

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

[2024] SGHC 65

Suit No 758 of 2021 (Registrar's Appeal No 24 of 2024 and Summons No 326 of 2024)

Between

D.N.G FZE

... Plaintiff

And

PayPal Pte Ltd

... Defendant

FOUNDATIONS OF DECISION

[Civil Procedure — Striking Out — Whether unless order breached]

[Civil Procedure — Striking Out — Whether striking out is proportionate response to breach of unless order]

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DNG FZE
v
PayPal Pte Ltd

[2024] SGHC 65

General Division of the High Court — Suit No 758 of 2021 (Registrar's Appeal No 24 of 2024 and Summons No 326 of 2024)
Goh Yihan J
13, 14 February 2024

12 March 2024

Goh Yihan J:

1 HC/RA 24/2024 (“RA 24”) was the plaintiff’s appeal against the decision of the learned Assistant Registrar Randeep Singh Koonar (“AR Koonar”) to strike out its Statement of Claim (Amendment No 1) dated 13 December 2022 and its Reply and Defence to Counterclaim dated 6 September 2023 (collectively, the “plaintiff’s case”), due to its breach of an unless order made on 15 December 2023 (the “Second Unless Order”). A few days before RA 24 was to be heard, the plaintiff filed HC/SUM 326/2024 (“SUM 326”). SUM 326 was the plaintiff’s application to adduce further evidence at the hearing of RA 24. Both RA 24 and SUM 326 took place against the backdrop of the underlying action, HC/S 758/2021 (the “Suit”).

2 I heard the parties in relation to RA 24 on 13 February 2024, being the first day of the scheduled trial. After hearing the parties, I allowed SUM 326 but

reserved my decision for RA 24. One day later, on 14 February 2024, I dismissed RA 24 and provided brief reasons for my decision. In short, the resolution of RA 24 came down to a few points:

- (a) First, AR Koonar had legitimately imposed the Second Unless Order, which stated clearly that if the plaintiff failed to comply with any of its two constituent aspects, the plaintiff's case would be struck out.
- (b) Second, the plaintiff had not appealed against AR Koonar's imposition of the Second Unless Order or its terms.
- (c) Third, the plaintiff had breached the Second Unless Order.
- (d) Fourth, the plaintiff had failed in explaining that its breach of the Second Unless Order was neither intentional nor contumelious.
- (e) Fifth, since the plaintiff had breached the Second Unless Order, and had failed in explaining that its breach was neither intentional nor contumelious, it followed that the stated consequences of the Order would apply. This meant that the plaintiff's case must be struck out, subject to the proportionality of striking out as an appropriate sanction.
- (f) Sixth, the striking out of the plaintiff's case was a proportionate response to its breach of the Second Unless Order.

3 I now provide the full reasons for my decision, which are in any event elaborations of the brief reasons I have already given to the parties, before the expiry of the time period for the plaintiff to appeal.

Background facts

The parties and their dispute

4 I begin with the background facts. The plaintiff, DNG FZE, is a company incorporated in the United Arab Emirates. It sells various products (the “Products”) through its websites “www.techxdeal.com” and “www.hyperstech.com” (collectively, the “Stores”). Mr Karim Mohamed Astoul (“Mr Karim”) is the plaintiff’s Chief Executive Officer (“CEO”).

5 In turn, the defendant, PayPal Pte Ltd, is a company incorporated in Singapore. It provides payment services for individuals and businesses in over 200 markets.

6 The parties’ dispute can be traced back to the plaintiff’s setting up of a PayPal business account (the “Account”) with the defendant on 15 June 2020. The Account was linked to the Stores. This means that buyers who purchased the Products from the Stores could choose whether to make payment by the defendant’s payment platform. If so, such payment transactions would be reflected in the Account.

The relevant clauses in the User Agreement and the AUP

7 It was not disputed that, in order for the plaintiff to set up the Account, it agreed to the User Agreement for PayPal Service (version last updated on 16 March 2020) (the “User Agreement”), as well as the PayPal Acceptable Use Policy (version last updated on 19 March 2020) (the “AUP”). The following clauses in the User Agreement and the AUP are relevant for present purposes.

8 First, the clause titled “Restricted Activities” in the User Agreement provides as follows:¹

In connection with your use of our websites, your PayPal account, the PayPal services, or in the course of your interactions with PayPal, other PayPal customers, or third parties, you will not:

- Breach this user agreement, the PayPal Acceptable Use Policy, the Commercial Entity Agreements (if they apply to you), or any other agreement between you and PayPal.
- Violate any law, statute, ordinance, or regulation (for example, those governing financial services, consumer protections, unfair competition, anti-discrimination or false advertising).
- Infringe PayPal’s or any third party’s copyright, patent, trademark, trade secret or other intellectual property rights, or rights of publicity or privacy.
- ...
- Provide false, inaccurate or misleading information.
- Send or receive what we reasonably believe to be potentially fraudulent funds.
- Engage in potentially fraudulent or suspicious activity and/or transactions.
- ...
- Control an account that is linked to another account that has engaged in any of these restricted activities.
- Conduct your business or use the PayPal services in a manner that results in or may result in:
 - o complaints;
 - o requests by buyers (either filed with us or card issuers) to invalidate payments made to you; or;
 - o fees, fines, penalties or other liability or losses to PayPal, other PayPal customers, third parties or you.

¹ Affidavit of Harpreet Kaur Dhillon dated 17 November 2023 (“7HKD”) at pp 77-79.

...

9 In a related vein, the AUP states as follows:²

You are independently responsible for complying with all applicable laws in all of your actions related to your use of PayPal’s services, regardless of the purpose of the use. In addition, you must adhere to the terms of this Acceptable Use Policy.

Prohibited Activities

You may not use the PayPal service for activities that:

1. violate any law, statute, ordinance or regulation.
2. relate to transactions involving ... (h) items that infringe or violate any copyright, trademark, right of publicity or privacy or any other proprietary right under the laws of any jurisdiction ...
3. relate to transactions that ... (d) are for the sale of certain items before the seller has control or possession of the item ...

...

[text in bold in original]

10 Next, the clause titled “Actions We May Take if You Engage in Any Restricted Activities” in the User Agreement provides as follows:³

If we believe that you’ve engaged in any of these activities, we may take a number of actions to protect PayPal, its customers and others at any time in our sole discretion. The actions we may take include, but are not limited to, the following:

- Terminate this user agreement, limit your PayPal account, and/or close or suspend your PayPal account, immediately and without penalty to us;

...

² 7HKD at p 144.

