IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHCR 2

HC/S 920 of 2017
HC/SUM 5798 of 2021

Between

DMX Technologies Group Ltd (in liquidation)

… *Plaintiff*

And

Deloitte & Touche LLP

… *Defendant*

JUDGMENT

[Civil Procedure – Discovery of Documents]

Version No 1: 01 Mar 2022 (19:54 hrs)

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DMX Technologies Group Ltd (in liquidation)
v
Deloitte & Touche LLP

[2022] SGHCR 2

General Division of the High Court — Suit No 920 of 2017 (Summons No 5798 of 2021)
Justin Yeo AR
9 February 2022

28 February 2022

Justin Yeo AR:

1 This is the Defendant's application for an order that the action be struck out pursuant to O 24 r 16 of the Rules of Court (2014 Rev Ed) ("Rules of Court"), unless the Plaintiff (a) complies with specific discovery orders concerning the listing and inspection of documents; and (b) explains on affidavit the reasons for breaching those orders and the steps taken by the Plaintiff's solicitors to supervise the discovery process.

2 I heard the application on 9 February 2022 and received clarificatory submissions on a limited point on 18 February 2022. I decline to grant the unless orders sought, but make three specific orders as stated in [41] below.

Background Facts

3 The Plaintiff, DMX Technologies Group Ltd (in liquidation) ("the Plaintiff") brought the present suit against the Defendant, Deloitte & Touche LLP ("the Defendant"), for breach of contract and breach of duties owed under tort. On 23 July 2021, an Assistant Registrar ("the AR") made an order for specific discovery against the Plaintiff ("the Discovery Order"), which provided as follows:

> 1. The Plaintiff do file and serve on the Defendant the following within 28 days from the date of the order made herein:
>
> (a) A further supplementary list of documents ("**SLOD**") enumerating all documents relating to the 13 categories of documents listed in the Schedule annexed herein that it has, or has had at any time in its possession, custody or power, and if not presently in its possession, custody or power, to state when it parted with the documents and what has become of these documents;
>
> (b) An affidavit verifying the aforesaid SLOD (the "Verifying Affidavit").
>
> 2. There be inspection of the originals (if any) of the documents listed in the aforesaid SLOD within 14 days from the time the SLOD and Verifying Affidavit are served on the Defendant;
>
> 3. The Plaintiff is to provide to the Defendant at the time of service of the aforesaid SLOD and Verifying Affidavit, copies of the documents listed in the SLOD which are presently in the Plaintiff's possession, custody or power; and
>
> 4. The costs of and incidental to this application shall be fixed at S$5,000 (all-in) to be paid by the Plaintiff to the Defendant.

4 The Plaintiff appealed against the Discovery Order to a Judge of the General Division of the High Court ("the Judge"). The Judge dismissed the

Version No 1: 01 Mar 2022 (19:54 hrs)

appeal on 30 September 2021 and ordered the Plaintiff to comply with the Discovery Order by 28 October 2021.

5 On 28 October 2021, the Plaintiff filed and served the Plaintiff's 4th Supplementary List of Documents ("P4SLOD") and an affidavit verifying the P4SLOD ("Verifying Affidavit"), purportedly in compliance with paragraph 1 of the Discovery Order. The Plaintiff listed documents in Categories 1, 9, 11, 12 and 13 of the Schedule to the Discovery Order and explained in the Verifying Affidavit that it was not aware of any documents in the remaining categories. The Plaintiff did not provide copies of the documents listed in P4SLOD at the time of service of P4SLOD and the Verifying Affidavit.

6 The descriptions in P4SLOD were as follows:

S/No.	Date	Description (copies unless otherwise stated)
A. CATEGORY 1		
1.	Undated	General Ledgers of DMX Technologies (Hong Kong) Limited and DMX Technologies (Macao Commercial Offshore) Company Limited for FY2008 – FY2015
B. CATEGORY 9		
2.	Undated	Sales and Purchase Ledgers of DMX Technologies (Hong Kong) Limited and DMX Technologies (Macao Commercial Offshore) Company Limited for FY2008 – FY2015

Version No 1: 01 Mar 2022 (19:54 hrs)

