that any breach of the Unless Order would "automatically warrant" striking out.[83] I will first discuss whether Ben, Bee and the AXXIS Companies' defences should be struck out on the basis of their alleged breaches of the Unless Order, before I discuss the wider issue of whether their defences should be struck out on the more general basis that they have committed inexcusable breaches of their discovery obligations. I use the term "inexcusable" rather than "contumelious" (which is the term the plaintiff has used) to reflect the idea that apart from wilful disobedience, negligence and inaction can also justify the sanction of striking out (see [77] above).

Breaches of the Unless Order

92 Whether the defences should be struck out on the basis that Ben and Bee breached the Unless Order may be analysed in terms of two questions: firstly, whether, and in what way, Ben and Bee have breached the Unless Order; and secondly, if they have breached the Unless Order, whether these breaches warrant a striking out.

(1) Have the Represented Defendants breached the Unless Order?

93 It will be recalled that the Unless Order related only to Categories 1(2) and 1(5), and not to Category 1(3). There are two main obligations under the Unless Order which are relevant for present purposes:

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[83] Plaintiff's skeletal submissions for Summons 2275/2017, para 14(2).

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(a) First, Ben and Bee were required to explain why the Category 1(2) documents had emerged "later", and if they had only obtained the documents after making enquiries with HSBC bank, to explain why such enquiries were not made "earlier".

(b) Secondly, Ben and Bee were to produce the Category 1(5) documents for the AXXIS Companies' projects prior to 18 December 2009 within 14 days.

94 I first consider whether Ben and Bee breached the Unless Order with respect to Category 1(2). Although Ben and Bee were required to explain why these documents had only emerged "later", and why they did not make requests "earlier", the Unless Order does not specify what is meant by the terms "later" and "earlier". Nevertheless, I note the following exchange between AR Lim and counsel for the plaintiff, Mr Eddy Hirono, at the hearing of the Unless Order Application:

> PC: For [Category 1(2)], all the statements are now in save for AXXIS Pte Ltd. Defendants have given us letters form HSBC to say that there are no such records for AXXIS Pte Ltd – given to us after application is filed.
>
> 3 main points on [Category 1(2)]. We believe that Plaintiff should be entitled to costs. *Prior to us taking out the application*, they didn't disclose. There has been no explanation as to why the HSBC documents only emerged later. This is the second point. Thirdly, see paragraph 17 of my submissions. As recently as 25 August 2016, [Ben and Bee] had stated that AXXIS Pte Ltd and [AXXIS Group] were dormant companies with no substantive business. After we took out the application, the Defendants had written to ask for AXXIS Group's statements. At least in relation to AXXIS Group it had to be a lie.
>
> Ct: So any remaining issue on Order 1b?

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> PC: Order asked them to explain why HSBC banks only emerged later. See paragraph 22 of my submissions. They have not explained.
>
> Ct: Your client said they only managed to obtain only after making enquiries with the bank but why didn't they make enquiries with the bank earlier?
>
> DC: I don't have instructions on that.

95 I agree with the plaintiff that the above exchange and the general context of the First Unless Order Application make it amply clear that what was required was an explanation for the Represented Defendant's delay in obtaining these documents *only after the plaintiff had taken out the unless order application* (see [29] above).[84] Seen in that light it is remarkable that Ben's eleventh Affidavit, which he purportedly filed in compliance, proffers the "explanation" that:[85]

> (a) The reason why the HSBC bank documents only emerged later was that "the Represented Defendants did not have possession of these documents" and only obtained them "after making enquiries with HSBC."
>
> (b) The plaintiff had not requested for the bank statements of the AXXIS Companies until the 18 November 2014 Letter.

96 Did such an explanation comply with the terms of the Unless Order? In my view, it did not. The statements in Ben's eleventh Affidavit do not explain why the Represented Defendants had taken almost two years between the 18 November 2014 Letter and 19 September 2016 to write to HSBC to request

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84 6th Affidavit of Sim Bee Har, 17 May 2017, pp 410–411; Plaintiff's skeletal submissions for Summons 2275/2017, paras 53–55.