³ 7HKD at p 79.

- Hold your PayPal balance if reasonably needed to protect against the risk of liability to PayPal or a third party, or if you have violated our Acceptable Use Policy;

...

- If you've violated our Acceptable Use Policy, then you're also responsible for damages to PayPal caused by your violation of this policy; or;

- If you violate the Acceptable Use Policy, then in addition to being subject to the above actions you will be liable to PayPal for the amount of PayPal's damages caused by your violation of the Acceptable Use Policy. You acknowledge and agree that \$2,500 USD (or equivalent) per violation of the Acceptable Use Policy is presently a reasonable minimum estimate of PayPal's actual damages considering all currently existing circumstances, including the relationship of the sum to the range of harm to PayPal that reasonably could be anticipated because, due to the nature of the violations of the Acceptable Use Policy, actual damages would be impractical or extremely difficult to calculate. PayPal may deduct such damages directly from any existing PayPal balance in any PayPal account you control [the "Liquidated Damages Clause"].

11 Finally, the "Account Limitations" clause in the User Agreement provides as follows:⁴

Limitations prevent you from completing certain actions with your PayPal account, such as withdrawing, sending or receiving payments. These limitations are implemented to help protect PayPal, buyers and sellers when we notice restricted activities, an increased financial risk, or activity that appears to us as unusual or suspicious. Limitations also help us collect information necessary for keeping your PayPal account open.

There are several reasons why we may limit your access to your PayPal account or the PayPal services, and/or limit access to your funds, including:

- If we suspect someone could be using your PayPal account without your knowledge, we'll limit it for your protection and look into the fraudulent activity.

⁴ 7HKD at p 81.

...

- In order to comply with applicable law.
- If we reasonably believe you have breached this agreement or violated the Acceptable Use Policy.
- Seller performance indicating your PayPal account is high risk. Examples include: indications of poor selling performance because you've received an unusually high number of claims and chargebacks selling an entirely new or high cost product, or if your typical sales volume increases rapidly.

The defendant's account review and consequential actions

12 The defendant reviewed the Account on 4 August 2020. According to the defendant, it found that the plaintiff's customers had filed at least 400 complaints and/or payment invalidation requests against the plaintiff. These buyer complaints and/or payment invalidation requests mainly concerned transactions that had occurred in June and July 2020. The defendant said that it had received at least 500 more such buyer complaints and/or payment invalidation requests from the plaintiff's customers between 5 August 2020 and 31 December 2020.⁵

13 Further, the defendant found that the Account was linked to at least seven other PayPal accounts that had engaged in one or more of the restricted activities that are listed in the "Restricted Activities" clause in the User Agreement. These restricted activities included conducting their businesses in a manner that led to a significant number of buyer complaints and/or payment invalidation requests being filed.⁶

⁵ 7HKD at para 11a.

⁶ 7HKD at para 11b.

14 As a result of its review, the defendant placed a permanent limitation on the Account on 4 August 2020 (the “Permanent Limitation”). This was done pursuant to the clauses titled “Actions We May Take if You Engage in Any Restricted Activities” and “Account Limitations” in the User Agreement. The defendant notified the plaintiff of the Permanent Limitation on the same day. This prevented the plaintiff from, among other things, withdrawing, sending, and/or receiving payments through the Account.⁷

15 Further to its review on 4 August 2020, the defendant conducted further investigations into the Account. According to the defendant, these further investigations revealed other restricted activities by the plaintiff. For example, the defendant found that the plaintiff had allegedly sold two categories of products, in transactions processed through the Account, that infringed or violated third parties’ copyright, trade mark, and/or proprietary rights. The defendant also found that the plaintiff had allegedly provided false, inaccurate, or misleading information in its advertisements. Finally, the defendant found that the plaintiff had allegedly not been in control or possession of the Products before putting them up for sale. The defendant alleged that, as a result of the plaintiff’s failure to ensure that it retained control or possession over the Products, about 50% of the buyer complaints and/or payment invalidation requests filed against the plaintiff as of 4 August 2020 stated that the buyers never received their purchased products.

16 Consequent to these findings, the defendant deducted liquidated damages of €441,843.56 and US\$919,061.50 from the Account (the

⁷ 7HKD at paras 12-13.

“LD Deduction”).⁸ This was done pursuant to the Liquidated Damages Clause, which is part of the clause titled “Actions We May Take if You Engage in Any Restricted Activities” in the User Agreement. The LD Deduction formed the nub of the parties’ dispute in the Suit.

The parties’ cases for the Suit

The plaintiff’s case

17 The plaintiff claimed in the Suit for a return of the LD Deduction, as well as a declaration that the Liquidated Damages Clause is void and unenforceable.

18 The plaintiff’s pleaded case in its Statement of Claim (Amendment No 1) dated 13 December 2022 was that the defendant had breached the User Agreement by making the LD Deduction. In this regard, the plaintiff pleaded that it had not been given details as to how it had violated the AUP in a manner entitling the defendant to make the LD Deduction, pursuant to the Liquidated Damages Clause. In addition, the plaintiff pleaded that the defendant was not entitled to make the LD Deduction because the plaintiff had not breached the AUP. In the alternative, the plaintiff pleaded that the Liquidated Damages Clause is void and unenforceable as it is a penalty clause.

The defendant’s case

19 The defendant’s defence consisted of three main planks. First, the defendant had been contractually entitled to place the Permanent Limitation and make the LD Deduction, in accordance with the various clauses in the User

⁸ 7HKD at para 15.

Agreement, and because the plaintiff had breached the AUP. Second, the Liquidated Damages Clause is enforceable since the quantum of the liquidated damages provided is a genuine pre-estimate of the defendant's conceivable loss as a result of an AUP violation. Third, it would be contrary to public policy if the plaintiff could recover the LD Deduction as this sum represented the proceeds from its own crime.

20 The defendant also counterclaimed for damages against the plaintiff for breaching the AUP and the User Agreement by, among other things, engaging in the restricted activities. The defendant then advanced a defence of set-off against the plaintiff's claims on the assumption that its counterclaim would be successful.

The AR's decision to strike out the plaintiff's case

Events leading to the AR's decision

21 Against the background facts and the parties' cases, I come to the events that led to AR Koonar's decision below to strike out the plaintiff's case.