S/No.	Date	Description (copies unless otherwise stated)
C. CATEGORY 11		
3.	Various	Contracts, Invoices, Purchase Orders, Goods Received Notes, Sales Order Forms, Delivery Notes, Project Cost Analyses, Journal Entries and Offset Instructions in relation to Transactions in Question entered into between FY2007 and FY2012
D. CATEGORY 12		
4.	Various	Correspondence and/or communications with PWC, including but not limited to: (a) correspondence and/or communications in relation to the engagement of PWC for a review of the Plaintiff's existing risk management processes referred to at paragraph 7 of the SOC; (b) instructions given to PWC; and (c) any terms on which PWC was engaged by the Company and/or its subsidiaries
E. CATEGORY 13		
5.	Various	Cause papers filed in HCA 896/2016

7 Various exchanges of correspondence ensued between the parties' solicitors. On 31 October 2021, the Defendant's solicitors requested softcopies of the documents within the various categories listed in P4SLOD. On 1 November 2021, the Plaintiff's solicitors informed the Defendant's solicitors that the Plaintiff was compiling the softcopies and that the originals were located overseas (*ie* in Hong Kong Special Administrative Region ("HKSAR")). On 3 November 2021, the Defendant's solicitors highlighted to the Plaintiff's solicitors that (a) the Plaintiff failed to sufficiently enumerate documents in P4SLOD; (b) the Plaintiff failed to produce softcopies of the

Version No 1: 01 Mar 2022 (19:54 hrs)

documents ostensibly listed in P4SLOD; and (c) the Defendant wished to inspect originals of the documents. On 5 November 2021, the Defendant's solicitors reiterated the Defendant's positions on the issues above, but there was no response from the Plaintiff's solicitors.

8 On 8 November 2021, six working days after the 28 October 2021 deadline, the Plaintiff's solicitors provided softcopies of the documents to the Defendant's solicitors. These softcopy documents were organised in folders, with each document bearing a detailed filename (see a simplified representative schematic in the appended table). According to the Plaintiff, the additional six working days were required to organise the documents in this manner, "to enable the Defendant to clearly see what documents were being disclosed".[1] This included, in relation to the documents in S/No 3 of P4SLOD, "organis[ing] documents connected to individual transactions into Portable Document Format Files, and then label[ing] them according to the corresponding transaction numbers".[2]

P4SLOD > A. Category 1 > **1. General Ledgers**	
Type	Name
PDF	General Ledger of DMX HK for FY 2008.pdf
XLS	General Ledger of DMX HK for FY2009.xls
PDF	General Ledger of DMX HK for FY2010.pdf
…	…
P4SLOD > B. Category 9 > **2. Sales and Purchase Ledgers**	

1 Affidavit of Bob Yap Cheng Ghee (dated 12 January 2022) at paragraph 16.

2 Affidavit of Bob Yap Cheng Ghee (dated 12 January 2022) at paragraph 16.

Version No 1: 01 Mar 2022 (19:54 hrs)

XLS	Sales and Purchase Ledger of DMX HK for FY2008.xls
XLS	Sales and Purchase Ledger of DMX HK for FY2009.xls
XLS	Sales and Purchase Ledger of DMX HK for FY2010.xls
…	…
P4SLOD > C. Category 11 > **3. Documents in relation to Transactions in Question**	
PDF	Offset Instructions.pdf
PDF	SO 07HK192.pdf
PDF	SO 07HK204.pdf
…	…
P4SLOD > D. Category 12 > **4. Correspondence with PWC**	
MSG	20130610 – Email from Skip Tang to Sharon Chow.msg
MSG	20130715 – Email from Benson Leung to Astor Cheung.msg
MSG	20130628 – Email from Astor Cheung to Eric Tse.msg
…	…
P4SLOD > E. Category 13 > **5. Cause papers filed in HCA 896 of 2016**	
PDF	20160407 – Writ of Summons.pdf
PDF	20160714 – Amended Writ of Summons.pdf
PDF	20160914 – Statement of Claim.pdf
…	…

Version No 1: 01 Mar 2022 (19:54 hrs)

9 On 15 December 2021, the Defendant brought the present application, seeking an order that the action be struck out pursuant to O 24 r 16 of the Rules of Court unless, within seven days, the Plaintiff:

(a) complies with paragraph 1 of the Discovery Order by filing and serving on the Defendant a supplementary list of documents ("SLOD") enumerating all documents relating to categories 1, 9, 11, 12 and 13 listed in the Schedule to the Discovery Order;

(b) complies with paragraph 2 of the Discovery Order by providing inspection of the originals (if any) of the documents listed in the aforesaid SLOD; and

(c) explains on affidavit why the Plaintiff acted in breach of the Discovery Order, and the steps taken by the Plaintiff's solicitors to discharge their duties to the Court to supervise the discovery process.

