Dispute Resolution

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DISPUTE RESOLUTION BULLETIN





E-discovery and cloud computing

The increased use of "cloud computing", the speed with which the cloud has developed and the need for the rules on discovery in litigation and the courts to keep pace with those developments have created challenges for practitioners. For example, who has possession or custody over emails which are stored on servers owned by cloud service providers?

This question arose in *Dirak Asia Pte Ltd and another v Chew Hua Kok and another* (9 January 2013), a decision of the Singapore High Court. The case involved an application for discovery of emails in a dispute between ex-employers and ex-employees over alleged breaches of fiduciary duties and contractual clauses under the ex-employees' employment contracts.

The Singapore Court had to consider whether an email user has possession and custody over emails stored on servers and in data centres which may be in remote locations and where the user has not stored a copy of the relevant emails on their computer, hard drive, smart phone, tablet or other device.

The ex-employers were seeking disclosure of the emails in the accounts in which the ex-employees' emails were stored. It was not disputed that the emails in question were stored on the servers of a third party. It was argued that this was no bar to the granting of a discovery order, given that the ex-employees had the practical ability to access the emails in their accounts.

The Singapore Court had to consider whether emails in the possession and custody of a third party were in the defendants' "power" and the extent to which a cloud user could be said to have "power" over electronically stored information in the possession of a cloud service provider.

It is said that more than 80% of companies now use the cloud in some way[1] with more than 50% reporting that they planned to boost their investment in the cloud by at least 10% in the next twelve months. It is not surprising therefore, that the recovery of data from cloud service providers and the issues of obtaining that data on discovery, determining which country it is held in, searching it, privacy rules and even who owns it have become complicated questions to answer[2].

The Singapore Court considered the approach adopted by both US and English authorities and the approach adopted by the courts in those jurisdictions to the analysis of the relationship between the producing party and the third party in possession of the documents to determine whether the producing party had the legal right or the "*right, authority or practical ability*" to obtain the documents from a non-party to the action (e.g. the cloud service provider). It concluded that reaching the answer involved a fact intensive exercise that required a contextual appreciation of the relationship between the producing party and the third party in possession and custody of the documents.

However, the Singapore Court recognised that care should be taken not to equate the practical ability to access documents with having "power" over them so as to automatically render the party subject to a discovery order. Practical ability

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to access documents could be one measure to determine the factual enquiry as to whether or not the producing party had power over the documents, but it did not mean that that party would have such power in every situation.

The Singapore Court considered the US decision of *Flagg v City of Detroit*[3], in which the US Court had to decide whether text messages sent by an employee which were kept in a system maintained by a third party provider could be said to be within the City of Detroit's control. The Court examined the relationship between the City and the third party provider, finding that the City did have "control" over the information. A similar fact intensive investigative approach was adopted in *Ice Corp v Hamilton Sundstrand Corp*[4], where multiple factors were considered and balanced, including who had access to the documents, how they were used, who had generated, acquired or maintained them and what evidence there was of transfer of ownership or title to the documents.

When considering the position under English law, the Singapore Court looked at a number of decisions, including the House of Lords decision in *Lonrho Ltd v Shell Petroleum*[5] and the Court of Appeal decisions in *Re Tecnion Investments Ltd*[5] *and North Shore Ventures Limited v Anstead Holdings Inc*[7]. All of these pre-date the cloud.

The Singapore Court concluded that the earlier, rigid concept of "power" stated by Lord Diplock in *Lonrho* - "*a presently enforceable legal right to obtain from whoever actually holds the document…without the need to obtain the consent of anyone else*" - should give way to a more flexible approach, like that in *North Shore Ventures,* and have regard to the Rules of Civil Procedure[8] for documents. These provide that a party's duty to disclose documents extends to documents in

1 CompTIA's Third Annual Trends in cloud Computing Survey 2013

2 KordaMenta "Storm clouds ahead?" Publication No 14-03 April 2014.

3 252 F.R.D 346, 353 (E.D. Mich 2008)

4 245 F.R.D. 513 (D. Kan 2007).

