**IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE**

**[2020] SGHC(I) 03**

Suit Nos 7 to 9 of 2018 (Summons No 49 of 2019)

Between

(1) Hai Jiao 1306 Limited
(2) Hai Jiao 1207 Limited
(3) Hai Jiao 1307 Limited

… *Plaintiffs*

And

Yaw Chee Siew

… *Defendant*

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# GROUNDS OF DECISION

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[Civil Procedure] — [Discovery of documents] — [Adverse inference]

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# Hai Jiao 1306 Ltd and others
# v
# Yaw Chee Siew

**[2020] SGHC(I) 03**

Singapore International Commercial Court — Suit Nos 7 to 9 of 2018
(Summons No 49 of 2019)
Kannan Ramesh J
30 September; 10 October 2019

21 February 2020

**Kannan Ramesh J:**

1 Summons No 49 of 2019 ("Sum 49/2019") was an application by the plaintiffs for a peremptory order arising from the defendant's failure to comply with the Order of Court dated 18 July 2019 ("ORC 38/2019"). ORC 38/2019 was made in Summons No 34 of 2019 ("Sum 34/2019"), which was similarly an application by the plaintiffs for a peremptory order against the defendant, again arising from the latter's non-compliance with his discovery obligations, specifically, to give eDiscovery pursuant to the Order of Court dated 17 April 2019 ("the eDiscovery Order") made in Summons No 13 of 2019 ("Sum 13/2019") and to comply with the directions the court made at a case management conference on 8 May 2019 (see [22] below). Sum 13/2019 and Sum 34/2019 were heard by the full *coram*, comprising Patricia Bergin IJ, Bernard Eder IJ and me, while Sum 49/2019 was heard by me as a single judge.

2 Sum 49/2019 was heard over three separate hearings, two of which, on 30 September 2019 and 10 October 2019, are relevant to these grounds. On 30 September 2019, after hearing parties, I was persuaded that the defendant had not complied with the eDiscovery Order and ORC 38/2019. I ordered that he do so within a week from 30 September 2019 ("ORC 51/2019"), and stated that the consequences of non-compliance were to be considered subsequently. At the further hearing on 10 October 2019, I ordered ("the 10 October Order") that the defendant comply with ORC 51/2019, with non-compliance in respect of four specified repositories to result in an adverse inference being drawn to the effect that: (a) the defendant failed to exercise his best endeavours to procure a mortgage of the Parkcity Everly Hotel in Bintulu, East Malaysia ("the Hotel") in favour of the plaintiffs; and, (b) but for such failure the mortgage would have been procured in favour of the plaintiffs. Dissatisfied with my decision, the defendant appealed on 11 November 2019 against the 10 October Order.

3 At the third hearing on 11 November 2019, the first day of trial, the full *coram* found that the adverse inferences that were directed on 10 October 2019 could be drawn by reason of the defendant's non-compliance with the 10 October Order. The defendant has not appealed against the decision we made on 11 November 2019.

4 As noted earlier, Sum 49/2019 was an application to enforce ORC 38/2019, which in turn sought to enforce the eDiscovery Order and the directions made at the case management conference on 8 May 2019 – (collectively, "the eDiscovery obligations" and as regards the latter, the "8 May directions"). Thus, the orders that were made in Sum 49/2019 – ORC 51/2019 and the 10 October Order – flowed from the eDiscovery obligations and ORC 38/2019 and were premised on them. This context is important in understanding

the reasons for the specific orders that were made in Sum 49/2019 in relation to three repositories, namely, the defendant's email accounts at Perdana, csyaw@ppcity.com.my and csyaw.om@ppcity.com.my, as well as to what the defendant later claimed was an "Apple Mac Desktop" computer in his Perdana office (see [28], [42(d)], [49] and [52] below).

5 I now set out the reasons for my decision in Sum 49/2019.

**Background facts**

6 The defendant is the majority shareholder, sole director and executive chairman of Otto Marine Limited ("OML"), as well as the Executive Chairman of Perdana. The Chief Executive Officer of Perdana, Joseph Lau, is the defendant's cousin. Perdana's ultimate holding company is Yaw Holding Sdn Bhd ("Yaw Holding"), which is substantially owned by the defendant's father and brother.

7 The first to third plaintiffs are the registered owners of three vessels: "GO PERSEUS", "GO PHOENIX" and "GO PEGASUS" respectively. Each of these vessels was chartered under a bareboat charter agreement (collectively, "the Agreements"). "GO PHOENIX" and "GO PEGASUS" were chartered by Otto Fleet Pte Ltd ("OFPL"). "GO PERSEUS" was chartered by Go Offshore (L) Pte Ltd ("GOPL"). OML is the ultimate holding company of OFPL and GOPL (collectively, "the Charterers").

8 A corporate guarantee was issued by OML in favour of the second and third plaintiffs, guaranteeing as primary obligor the due and punctual performance by OFPL of all its obligations under the two bareboat charterparties, including the payment of charter hire. OML and GOPL's

immediate parent, Go Marine Group Pty Ltd ("GOML"), issued guarantees in favour of the first plaintiff similarly guaranteeing, as primary obligors, the due and punctual performance by GOPL of all its obligations under its bareboat charterparty.

9 Financial difficulties hit the Charterers as well as OML and its related entities. As result, the defendant was desirous of delisting OML so that it would be easier for him to personally fund the Charterers and OML in order to enable performance of the payment obligations under the Agreements and the guarantees issued by OML. However, delisting OML would be a breach of a term in each of the Agreements and therefore the plaintiffs' consent was required. The plaintiffs consented in consideration for the defendant agreeing to issue Letters of Support in relation to each Agreement and the guarantees issued by OML. These Letters of Support were to be in identical form. The relevant portion, for present purposes, reads:

> In consideration of your consent to the restructuring and potential delisting arrangement in relation to [the Guarantor] and [the respective Charterer], I, Yaw Chee Siew, hereby issue to [the relevant plaintiff] this Letter of Support *that I will use best endeavours to support the Charterer and the Guarantor in meeting all obligations* under or in relation to the Bareboat Charter Agreement between [the relevant plaintiff] and the Charterer, and the relevant Guarantee issued by the Guarantor.
>
> …
>
> 2. At all times during the term of this Letter, I shall use best endeavours to:
>
> > (a) procure the Guarantor and Charterers to have sufficient liquidity to make timely payment of any amounts payable by the Guarantor and Charterers under or in respect of the Bareboat Charter Agreement and the Guarantee; and
> >
> > (b) procure the Guarantor and Charterers to remain solvent and a going concern at all times under the laws