Issues

10 Based on the written submissions and oral arguments, the key issues arising in this application are:

(a) whether the Plaintiff had complied with paragraph 1 of the Discovery Order given the manner in which the Plaintiff enumerated and described documents in P4SLOD ("the Enumeration and Description Issue");

(b) whether the Plaintiff had complied with paragraph 2 of the Discovery Order concerning inspection of the originals (if any) of the documents listed in P4SLOD ("the Inspection Issue");

Version No 1: 01 Mar 2022 (19:54 hrs)

(c) whether the Plaintiff's solicitors had complied with their duty to supervise the discovery process ("the Duty Issue"); and

(d) whether any unless order should be made ("the Unless Order Issue").

The Enumeration and Description Issue

Relevant Law and Principles

11 Order 24 r 3(1) of the Rules of Court provides:

> **3.**—(1) A list of documents made in compliance with an order under Rule 1 must be in Form 37, and must enumerate the documents in a convenient order and as shortly as possible but describing each of them or, in the case of bundles of documents of the same nature, each bundle, sufficiently to enable it to be identified.

12 Plaintiff's counsel contended that P4SLOD was properly listed in the manner shown at [6] above, because the documents in each category were "bundles of documents of the same nature" for the purposes of O 24 r 3(1) of the Rules of Court. Defendant's counsel disagreed, arguing that the various categories listed in P4SLOD were not reasonably understood as "bundles of documents" for the purposes of the rule. Both sets of counsel relied solely on *Lee Shieh-Peen Clement v Ho Chin Nguang* [2010] 3 SLR 807 ("*Lee Shieh-Peen Clement*") as the relevant case authority.

13 In *Lee Shieh-Peen Clement*, the relevant accounts for each period were compiled in a loose-leaf manner and bound in a booklet, with the contents for each relevant period relating to financial transactions including receipts, invoices and payment particulars. The party giving discovery listed the items as shown in the following table:

Version No 1: 01 Mar 2022 (19:54 hrs)

101.	July 2007	Accounts for the month of July 2007 (159 pages)	Original
102.	September-October 2007	Accounts for the month of September to October 2007 (191 pages)	Original
103.	November 2007	Accounts for the month of November 2007 (276 pages)	Original

14 The party seeking discovery contended that a further and better list of documents ought to be provided because, in contravention of O 24 r 3(1) of the Rules of Court, the bundles did not contain documents of the same nature and the descriptions of the bundles were insufficient for the documents to be identified. The party seeking discovery sought an order for the party giving discovery to further elaborate upon the listed items by listing every invoice and receipt in each period's account book.

15 The court noted that enumerating and describing *bundles* of documents was an exception to the usual practice of listing *individual* documents (*Lee Shieh-Peen Clement* at [7]). On the facts of the case, the court observed that the account books were originals of the accounts for the relevant periods and, "as would be expected", contained a compilation of all receipts and invoices constituting the accounts (*ibid* at [12]). The court rejected the submission that receipts and invoices were "necessarily diverse documents (though dealing with the same subject-matter or transactions) that do not come within the exception" (*ibid*; and see [17(c)] below). The court concluded that the enumeration and description of the three bundles constituted accurate and adequate descriptions of the contents and periods of the items in question, and therefore sufficiently complied with O 24 r 3(1) of the Rules of Court.

Version No 1: 01 Mar 2022 (19:54 hrs)

16 I explore in greater detail the principles relating to enumerating and describing bundles for the purposes of O 24 r 3(1) of the Rules of Court. The starting point is that O 24 r 3(1) of the Rules of Court requires a party providing a list of documents for the purposes of discovery to "enumerate the documents in a convenient order", "describing each of them… sufficiently to enable it to be identified". Proper listing of documents enables (a) the other party to ascertain and request for those he or she wishes to inspect; and (b) the court to determine whether the parties have complied with their discovery obligations and, if necessary, to make certain orders (including orders for production) in relation to the listed documents. See *Singapore Civil Procedure 2021* vol 1 (Cavinder Bull SC gen ed) (Sweet & Maxwell, 2021) ("*Singapore Civil Procedure 2021*") at paragraph 24/3/3 and *Singapore Court Practice 2021* (Jeffrey Pinsler SC gen ed) (LexisNexis, 2021) ("*Singapore Court Practice 2021*") at paragraph 24/3/2. Compliance with the rule thus goes towards ensuring the conduct of litigation in an efficient, economical, and expeditious manner that is consistent with doing justice between the parties (see *Lee Shieh-Peen Clement* at [11]; for convenience, referred to hereinafter as the "Ideal").