HC/SUM 1966/2022

22 On 25 May 2022, the defendant filed HC/SUM 1966/2022 ("SUM 1966") to seek the discovery of certain documents. SUM 1966 was heard on 6 July 2022 and the plaintiff was eventually ordered to disclose, among others, the following documents (the "Discovery Order"):

- (a) all email notifications sent to the email address [email address redacted] in relation to each buyer dispute filed with the defendant against the plaintiff ("Category 1");

(b) all correspondence and written documents evidencing that the plaintiff had not falsely advertised and represented that its products had certain performance characteristics, accessories, qualities, uses, and/or benefits which they do not have and were of a particular standard and/or quality (“Category 2”); and

(c) in respect of disputes raised by the plaintiff’s customers on the grounds that the items purchased were not received, all documents, including but not limited to certificate of posting, bill of lading, and/or shipping invoices, that show proof of delivery (“Category 5”).

23 The plaintiff’s appeal against the Discovery Order was dismissed by the High Court on 1 August 2022 in HC/RA 236/2022.

24 On 8 November 2022, the plaintiff filed its Supplementary List of Documents (“PSLOD”) and Affidavit Verifying Plaintiff’s Supplementary List of Documents.

25 Subsequently, the defendant changed its solicitors on 13 June 2023. The defendant then amended and filed its Defence and Counterclaim (Amendment No 2) (“D&CC2”) on 21 August 2023. The parties were then directed on 22 August 2023 to file their respective Supplementary Lists of Documents (“SLODs”) and Affidavits Verifying Supplementary Lists of Documents (“AVSLODs”) (if any) by 8 September 2023. On 8 September 2023, the plaintiff informed the defendant shortly before the close of business hours that it required more time to file its SLOD. Following this, on 11 September 2023, the plaintiff made a belated request to the court for the deadline for filing

its SLOD to be extended.⁹ The court rejected the request.¹⁰ Despite this, the plaintiff still failed to comply with its own proposed deadline to file its SLOD and AVSLOD by 13 September 2023.

The First Unless Order and the First Striking Out Application

26 At a Pre-Trial Conference (“PTC”) on 19 September 2023 before the learned Assistant Registrar Carol Liew (“AR Liew”), the plaintiff’s counsel informed the court that he had been instructed that the plaintiff did not have any further documents to disclose and that he had no instructions on the filing of an SLOD. AR Liew noted that if, as the plaintiff asserted, there were no documents in its possession, custody, or power (“PCP”), then a statement to that effect should be filed in the SLOD and AVSLOD. As such, AR Liew concluded that the plaintiff had not complied with the filing of the SLOD and AVSLOD. Having regard to the scheduled trial dates in February 2024, AR Liew expressed concern that the plaintiff was not going to meet the trial dates if it did not file the SLOD and AVSLOD in a timely manner. AR Liew then asked if the plaintiff was prepared to take an unless order. The plaintiff’s counsel replied that he “can impress upon [the plaintiff] that they will have to file their SLOD by 22 Sep 2023”. Accordingly, AR Liew ordered that, unless the plaintiff filed its SLOD and AVSLOD by 22 September 2023, the plaintiff’s claim would be struck out (the “First Unless Order”).

27 On 22 September 2023, the plaintiff filed a blank Plaintiff’s 2nd Supplementary List of Documents (“P2SLOD”). Further, in its Affidavit

⁹ Plaintiff’s Letter to Court dated 11 September 2023 sent by Solitaire LLP.

¹⁰ Correspondence from Courts dated 12 September 2023, in accordance with directions by Assistant Registrar Carol Liew.

Verifying Plaintiff's 2nd Supplementary List of Documents ("AVP2SLOD"), the plaintiff stated that "[n]either the Plaintiff nor its Solicitors nor any other person on their behalf, has now, or ever had, in their possession, custody or power any document of any description whatever relating to any matter in question in this action, other than the documents enumerated in Schedule 1 hereto".¹¹

28 On 27 September 2023, the defendant's solicitors, Drew & Napier LLC ("D&N"), wrote to the plaintiff's solicitors, Solitaire LLP ("Solitaire") (the "D&N 27 September Letter"). This letter stated that, based on D&N's review of the documents disclosed so far, it appeared that the plaintiff had not fully complied with the Discovery Order. D&N therefore requested that the plaintiff confirm whether it was prepared to file a SLOD providing discovery of a list of specified documents. On 2 October 2023, Solitaire replied to D&N (the "Solitaire 2 October Letter"). In this letter, Solitaire stated that the plaintiff was *willing* to provide discovery of some of the documents listed in the D&N 27 September Letter. However, Solitaire asserted that certain documents requested were not in the plaintiff's PCP.

29 At a further PTC on 10 October 2023, AR Liew directed the plaintiff to produce the documents it had agreed to produce by 13 October 2023. The learned AR also directed the defendant to file its application for specific discovery, if any, by 16 October 2023. On 13 and 16 October 2023, Solitaire wrote to D&N to update D&N on the discovery process. In essence, Solitaire stated that it could not meet the court-imposed deadline of 13 October 2023.

¹¹ Hua Yew Fai Terence's Affidavit Verifying Supplementary List of Documents filed on 22 September 2023 at p 3.

Then, on 18 October 2023, Solitaire wrote to D&N with a table listing the documents requested in the D&N 27 September Letter. However, on 30 October 2023, D&N wrote to Solitaire to state the defendant’s position, which was that the plaintiff still had not provided full discovery of the documents requested in the D&N 27 September Letter.

30 On 3 and 6 November 2023, Solitaire sent a letter and two emails to D&N, attaching drafts of its further SLODs. Despite the eventual filing of these draft SLODs, the defendant still regarded the plaintiff as not having complied with the Discovery Order, as well as another discovery order emanating from HC/SUM 3195/2023. The defendant therefore filed HC/SUM 3556/2023 to strike out the plaintiff’s case on 17 November 2023 (the “First Striking Out Application”). The defendant took out this application because it believed that the plaintiff had failed to comply with the Discovery Order, as well as the First Unless Order.

The Second Unless Order and the Second Striking Out Application

31 AR Koonar heard the First Striking Out Application on 13 and 15 December 2023. AR Koonar found that the plaintiff had failed to provide full discovery of the Category 1, 2, and 5 documents. This necessarily meant that the plaintiff had breached the First Unless Order. However, AR Koonar decided against striking out the plaintiff’s case. Instead, AR Koonar gave the plaintiff a “final opportunity” to comply with its discovery obligations. The learned AR said as follows:¹²

¹² AR Koonar’s Oral Judgment in HC/SUM 3556/2023 dated 15 December 2023 at [30(d)].