> of its jurisdiction of incorporation or applicable accounting standards so long as any Charter Hire and/or any other obligations under or in respect of the Bareboat Charter Agreement and the Guarantee is outstanding.
>
> 3. If the Guarantor and Charterers at any time have insufficient liquidity or cashflow to meet any obligations under or in respect of the Bareboat Charter Agreement and the Guarantee as they fall due, I shall use best endeavours to procure for the Charterer, before the relevant due date of the relevant obligations, sufficient funds by means permitted by applicable laws and regulations so as to enable the Guarantor and Charterers to meet such obligations as they fall due.
>
> …
>
> [emphasis added]

10 OML delisted but the Letters of Support were not issued despite the fact that the defendant claimed to have executed them. It is common ground, however, that the Letters of Support are binding on the defendant. Post-delisting, the Charterers and OML continued to default on their payment obligations under the Agreements and the related guarantees respectively.

11 This resulted in further negotiations between the plaintiffs and the defendant. The result was two-fold. First, on 26 September 2017, a second set of Letters of Support between the defendant and each of the plaintiffs was agreed and executed as deeds. These deeds each contained terms that were materially identical to those excerpted at [9] above, except that Clause 3 of the second set of Letters of Support reads:

> 3. If the Guarantor and Charterers at any time have insufficient liquidity or cashflow to meet any obligations under or in respect of the Bareboat Charter Agreement and the Guarantee as they fall due, I shall use best endeavours to procure for the Charterer *(but shall in no way guarantee),* before the relevant due date of the relevant obligations, sufficient funds by means as permitted by applicable laws and regulations so as to enable the

> Guarantor and Charterers to meet such obligations in full as they fall due. [emphasis added]

12 Second, also in September 2017, various addenda were entered into in respect of each of the Agreements by the relevant parties. These addenda, which were similar in material respects between the different Agreements, were intended to, amongst other things, modify the charter hire rate and instalment payment scheme under the Agreements in light of the financial situation of the Charterers and OML. Of particular relevance to Sum 49/2019 are the addenda that were entered into on 29 September 2017 (the "Addendum") between each of the plaintiffs and the relevant Charterer in respect of the relevant Agreement. Each Addendum provided that the Charterers were to deliver to the relevant plaintiff documents satisfactory to the latter evidencing compliance with Schedule 1A of the Addendum:

> Clause 5.3
>
> On or before 31 October 2017 (the "**Condition Subsequent Satisfaction Date**") the Charterers shall deliver to the Owners documents, in a form and substance satisfactory to Owners, evidencing that the condition set out in Schedule 1A (the "**Condition Subsequent**") has been fully complied with.
>
> Failure by the Charterers to satisfy the Condition Subsequent by the Condition Subsequent Satisfaction Date shall be an Event of Default under the Charter, and shall render the amendments to the Charter introduced by way of [the present Addendum] null and void. Without prejudice to the foregoing, any performance of the Charter (as amended by [the present Addendum]) before the Conditions Subsequent Satisfaction Date, including any payment made by the Charterers to the Owners pursuant to the Charter (as amended by this Addendum No. 3), shall remain valid and duly accounted for.
>
> Schedule 1A
>
> Evidence satisfactory to the Owners that a *valid mortgage* or charge over the *Parkcity Everly Hotel*, Bintulu, Sawarak, East Malaysia … to secure the due and punctual performance by the

> Charterers of their obligations under this Charter and the performance by the Guarantor of their obligations under the Guarantee, for an amount of not less than USD 14,000,000, [had] been granted and registered in favour of the Owners.
>
> [emphasis added in italics]

13 Schedule 1A therefore required, *inter alia*, that the Charterers provide as a condition subsequent satisfactory evidence of a mortgage over the Hotel registered in the plaintiffs' favour to secure due performance of the Agreements and the related guarantees. The plaintiffs' case was that the Hotel was indirectly owned by the Perdana Group of companies and Yaw Holding, and counsel for the defendant did not challenge this at the hearings for Sum 49/2019. The Addenda further provided that the failure to satisfy Schedule 1A on or before 31 October 2017 would render the amendments to the Agreements introduced by the Addenda null and void.

14 OML and its related companies, including the Charterers, were not able to extricate themselves from their financial malaise. OML was placed under judicial management on 21 March 2018 and subsequently placed in liquidation on 5 October 2018. GOPL was placed in liquidation on 11 May 2018, and OFPL went into creditors' voluntary winding up on 10 July 2019.

15 The present suits rest, *inter alia*, on the "best endeavours" obligation found in the first and second sets of Letters of Support. They were brought against the defendant on the basis that he had breached the "best endeavours" obligation in both sets of Letters of Support and/or various undertakings, and/or had misrepresented certain facts which the plaintiffs had relied upon, suffering loss as a consequence. Specifically, relevant to Sum 49/2019 is the plaintiffs' claim that the defendant failed to take any steps, or alternatively to exercise best endeavours, to ensure that the Charterers provided them with satisfactory

evidence that a mortgage over the Hotel had been registered in the plaintiffs' favour, contrary to the obligation under the Addendum excerpted at [12] above. This, it was alleged, constituted a failure by the defendant to comply with his obligations under both sets of Letters of Support to use best endeavours to support the Charterers and OML in meeting their obligations under the Agreements and the related guarantees respectively. In contrast, the defendant asserted that he had exercised his best endeavours to persuade the owner of the Hotel to effect a mortgage over the Hotel in favour of the plaintiffs, but was unsuccessful in doing so.

***Procedural history***

16 As stated earlier, ORC 51/2019 (made on 30 September 2019 in Sum 49/2019) was the culmination of a long period of flagrant non-compliance by the defendant of his discovery obligations under the eDiscovery Order and ORC 38/2019. ORC 51/2019 and the 10 October Order that was subsequently ordered in Sum 49/2019 were made as a "last resort" after many opportunities had already been afforded to the defendant to comply with his discovery obligations. The procedural history of this matter is therefore important to my decision, and I set it out in some detail.