17 As each case differs from the next and the discovery process must be tailored to the case at hand, it is difficult to provide formulaic guidance on when enumerating and describing bundles (in lieu of listing individual documents) is justified. However, I make four broad observations:

(a) First, listing *individual* documents generally affords the greatest granularity and clarity, and best conduces to precision in future referencing. The usual practice is for documents to be listed individually, with enumerating and describing bundles of documents being an exception (see *Lee Shieh-Peen Clement* at [7]). If a party giving

Version No 1: 01 Mar 2022 (19:54 hrs)

discovery chooses to enumerate and describe bundles instead of listing individual documents, it must be prepared to provide adequate justification for doing so should the issue arise (as in the present application). This it may do by demonstrating that in the circumstances of the case (*eg* the disputed issues, the number or types of documents at hand, *etc*), enumerating and describing bundles would facilitate the abovementioned Ideal.

(b) Second, the reference to "convenient order" in O 24 r 3(1) of the Rules of Court refers to the convenience of the court and all parties involved in the litigation process. A party giving discovery should not enumerate and describe bundles solely on the basis of its own convenience (*eg* its unwillingness to invest time and effort in properly listing or organising the documents).

(c) Third, O 24 r 3(1) of the Rules of Court provides that enumerating and describing bundles is limited to the situation where the documents are "*of the same nature*" (emphasis added). In *Lee Shieh-Peen Clement,* the court cited *Singapore Civil Procedure 2007* (GP Selvam gen ed) (Sweet & Maxwell Asia, 2007) at paragraph 24/3/5 for the proposition that "[d]iverse documents though dealing with the same subject-matter or transaction and filed or bundled together do not come within the exception". While the court did not elaborate on the meaning of "diverse documents", the decision in *Lee Shieh-Peen Clement* itself (see [15] above) makes clear that the mere fact that a bundle contains different *types* of documents does not necessarily mean that the documents are considered "diverse documents" falling outside the exception. Indeed, the court held that these different document types

Version No 1: 01 Mar 2022 (19:54 hrs)

constituted "documents of the same nature" (*Lee Shieh-Peen Clement* at [12]). The diversity referred to, therefore, relates to the *nature* rather than the *type* of documents. Put another way, documents of different *types* can come within the exception, so long as they are of the same *nature* for the purposes of the case at hand.

(d) Fourth, O 24 r 3(1) of the Rules of Court requires that each bundle of documents be *sufficiently described*. In *Lee Shieh-Peen Clement* at [11], the court referred to *DCH Legal Group v Skevington* [2001] WADC 116 at [8] for the observation that the description of each bundle must "accurately and adequately [describe] its contents and [specify] the dates between which the correspondence was produced".

18 I mention for completeness that in the context of electronic discovery (*ie* the discovery of electronic copies of electronically stored documents), the court may dispense with the listing of individual documents, and instead order that each party provide "a meaningful description… for each category or sub-category in the list of documents" (see paragraph 53(2)(e) of the Supreme Court Practice Directions). However, I say no more about this because Part V of the Supreme Court Practice directions does not apply to the present case (see paragraph 44(1) of the Supreme Court Practice Directions).

Decision

19 I turn now to the present facts. On perusal of P4SLOD and the types of documents contained therein, there is scant justification for the Plaintiff to proceed by describing the five categories of documents as five bundles, instead of listing individual documents falling within each category. I am unable to see

Version No 1: 01 Mar 2022 (19:54 hrs)

how enumerating and describing bundles instead of listing individual documents in the present case would help to achieve the Ideal. Indeed, the difficulties that immediately spring to mind include the Defendant's difficulty in making pinpoint references to specific documents that it wishes to inspect, and the court's difficulty in determining if the individual documents are properly described (notwithstanding their detailed filenames). It would certainly be no mean feat to make precise references to the documents in the course of litigation without a proper and detailed listing. These observations are buttressed by the fact that the Plaintiff and its solicitors – on their own volition, it should be emphasised – took pains (and six additional working days) to carefully set out a softcopy folder hierarchy and provide detailed file-naming of the documents therein. Having already performed the considerably more time-consuming task of providing a softcopy folder hierarchy with documents bearing detailed individual filenames, I see no reason why the Plaintiff maintains its position that enumerating and describing bundles is sufficient in this case. Indeed, given the detailed file naming, the Plaintiff can easily leverage readily available software shortcuts and solutions to assist in extracting and listing the individual documents properly, although more details may have to be provided in the eventual list to meet the requirement of describing each item sufficiently for the purposes of O 24 r 3(1) of the Rules of Court.