... [A]gainst what I have just said, I am minded to give the Plaintiff a final opportunity to comply with the Discovery Orders and not make a striking out order forthwith. To an extent, this might be seen as an indulgence granted to the Plaintiff. But the underlying principle is that of proportionality, as discussed in [*Mitora Pte Ltd v Agritrade International (Pte) Ltd* [2013] 3 SLR 1179]. In my view, balancing the various relevant interests is best met by an unless order. If the Plaintiff provides proper discovery, the trial should proceed and justice is best served by the Court adjudicating on the merits of the claim and counterclaim. For time wasted in seeking to have the Plaintiff comply with the Discovery Orders, appropriate costs orders can also be made in the Defendant's favour.

32 AR Koonar therefore made, among others, orders that:

(a) the plaintiff shall, within 21 days of 15 December 2023 (that is, by 5 January 2024), comply with the Discovery Order by providing discovery of the following documents:

(i) Category 1;

(ii) Category 2, in so far as it relates to the plaintiff's advertisements of its products and the directives, standards, and/or regulations relating to certification and test reports ("Unless Order Category 2");

(iii) Category 5, in so far as it relates to source documents relating to the "www.17track.net" documents and summaries disclosed by the plaintiff ("Unless Order Category 5");

(b) in addition to filing a SLOD and AVSLOD, the plaintiff was to file a further affidavit to explain the steps taken to obtain and provide discovery of the documents above; and

(c) if the plaintiff failed to comply with the first and/or second orders above, the plaintiff's case shall be struck out.

I shall term this as the “Second Unless Order”.

33 On 5 January 2024, the plaintiff filed its 6th Supplementary List of Documents (“P6SLOD”), an AVSLOD in respect of the P6SLOD (“AVP6SLOD”), as well as a further solicitor’s affidavit exhibiting Mr Karim’s draft affidavit which purported to explain the steps taken by the plaintiff to obtain and provide discovery of the documents in the Second Unless Order. Mr Karim’s notarised affidavit was only filed on 18 January 2024 (“Karim’s 10th Affidavit”).

34 On 8 January 2024, the defendant took out a second application to strike out the plaintiff’s case on the basis that the plaintiff had breached the Second Unless Order (the “Second Striking Out Application”). AR Koonar heard the application on 26 January 2024 and decided to strike out the plaintiff’s case on 29 January 2024.

The AR’s decision to strike out the plaintiff’s case

35 AR Koonar delivered extensive oral grounds to explain his decision. As a preliminary matter, he considered that he had to decide two issues, namely, (a) whether the plaintiff had breached the Second Unless Order and/or its discovery obligations, and (b) whether the plaintiff’s case should be struck out. In relation to the issue of breach, AR Koonar also held that the Second Striking Out Application was not confined to whether the plaintiff had breached the Second Unless Order. Rather, it extended to whether striking out was warranted by O 24 r 16 of the Rules of Court (2014 Rev Ed) (“ROC 2014”) and/or the court’s inherent jurisdiction, both of which would cover grounds apart from a breach of the Second Unless Order.

36 Still on the issue of breach, AR Koonar set out his conclusions on each of the documents in the Second Unless Order. First, in relation to the Category 1 documents, AR Koonar accepted that the plaintiff had provided discovery of these documents, albeit after the Second Unless Order was made. However, he went on to consider whether the plaintiff was in breach of its discovery obligations by failing to disclose these documents earlier. In this regard, he found that the reasons given by the plaintiff for its belated disclosure raised “grave concerns” about its conduct in discovery. In sum, AR Koonar found that while the plaintiff had disclosed the Category 1 documents, the evidence before the court suggested that its earlier breaches were deliberate.

37 Second, in relation to the Unless Order Category 2 documents, AR Koonar dealt with the two sub-categories of Category 2, namely, (a) documents relating to the plaintiff’s advertisements of its products, and (b) the directives, standards, and regulations referred to in the certifications and test reports disclosed by the plaintiff. In relation to sub-category (a), AR Koonar concluded that the plaintiff had breached the Second Unless Order. The evidence showed that there must have been further responsive documents in the plaintiff’s past or present PCP, which had not been disclosed. As for sub-category (b), AR Koonar found that the plaintiff had breached the Second Unless Order because it had not provided any further discovery since the making of the said Order.

38 Third, in relation to the Unless Order Category 5 documents, which pertain to source documents relating to the “www.17track.net” documents and summaries disclosed by the plaintiff, AR Koonar noted that the plaintiff had disclosed a table containing what purported to be primary data extracted from its internal computerised system (“CRM Database”). However, AR Koonar found that the plaintiff had not complied with the Second Unless Order. Further,

he found troubling the plaintiff's belated disclosure of the CRM Database until after the Second Unless Order was made. This was because he regarded the CRM Database to be a crucial source of evidence in the Suit.

39 In summary, AR Koonar concluded that the plaintiff remained in breach of the Second Unless Order and its discovery obligations in relation to the Unless Order Category 2 and Unless Order Category 5 documents. Further, AR Koonar found that the evidence adduced since the Second Unless Order showed that the plaintiff had deliberately suppressed documents in relation to the Category 1 documents. AR Koonar also held that the evidence showed that the plaintiff had previously suppressed material information from the court in relation to the Unless Order Category 2 and Unless Order Category 5 documents, and had painted a misleading picture as to why it had been allegedly unable to provide discovery.

40 As such, AR Koonar decided that the plaintiff had "played a protracted game of cat and mouse with the Court and the Defendant during discovery" and that its conduct "is inexcusable and is a blatant abuse of process".¹³ AR Koonar rejected the plaintiff's argument that because the parties were on the doorstep of trial, the trial should proceed so that the Suit could be decided on its merits. He considered this argument to be unprincipled because discovery is intended to secure a fair trial, which the plaintiff's non-compliance had jeopardised. Moreover, this argument, if accepted, would create a perverse incentive for parties to prolong their non-compliance with their discovery obligations to as close as the trial as possible, in the hope of escaping these obligations on the excuse that the trial should proceed. Accordingly, AR Koonar decided that this

¹³ AR Koonar's Oral Judgment in HC/SUM 64/2024 dated 29 January 2024 at para 43(c).

was a “plain and obvious case for striking out under O 24 r 16 of the Rules of Court 2014” and accordingly struck out the plaintiff’s case.¹⁴

41 With the above in mind, I turn now to SUM 326, which was the plaintiff’s application to admit new evidence in RA 24.

SUM 326: application to admit new evidence

42 In SUM 326, the plaintiff had sought to admit the evidence contained in Mr Karim’s 12th Affidavit,¹⁵ which the plaintiff argued would clearly show that it had not breached any order to make full discovery of the Category 1 documents. In fact, the plaintiff asserted that the defendant was furnished with the full set of the Category 1 documents as far back as November 2022.