17 The narrative begins with Sum 13/2019 and the eDiscovery Order. Sum 13/2019 was the plaintiffs' application for specific discovery of electronically stored documents contained in a defined list of repositories. The list included, *inter alia*, any personal or work mobile devices, any personal or work computers or laptops *owned* or *used* by the defendant from 2015 to April 2018, as well as email accounts or mailboxes of the defendant, including any server or computer system that contained emails from "ottomarine.com" for the same time period

which the defendant had or could obtain access to. The search of the repositories was to be done using a search protocol which contained a list of specified search terms or phrases. In other words, the application sought repositories and devices that were either *owned or used* by the defendant regardless of whether such use was for personal or work purposes.

18 On 17 April 2019, the application was heard by the full *coram* and the eDiscovery Order was made. In substance, the application was allowed with some modifications, *eg*, narrowing the list of search terms and confining the time period for the search to between April 2016 and February 2018. It is relevant that one of the agreed search terms, item 54, provided as follows: "Hotel" AND "mortgage" AND ("Yaw Chee Meng" OR "Chee Meng" OR "Cheemeng" OR "Joseph Lau" OR "Reddi" OR "Wai Hoong" OR "Pany") (within the period July to December 2017)". Item 52 in turn provided: "Hotel" W/30 ("Parkcity" OR "Bintulu" OR "Everly" OR "Kenama"). It was therefore clear that from the outset the plaintiffs had targeted information that was related to Perdana, the Hotel and, indeed, Yaw Holding that was residing in repositories that were owned or used by the defendant. The defendant's obligation was clear: make available repositories and devices that he either *owned or used*, whether for personal or business purposes, to enable a search to be carried out based on the directed search protocol. The defendant did not object to the nature of the information, devices and repositories sought, with the focus of the arguments made by counsel for the defendant relating primarily to the search terms that were to be used.

19 Two other facets of the eDiscovery Order should be noted. First, electronic copies of discoverable documents were to be provided in their native format. Second, pursuant to the search protocol, the searches were to be run on

the basis that any results returned should include related documents necessary to give context to the circumstances under which the documents that were turned up by the search were produced or transmitted (the "related documents requirement"). The defendant was ordered to provide discovery within two weeks of the eDiscovery Order*, ie*, by 2 May 2019.

20 On 2 May 2019, the defendant sought an extension of time until 20 May 2019 to comply with the eDiscovery Order. By this time, the defendant had retained PricewaterhouseCoopers Malaysia ("PwC") to assist in the retrieval of electronic information stored in devices and repositories that the defendant was to make available pursuant to the eDiscovery Order. On 3 May 2019, the plaintiffs objected to the defendant's request. The plaintiffs' letter also requested that the court direct the defendant to provide:

> (a) the type, make and serial number of each electronic device that had been secured by PwC along with the time period for which the device was utilised by the defendant;
>
> (b) confirmation that all the relevant electronic devices covered by the eDiscovery Order had been secured by PwC; and
>
> (c) if the defendant was not able to provide the confirmation in (b), a list of the electronic devices that remained to be secured by PwC and either the steps that were taken to secure them or, if the defendant was unable to so secure, an explanation as to what had become of them.

21 On 6 May 2019, the defendant's request for an extension of time was denied by the court. The directions sought by the plaintiffs on 3 May 2019 were not made. However, the defendant's solicitors notified the plaintiffs' solicitors

by a letter dated 7 May 2019 ("the 7 May letter") that all relevant electronic devices utilised by him during the relevant period had been provided to and secured by PwC on 30 April 2019. The letter identified the three devices secured by PwC to be: (a) an iPhone 6; (b) an iPhone XS; and (c) an iPad Air.

22 The 7 May letter caused the plaintiffs some concern. For example, while the defendant claimed to have used the iPhone XS from January 2015 to 30 April 2019, the plaintiffs pointed out that the said model was only launched by Apple in or around September 2018, suggesting therefore that the defendant's claim was not true. Amongst others, these concerns were raised by the plaintiffs at a case management conference held on 8 May 2019. Having heard the parties, the court directed that the defendant file an affidavit by 13 May 2019 (a) confirming that he had indeed surrendered all relevant electronic devices in his possession to PwC as required under the eDiscovery Order and (b) explaining what had become of the devices that were no longer in his possession ("the 8 May 2019 directions"). The defendant failed to comply by the deadline stipulated in the 8 May 2019 directions.

23 The defendant subsequently filed an affidavit on 14 May 2019 ("14 May affidavit") purporting to comply with the 8 May 2019 directions. Contrary to the confirmation given in the 7 May letter, it was apparent from this affidavit that there was at least one device utilised during the relevant period which had not been previously provided by the defendant to PwC. This was a "laptop" which had been "surrendered" to the judicial managers of OML and therefore no longer in his possession. It was later clarified that this was a desktop computer and not a laptop. Further, it later transpired that, on his own admission in an affidavit filed on 12 June 2019, the defendant had performed a factory reset on the iPhone 6 (see [21] above) after the commencement of these

proceedings, notwithstanding that doing so would have destroyed information potentially discoverable under the eDiscovery Order. This stood in stark contrast to the assertions in the 7 May letter and his 14 May affidavit that all relevant devices had been surrendered to PwC.

24 Despite his earlier request for extension of time to comply with the eDiscovery Order having been rejected by the court, on 21 May 2019, the defendant's solicitors wrote to the court again requesting a further extension of time until 28 May 2019 to comply. It should be noted that the new deadline that was sought was past the deadline that had been sought in the previous request for an extension of time (see [20] above). This letter was not copied to the plaintiffs' solicitors for reasons unexplained and had to be brought to their attention by the court. The plaintiffs objected on 23 May 2019, and on 24 May 2019, the court refused the defendant's request once again.

25 On 28 May 2019, the plaintiffs filed Sum 34/2019, under O 92 r 4 of the Rules of Court (Cap 322, R5, 2014 Rev Ed) ("ROC") seeking a peremptory order requiring that the defendant comply with the eDiscovery obligations within three days. By the time Sum 34/2019 was filed on 28 May 2019, the defendant had been in breach of the eDiscovery Order for almost 4 weeks (*ie*, since 2 May 2019).

