

HCA 832/2014
[2020] HKCFI 360

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE**

ACTION NO 832 of 2014

BETWEEN

CHAN SHU CHUN (陳書春) 1st Plaintiff

KING BASE ENGINEERING LIMITED
(卓基工程有限公司) 2nd Plaintiff

and

DR KUNG YAN SUM (龔仁心) 1st Defendant

HERO FORTUNE LIMITED (雄福有限公司) 2nd Defendant

CHINACHEM CHARITABLE FOUNDATION
LIMITED (華懋慈善基金有限公司) 3rd Defendant

MESSRS PHILIP KH WONG, KENNEDY YH WONG
& CO (黃乾亨黃英豪律師事務所) 4th Defendant

Before: Hon Mimmie Chan J in Chambers (open to public)

Date of Hearing: 4 November 2019

Date of Decision: 4 March 2020

DECISION

Background

1. This is an appeal against the decision of the Master on 26 April 2019, whereby the Master dismissed the Plaintiffs' application for specific discovery made by their summons of 27 February 2019 ("**Summons**"). By the appeal, the Plaintiffs pursue their application for discovery of "the 1st Defendant's Statement of Travel Records issued by the Immigration Department for the period of January 2011", as stated in Schedule 1 ("**Schedule**") to the Summons. The application was refused by the Master, for the reason that no such document as that sought in the Schedule exists.

2. On behalf of the Plaintiffs, it was argued that the Master was wrong, for taking a simplistic approach to the meaning of a "document" in deciding that the document sought did not exist.

3. The underlying action concerns claims made by the Plaintiffs against the 1st Defendant and other defendants for, inter alia, deceit and conspiracy to defraud the Plaintiffs. The Plaintiffs allege that the 1st Defendant made fraudulent misrepresentations to the 1st Plaintiff and induced the 1st Plaintiff to make payment (through the 2nd Plaintiff) of a sum of HK\$50 million to the 1st Defendant, for the stated purpose of an investment in real estate, land development and securities ("**Investment**") to be made jointly with one Madam Song. The Plaintiffs rely on an Investment MOU ("**MOU**") which was allegedly signed by the 1st Plaintiff on behalf of the 2nd Plaintiff, and by Madam Song on behalf of the 2nd Defendant. One of the claims made in the Statement of Claim is that on 12 January 2011, the 1st Defendant had travelled to Shanghai with the 1st Plaintiff, with the intent of introducing Madam Song to the 1st Plaintiff and to ask Madam Song to sign

a Cancellation Agreement in respect of the Investment and the MOU, and to refund the HK\$50 million to the 1st Plaintiff within 12 months.

4. The Defence of the 1st Defendant is one of essential denial. He denies that he knew the 1st Plaintiff, or had any dealings with the 1st Plaintiff at all. The 1st Defendant denies making any representation to the 1st Plaintiff, denies having received any cheque of HK\$50 million as alleged, denies knowledge of the MOU, and in particular, denies that he had travelled to Shanghai with the 1st Plaintiff at all.

5. According to the Plaintiffs, one of the issues in dispute and for determination at trial would be whether the 1st Plaintiff and the 1st Defendant made the Shanghai trip on 12 January 2011. For that purpose, the Plaintiffs' Summons seeks specific discovery of the 1st Defendant's Statement of Travel Reports for January 2011 ("**Statement**"), as it relates to one or more of the matters in question in the cause or matter, under Order 24 rule 7 RHC.

6. It is not in dispute, that the Court has no jurisdiction to make an order for specific discovery under rule 7 unless (a) there is a prima facie case that the document sought exists; (b) the document relates to a matter in issue in the action; and (c) the document is in the possession, custody or power of the other party.

The existence of the Statement

7. Counsel for the Plaintiffs' highlighted the fact that the definition of "documents" is very wide, and covers computer disks and records. In *Disclosure, Paul Matthews*, 5th ed, at paragraph 5.07, the authors defined "documents" as follows:

“Records and information are increasingly held on computer, whether on disk, database, microchips or microcircuits. In principle the disc and other material holding the information should be regarded as documents, even though this may well pose difficulties when it comes to inspection.”