The new evidence

43 In essence, Mr Karim stated in his 12th Affidavit that, after AR Koonar struck out the plaintiff’s case, he and Solitaire conducted further and thorough checks concerning the documents that formed the subject of the Second Unless Order.¹⁶ It then transpired that “both [Solitaire] and [Mr Karim] had laboured under an honest and innocent mistake concerning certain categories of the [p]laintiff’s discovery obligations and explanations concerning the [p]laintiff’s case in [the First Striking Out Application] and [the Second Striking Out Application] had not been explained clearly”.¹⁷ Indeed, Mr Karim explained

¹⁴ AR Koonar’s Oral Judgment in HC/SUM 64/2024 dated 29 January 2024 at para 43(e).

¹⁵ 12th Affidavit of Karim Mohamed Astoul filed on 6 February 2024 (“Karim’s 12th Affidavit”).

¹⁶ Karim’s 12th Affidavit at para 17.

¹⁷ Karim’s 12th Affidavit at para 17.

that he only managed to unearth this evidence at that juncture because he had been certain before that he had provided the relevant documents. As a result of AR Koonar’s decision to strike out the plaintiff’s case, Mr Karim and Solitaire “put in a final, thoroughly diligent attempt to find out what had really happened to answer the court’s queries”.¹⁸

44 As to the exact evidence that Mr Karim sought to admit, it was intended to show that the plaintiff had already given full discovery of the Category 1 documents back in November 2022 between Solitaire, and the defendant’s previous solicitors, Dentons Rodyk & Davidson LLP (“Dentons”). Mr Karim explained that when the plaintiff became obliged under the Discovery Order to produce the Category 1 documents, it was represented by its previous solicitors, Chevalier Law LLC (“Chevalier”).¹⁹ On 17 October 2022, the plaintiff changed its solicitors to Solitaire. Despite Solitaire’s previous suggestion to AR Koonar that “there could have been a slip up in the handing over of documents from [Chevalier] to [Solitaire] and/or the involvement of instructed counsels in the handing over process”,²⁰ Mr Karim stated that he was now sure that “Chevalier had handed all the documents necessary and relevant to the Suit to Solitaire”.²¹

45 Mr Karim further explained that the plaintiff had filed its AVSLOD and had notified Chevalier of this on 9 November 2022. Solitaire had also informed Dentons in a letter on 9 November 2022 that all of the Category 1 documents had been disclosed as per the Discovery Order.²² On 15 November 2022, the

¹⁸ Karim’s 12th Affidavit at para 17.

¹⁹ Karim’s 12th Affidavit at para 24.

²⁰ Karim’s 12th Affidavit at para 25.

²¹ Karim’s 12th Affidavit at para 26.

²² Karim’s 12th Affidavit at para 27.

parties had made a joint update to the court regarding the plaintiff's compliance with the Discovery Order. Mr Karim pointed out that "the [p]laintiff's previous solicitors had made numerous amendments to the joint letter in red and included the fact that they needed time to review the 9,350 documents" [emphasis in original].²³

46 I had difficulty understanding this sentence. After all, the joint update of 15 November 2022 was made by the plaintiff's *current* solicitors and the defendant's previous solicitors, Dentons, as the defendant had not yet changed its solicitors at that time. It was unclear to me how or why the plaintiff's *previous* solicitors (Chevalier) would have become involved in this joint update to the court, *ie*, stating that it needed time to review its *former* client's documents while maintaining that the disclosure of those documents fully complied with the plaintiff's discovery obligations. In my view, the sentence I referred to would only make sense if it referred to the *defendant's* previous solicitors, Dentons.

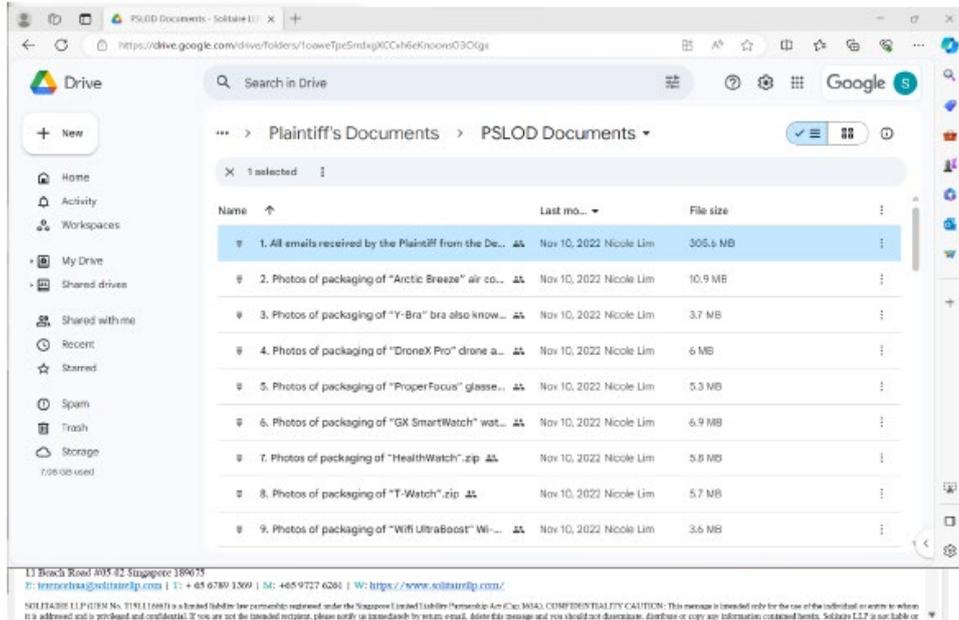
47 In any event, Mr Karim's point was that both Solitaire, as well as Dentons, were mistaken that the plaintiff had disclosed only 9,350 emails when, in fact, Solitaire had sent over all 17,643 emails to Dentons on 10 November 2022 by way of a Google Drive link.²⁴

48 Mr Karim sought to demonstrate that the plaintiff's solicitors had sent over all 17,643 emails by exhibiting various screenshots that, according to him, showed the process of clicking on the Google Drive link. The process was as

²³ Karim's 12th Affidavit at para 28.

²⁴ Karim's 12th Affidavit at para 30.