26 In the supporting affidavit to Sum 34/2019, the plaintiffs alleged that not only had the defendant's affidavit (see [23] above) been filed *after* the deadline imposed by the court, it also failed to comply with the requirements of the 8 May 2019 directions. In particular, while the defendant claimed to have misplaced a Samsung mobile phone, he did not explain how, when and where this had occurred. Moreover, he also did not identify the model, serial number

and the period in which the phone had been used. Similar arguments were made regarding the "laptop" that had been disclosed (see [23] above). Finally, the plaintiffs alleged that the affidavit showed that there was at least one other unidentified mobile device, an Apple iPhone, which had not been provided to PwC.

27 On 29 May 2019, the defendant filed a list of documents providing disclosure of 1,254 documents purportedly in compliance with the eDiscovery Order. However, a review of the documents showed that the discovery provided by the defendant was incomplete. The documents revealed that the defendant had other devices and email accounts which fell within the scope of the eDiscovery Order which had not been not made available to PwC. This was contrary to his assertions in the 7 May letter and his affidavit filed on 14 May 2019 purportedly in compliance with the 8 May 2019 directions. Further, there were other documents that should have been disclosed pursuant to the related documents requirement but were not. Significantly, not a single email was disclosed by the defendant despite the fact that one of the repositories identified in the eDiscovery Order was the defendant's OML email address. The affidavit the defendant subsequently filed on 12 June 2019 made no attempt to explain why this was the case.

28 This state of affairs prompted the plaintiffs to file Sum 34/2019. The application was heard on 18 July 2019. During the hearing, the court expressed serious concerns and grave reservations over whether the defendant had in fact complied with the eDiscovery obligations. The *coram* was, however, not minded to make the peremptory order that the plaintiffs had sought. Instead, the defendant was given "one final opportunity" to ensure full compliance. The defendant was therefore ordered (ORC 38/2019) to, *inter alia*, comply with the

eDiscovery obligations and file a Supplementary List of Documents by 5 August 2019, disclosing documents contained in six identified repositories as well as such further repositories as might be identified by the liquidators of OML. It is pertinent that the defendant did not contend that these repositories ought not to be the subject of the eDiscovery Order and ORC 38/2019 on the basis that the repositories and the information therein were not within his possession, custody or power. This is important for reasons I explain below. One of the specified repositories was the email address at csyaw@ppcity.com.my, which as pointed out earlier (see [4] above), was one of the defendant's email addresses at Perdana. Two other repositories were the "Apple Mac Desktop" in the defendant's office and a computer in his home. ORC 38/2019 also narrowed the scope of the related documents requirement to "attachments or documents specifically referred to in [the] documents disclosed".

29 The defendant did not comply with ORC 38/2019 by the stipulated deadline. On 6 August 2019, after the expiry of the deadline that had been set, the defendant's solicitors wrote to court requesting that he be given until the close of business that day to comply. The request was allowed. However, according to the plaintiffs, the letter was not served on their solicitors until around 6.26pm, after the court had granted the extension sought at around 6.16pm. By the time the plaintiffs received the defendant's solicitor's letter, they had already filed Sum 49/2019 at around 4.38pm. In any event, the defendant did not comply with ORC 38/2019 by the extended deadline he had sought.

30 On 9 August 2019, the defendant filed a Supplementary List of Documents, and a further affidavit. He produced emails from only one out of

the six specified repositories identified in ORC 38/2019, and did not disclose the existence of any other repositories. Such disclosure was incomplete. In a letter dated 16 August 2019 to the plaintiffs, OML's liquidators identified seven other repositories that they believed belonged to the defendant which he had failed to disclose pursuant to the eDiscovery obligations and ORC 38/2019. The plaintiffs also identified an additional email account, *ie*, another of the defendant's email addresses at Perdana, csyaw.om@ppcity.com.my. This also fell within the scope of the eDiscovery Order, which as stated above, covered all of the defendant's email addresses during the relevant period of time. The plaintiffs were invited to state whether they wished to proceed with Sum 49/2019. On 27 August 2019, they confirmed they did.

***Asset Discovery Order***

31 The defendant's foregoing breaches should be viewed in the following context. A further discovery order was made against the defendant on 23 July 2019 requiring that he disclose, *inter alia*, his tax returns, bank account records, documents evidencing his assets, and annual financial statements of companies which he had an interest in for the period 2016 to 2018 ("the Asset Discovery Order"). This required him to provide discovery by 20 August 2019. However, he only attempted to do so on 3 September 2019, and even then in a manner that was found to be inadequate (see [33] below).

32 The plaintiffs sought to rely on the defendant's non-compliance with the Asset Discovery Order at the hearing of Sum 49/2019 on 30 September 2019. The Asset Discovery Order, and the defendant's breaches thereof, were not expressly relied upon in the summons that was filed. It was not disputed that there had been a breach of the Asset Discovery Order. Indeed, at the hearing of

Sum 49/2019 on 30 September 2019, counsel for the defendant was only prepared to say that the defendant had "substantially" complied with the order. I considered it appropriate to take the defendant's breaches of the Asset Discovery Order into account in assessing the defendant's overall conduct of discovery. That said, I declined to make a specific order requiring compliance with the Asset Discovery Order and indicated that a separate application would have to be filed in this regard. The plaintiffs eventually filed an application for a peremptory order in relation to the defendant's non-compliance with the Asset Discovery Order as well ("Sum 71/2019").

33 It suffices to note that Sum 71/2019 was heard on 18 October 2019 by Eder IJ, who found that, even at that late stage, there continued to be serious breaches of the Asset Discovery Order. For example, as of 18 October 2019, no tax returns filed by the defendant in Singapore had been disclosed. No satisfactory explanation was given in this respect. Eder IJ further found that the defendant's conduct had been "completely unsatisfactory and unacceptable", and that it showed "a complete disregard [for] the orders of this Court". In many ways, Eder IJ's comments also accurately reflected the defendant's conduct with regard to the eDiscovery obligations.

