

IN THE DISTRICT COURT OF THE
 HONG KONG SPECIAL ADMINISTRATIVE REGION
 MISCELLANEOUS PROCEEDINGS NO. 295 OF 2010

BETWEEN

ABLE FORCE FREIGHT LIMITED

Plaintiff

and

EAST SUN ESTATE MANAGEMENT LIMITED

(怡生物業管理有限公司)

Defendant

Coram: His Hon Judge Leung in chambers (open to public)

Date of hearing: 20 April 2010

Date of decision: 13 May 2010

DECISION

1. **Able Force**, the Plaintiff, is the victim of a suspected theft of goods from its warehouse in an industrial building under the management of **East Sun**, the Defendant, on 14 March 2009. Able Force now applies for discovery by East Sun of the CCTV recording of the warehouse for the purpose of identifying or proving the identity of the wrongdoer(s) in the suspected theft. This is an application for discovery against a non-party to an intended civil suit or what is known as a *Norwich Pharmacal* discovery.

Background

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2. Briefly, Able Force was at the material times and is a freight-forwarder. Pursuant to a shipping instruction, Able Force has collected 140 cartons of mobile phones and parts from the supplier and stored them in its warehouse at East Sun Industrial Centre in Kwun Tong, Kowloon. As mentioned above, the industrial building was managed by East Sun.

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3. Lam and Wu were then the 2 employees of Able Force responsible for retrieving the goods from the warehouse for onward shipment by air. The goods were shipped. But on 16 March 2009, Able Force received a complaint from its customer about the missing of 800 mobile phones from 4 of the cartons arrived at the destination. Able Force was made to compensate for the loss.

4. Able Force reported the matter to the police in Hong Kong. After viewing the CCTV tape recording at East Sun's office, the officer of Able Force suspected Lam and Wu of being responsible for the missing mobile phones when they handled the goods at the warehouse on 14 March 2009. Able Force dismissed them.

5. On 23 March 2009, the solicitors for Able Force wrote to East Sun requesting for the CCTV tape recording to be preserved. East Sun was also informed of the report of the matter to the police.

6. On 4 May 2009, the solicitors for Able Force requested East Sun to supply a copy of the tape(s) to them. East Sun replied that the tape(s) has been given to the Police for their investigation in April 2009. Easy Sun suggested Able Force to contact the police directly.

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7. On 19 October 2009, the police informed Able Force of the result of their investigation. The police concluded that there was insufficient evidence to initiate any criminal proceedings against any person. All evidence would be returned to the provider, i.e., Easy Sun.

8. On 4 November 2009, the solicitors for Able Force wrote to the police and Easy Sun suggesting the police to release the CCTV tape(s) if Easy Sun did not object.

9. On 13 November 2009, Easy Sun informed the solicitors for Able Force that Easy Sun reserved its position in respect of Able Force's above request. Easy Sun indicated its intention to consult lawyers.

10. Later in November 2009, the police informed the solicitors for Able Force that the tape(s) would be returned to Easy Sun upon the latter's request.

11. The solicitors for Able Force repeated their written requests to Easy Sun for the CCTV tape(s). This was met with Easy Sun's refusal. By letters dated 9 and 15 December 2009 respectively, the solicitors for Able Force reiterated that the tape(s) contain material evidence helpful in its civil claim against those responsible for the theft and requested copy of the tape recording. Able Force also undertook to pay the reasonable cost of that.

12. Hearing nothing further from Easy Sun, Able Force took out the present originating proceedings seeking discovery of the CCTV tape(s) that recorded the loading of cargo between 19:00 and 21:30 on 14 March

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2009 in the loading area of the car park and the alley of as well as the nearby area outside the industrial building.

Principles

13. The principles governing a *Norwich Pharmacal* discovery have been summarised in *A Co v B Co* [2002] 3 HKLRD 111 at paras.10-13. They were cited and applied in *Cinepoly Records Co Ltd & Ors v Hong Kong Broadband Network Ltd & Ors* [2006] 1 HKLRD 255 at 261H-264E and recently in *Chang Wa Shan v Chan Chun Chuen*, HCMP 1101/2009 (9 October 2009) at paras.10-12.

14. The applying party for *Norwich Pharmacal* discovery needs to establish the following essential elements:

(1) There is a prima facie case of a tort or wrong have been committed.

(2) The alleged wrongdoer is a person whom the applying party bona fide believes to be infringing his rights in the sense that he can reasonably be assumed to be the wrongdoer vis-à-vis the applying party.