85 15th Affidavit of Toh Wee Ping Benjamin, 30 May 2017, para 8(b).

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the bank statements for the AXXIS Companies for the year of 2009. I note that initially, the Represented Defendants wrote to HSBC on 16 March 2015 only to request for AXXIS International's bank statements for 2008. Ben later revealed in his sixth Affidavit that this was because the Represented Defendants took the view that 2008 was "the only timeframe relevant to the discovery of documents".[86] But even if I accept that the Represented Defendants may have legitimately taken the *initial* position that some of the bank statements requested were irrelevant or unnecessary when they first received the plaintiff's request, they could no longer take that view as of 13 July 2015, when AR Mak issued the SD Order, which confirmed the relevance and necessity of the Category 1(2) documents.

97 Yet even after AR Mak issued the SD Order, in Ben's Affidavit Verifying the Third LOD dated 3 September 2015, he simply reiterated the position that the Category 1(2) documents were no longer in the Represented Defendants' possession, custody or control. This was despite the fact that at that point, the Represented Defendants had *already* requested for and obtained AXXIS International's bank statements for April to December 2008 from HSBC in March 2015 (see [25] above), and could obviously have done the same to obtain further Category 1(2) documents. Ben's eleventh Affidavit contains no explanation for why this was not done. It was thus no answer for Ben to say that the Represented Defendants had disclosed these documents as late as they had because they needed to make requests from HSBC bank. The point was that they did *not* make the necessary requests until September 2016, more than a year after AR Mak had issued the SD Order.

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[86] 6th Affidavit of Sim Bee Har, 17 May 2017, p 276, para 20.

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98 Having regard to the above I was satisfied that Ben and Bee did breach the Unless Order by failing to explain their delay with respect to obtaining the Category 1(2) documents in Ben's eleventh Affidavit. I further note that to date, no satisfactory explanation has been given in any of the subsequent affidavits filed on behalf of the Represented Defendants.

99 I turn now to discuss whether Ben and Bee also breached their obligation to disclose the Category 1(5) documents for the AXXIS Companies' projects prior to 18 December 2009. Unlike the SD Order, the terms of the Unless Order did not contain a statement to the effect that Ben and Bee could "file an affidavit to state that [the Category 1(5) documents] are not within their possession, custody or control and the reasons why". The Unless Order simply required Ben and Bee to produce the Category 1(5) documents dated prior to 18 December 2009. There was no alternative. AR Lim was evidently convinced that there must have been such documents with Ben and Bee. Strictly speaking, that must mean that Ben and Bee breached the Unless Order because they did not disclose further Category 1(5) documents within 14 days. Instead, Ben's eleventh Affidavit simply stated that there were no further documents in Category 1(5) in the Represented Defendants' possession, custody and control. If that were true, and if the Represented Defendants had taken steps to satisfy themselves that it was, then they could not be faulted even if they had technically breached the Unless Order. But that was not the case, as I shall shortly explain.

(2) Do the breaches of the Unless Order warrant striking out of the defences of Ben, Bee and the AXXIS Companies?

100 As mentioned, once an unless order is breached, it falls to the defaulting party to demonstrate that the breach was not intentional and contumelious if he

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is to avoid the specified consequences (*Mitora* at [35]). In the English decision of *In re Jokai Tea Holdings Ltd* [1992] 1 WLR 1196 ("*In re Jokai Tea Holdings*") (cited by the Court of Appeal in *Mitora* at [35]), Sir Nicolas Browne-Wilkinson VC stated that the defaulting party must show that "there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances". The Court of Appeal in *Syed Mohamed Abdul Muthaliff v Arjan Bhisham Chotrani* [1999] 1 SLR(R) 361 ("*Syed Mohamed Abdul Muthaliff*") at [14] observed that the defaulting party must "show that he had made positive efforts to comply but was prevented from doing so by extraneous circumstances".