**My decision**

34 I turn now to explain ORC 51/2019 (made on 30 September 2019) and the 10 October Order.

35 The applicable legal principles are not in dispute. The plaintiffs' application was made pursuant to O 24 r 16 and/or O 92 r 4. Order 24 r 16(1) ROC provides that the court may make such order as it thinks just upon a party's failure to comply with its obligations to give discovery, including an order that

the defence be struck out and judgment be entered accordingly. The order sought in Sum 49/2019 was a peremptory order, with the consequences of non-compliance being the striking out of the defence, leave to enter judgment, and costs on an indemnity basis.

36 In *Mitora Pte Ltd v Agritrade International (Pte) Ltd* [2013] 3 SLR 1179 ("*Mitora*") at [45], the Court of Appeal set out the following guidelines in relation to peremptory orders:

> (a) "unless orders" stipulating the consequence of dismissal should not be given as a matter of course but as a last resort when the defaulter's conduct is inexcusable;
>
> (b) the conditions appended to "unless orders" should as far as possible be tailored to the prejudice which would be suffered should there be non-compliance; and
>
> (c) other means of penalising contumelious or persistent breaches are available, including but not limited to, raising adverse inferences against the defaulting party at trial.

37 Further, the court is entitled to look at all the circumstances in its assessment of whether striking-out should be ordered (*Mitora* at [48]).

38 While the application was for a peremptory order, the plaintiffs, in their submissions, submitted that it would be appropriate for the court to exercise its discretion under O 24 r 16 and/or its inherent powers to strike out the Defence without any need for a prior peremptory order.

***Whether Sum 49/2019 was premature***

39 I begin first with the defendant's submission that Sum 49/2019 was premature. The defendant argued that at the time the application was filed, the court had granted the defendant's request for an extension of time and the defendant was therefore not in breach of ORC 38/2019. There was no merit in this submission. Before the plaintiffs filed Sum 49/2019, the defendant had written to the court seeking an extension of time to comply with ORC 38/2019 (see [29] above). However, the court's records indicate that Sum 49/2019 was filed before the court had granted an extension of time. The defendant was therefore in breach at that point in time. Further, the defendant's letter to the court was only served on the plaintiffs *after* Sum 49/2019 was filed. In any event, given that the defendant proceeded to breach the extended deadline of 6 August 2019, any prematurity in the plaintiffs' application was irrelevant.

***The defendant's non-compliance***

40 The crux of the matter was the defendant's ongoing breaches of his discovery obligations under the eDiscovery Order. The 8 May 2019 directions, ORC 38/2019, ORC 51/2019 and the 10 October Order were the result of the defendant's non-compliance with the eDiscovery Order. The procedural history I have described above is littered with glaring examples of the defendant's contumelious disregard for his discovery obligations, including the heedless manner in which he had provided multiple confirmations of his compliance – through the 7 May letter, as well as in his affidavits filed on 14 May and 12 June – despite the fact that it was *clear from his affidavits* that this could not have been true (see, for example, [23] above).

41 The defendant argued at the hearing of Sum 49/2019 on 30 September 2019 that he had complied with his discovery obligations and the various orders that had been made against him. Alternatively, it was argued that even if the defendant was found to be in breach of his discovery obligations, this was not contumelious but instead a result of circumstances beyond the defendant's control. I was and remained persuaded that the defendant's conduct has been nothing short of contumelious. This was the case even at the hearing on 30 September 2019, where, as I indicated above, I did not grant the order sought by the plaintiffs, instead giving the defendant a further opportunity to comply.

42 At the hearing on 30 September 2019, the plaintiffs relied on seven breaches of the defendant's discovery obligations. With the exception of the plaintiffs' contention that the emails from csyaw@ppcity.com.my were not provided in their native formats, it is my view that these allegations by the plaintiffs were correctly made. I provide a few examples:

(a) In breach of the related documents requirement as defined in ORC 38/2019 (see [19] and [28] above), the defendant failed to produce six documents. Notably, as a result of ORC 51/2019, the defendant subsequently filed a Supplementary List of Documents dated 9 October 2019 satisfying this requirement after he "personally investigated and searched" for these documents. There was no question that these were discoverable documents that should have been produced pursuant to the eDiscovery Order at a much earlier stage. However, no explanation was offered as to why this had not been done.

(b) Despite the defendant's multiple confirmations to the effect that he had fully complied with his discovery obligations under the eDiscovery Order, there were further repositories which had not been

disclosed. Eight of these were identified by the plaintiffs and OML's liquidators. It was undisputed that, in relation to three email accounts, the defendant was able to provide discovery. Instead of taking immediate steps to comply, he stated on affidavit that the repositories did not contain material relevant to the suit, but that he was "ready and willing" to provide discovery of them *if* the court ordered him to. This was simply unacceptable. The defendant had already been ordered to give discovery of these repositories in the eDiscovery Order and again in ORC 38/2019. The repositories under the eDiscovery Order covered any email accounts owned or used by the defendant between 2015 to 2018, and ORC 38/2019 required compliance with the eDiscovery Order. It was therefore not open to him to argue, when faced with an application for a peremptory order, that the information in these repositories was not relevant and would only be given if the court so ordered. In many ways, this example illustrates the attitude of the defendant, which was one of callous disregard for the court's orders on discovery.

(c) While discovery of six specified repositories was ordered under paragraph 2(a) of ORC 38/2018, the defendant only provided discovery of one email account. Particularly troubling was the fact that the iCloud account, which the defendant did not dispute was covered by the eDiscovery Order and ORC 38/2019, had not been disclosed. The defendant's position on affidavit was that the "data contained in this Repository [referring to the iCloud account] has already been disclosed by [the defendant] when [he] surrendered the electronic devices in [his] possession to PwC Malaysia … Discovery of this repository is therefore *unnecessary and duplicitous* [*sic*]" [emphasis added]. This was an

appalling assertion. It was not for the defendant to determine whether discovery was necessary: the eDiscovery Order and ORC 38/2019 referred *specifically* to the iCloud storage and required that discovery be given. The defendant simply had to comply. That said, at the hearing of Sum 49/2019 on 30 September 2019, counsel for the defendant appeared to suggest at points that the iCloud account *had in fact been disclosed to PwC*. As such, I ordered that PwC's confirmation to this effect be given on affidavit. However, notwithstanding counsel's suggestion otherwise at the hearing, it appeared from the affidavits which were filed subsequently that PwC only secured the data in the iCloud account on 3 October 2019, after the hearing on 30 September 2019. This was entirely unsatisfactory. On either account, there was no question that the defendant was in breach of his discovery obligations.