(3) The innocent party, against whom discovery is sought, has caught up or has become involved in such activities, thus facilitating the perpetration or continuation of the same.

(4) It is just and convenient in all the circumstances of the case for the court to exercise its discretion to order discovery.

The arguments

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15. By affirmation, the solicitors for Easy Sun explained that the reason why Easy Sun has refused to accede to Able Force’s request before this application was due to its concern about its obligations and liabilities under the Personal Data (Privacy) Protection Ordinance, Cap.486 (“**the Ordinance**”). Specifically:

- (1) The recording comes within the definition of personal data under section 2 of the Ordinance.
- (2) Being a data user, Easy Sun is required to observe the data protection principles pursuant to section 3 and Schedule 1 of the Ordinance.
- (3) Data Protection Principle 3 requires Easy Sun to ensure that the personal data should not be used, without the consent of the data subject, for any purpose other than for the purpose for which the data were to be used at the time of the collection of the data or a purpose directly related to that purpose.
- (4) Data Protection Principle 4 requires Easy Sun to take all practical steps to ensure that personal data are protected against unauthorised or accidental access, processing, erasure or other use.
- (5) As the tape(s) may have recorded not only the movement of the third party that Able Force intends to sue but also other individuals who happened to be captured, Easy Sun is concerned that it would invade the privacy of others if it shows these images to Able Force or allows Able Force to make copies of such images.

16. The solicitors for Easy Sun affirmed that subject to the above concern, Easy Sun had no objection to the production of the CCTV tape(s), if the court so orders and upon Able Force’s payment of the expenses reasonably incurred in the copy, production and delivery of the tape(s).

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17. In his submissions, Mr Chen for Easy Sun reiterated his client's stance that it would not oppose to an order for the production of the CCTV tape(s) as long as Able Force undertakes to pay the necessary charges for such production.

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18. The real issue is whether Able Force is entitled to seek costs of these proceedings against Easy Sun in the event of an order for production being made.

19. The general rule as to costs in similar proceedings is not in dispute. A *Norwich Pharmacal* action is not ordinarily adversarial proceedings between the applying party and the party being ordered to make discovery. This is because the latter is basically an innocent party being caught up in the matter out of no fault on its own. The fact that the court makes an order does not render the disclosing party an unsuccessful party or a party at fault. Normally the applying party shall pay its costs of the proceedings and the costs of the disclosing party.

20. Mr Chen referred to *Totalise plc v Motley Fool Ltd and Anor* [2003] 3 All ER 872 where the English Court of Appeal accepted that there might be cases where the circumstances would require a different costs order. But they would *not* include cases where: (a) the party required to make the disclosure had a genuine doubt that the person seeking the disclosure was entitled to it; (b) the party was under an appropriate legal obligation not to reveal the information or where the legal position was unclear or the party had reasonable doubt as to the obligations; (c) the party could be subject to proceedings if disclosure was voluntary; or (d) the party would or might suffer damage by voluntary giving the disclosure; or (e) the disclosure would or might infringe a legitimate interest of another.

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21. Mr Chen submitted that his client's case falls within class (b), (c), (d) and/or (e) mentioned by the court in the case of *Totalise*. This, he submitted, is just one of the normal cases where the applying party should bear the costs of the application as well as the disclosing party's costs.

22. Miss Leung for Able Force disagreed. She submitted that the concern of East Sun mentioned above is not justified because the law in this regard has become clear since the case of *Lily Tse Lai Yin & Ors v The Incorporated Owners of Albert House and Ors*, HCPI 828/1997 (10 December 1998). After the commencement of these proceedings, Miss Leung's firm has by letter drawn the attention of the solicitors for Easy Sun to the *Lily Tse* case. She submitted that that Easy Sun has been unreasonable and this takes the present case out of the norm.

23. On this basis, except for the costs and expenses reasonably incurred by Easy Sun in complying with the order for discovery, which Able Force has always been ready to pay, Able Force asks for costs of these proceedings against Easy Sun.

Discussion

24. As to the concern about the production of the CCTV tape, I agree that the court's decision in the case of *Lily Tse* on the construction of the relevant provisions of the Ordinance provides the answer:

- (1) Pursuant to section 58(2) of the Ordinance, personal data are exempted from the provisions of Data Protection Principle 3 where the data is used for the purposes of the prevention, preclusion or remedying (including punishment) of unlawful or

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seriously improper conduct, or dishonesty or malpractice, whether or not the data are held for any of those purposes (see paras.14-15).