101 Even where a breach has been found to be intentional and contumelious, however, the court must decide what is the appropriate response, having regard to the "drastic" effects of striking out an action or defence (*Von Roll Asia* at [43]). As stated by Chan Seng Onn J in *Teeni Enterprise Pte Ltd v Singco Pte Ltd* [2008] SGHC 115 at [64]:

> Clearly, the court must balance the need to ensure compliance with court orders … and the need to ensure that a party would not be summarily deprived of its cause of action or have default judgment entered against it without any hearing of the merits especially when the non-compliance or breach, having regard to all the relevant circumstances, was not so serious or aggravating as to warrant such a severe consequence: see *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR 117 at [4]. The discretionary power to enforce the unless order according to its strict terms must therefore be exercised judiciously and cautiously after weighing everything in the balance.

102 I am satisfied that in this case, the breaches of the Unless Order were intentional and contumelious, and were not due to extraneous circumstances.

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103 As for AR Lim's orders relating to Category 1(2), it was clear from the exchange between AR Lim and Mr Hirono at the First Unless Order Application that Ben and Bee were required to provide an explanation for their delay in obtaining the bank statements from HSBC - long after the plaintiff had first requested discovery, long after AR Mak had issued the SD Order and *only* after the plaintiff had taken out the First Unless Order Application. If there was no explanation for such delay, the Represented Defendants ought to have been upfront about this and apologised for their inaction. On any view, it was unacceptable for Ben to simply rehash what the court obviously already knew – that Ben and Bee had had to make inquiries with HSBC in order to obtain the documents, and that the plaintiff's request had only come in 18 November 2014. Yet that was precisely what Ben did in his eleventh Affidavit, and that he did so reflects the Represented Defendants' cavalier attitude towards their discovery obligations and the orders of the court. I further note that Ben in his eleventh Affidavit had reprised the point that all AXXIS documents had been discarded in order to reduce storage costs when the AXXIS Companies became dormant in 2014.[87] He has since revealed in his seventeenth Affidavit that he made this statement without actually being able to recall if the AXXIS documents were ever really thrown away or destroyed (see [33] above).

104 I am also satisfied that Ben and Bee have breached AR Lim's orders with respect to Category 1(5) in an inexcusable manner. Obviously, if it was true that Ben and Bee had no further Category 1(5) documents in their possession, custody or control, then even if they had *technically* breached the Unless Order by not disclosing further documents, that would be due to "extraneous circumstances" and not something which Ben and Bee could be

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87 6th Affidavit of Sim Bee Har, 17 May 2017, p 415.

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faulted for. I should stress that I make no finding as to whether it *is* true that there were no more Category 1(5) documents. The plaintiff says the Peachtree Directory discloses documents falling within this category but I am not prepared to draw that conclusion based only on the filenames.

105 However, even if I give the Represented Defendants the benefit of the doubt, and assume they *in fact* had nothing further to disclose within Category 1(5), it would surely be incumbent upon Ben and Bee *to make the necessary checks and enquiries* to satisfy themselves that this was true. They would also have to take steps to satisfy the *court* that they had made such checks and enquiries. I stress the statement in *Syed Mohamed Abdul Muthaliff* at [14] that the defaulting party must *show* that he made positive efforts to comply but was prevented from doing so by extraneous circumstances.

106 Instead, Ben and Bee's purported attempt to comply with the Unless Order took the form of Ben's eleventh Affidavit, in which he simply stated that there were no other documents because they had been "thrown away" to reduce storage costs and because they were unnecessary for accounting purposes when the AXXIS Companies became dormant (see [42] above). It is by now clear that the above statement was made without Ben actually remembering if the AXXIS documents were ever really thrown away or destroyed or simply lost. It is also clear that the statement was made without Ben and Bee having started up the Old Computer to see if it contained any potentially relevant documents (see [46] above). Ben's eleventh Affidavit also does not speak of any other checks, searches or enquiries that were made to verify that there were no further Category 1(5) documents to be disclosed. In the circumstances, I was satisfied that Ben and Bee have breached the Unless Order with respect to Category 1(5) in an intentional and contumelious manner.