(d) As noted earlier (see [28] above), ORC 38/2019 also required the defendant to provide disclosure of documents in two computers: an "Apple Mac Desktop" in the defendant's office and a computer in the defendant's home. The defendant, however, did not do so, alleging instead that, with regard to the "Apple Mac Desktop in [his] office", he had no recollection of this computer, which was not in his possession. This was a position that changed at the hearing on 10 October 2019 (see [52] below). The defendant's response was unsatisfactory as it was incumbent on him to take reasonable steps to locate this device. There were messages exchanged between the defendant and his secretary referring to this computer, and he could very well have asked her about its whereabouts at the very least. His bare assertion that he had no recollection of the computer was insufficient. With regard to the computer in his home, the defendant simply stated that it was his wife's

and that he did not have possession or use of it. This seemed unlikely from the correspondence exhibited by the plaintiffs. In any event, given that he did not dispute at the hearing of Sum 34/2019 on 18 July 2019 that these devices were not in his possession, this point was not open to him any longer (see [28] above).

43 Significantly, for the first time, the defendant advanced the argument that the information in the email accounts at Perdana - csyaw@ppcity.com.my and csyaw.om@ppcity.com.my - were not within his power and as such, he could not give discovery. The defendant contended that these repositories were in the control of Perdana, whose permission would be required before discovery of the information there could be provided. The defendant's affidavit indicated that his solicitors had written to the Perdana Group's Chief Executive Officer, his cousin Joseph Lau, on 26 July 2019 and 3 August 2019 requesting approval for csyaw@ppcity.com.my to be subject to an e-discovery search. He stated that his solicitors had not received any response.

44 In substance, this was an argument that the emails accounts were not in his possession, custody or power. This was *not* an argument that was open to the defendant. The email account csyaw@ppcity.com.my was specifically referred to in ORC 38/2019. It was also covered by the terms of the eDiscovery Order. The issue of possession, custody or power was decided when ORC 38/2019 was made. Any argument as to possession, custody or power ought to have been made then at the very least. Indeed, the argument ought to have been made when the eDiscovery Order was made on 17 April 2019. Having failed to do so, it was not open to the defendant to argue that the email account was not in his possession, custody or power at the stage when compliance with ORC 38/2019 was sought in Sum 49/2019. As Belinda Ang J held in *Alliance*

*Management SA v Pendleton Lane P and another and another suit* [2008] 4 SLR(R) 1 ("*Pendleton Lane*") at [23], it is a prerequisite to the court's power to order inspection that the document (or in that case, the hard disk) be in the possession, custody and power of that party. ORC 38/2019 (and indeed the eDiscovery Order) was made on the basis that the email account csyaw@ppcity.com.my and the information therein were in the defendant's possession, custody or power.

45 If the email account csyaw@ppcity.com.my was to be regarded as in the possession, custody or power of the defendant, it is axiomatic that the defendant's other email account at Perdana, csyaw.om@ppcity.com.my, would be similarly regarded.

46 In any event, I was satisfied on the evidence before me that the defendant did have power over his email accounts at Perdana. The defendant clearly had access to the email accounts and had used them to correspond on OML's affairs. For example, he had used csyaw@ppcity.com.my to correspond with OML's liquidators on 8 April 2019. Notably, this was after Sum 13/2019 was filed (on 12 March 2019) and shortly before the eDiscovery Order was made on 17 April 2019. The plaintiffs relied on *Dirak Asia Pte Ltd and another v Chew Hua Kok and another* [2013] SGHCR 1 ("*Dirak Asia*") to argue that it was sufficient for the defendant to have practical access to the email accounts to find that he had power over the repository. In *Dirak Asia*, the Assistant Registrar ("AR") held that where the producing party has the practical ability to access or obtain documents held in the possession of the third party, the producing party *may* be found to have a sufficient degree of control to constitute power under O 24 ROC (at [35]). The practical ability to obtain the documents is to be seen and assessed in context. The AR went on to find that the defendants had each been provided

with a work email account which they had ready and easy access to on a routine basis. The strong degree of control over the work email accounts was evident, and the practical ability to access the email accounts could readily translate into actual possession (at [38]). The AR therefore concluded that the defendants had power over the emails in their work email accounts.

47 The reasoning from *Dirak Asia* applies with particular force in the present case given that the defendant was the Executive Chairman of a family-owned business. He clearly had an unfettered right to access the email accounts at Perdana and the practical ability to do so. From the affidavits which had been filed up to this point, there was no basis to conclude that Perdana's permission was necessary or would be refused. As I have said at [43], his position on affidavit when Sum 49/2019 was heard on 30 September 2019 was that his solicitors had not received any response from Perdana regarding their requests to give discovery of the Perdana email accounts. I found it difficult to believe that the defendant, as Executive Chairman, would have difficulty in even obtaining a response. Further, the various discovery orders were made against him personally, and it was for him to procure any approvals that might be necessary as a matter of corporate policy. The purported need for approval seemed very much like a convenient ruse for not providing discovery particularly when seen in light of the fact that the defendant had been allowed to use one of the email accounts to communicate with the liquidators of OML. While the suggestion was that he did not have the authority in Perdana to procure such access, this was not believable. It was at odds with the defendant's willingness to agree to the term that required a mortgage be obtained over the Hotel as a condition subsequent to the validity of the Addendum (see [13] above). This spoke clearly to the defendant's confidence that he would be able to exert the necessary control over Perdana, which, on the plaintiffs' case,

indirectly owned the Hotel. Assessed as a whole, I was satisfied that the defendant's failure to disclose the documents contained in the email accounts at Perdana was a breach of his discovery obligations. This was a point that was re-visited at the 10 October hearing, as I explain below at [55].