(2) Bringing of a civil claim for damages in tort amounts to the remedying of unlawful or seriously improper conduct. Alternatively, it is for a purpose directly related to the initial purpose for which the data were originally taken (see paras.16-18).

25. Apparently, the purpose of installing the CCTV system and the collection of data in the form of the recording in the present case was for the purposes, or directly related to the purposes, stipulated under the section 58 exemption.

26. Able Force's attempt to obtain the CCTV tape from Easy Sun with court intervention is understandable. Having said that, I do not think that Easy Sun is therefore to blame for not acceding to Able Force's request without a court order.

27. The starting point is that Easy Sun, being an innocent and non-party to the intended lawsuit, owes no obligation to Able Force to take the slightest risk in view of its concern and to save Able Force from having to obtain an order of the court. It is for the applying party to satisfy the court that the order should be made, not for the disclosing party to take a view that could be wrong: see *Totalise plc* at 878g.

28. The solicitors for Easy Sun came on record after the commencement of these proceedings. By way of affirmation, Easy Sun's solicitors explained why their client has refused to accede to Able Force's request. At the same time, they indicated their client's intention not to oppose to the order for discovery so long as Able Force pays the costs and

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reasonable expenses incurred by Easy Sun to comply with the order to be made.

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29. Mr Chen explained in court that had the application proceeded on the above basis, Easy Sun would not have made any representation. But this is not how Able Force has been proceeding with the application. By the originating summons, Able Force asks for costs of the application against Easy Sun. Notwithstanding the stance in respect of the order for discovery explained in the above affirmation of Easy Sun's solicitors, the solicitors for Able Force by letter dated 17 March 2010 categorised Easy Sun's stance as one of unreasonable objection to its client's request. Therefore, if the court follows the case of *Lily Tse* and grants the order, Able Force held Easy Sun to be responsible for the costs of this application under the principle of costs following the event.

30. In other words, due to the alleged unreasonableness of Easy Sun, Able Force would not only ask for an order that Easy Sun should bear its own costs but it should also bear Able Force's costs of these proceedings. This, Mr Chen submitted, must be opposed.

31. In the case of *Cinepoly Records Co Ltd* (above), in opposition to the application for *Norwich Pharmacal* order, one of the defendants also raised its concern about the data protection principles under the Ordinance. The plaintiff criticised that defendant for descending into an adversarial arena in resisting the application. It therefore refused to pay that defendant's costs of the application. The court however held that by asking the court to address its concern and to hear its arguments, the defendant acted understandably and legitimately. The defendant should not be penalised on costs.

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32. The same court heard the case of *Chang Wa Shan* (above). In that case, the court considered that the reasons advanced on behalf of the defendant in his solicitors' affidavit and counsel's submissions in opposition to the application were plainly untenable against the facts of that case. That rendered the defendant's opposition at a certain stage after the commencement of proceedings unreasonable. Therefore the defendant's costs since that stage were disallowed and had to be borne by himself. There was no contention that the defendant should in those circumstances be further ordered to bear the costs of the plaintiff since that stage of the proceedings.

33. In the present case, Easy Sun is not opposed to the order for discovery as such found in the two cases cited in the preceding paragraphs. It really is opposed to the costs order sought by Able Force against it. As discussed above, I see nothing unreasonable about Easy Sun in not acceding to Able Force's request without an order of the court. In view of the stance of Easy Sun since the commencement of these proceedings, I am of the view that it was Able Force's application for the adverse costs order against Easy Sun that necessitated the real argument between the parties.

34. I see no basis for departing from the norm that the applying party shall bear the disclosing party's costs of the application for such an order. Having successfully resisted Able Force's application for costs against it, Easy Sun shall have its costs of this application.

Order

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35. I order that Easy Sun do disclose the CCTV tape(s) as described in the schedule to the originating summons (and above).

36. Able Force shall pay Easy Sun’s costs of these proceedings, including any costs reserved, with certificate for counsel. Able Force shall further pay Easy Sun’s costs of complying with this order and reimburse Easy Sun for the reasonable expenses for complying with the order. All costs shall be taxed, if not agreed.

Simon Leung
District Judge

Miss C LEUNG of Messrs Holman Fenwick Willan for the Plaintiff
Mr Vincent CHEN instructed by Messrs Lo Chan & Leung for the Defendant