8. In *Derby & Co Limited v Weldon (No 9)* [1990] 2 All ER 901, it was held that a computer database, so far as it contains information capable of being retrieved and converted into readable form, is a document.

9. Counsel for the Plaintiffs argued that the Statement comprises a “document” which existed in the database of the Immigration Department, even though it is not yet generated in printed form until an application is made by the 1st Defendant to the Immigration Department, upon completion of an application form to seek the information of his travel records, comprising the dates of his arrival and departure from Hong Kong in January 2011. Seeking aid from the Personal Data (Privacy) Ordinance (“**Ordinance**”), the Plaintiffs contend that the 1st Defendant has a presently enforceable right to obtain the Statement from the Immigration Department, which holds the data of the 1st Defendant’s travel records, such that the Statement is in the power of the 1st Defendant, and is discoverable. Reliance is placed on the judgment of Lord Diplock in *Lonrho Ltd v Shell Petroleum Limited (No 1)* 1980 1 WLR 627:

“In the context of the phrase “possession, custody or power” the expression “power” must, in my view, mean a presently enforceable legal right to obtain from whoever actually holds the document inspection of it without the need to obtain the consent of anyone else.”

10. To establish the 1st Defendant’s power over the Statement, Counsel relies on section 18 (1) of the Ordinance, which states:

- “An individual, or a relevant person on behalf of an individual, may make a request –
- (a) to be informed by a data user whether the data user holds personal data of which the individual is the data subject;
 - (b) if the data user holds such data, to be supplied by the data user with a copy of such data.”

11. The Plaintiffs contend that section 18 (1) confers on the 1st Defendant a presently enforceable legal right to obtain the Statement, which constitutes personal data of his held by the Immigration Department in digital form.

12. I agree with Counsel for the 1st Defendant, that the Plaintiffs have failed to make the important distinction between data and document. Of significance is the fact that the Summons seeks specific discovery of a defined and named document, namely the Statement. The Summons does not seek the information or personal data concerning the 1st Defendant’s travel history, or the dates of his departure from and arrival in Hong Kong for the stated period of January 2011. The Summons was issued under Order 24 for discovery of documents. The application is not one for information. Nor does the Summons seek discovery of the database or record of the 1st Defendant’s travel history as kept or maintained by the Immigration Department. It seeks specific discovery of the defined Statement.

13. Whilst it may be correct, that “documents” may include computer discs and records so far as they contain information capable of being retrieved and converted into readable form, the Summons does *not* seek discovery of computer discs or records held by the 1st Defendant or the Immigration Department of the former’s travel history. The Plaintiffs went to elaborate lengths to explain the Statement which is sought, by exhibiting a copy of an application form which the 1st Plaintiff himself completed and

submitted to the Immigration Department, to show the application which the 1st Defendant *can* make and the form of the Statement which *can* be issued, similar to the one which the 1st Plaintiff himself obtained from the Immigration Department. From such evidence, it can be seen that the Statement is a form of certification by the Immigration Department of particulars of the arrival and departure date, clearance time, and control point of each occasion of the applicant's travel from and to Hong Kong during a specified period. The Statement sought is a document to be issued and produced by the Immigration Department, upon an application being made by the 1st Defendant, to certify information compiled from accessing its records containing the personal data of the 1st Defendant, as well as other information kept by the Immigration Department (such as the control point in question in respect of the 1st Defendant's entry into and exit from Hong Kong). As Counsel for the 1st Defendant rightly pointed out, a simple request for the records of the personal data of the 1st Defendant as are held by the Immigration Department may not necessarily produce the Statement and should not be equated with a request for the Statement itself, as the Summons now specifies.

14. The 1st Defendant never had the Statement nor applied to the Immigration Department for his travel history. The Plaintiffs only say that he can apply for such information as part of his personal data kept by the Immigration Department and therefore the 1st Defendant is in power of the Statement as a record of his personal data, and he should accordingly apply to the Immigration Department for the Statement and then make discovery of the Statement.

15. Confined to what the Summons specifies, I agree with the learned Master that there is no Statement existing at the date of the Summons, of which the 1st Defendant can be said to have control or power. This is sufficient to dispose of the Summons.