20 It appears to me that the Plaintiff filed P4SLOD in its present form because it required more time to organise the detailed listing of individual documents.[3] If so, the proper course of action would have been to seek an extension of time instead of enumerating and describing bundles simply to meet

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[3] Affidavit of Bob Yap Cheng Ghee (dated 12 January 2022) at paragraph 21.

Version No 1: 01 Mar 2022 (19:54 hrs)

the 28 October 2021 deadline. The Plaintiff should not rely solely on its own convenience – *ie*, filing a generic list to meet a deadline or to avoid having to seek an extension of time from the court – to justify enumerating and describing bundles instead of listing individual documents (see [17(b)] above).

21 As there is no justification for enumerating and describing bundles in this case, and doing so does not facilitate achievement of the Ideal, I find that P4SLOD does not comply with O 24 r 3(1) of the Rules of Court. For completeness, however, I go on to consider whether the documents within the five bundles are "of the same nature". In this regard, I would have been prepared to find that the bundles described in S/No 1, 2, 4 and 5 of P4SLOD contain documents "of the same nature". However, there are complications with the bundle described in S/No 3 of P4SLOD.

22 Within S/No 3 of P4SLOD, each individual softcopy Portable Document Format ("PDF") file was a *composite* file comprising discrete documents. These "mini bundles" were (save for one, on which, see [24] below) identified by unique transaction numbers in their PDF filenames. Each PDF file contained various documents (*eg* contracts, invoices, purchase orders) purportedly connected to the transaction identified in the filename. The documents in each "mini bundle" appeared to be discrete hardcopy documents that were scanned into softcopy and furnished to the Plaintiff's liquidators.[4] The Plaintiff's liquidators and solicitors thereafter compiled the scanned documents into composite PDF files (including organising the documents and removing

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[4] Affidavit of Bob Yap Cheng Ghee (dated 12 January 2022) at paragraph 12(c).

Version No 1: 01 Mar 2022 (19:54 hrs)

duplicates) for the purposes of giving discovery.[5] Plaintiff's counsel explained that the discrete documents in each "mini bundle" were "of the same nature" as they were supporting documents for various transactions that were the subject matter of the suit. Plaintiff's counsel further submitted that if the documents had been listed individually in sub-categories according to document type (*eg* contracts, invoices, purchase orders), time and costs would have to be incurred by the parties and the court to re-organise the documents in accordance with each transaction.[6]

23 I accept the Plaintiff's position that listing documents in sub-categories according to *document types* may not be the most efficient given the circumstances of the present case. However, the proper approach would be to list individual documents and organise these by sub-categories based on *specific transactions*, which is – *in effect* – what the Plaintiff has done (save that the Plaintiff compiled them as "mini bundles" and omitted to itemise the documents therein). Listing documents in this manner will facilitate achieving the Ideal in the present case. Otherwise, possible confusion may arise, and further time and costs will be incurred, each time the court or the parties wishes to refer to a specific document *within* a "mini bundle".

24 There was one PDF file within S/No 3 of P4SLOD that was not identified by a transaction number. Instead, it bore the filename "Offset Instructions.pdf". The rationale for bundling these documents together in a composite PDF file is unclear. It is also unclear why these documents are said

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5 Affidavit of Bob Yap Cheng Ghee (dated 12 January 2022) at paragraph 12(c).

6 Letter from Plaintiff's counsel (dated 18 February 2022), at paragraph 12.

Version No 1: 01 Mar 2022 (19:54 hrs)

to be "of the same nature". The individual documents ought to be listed individually, possibly under a suitable sub-category, and with a proper description of each document.

25 To conclude on the Enumeration and Description Issue, I find that the Plaintiff has failed to comply with paragraph 1 of the Discovery Order. I therefore order that the Plaintiff is to comply with paragraph 1 of the Discovery Order by filing and serving on the Defendant a fresh SLOD and Verifying Affidavit within 21 days of this order. The fresh SLOD is to comply with the requirements in O 24 r 3(1) of the Rules of Court.

The Inspection Issue

26 Paragraph 2 of the Discovery Order provides for inspection of the *originals* (if any) of the documents listed in P4SLOD within 14 days from the time P4SLOD and the Verifying Affidavit are served on the Defendant.