48 The examples I have referred to above are by no means an exhaustive list of the defendant's breaches, which were wide-ranging and egregious. This was despite the fact that the *defendant himself* had confirmed thrice – twice on affidavit, and once by way of the 7 May letter – that he had surrendered all relevant electronic devices in his possession. These breaches ought to also be viewed in the context of the procedural history I have sketched above: in particular, this was not the first unless order sought by the plaintiffs arising from the defendant's non-compliance with the eDiscovery obligations. In declining to grant the peremptory order in Sum 34/2019, the court had expressed "serious concerns and doubts" as to the defendant's compliance with his discovery obligations, and afforded him a final opportunity to ensure full compliance. Additionally, there was the defendant's conduct with regard to the Asset Discovery Order and the observations made by Eder IJ, as I noted above at [33], which provided relevant context.

49 Despite the defendant's contumelious and egregious conduct, at the hearing on 30 September 2019, I was once again prepared to give the defendant a further opportunity to provide discovery. In doing so, I was conscious of the fact that some attempts, although wholly inadequate, had been made at providing discovery. The sums claimed by the plaintiffs were also very substantial, and I was not convinced that striking out the Defence, particularly at such a late stage, would be a proportionate consequence. I therefore ordered in ORC 51/2019 that, in respect of repositories the defendant claimed were no

longer in his possession, custody, power and/or control, he state on affidavit, *inter alia*, the steps that had been taken to locate or obtain them and whether a backup copy of the information was available. This included the "Apple Mac Desktop in [his] office" and "Apple-Mac computer using the operating system OS X 10.10" (see [52] below). In respect of eight specified repositories or categories of documents, including the email accounts at Perdana and the computer in the defendant's home, I ordered that the defendant provide discovery. Finally, as there had been some suggestion at the hearing that the iCloud and Dropbox Accounts had been surrendered to PwC Malaysia (see [42(c)] above), I ordered that the defendant obtain written confirmation from them that this had been done.

50 In balancing the prejudice to the plaintiffs, taking into account the fact that trial had been fixed for 11 November 2019, I gave the defendant until 7 October 2019 to comply with ORC 51/2019. I stood down for subsequent consideration the plaintiffs' prayer on the consequences of non-compliance. That was dealt with at the 10 October hearing to which I now turn.

***The 10 October hearing***

51 On 7 October 2019, the defendant applied for an extension of time to comply with ORC 51/2019. In support of this, he filed an affidavit detailing the steps that had been taken to comply with the order.

52 Under ORC 51/2019, the defendant was to state, *inter alia*, the steps he had taken to locate or obtain the "Apple Mac Desktop in [his] office" and "Apple-Mac computer using the operating system OS X 10.10" (see [49] above). The defendant stated for the first time that these were the same device (the "Apple Mac Desktop" computer) and that the device was located in his

Perdana office in Kuala Lumpur, Malaysia. This was contrary to his earlier assertions that he was unaware of the "Apple Mac Desktop" computer's whereabouts (see [42(d)] above). No indication was given in his affidavit as to the steps that had been taken to provide discovery of the documents therein. In particular, the letter dated 1 October 2019 sent by his solicitors to the Group CEO of Perdana, Joseph Lau, only asked for the latter's approval to provide discovery of his email accounts at Perdana, but *not* of the "Apple Mac Desktop" computer. The defendant was therefore clearly in breach of ORC 51/2019. In any event, as noted earlier, the analysis with regard to the two email accounts at Perdana would also apply to this device given that it was apparently located in Perdana's Kuala Lumpur office.

53 The plaintiffs accepted at the 10 October hearing that, with the exception of the email accounts at Perdana, the "Apple Mac Desktop" computer referred to at [52] above, a Dropbox account registered under the email csyaw@ottomarine.com and the email account csyaw123@gmail.com, the remainder of the repositories and documents I directed the defendant to provide disclosure of in ORC 51/2019 had been provided to PwC Malaysia. The defendant's position with regards to the Dropbox account and the email account csyaw123@gmail.com was that he had forgotten the passwords necessary to access these repositories. Recovering the password required access to csyaw@ottomarine.com, which was under the control of OML's liquidators. He further said that he had not yet been able to arrange with OML's liquidators for the password to be recovered. The defendant produced correspondence between his solicitors and the solicitors of OML's liquidators, but the last email produced was dated 5 October 2019. It appeared that nothing had been done since then. The defendant did not argue that discovery could not or need not be provided,

and it therefore seemed as though it was a matter of time before the documents would be produced.

54 However, the same could not be said of the email accounts at Perdana and the "Apple Mac Desktop" computer. The defendant continued to maintain that the former could not be disclosed because Perdana had not allowed him to. The defendant relied on a letter from Perdana's counsel dated 7 October 2019. This letter indicated that Perdana was a wholly owned-subsidiary of Yaw Holding, which was substantially owned by the defendant's father and brother. There had apparently been a board meeting attended by directors of Perdana, with the exception of the defendant, on 6 August 2019, where the board considered the defendant's "request" for access to Perdana's email servers and repositories. The board decided that it could not agree to the defendant's request. It was asserted that the email accounts that were created for the defendant's use were "to allow him to communicate with the management of [Perdana] on issues relating to [Perdana] Group property development activities" and there were concerns over confidentiality. This of course did not explain why the same email accounts had been used to communicate on OML's matters. To be clear, while the letter referred to allowing the defendant "access" to the email accounts, counsel for the defendant accepted at the hearing that the defendant could in fact access the accounts and provide disclosure, and was simply concerned about potential liability. This was also illustrated by the fact that the defendant had, in an attempt to comply with the Asset Discovery Order, produced an email dated 1 August 2019 which had been sent to csyaw.om@ppcity.com.my. I note as an aside that the concerns over confidentiality could have been addressed in a number of ways, such as by redacting portions of the documents. This was plainly no answer to complete

non-compliance with ORC 38/2019 and ORC 51/2019. Notably, nothing was said about the "Apple Mac Desktop" computer.