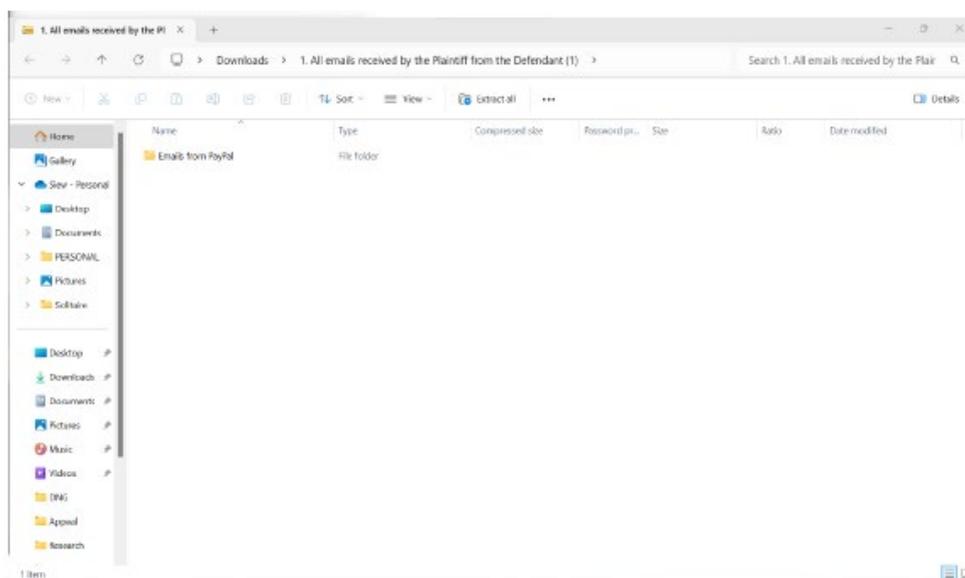
follows. One, the first screenshot showed that the Google Drive folder “PSLOD Documents” included a zipped file containing documents responsive to Category 1:²⁵



49 Two, upon downloading and later unzipping the zipped file containing documents responsive to Category 1, it can be seen that there is a folder titled “Emails from PayPal”:²⁶

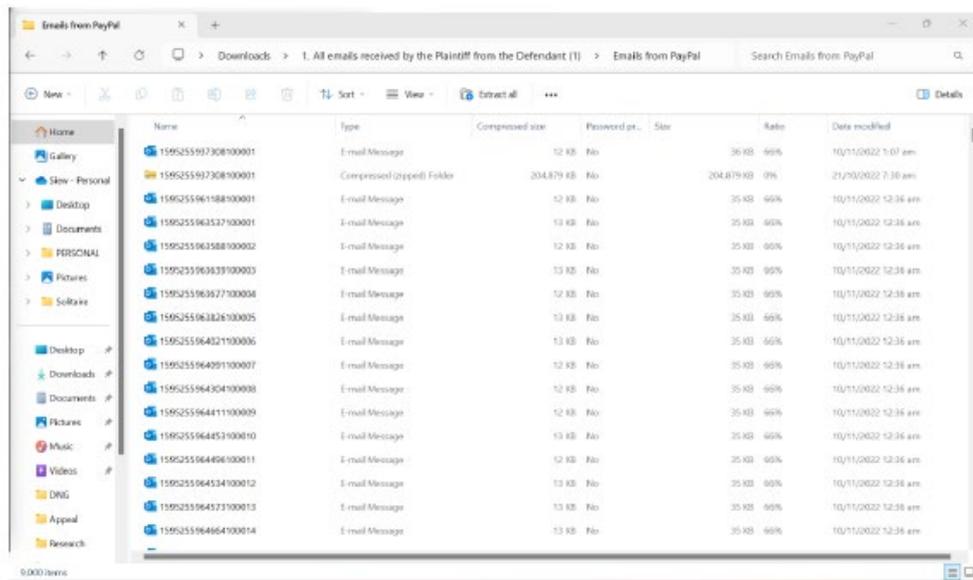
²⁵ Karim’s 12th Affidavit at para 31a.

²⁶ Karim’s 12th Affidavit at para 31c.



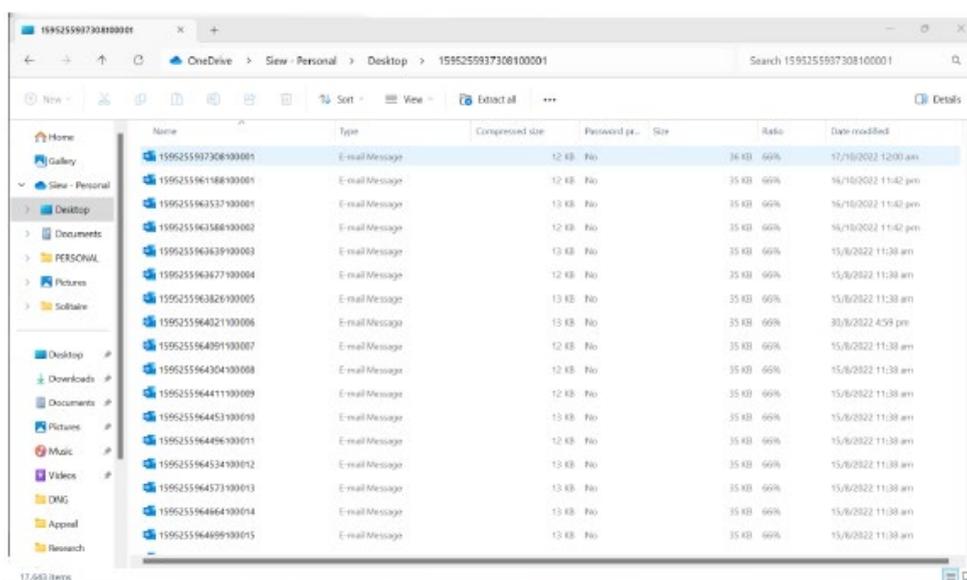
50 Three, upon opening the folder titled “Emails from PayPal”, it is revealed that there are 9,000 files in the folder. These 9,000 files comprise 8,999 emails and a zipped folder:²⁷

²⁷ Karim’s 12th Affidavit at para 31d.



51 After that zipped folder is opened, it can be seen that there are 17,643 files, which Mr Karim claimed were email documents:²⁸

²⁸ Karim’s 12th Affidavit at para 31e.