5 [1980] 1 WLR 627

6 [1985] BCLC 434

7 [212] EWCA Civ 11

8 CPR Rule 31.8 (the successor of Order 24)

his control including whether he has a right to possession of the documents or a right to inspect or take copies of them. In *North Shore Venture*, the Court of Appeal had refused to adopt a narrow understanding of "control" and had rejected the submission that it was confined to the Lonrho "*legal right to possession or legal right to obtain copies*" type definition.

Based upon the evidence, the Singapore Court held that the ex-employees' practical ability to access the documents in the course of their employment translated into actual possession and so they had "power" over the emails in their accounts even though they did not have soft copies on their storage devices, or printed hard copies.

It is not surprising the companies are discovering the advantages of the cloud given the cost savings and cheaper storage it offers. But issues as to ownership of the data stored there, where it is physically located, privacy laws, security and the duties of the cloud service providers to respond to subpoenas or third party data requests all give rise to new challenges within e-discovery. Consequently, where organisations no longer maintain physical control of their data, questions as to who has access to it and on what terms may not be easy to answer. The Singapore Court's decision suggests that a factual investigation will be required in each case.

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Evidential issues in litigation – recent experience

HFW recently acted for the successful defendant in *American Overseas Marine Corp v Golar Commodities Ltd* (7 May 2014). The case will shortly be the subject of an article in the upcoming HFW Commodities Bulletin, with regard to the meaning of the term "injurious cargoes" when used in vessel charters. However, a number of evidential issues arose during the case, and how they were handled by the Court underlines the importance of adherence to the Civil Procedure Rules (CPR) when conducting High Court litigation.

The claimant, the owner of the vessel *LNG GEMINI*, claimed reimbursement from the defendant charterers for the costs of work on the vessel's cargo systems following alleged contamination by a cargo of LNG loaded by charterers. In the litigation that followed, the claimant failed to prove its case on liability. The Court also held that even if the claimant's case on liability had succeeded, it would have substantially failed to prove its case on quantum. That failure was partly due to the claimant's failure to comply with procedural rules on the adducing of evidence.

The Court has power to control evidential matters as part of its general case management powers. CPR 1.4 provides that the Court must actively manage cases to further the overriding objective of enabling the courts to deal with cases justly and at proportionate cost. CPR 32 gives the court specific powers to control evidence, including by making directions as to the scope and form of evidence that will be admitted evidence. These powers are most commonly exercised at the Case Management Conference (CMC) stage, when the Court decides what issues, if any, will be the subject of factual and expert evidence, and the scope of the parties' disclosure obligations. Expert evidence is only admissible with the Court's permission under CPR 35.4.

Additional expert evidence/hearsay

The claimant served a supplemental expert report that relied on opinions from a colleague of the report's author. The Court accepted the defendant's submissions that that evidence should be given no weight, because it was factual hearsay evidence as to a subjective expert opinion and that the evidence should in any event be excluded as additional expert evidence which the claimant had not sought permission to adduce. The opinions of the expert's colleague were found to be inadmissible.

Late disclosure

Shortly before the trial, and after the trial bundles had been agreed, the claimant disclosed new documents and sought to introduce them in additional trial bundles.

The defendant sent notices to the claimant pursuant to CPR 32.19 requiring the claimant to prove the authenticity of the newly disclosed material. The claimant made no attempt to prove the authenticity of the new documents or to explain the late disclosure. The defendant declined to agree to amend the trial bundles to include the new material. The Court excluded the new material on the grounds that it had been disclosed late and its authenticity had not been proved pursuant to CPR 32.19.



Late factual evidence

The claimant did not serve factual evidence in support of its case on quantum until the last working day before the trial, and the witness statement that was served then exhibited some of the belatedly disclosed documents referred to above and contained hearsay, without a hearsay notice under the Civil Evidence Act 1995. No reasons were given for the lateness of the evidence until the first morning of the trial, when the claimant's counsel indicated that the need for evidence on quantum had simply been overlooked.