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107 The next question to be considered is whether these intentional and contumelious breaches of the Unless Order justify striking out the defences of Ben, Bee and the AXXIS Companies. I am mindful that in *In re Jokai Tea Holdings*, Parker LJ noted that there were "degrees of appropriate consequences" which may be imposed. The Court of Appeal in *Mitora* (at [45(c)]) also noted that the court has in its arsenal other means of penalising contumelious or persistent breaches, including awarding costs on an indemnity basis, ordering the payment of the plaintiff's claim or part thereof into court, striking out relevant portions of a defaulting party's pleading rather than the whole, barring the defaulting party from adducing certain classes of evidence or calling related witnesses, and raising adverse inferences against the defaulting party at trial.

108 Nevertheless, in my view, this is a case where Ben and Bee's breaches of the Unless Order warrant the "draconian sanction" (*Mitora* at [46]) of striking out their defence. Ben and Bee have been given ample opportunity to comply with the SD Order which was first issued on 13 July 2015, and with the Unless Order. Instead of making reasonable or good faith efforts to comply with these orders, they have, at best, been slow to act and careless and at worst, deliberately delayed the proceedings. Where called upon to explain their delay, they have been evasive, and unapologetically so. They have repeatedly asserted on affidavit that the documents they have been ordered to disclose have been destroyed or disposed of, even though neither Ben nor Bee can actually recall if this was the case. They have not demonstrated any positive efforts to comply with the court's orders, and have shown no indication that they take their obligations and the court's orders seriously. They have dragged the Discovery process in this action over a period of more than two years. This has

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unnecessarily increased the cost of the litigation and they have throughout, displayed a cavalier attitude towards their discovery obligations.

109 I note that the Represented Defendants have argued that the facts behind the delayed disclosure of the Category 1(2) documents are merely background facts and are not essential for a "fair trial" of the plaintiff's claim.[88] The point, perhaps, is that there has been no prejudice to the plaintiff's ability to prove its claim as a result of Ben and Bee's failure to comply with AR Lim's order that they should explain their delay. I do not accept this argument because their obligation to provide an explanation derives from the Unless Order *itself*. Subject obviously to their right to appeal (and Ben and Bee have not appealed), Ben and Bee *must* provide the explanation, even if they think their explanation would merely constitute "background facts", as they say. Not only have Ben and Bee effectively refused to explain themselves, they are also *still* trying to justify their default by saying that the reasons for their delay with regard to Category 1(2) are irrelevant to the issues at trial. This is symptomatic of their utter disregard for the court's authority.

110 Given Ben and Bee's intentional, contumelious and inexcusable breaches of the Unless Order, I see no reason not to enforce AR Lim's Unless Order according to its exact terms and to impose the very consequence that it stipulates – the striking out of Ben and Bee's defence. I have come to the conclusion that this is not a disproportionate response having regard to the breaches of the Unless Order *as well as* the other ways in which the Represented Defendants have contumeliously breached their discovery obligations, as I shall discuss below.

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88 3rd and 4th Defendants' written submissions for Summons 2275/2017, para 19.

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111 Before I turn to that, however, I should address one point: the plaintiff's application is to strike out not only Ben and Bee's defences but also those of the AXXIS Companies. The AXXIS Companies are legal entities separate from Ben and Bee. They were not the subject of, and have not breached, the Unless Order. It follows that their defences cannot be struck out based on Ben and Bee's breaches of the Unless Order. I shall later address whether their defences can be struck out based on the wider argument that they have breached their discovery obligations.

Inexcusable breaches of discovery obligations

112 As I have mentioned, the cases have frequently referred to the standard of "contumelious" and "contumacious" breaches of discovery obligations, but it has also been recognised that "negligence, incompetence, or sheer indolence" (*Mitora* at [40]) may also justify the sanction of striking out under O 24 r 16 (see [77] above).

113 Having regard to the Represented Defendants' behaviour from the time the plaintiff requested specific discovery to the time of this application, I agree with the plaintiff that they have committed inexcusable breaches of their discovery obligations. I say this based on the following factors:

(a) The Represented Defendants breached the Unless Order contumeliously, as discussed at [92]–[110] above.