52 Drawing on the above, Mr Karim explained that these 17,643 emails included the same 8,999 email documents located in the folder “Emails from PayPal”, and also an additional 8,644 email documents.²⁹ As such, when Solitaire sent to Dentons all documents relevant to Category 1 on 10 November 2022, Solitaire was mistaken that only 9,000 emails had been disclosed when in fact all 17,643 emails had already been sent over on 10 November 2022 via the Google Drive link. According to Mr Karim, this evidence therefore showed that the plaintiff never intended to play a “cat and mouse” game with its discovery obligations to suppress the Category 1 documents.³⁰

53 For completeness, Mr Karim also briefly referred to the Unless Order Category 2 documents in his 12th Affidavit. In this regard, Mr Karim clarified that the plaintiff “did not intend to attempt to and/or lie to [*sic*] the Honourable

²⁹ Karim’s 12th Affidavit at para 31e.

³⁰ Karim’s 12th Affidavit at para 34.

Court about its position concerning Category 2 documents” and that the plaintiff’s “alleged lies ... mainly stem from inaccurate presentations of the [p]laintiff’s instructions”.³¹ However, Mr Karim raised only a single instance of such “inaccurate presentations”, which was that “due to [Solitaire’s] inadvertence, images and videos captured at the screenshots exhibited at Tab 3 of [Hua Yew Fai Terence’s 15th Affidavit filed on 23 January 2024] were not exhibited”.³²

The parties’ arguments

54 The plaintiff’s main argument in SUM 326 was that the requirements laid down in *Ladd v Marshall* [1954] 1 WLR 1489 (“*Ladd v Marshall*”) should not be applied in an unattenuated manner here because RA 24 was clearly not an appeal from a trial.³³ Further, Mr Oommen Mathew (“Mr Mathew”), who appeared as instructed counsel for the plaintiff, stressed that, regardless of whether the *Ladd v Marshall* requirements applied in the plaintiff’s favour, this court should exercise its discretion to admit the further evidence pursuant to the overarching considerations of proportionality and prejudice (see the High Court decision of *SW Trustees Pte Ltd (in compulsory liquidation) and another v Teodros Ashenafi Tesemma and others (Teodros Ashenafi Tesemma, third party)* [2023] SGHC 273 at [21]). This was because the plaintiff was putting forward credible evidence that set out the truth of what happened in relation to its discovery obligations for the Category 1 documents.

³¹ Karim’s 12th Affidavit at para 41.

³² Karim’s 12th Affidavit at para 42.

³³ Defendant’s Written Submissions for HC/RA 24/2024 filed on 9 February 2024 (“DWS”) at para 29.

55 In response, the defendant argued that the *Ladd v Marshall* requirements should be applied in an unattenuated manner. Accordingly, the defendant submitted that SUM 326 should be dismissed because (a) the evidence sought to be admitted could have been obtained with reasonable diligence for use at the hearing below, and (b) the evidence would not have an important influence on the outcome of RA 24. On (b), this was because, among other reasons, the evidence sought to be admitted did not address AR Koonar’s findings in respect of the Unless Order Categories 2 and 5 documents.

My decision: SUM 326 was allowed

56 After considering the parties’ submissions, I allowed SUM 326 for the reasons below.

The applicable law

57 To begin with, the applicable law was not in dispute. Under O 55D r 11(1) of the ROC 2014, it is provided that:

General powers of court (O. 55D, r. 11)

11.—(1) The General Division shall have power to receive further evidence on questions of fact, either by oral examination in the General Division, by affidavit, or by deposition taken before an examiner, but no such further evidence (other than evidence as to matters which have occurred after the date of the decision from which the appeal is brought) may be given except on *special grounds*.

...

[emphasis added]

58 Although the term “special grounds” in O 55D r 11(1) of the ROC 2014 is not defined either in the ROC 2014 or the Supreme Court of Judicature Act 1969 (2020 Rev Ed), the courts have consistently interpreted it to refer to the threefold requirements in the seminal English decision of *Ladd v Marshall*

(see, for example, the Court of Appeal decisions of *Toh Eng Lan v Foong Fook Yue and another appeal* [1998] 3 SLR(R) 833 (at [34]), *ARW v Comptroller of Income Tax and another and another appeal* [2019] 1 SLR 499 (at [99]), and *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2019] 2 SLR 341 (“*AnAn Group*”) (at [21])). In this regard, the three requirements in *Ladd v Marshall* are (at 1491):

- (a) first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial or hearing;
- (b) second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; and
- (c) third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

These three requirements have often been referred to, respectively, as the criteria of non-availability, relevance, and credibility.

59 Furthermore, following the Court of Appeal’s comments in *AnAn Group* (at [35]), the cases applying the *Ladd v Marshall* requirements should be analysed as lying on a spectrum. On one end of the spectrum are appeals against trials or hearings having the full characteristics of a trial, where the requirements would apply with full rigour. On the other end are appeals against decisions not touching upon the merits at all, such as interlocutory applications, where the requirements would serve as guidelines that the court is entitled, but not obliged, to refer to in the exercise of its unfettered discretion.

60 In any event, the court should conduct a balancing exercise between the interests of finality and the right of an applicant to put forth relevant and credible evidence, having regard to the considerations of proportionality and prejudice (see *AnAn Group* at [59]).

The first Ladd v Marshall requirement applied more strictly

61 In my judgment, while RA 24 arose from an interlocutory application to strike out for breach of an unless order, and therefore fell within the lower end of the spectrum, I was of the view that the first requirement of *Ladd v Marshall*, *ie*, the criterion of non-availability, should still apply more strictly. In this regard, the Court of Appeal in *AnAn Group* laid down three relevant (non-exhaustive) factors that courts may use to consider how strictly to apply the first requirement of *Ladd v Marshall*. The factors are: (a) the extent to which evidence, both documentary and oral, was adduced for the purposes of the hearing; (b) the extent to which parties had the opportunities to revisit and redefine their cases before the hearing; and (c) the finality of the proceedings in disposing of the dispute between the parties (see *AnAn Group* at [35]).

62 Applying these factors, I found that the *Ladd v Marshall* requirement of non-availability should be applied more strictly in this case for the following reasons. First, while the Second Striking Out Application was interlocutory in nature, there was a significant extent of fact-finding based on the documentary evidence adduced for the purposes of the hearing. Second, there was no indication that the parties lacked ample opportunity to refine and revisit their cases before the hearing. Third, subject to any appeal, the proceedings below disposed of the dispute between the parties (save for the counterclaim), albeit on a procedural as opposed to a substantive point. In these circumstances, especially given that the parties have had ample time to refine and revisit their

cases, it would not be in the interests of finality and certainty for a party to be allowed to easily reopen his or her case by adducing new evidence.