Whether the document is discoverable

16. Counsel for the Plaintiffs argued that the decision in *Gotland Enterprises Ltd v Kwok Chi Yau* [2007] 1 HKLRD 226 was wrongly decided, when the Court held that a data subject has no enforceable claim under the Ordinance to enforce any right for the inspection or delivery of any documents. It was argued that as held in *Lonrho*, “power” is not confined to a right of inspection but also to a right to obtain possession or to have a copy of the document, which right the 1st Defendant has under the Ordinance with regard to his personal data.

17. Whatever may be the legally enforceable right which a data subject has under the Ordinance, I agree with the observations made by Saunders J in *Wu Kit Ping v Administrative Appeals Board* [2007] 4 HKLRD 849, that it is *not* the object of the Ordinance to extend the rights and duties of discovery in legal proceedings, to require a party to apply to another party or authority in order to produce a document for the purpose of discovery. At paragraphs 29 to 33 of the judgment, the court observed thus:

“29. The right of an individual to obtain data is limited to that individual’s personal data. The expression “such data” in section 18 (1)(a) and s 18(1)(b) plainly refers to the expression “personal data” in 18 (1)(a).

30. There is an important distinction between “data” and a “document”. The interpretation provision of the Ordinance (s.2) defines the two expressions in the following terms:

“data” means any representation of information (including an expression of opinion) in any document, and includes a personal identifier;

“document” includes, in addition to a document in writing:

(a) a disc, tape or other device ... etc”

18. At paragraph 34, the Court concluded:

“It is not the purpose of the Ordinance to enable an individual to obtain a copy of every document upon which there is a reference to the individual. It is not the purpose of the Ordinance to supplement rights of discovery in legal proceedings, nor to add any wider action for discovery for the purpose of discovering the identity of a wrongdoer under the principles established in *Norwich Pharmacal & others v Commissioners of Customs and Excise* [1974] AC 133. That conclusion is entirely in accord with the decision of Deputy Judge Muttrie in *Gotland Enterprises Ltd v Kwok Chi Yau* [2007] 1 HKLRD 226 at pp 231–232.” (Emphasis added)

19. The mischief which the Ordinance was intended to address was the misuse and retention of personal data collected, and the objective it was intended to achieve was to provide for the right of an individual to access the personal data collected by a data user, to prevent it from being misused and to correct any inaccuracy of the data collected. It had nothing to do with the operation of discovery in legal proceedings and Legislature could not have intended to produce any collateral effect on the settled law and already broad scope of discovery. I do not see any necessity or justification under the CJR objectives to extend discovery to the extent suggested by the Plaintiffs in this case.

Whether the order for discovery is necessary

20. Even if I should be wrong, and the Statement can be said to be a document which existed at the time of the Summons, I do not agree that it is

necessary for an order to be made under Order 24 rule 7. Under Order 24 rule 8, the Court may refuse to make an order under rule 7 if it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs.

21. The Statement is said to be relevant to show whether the 1st Defendant had travelled to Shanghai on 12 January 2011, as the Plaintiffs allege, in order to meet with Madam Song to finalize and sign the Cancellation Agreement. Even if the Statement is produced, it will only show the 1st Defendant's departure from and arrival in Hong Kong on particular days in January 2011. It cannot show whether he had visited Shanghai. Even if the Statement could establish that the 1st Defendant had travelled to Shanghai on 12 January 2011, it cannot establish whether the 1st Defendant had been to Shanghai to meet with Madam Song. The Statement is accordingly of little probative value, and bearing in mind the CJR objectives of proportionality and costs effectiveness, I do not consider that discovery of the Statement is necessary for disposing fairly of the cause or matter or for saving costs.

Conclusion

22. For all the above reasons, I agree with the Master's Decision, and dismiss the Plaintiffs' Appeal, with costs to the 1st Defendant.

(Mimmie Chan)
Judge of the Court of First Instance
High Court

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Mr Vincent Chen, instructed by Lam & Co, for the 1st & 2nd plaintiffs
Mr Geoffrey Yeung, instructed by Hugill & Ip, for the 1st defendant

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