27 In the "Notice to Inspect" found within P4SLOD, the Plaintiff stated that the documents listed in Part 1 of P4SLOD may be inspected at the office of the Plaintiff's solicitors by prior appointment between 10am and 4pm. However, in Part 1 of P4SLOD, the Plaintiff listed the documents as "copies unless otherwise stated". In other words, the Plaintiff's position was that it would provide inspection only of *copies* in Singapore. While one possible argument may be that this technically constitutes a breach of paragraph 2 of the Discovery Order (as there is no stated offer for the inspection of *originals*), the parties did not proceed on this basis. Instead, they crossed swords on the Plaintiff's indication that it would provide the inspection of originals *in HKSAR*.

Version No 1: 01 Mar 2022 (19:54 hrs)

28 The Plaintiff explained that it had offered the inspection of originals in HKSAR due to numerous practical difficulties in bringing the originals to Singapore, namely: (a) the originals are within the purview of the liquidators of a related HKSAR company; (b) the originals are relevant to ongoing legal proceedings in HKSAR; and (c) it is not feasible for the Plaintiff to incur the hefty costs of shipping the voluminous originals to Singapore when the Defendant has not disputed the authenticity of any of the documents and has not identified exactly which originals it wishes to inspect.[7] The Plaintiff's position was that the Defendant should make arrangements to inspect the originals in HKSAR[8] or identify exactly which documents it disputes the authenticity of and wishes to inspect.[9] In this regard, Plaintiff's counsel submitted that the Defendant had failed to demonstrate the prejudice it would suffer if it was required to inspect the originals in HKSAR, or that a fair trial would not be possible if the originals were not brought to Singapore for inspection.[10]

29 In response, Defendant's counsel relied on O 24 r 11(1)(*c*) of the Rules of Court (which was one of the stated grounds for the present application), and argued that offering inspection in HKSAR was unreasonable in the light of the prevailing COVID-19 pandemic and the attendant travel restrictions for in-bound travellers to HKSAR from Singapore.[11] The Defendant also explained that it had to inspect the originals as this "may be relevant to determine issues

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7 Affidavit of Bob Yap Cheng Ghee (dated 12 January 2022) at paragraphs 9 and 18.

8 Affidavit of Bob Yap Cheng Ghee (dated 12 January 2022) at paragraph 17.

9 Affidavit of Bob Yap Cheng Ghee (dated 12 January 2022) at paragraph 23.

10 Plaintiff's Written Submissions (dated 7 February 2022) at paragraphs 22 and 24.

11 Affidavit of Geraldine Yeong (dated 15 December 2021) at paragraph 30(c).

Version No 1: 01 Mar 2022 (19:54 hrs)

such as whether there are wet-ink signatures, seals, or any indication of forgery".[12]

Relevant Law and Principles

30 The relevant provisions are O 24 rr 11(1) and 13(1) of the Rules of Court, which provide as follows:

> **Order for production for inspection (O. 24, r. 11)**
>
> **11.**—(1) If a party who is required by Rule 9 to serve such a notice as is therein mentioned or who is served with a notice under Rule 10(1) —
>
> (a) fails to serve a notice under Rule 9 or, as the case may be, Rule 10(2);
>
> (b) objects to produce any document for inspection; or
>
> (c) offers inspection at a time or place such that, in the opinion of the Court, it is unreasonable to offer inspection then or, as the case may be, there,
>
> then, subject to Rule 13(1), the Court may, on the application of the party entitled to inspection, make an order in Form 42 for the production of the documents in question for inspection at such time and place, and in such manner, as it thinks fit.
>
> …
>
> **Production to be ordered only if necessary, etc. (O. 24, r. 13)**
>
> **13.**—(1) No order for the production of any documents for inspection or to the Court shall be made under any of the foregoing Rules unless the Court is of the opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.
>
> …

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12 Affidavit of Geraldine Yeong (dated 15 December 2021) at paragraph 31.

Version No 1: 01 Mar 2022 (19:54 hrs)

31 In relation to the time and place for inspection, the parties are expected to agree to a reasonable time and place, which is usually during office hours at the office of the solicitor of the party offering inspection (*Singapore Court Practice 2021*, at paragraph 24/11/1).

32 If the time or place stated is unreasonable, the court may order inspection at a different time or place (O 24 r 11(1)(*c*) of the Rules of Court). However, this is subject to the overarching consideration of whether production of the document for inspection is necessary "either for disposing fairly of the cause or matter or for saving costs" (O 24 r 13(1) of the Rules of Court). As observed by the learned author of *Singapore Court Practice 2021* (at paragraph 24/13/1), O 24 r 13(1) of the Rules of Court "imposes a paramount condition" in respect of the production of a document.