The Court allowed the quantum evidence to the extent that it spoke to documents disclosed at an earlier stage of the case, but excluded evidence that relied on material that had been disclosed shortly before the trial on the basis that the defendant had not had time to consider the material. The Court also found that parts of the witness statements contained matters of opinion which were properly the subject of expert evidence, which the claimant had not sought permission to adduce. The Court also referred to the absence of any proper explanation of the lateness of the evidence.

The claimant responded to this ruling by asking the Court to postpone until a later date consideration of quantum issues, so that the claimant would have time fully to prepare its evidence on quantum. That application was rejected by the Court.

The procedural decisions of the Court in the *LNG GEMINI* case underline the determination of the Court to ensure strict compliance with the CPR, including Practice Directions. Until recent years there may have been a tendency to assume that procedural defaults could usually be cured, and that, whilst such defaults could lead to adverse costs orders, they would rarely affect the substantive outcome of cases. Such assumptions can no longer be made.

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European Account Preservation Orders – update

An EU regulation creating European Account Preservation Orders (EAPOs) was adopted by the EU Council of Ministers on 13 May 2014. An EAPO will be broadly equivalent to an EU-wide freezing injunction and is aimed at assisting creditors in recovering cross-border debt using a simple, uniform procedure across the EU.

Key features of the Regulation

The key features of the Regulation are as follows:

1. EAPOs will be available to creditors in most civil and commercial matters, with the exception of insolvency proceedings, as long as the matter has a "cross-border" aspect.
2. The effect of an EAPO will be fairly similar (though not identical) to that of a freezing injunction – it will capture and preserve the contents of the debtor's bank accounts up to the amount of the creditor's claim, so that the monies can later be used to satisfy a judgment against the debtor.
3. Wherever in EU an EAPO is issued, the court's order will be immediately enforceable in all other Member States of the EU without the need to seek formal recognition before the courts of each Member State.
4. Applications for an EAPO will usually be "without notice": the debtor will not receive any advance notification of the creditor's application nor be entitled to challenge the initial application.
5. Measures currently existing under each Member State's national law will continue to be available alongside the EAPO.

What next?

The Regulation will be the first piece of legislation making EU-wide provision for the enforcement of judgments. Its publication in the Official Journal is expected in June 2014. The Regulation will then be directly applicable in all Member States except the UK and Denmark. (Given the UK's decision to opt-out of the Regulation and Denmark's status under the governing treaties of the European Union, the Regulation will not apply in these countries.)

The UK has pledged to review the text of the Regulation as enacted and "opt-in" to the Regulation if its concerns about the original draft have been satisfactorily addressed. If the UK does not opt-in, UK-domiciled companies could be at a disadvantage to their EU counterparts when it comes to securing claims owed by entities in other EU jurisdictions. Although English law does permit the granting of freezing orders, including – in some circumstances – worldwide freezing orders, it is not always possible for the English courts to grant worldwide freezing orders against companies domiciled elsewhere in the EU.

We shall continue to monitor the UK's response to the Regulation.

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News

Freezing injunctions: update

In our March 2014 Bulletin, Partner, Brian Perrott examined recent conflicting decisions as to whether assets held by companies wholly owned and controlled by a defendant are covered by the standard form freezing order wording. One of those decisions, *Lakatamia Shipping Company v Nobu Su & Ors (6 June 2013)*, found that the standard wording did cover such assets. That decision was appealed and the Court of Appeal has now clarified the position in its judgment on 14 May 2014, dismissing the appeal but criticising the reasoning of the judge at first instance. In summary, the Court of Appeal held that the assets of a company wholly owned and controlled by a defendant are not themselves frozen and the company is not directly caught by the injunction. Brian will provide an in-depth response to the judgment in the July edition of our Dispute Resolution Bulletin. Original research was conducted by Edward Beeley, Trainee.

hfw Conferences and events

Young SIAC
Singapore
3 June 2014
Hosting: Chanaka Kumarasinghe

SIAC Congress
Singapore
6 June 2014
Panellist: Paul Aston
Attending: Chanaka Kumarasinghe

HFW International Arbitration Seminar
HFW London
18 June 2014
Chairing: Damian Honey
Guest presenter: Vernon Flynn QC, Essex Court Chambers

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