55 The main difficulty with the defendant's argument was similar to that alluded to above at [44]. By this point, it was clear that multiple orders had been made requiring that discovery be provided of electronically stored documents in the emails accounts at Perdana. ORC 38/2019 specifically required that the defendant provide discovery of documents contained in csyaw@ppcity.com.my, and ORC 51/2019 expressly required this for both email accounts at Perdana. These orders were made on the basis that the documents were in the defendant's power. The defendant's claim to need Perdana's permission to release the documents ought to have been made at the very latest on 18 July 2019 when ORC 38/2019 was made (or perhaps even earlier when the eDiscovery Order was made). In so far as the defendant made a belated attempt to resist discovery on the basis that there had been a Perdana board meeting on 6 August 2019 at which the board had apparently decided not to accede to the defendant's request to "access and search [its] confidential information", the defendant was estopped from making that argument as that in effect would be to re-litigate the issue of possession, custody or control over the email accounts at Perdana which was decided at the very latest when ORC 38/2019 was made. To that extent, the sole investigation at the 10 October hearing was to ascertain whether ORC 51/2019 had been complied with. To a large extent, the same points applied to the "Apple Mac Desktop" computer, which, as noted earlier, was not addressed by the defendant in any detail at the hearing on 10 October 2019.

56 Accordingly, at the 10 October hearing, I ordered the defendant to comply with ORC 51/2019 by 15 October 2019, save for the email accounts at

Perdana and the computer the defendant claimed to be the "Apple Mac Desktop" computer allegedly in Perdana's offices (see [52] above), in relation to which the defendant was given until 18 October 2019 to comply.

57 The more difficult question was the consequences that should follow if the defendant did not provide discovery of the email accounts at Perdana and the "Apple Mac Desktop" computer. There was no doubt that the defendant's conduct was inexcusable. As the Court of Appeal stated in *Mitora* at [45], the conditions appended to a peremptory order should be tailored to the prejudice which would be suffered should there be non-compliance. It was the defendant's case that he had exercised his best endeavours to persuade the owner of the Hotel to effect a mortgage in favour of the plaintiffs. Any emails that corroborate this claim, or the absence thereof, would be a relevant fact at trial.

58 It was the plaintiffs' case that the Hotel is indirectly owned by the Perdana group of companies, and that the emails contained in the email accounts at Perdana and the "Apple Mac Desktop" computer would be relevant at least to the efforts the defendant made to obtain the mortgage over the Hotel in favour of the plaintiffs. I accepted this submission. In particular, the defendant appeared to have used the email accounts at Perdana for a variety of purposes, and it is therefore necessary for the plaintiffs to have discovery of relevant documents retrieved from these repositories using the search terms in the eDiscovery Order. The plaintiffs accepted that it would be sufficient for an adverse inference to be drawn against the defendant; the defendant instead sought costs sanctions, or alternatively, to narrow the search terms to those relating only to the Hotel, and for the board of Perdana to then consider approving disclosure on that limited basis. Neither of the defendant's two proposals were remotely satisfactory or adequate: as I have said, I was not

convinced that the defendant could not provide discovery. Orders had been made requiring that this be done, and the trial was approximately one month away. Given that the defendant's efforts to procure the mortgage over the Hotel was a significant facet of the case, I was satisfied that a proportionate consequence should the defendant fail to provide discovery of the information in the email accounts at Perdana and the "Apple Mac Desktop" computer would be for an adverse inference to be drawn against him. The adverse inference to be drawn would be that the defendant failed to exercise his best endeavours to procure the mortgage over the Hotel in favour of the plaintiffs, and that, but for such failure, the mortgage would have been procured, with the consequential inference that such failure had occasioned loss and damage to the plaintiffs.

**Conclusion**

59 The defendant, in resisting Sum 34/2019, relied on *Zhong Da Chemical Development Co Ltd v Lanco Industries Ltd* [2009] 3 SLR(R) 1017 at [24] where Judith Prakash J (as she then was) held that an unless order is an order of last resort, and is not made unless "there is a history of failure to comply with other orders". In his written submissions dated 5 July 2019, he submitted that he had not failed to comply with any orders made in the present case, and that a peremptory order would therefore be inappropriate. To the extent that submission had been inaccurate then, it was even more so at the hearings for Sum 49/2019. To the defendant's credit, he did not attempt to make the same argument in relation to Sum 49/2019. Indeed, by the time I finally made the 10 October Order, it was crystal clear that the defendant had an established history of flagrant non-compliance. Counsel for the defendant in fact accepted on the first day of trial (11 November 2019) that the defendant had not complied with ORC 51/2019 by 10 October 2019. In the circumstances, I considered that an

adverse inference against the defendant in the terms I have set out at [58] above would be a proportionate and appropriate consequence if the defendant failed to comply with the 10 October Order.

60 For completeness, I make a few observations on the submissions the defendant made on the first day of trial. On 5 November 2019, the defendant filed an affidavit in an attempt to comply with the 10 October Order. A letter dated 18 October 2019 from Perdana's solicitors (the "18 October 2019 letter") was appended to the affidavit. This letter reiterated the concerns regarding confidentiality, but, this time, provided selective discovery. The arguments made by the Counsel for the defendant focused in the main on the email accounts at Perdana though the "Apple MacDesktop" computer was treated as if it was subject to the same considerations. None of these were persuasive. Two are of potential relevance here.

61 First, he argued that the court could come to the view at a later stage, having had sight of the two letters from Perdana, that the defendant did not in fact have "power to release the repositories for discovery". This was not a tenable argument as that was again an attempt to revisit the issue of power over the email accounts. The 18 October 2019 letter was not materially different from the letter from Perdana's solicitors on 7 October 2019 (see [54] above), which had been considered at the 10 October hearing. It was also no answer to the question of possession, custody, or power, which in any event had already been determined by ORC 38/2019 on 18 July 2019. Second, it was argued that the present case was distinguishable from *Pendleton Lane* on the basis that the court there had found that the defendant had *possession* of a hard disk. Power, according to the defendant, "is very different". This was a puzzling position to take, and I could not see any principled distinction between the two in so far as

the defendant's discovery obligations and the doctrine of estoppel were concerned. As such, the full *coram* found at the 11 November 2019 hearing that the adverse inference I directed in the 10 October Order (see [58] above) could be drawn by reason of non-compliance with paragraph 2 of that order.

Kannan Ramesh
Judge

Toh Kian Sing SC, Ting Yong Hong, Davis Tan Yong Chuan, Lim Zhi Kang and Wang Yufei (Rajah & Tann Singapore LLP) for the plaintiffs;
Clarence Lun Yao Dong, Samuel Lim Jie Bin, Giam Zhen Kai and Lin Yu Mei (Foxwood LLC) for the defendant.