(b) The Represented Defendants have taken shifting positions with regard to numerous issues, including when and by whom the documents were destroyed, whether the documents exist to begin with and whether they have further undisclosed AXXIS documents remaining in their possession, custody or control at various points in time. The biggest and

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most egregious shift in their position was that they initially created the impression that Ben and Bee knew what became of the AXXIS documents (*ie* that they had been destroyed), but later, after having sworn numerous affidavits, revealed that they had made all of their previous statements based on Ben's limited memory and without making any attempt to verify their claims. This is discussed in detail at [59]–[64] above.

(c) The Represented Defendants have shown a consistent pattern of "drip-feeding" documents in the discovery process. They have on numerous occasions repeated the refrain that they have disclosed everything in their possession, custody and control, only to later produce further documents under the various categories without any explanation as to why this was not done earlier. These further belated disclosures are often made only when the plaintiff has taken out applications with the court to compel the Represented Defendants to cooperate. Examples of this include the belated disclosures of the HSBC bank statements under Category 1(2) and 134 documents under Category 1(5) in the Fourth LOD, which was filed after the plaintiff took out the First Unless Order Application (see [29] and [40] above).

(d) The Represented Defendants have taken a completely unrepentant attitude and have never once apologised for their various breaches. In fact, they continue to offer spurious excuses and continue to dispute the relevance and necessity of information they have already been ordered to provide. For example, in their written submissions for this application, Ben and Bee make the following argument:

> The argument that the balance sheet must have more pages simply because it has page numbers not starting

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> at 1 is simply *non-sequitur*, since the essential part of the balance sheets, being assets and liabilities, are displayed in documents already disclosed.

It is remarkable to me that at this stage Ben and Bee are still taking the position that they are entitled to choose which page of a balance sheet to disclose based on their own assessment of what is "essential", notwithstanding the fact that they have been ordered to disclose "*all* annual financial statements of the AXXIS Companies…including but not limited to the balance sheets of the AXXIS Companies" under the terms of the SD Order (see [16] above).

114 Taking these factors as a whole, I was satisfied that Ben and Bee have demonstrated utter disregard for the Rules of Court and the various court orders that have been issued against them (in the language of *Alliance Management* at [9]). They have shown no evidence of conscientious efforts to give proper discovery. Their conduct gives me no confidence that they would defend the plaintiff's claim in an honest and fair manner. I therefore strike out their defences on this basis as well.

115 Again, that leaves me to discuss the point that the plaintiff seeks to strike out not only Ben and Bee's defences but also those of the AXXIS Companies. O 24 r 16 empowers the court to strike out a claim or defence of "a party who is required by any Rule in [O 24], or by any order made thereunder, to make discovery of documents", but fails to comply. The problem, however, is that the AXXIS Companies were not even the subject of AR Mak's SD Order, which was only issued in respect of the Represented Defendants. It therefore cannot be said that *the AXXIS Companies* are in contumelious breach of their discovery obligations.

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116 At the hearing of this application, counsel for the plaintiff Mr Dominic Chan stressed that the AXXIS Companies are not entitled to act in person as they have purported to do, have not sought leave of court to be represented by their company officer(s), and have chosen not to appear at the hearing of this application. That may be so, but those facts do not offer me a legal basis for striking out their defence.

Conclusion

117 To conclude, I decline to strike out the defences of the AXXIS Companies. For the aforesaid reasons, I strike out Ben and Bee's defences on the basis that they have committed inexcusable breaches of their discovery obligations and of the Unless Order, and enter interlocutory judgment for the plaintiff, with damages to be assessed. The costs of this action up to this stage of the proceedings are to be taxed and paid by Ben and Bee to the plaintiff. Ben and Bee are also to pay the costs of this application, to be taxed, if not agreed.

Lee Seiu Kin
Judge

Chan Wai Kit Darren Dominic and Ng Yi Ming Daniel (Characterist LLC) for the plaintiff;
Ng Boon Gan (VanillaLaw LLC) for the third and fourth defendants.

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