Decision

33 In the present case, the Defendant has not controverted the practical difficulties cited by the Plaintiff concerning conveying the originals to Singapore. In addition, the Defendant's need to examine the originals is motivated by the need to detect forgery – in particular, to consider potential issues with documents bearing wet-ink signatures or seals (see [29] above). In the circumstances, the necessity requirement in O 24 r 13(1) of the Rules of Court is best met by adopting a calibrated approach in relation to the time and place for the production of originals for inspection, as follows:

(a) The Plaintiff is to provide inspection of the originals of the documents in S/No 3 of P4SLOD, limited to those which exist in their original form in hardcopy (including, for the avoidance of doubt,

Version No 1: 01 Mar 2022 (19:54 hrs)

documents with wet-ink signatures and seals, electronic documents which were printed out and annotated, *etc*), at the office of the Plaintiff's solicitors, at a reasonable time to be agreed by parties. Failing agreement, either party is at liberty to apply to the court for directions.

(b) For all other documents, it is unclear why the production of originals for inspection in Singapore is necessary for fairly disposing of the cause or matter, or for saving costs in the present suit. Many of the documents mentioned in S/No 1, 2 and 4 of P4SLOD appear to exist originally in electronic format (*eg* PDF, Microsoft Excel spreadsheets (**.xls*) or Microsoft Outlook email (**.msg*)). In any event, it is unclear what possible forgery-related issues the Defendant is concerned with in relation to these documents. Likewise, it is difficult to see why it is necessary to inspect the original cause papers filed in HKSAR court proceedings (see S/No 5 of P4SLOD) and what authenticity-related issues the Defendant surmises will arise out of these. In the circumstances, should the Defendant wish to inspect originals falling outside [33(a)], the Plaintiff is to provide inspection of the originals at a reasonable time and place to be agreed by the parties, failing which at the Plaintiff's or its representative's offices in HKSAR at a reasonable time to be agreed by the parties. Failing agreement, either party is at liberty to apply to the court for directions.

The Duty Issue

34 The Defendant sought an order that an explanation be made on affidavit on the conduct of the Plaintiff and its solicitors in relation to the failure to provide copies of the documents at the time of service of P4SLOD, and the steps

Version No 1: 01 Mar 2022 (19:54 hrs)

taken by the Plaintiff's solicitors to discharge their duty to supervise the discovery process.[13] The Defendant provided two reasons for seeking this order:

(a) First, the Plaintiff has not explained the failure to provide copies of the documents at the time of service of P4SLOD and the Verifying Affidavit. If the Plaintiff's solicitors had the relevant documents in softcopy and had reviewed the documents prior to the filing of P4SLOD, they would have been able to provide copies of the same.[14]

(b) Second, given that the originals of the documents are in HKSAR, it is unclear how the Plaintiff's solicitors went through the documents to ensure that no documents were omitted.[15] There is a possibility that the Plaintiff was left to simply decide on its own what documents it wished to provide to its solicitors.[16] The Plaintiff's solicitors may therefore have breached their duty to supervise discovery (citing *Teo Wai Cheong v Credit Industriel et Commercial and another appeal* [2013] 3 SLR 573 ("*Teo Wai Cheong*") at [43] to [49]).

35 I do not think that these are sufficient reasons to warrant the order sought by the Defendant. I acknowledge that the Plaintiff has technically breached paragraph 3 of the Discovery Order by failing to provide the copies of the documents on 28 October 2021 or to seek an extension of time to do so. However, the Plaintiff has provided an explanation for this delay (see [8] above)

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13 Defendant's Written Submissions (dated 7 February 2022) at paragraph 40.

14 Defendant's Written Submissions (dated 7 February 2022) at paragraph 42.

15 Defendant's Written Submissions (dated 7 February 2022) at paragraph 43.

16 Defendant's Written Submissions (dated 7 February 2022) at paragraph 46.

Version No 1: 01 Mar 2022 (19:54 hrs)

and stated on affidavit that the Plaintiff's solicitors had reviewed the documents prior to the filing of P4SLOD.[17]

36 In *Teo Wai Cheong*, when considering the practical applications of a solicitor's duty in discovery, the Court of Appeal cited a passage from *Myers v Elman* [1940] AC 282, as follows:

> He is at an early stage of the proceedings engaged in putting before the Court on the oath of his client information which may afford evidence at the trial. Obviously *he must explain to his client what is the meaning of relevance: and equally obviously he must not necessarily be satisfied by the statement of his client that he has no documents or no more than he chooses to disclose. If he has reasonable ground for supposing that there are others, he must investigate the matter*; but he need not go beyond taking reasonable steps to ascertain the truth. He is not the ultimate judge, and if he reasonably decides to believe his client, criticism cannot be directed to him. [emphasis added in *Teo Wai Cheong*]

37 On the facts of *Teo Wai Cheong*, the party in question had breached its discovery obligations by failing to disclose certain evidence. In those circumstances, the Court of Appeal invited the party to consider waiving privilege and disclosing the legal advice it received in relation to discovery (*Teo Wai Cheong* at [46]). The Court of Appeal also took the view that the documents that the party had failed to disclose appeared to be the sort that would likely have emerged had the party's solicitors taken the necessary steps in relation to discovery (see *Teo Wai Cheong* at [49]).

38 In contrast, in the present case, there is no indication or finding made that the Plaintiff had failed to disclose any documents. The Defendant's main

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[17] Affidavit of Bob Yap Cheng Ghee (dated 12 January 2022) at paragraph 20.

Version No 1: 01 Mar 2022 (19:54 hrs)

concern relates to precisely how the Plaintiff's solicitors supervised the discovery process given that the originals of the documents were in HKSAR, but the Defendant was unable to provide any basis (beyond suspicion and speculation) for suggesting that the Plaintiff's solicitors had failed to provide the necessary supervision, or that the Plaintiff's solicitors had failed to investigate when there was reasonable ground for supposing that the disclosed documents were inadequate. As such, I decline to grant the order sought, without prejudice to the Defendant's right to apply afresh if any non-disclosure has been positively identified.

The Unless Order Issue

39 It is well established that an unless order, particularly one with the effect that an entire action be struck out, is an order of last resort when the defaulter's conduct is inexcusable (see *Mitora Pte Ltd v Agritrade International (Pte) Ltd* [2013] 3 SLR 1179 ("*Mitora*") at [45(a)]). The conditions appended to an unless order should, as far as possible, be tailored to the prejudice which would be suffered should there be non-compliance (*Mitora* at [45(b)]). As explained in *Mitora* at [46], the "draconian sanction of striking out a litigant's claim… in its entirety should not be the default consequence of an 'unless order' as it would effectively deprive the litigant of its *substantive* rights on account of a *procedural* fault" (emphasis in original).

40 In the present case, there is simply no evidence that the Plaintiff has routinely or repeatedly failed to comply with orders, or that the Plaintiff's conduct is inexcusable. The Defendant also did not attempt to tailor the order sought to the prejudice suffered in the event of non-compliance. The Defendant's seeking of an unless order with the effect that the Plaintiff's action

Version No 1: 01 Mar 2022 (19:54 hrs)

be struck out upon non-compliance is, to adapt language from *Mitora* at [44], an attempt to crack a walnut with a sledgehammer. I therefore decline to make any unless order in the present case.

Conclusion

41 For the foregoing reasons, I decline to grant the unless orders sought. Instead, I make the following orders:

(a) The Plaintiff is to comply with paragraph 1 of the Discovery Order by filing and serving on the Defendant a fresh SLOD and Verifying Affidavit within 21 days of this order. The fresh SLOD is to comply with the requirements in O 24 r 3(1) of the Rules of Court.

(b) The Plaintiff is to provide inspection of the originals of the documents in S/No 3 of P4SLOD, limited to those which exist in their original form in hardcopy (including, for the avoidance of doubt, documents with wet-ink signatures and seals, electronic documents which were printed out and annotated, *etc*), at the office of the Plaintiff's solicitors, at a reasonable time to be agreed by parties. Failing agreement, either party is at liberty to apply to the court for directions.

(c) For all other documents, should the Defendant wish to inspect originals, the Plaintiff is to provide inspection of the originals at a reasonable time and place to be agreed by the parties, failing which at the Plaintiff's or their representative's offices in HKSAR at a reasonable time to be agreed by the parties. Failing

Version No 1: 01 Mar 2022 (19:54 hrs)

agreement, either party is at liberty to apply to the court for directions.

42 I will hear parties on costs.

Justin Yeo
Assistant Registrar

Ms Premalatha Silwaraju and Ms Joelle Tan
(M/s Drew & Napier LLC) for the Plaintiff.
Mr Niklas Wong and Mr Uday Duggal
(M/s TSMP Law Corporation) for the Defendant.

Version No 1: 01 Mar 2022 (19:54 hrs)