63 I turn then to the application of the *Ladd v Marshall* requirements to the facts.

The evidence could have been obtained with reasonable diligence

64 First, I found that the first *Ladd v Marshall* requirement applied against the plaintiff. Indeed, Mr Karim admitted as much in his 12th Affidavit – that the evidence could have been obtained earlier with reasonable diligence. One, Mr Karim said that it was only after AR Koonar’s decision to strike out that “the [p]lainiff’s solicitors and [him] have conducted further and thorough checks”.³⁴ It was unclear why the plaintiff could not have done so before the Second Striking Out Application, especially when the plaintiff knew of the serious consequences it would face. Two, Mr Karim stated that he only realised on 31 January 2024 that the plaintiff had already provided full discovery of the Category 1 documents back in November 2022. In other words, he only realised this after the Second Striking Out Application.³⁵ Yet, again, it was unclear why the plaintiff could not have come to this realisation earlier, especially when full discovery was allegedly provided in November 2022. Three, Mr Karim said that he instructed Solitaire to conduct “further checks” to verify that the Category 1 emails had been sent by Chevalier to Solitaire and confirmed that Chevalier had done so. But, again, it was unclear why the plaintiff could not have done so earlier.³⁶

³⁴ Karim’s 12th Affidavit at para 17.

³⁵ Karim’s 12th Affidavit at para 23.

³⁶ Karim’s 12th Affidavit at para 26.

65 In sum, it appeared that the plaintiff had to be woken into action by AR Koonar's decision to strike out its case. It was only through those further checks that the plaintiff found out what it now stated to be the truth. This is the textbook definition of a party not having taken reasonable diligence. Indeed, there was nothing in Mr Karim's latest affidavit to explain *why* the plaintiff could not have obtained the new evidence with reasonable diligence before the Second Striking Out Application. Further, it turned out that the plaintiff's explanation of what actually happened was not so complicated. At its core, the plaintiff's account was that it ought to have looked harder at the *actual zipped file* it sent over to Dentons. This did not take a forensic investigation of the files. The plaintiff had this information all along. This is yet again another textbook example of a party not having taken reasonable diligence.

66 For all these reasons, I found that the plaintiff could have obtained the evidence that it now seeks to admit with reasonable diligence.

The evidence would not have an important influence on the outcome of RA 24

67 Second, I found that the second *Ladd v Marshall* requirement applied against the plaintiff. This is because even if I were to allow the evidence to be admitted, it would not have an important influence on the outcome of RA 24.

68 First, AR Koonar had proceeded on the basis that the plaintiff had not breached its discovery obligations in relation to the Category 1 documents. Thus, in so far as the evidence sought to be admitted verified the plaintiff's compliance with its obligations in relation to the Category 1 documents, AR Koonar had already factored this into his decision. Indeed, AR Koonar's decision in RA 24 was primarily founded on the plaintiff's breach of its discovery obligations in relation to Unless Order Categories 2 and 5. In this

regard, the plaintiff did not adduce any further evidence that AR Koonar had not already considered in relation to its non-compliance with these other Categories.

69 Second, because the breach of an unless order generally attracts the consequences stated therein (in this case, the striking out of the plaintiff's case) unless the defaulting party can show that the breach was not intentional or contumelious, the plaintiff would still have needed to prove the latter point (*ie*, that its breach was not intentional or contumelious). Therefore, whether or not the plaintiff had breached its discovery obligations in relation to the Category 1 documents, which in any event AR Koonar held that it had not, the key issue in RA 24 was whether the plaintiff's breaches in relation to Unless Order Categories 2 and 5 were intentional or contumelious. The evidence sought to be admitted did not deal with this issue at all.

70 Accordingly, I found that the evidence, even if admitted, would not have an important influence on the outcome of RA 24.

The evidence was, however, apparently credible

71 Third, and in contrast to the previous two requirements, I found that the third *Ladd v Marshall* requirement applied in favour of the plaintiff. While I had some concerns as to whether the downloaded zipped file was the actual file downloaded from the Google Drive link (as the screenshots do not show this), Ms Ong Siew Choo ("Ms Ong") from Solitaire showed me that this was so by (a) downloading the actual file from the Google Drive link in court, and (b) unzipping it to show that its contents matched the relevant screenshot in Karim's 12th Affidavit. Mr Benedict Teo ("Mr Teo"), who appeared on behalf

of the defendant, did not object either to Ms Ong's demonstration of the above in court, or to the apparent credibility of the evidence.

72 Accordingly, I found that the evidence was, on its face, apparently credible.

It was ultimately proportionate to admit the further evidence

73 Ultimately, despite finding that two of the three *Ladd v Marshall* requirements applied against the plaintiff, I decided that it was proportionate to admit the further evidence. This was because the evidence had the effect of explaining if the plaintiff had discharged its discovery obligations in relation to Category 1. While the plaintiff's inconsistent prior explanations could still lead to a finding that it was indolent and negligent with respect to its discovery obligations, it served the ends of practical justice for a party to be able to put forward an apparently credible account of what actually happened.

74 For this primary reason, and despite my concerns about the plaintiff's lack of reasonable diligence in obtaining this evidence, and the materiality of the evidence in RA 24, I allowed SUM 326.

RA 24: appeal against the AR's decision to strike out the plaintiff's case

The parties' arguments

75 I turn now to RA 24. The plaintiff made two primary arguments in support of its position that its appeal in RA 24 should be allowed.

76 First, there was no breach of the Second Unless Order. In this regard, the plaintiff specifically made the following arguments in relation to the Category 1 documents:

(a) It was not disputed that the plaintiff had provided discovery of the Category 1 documents. Further, the plaintiff had never suppressed the production of these documents because (i) the plaintiff had disclosed at least 9,000 emails in Category 1, (ii) the plaintiff had no reason to suppress the remaining emails because there was nothing to set the remaining emails apart from the 9,000 emails disclosed, and (iii) the plaintiff's latest investigations showed that it had in fact provided disclosure of all the emails in November 2022.

(b) In retrospect, the plaintiff's inconsistent positions as regards the Category 1 documents occurred because it was genuinely overwhelmed by the numerous interlocutory applications which the defendant had taken out against it since changing solicitors in 2023. It was therefore understandable why the plaintiff and Solitaire would have made unintended errors in relation to the scope and fulfilment of its discovery obligations.

(c) Further, the Category 1 documents were not material to the central issues to be determined in the Suit. This is because the Discovery Order was made in the context of the defendant's original Defence and not its D&CC2. However, the defendant's case had by now fundamentally shifted from the buyer complaints and/or payment invalidation requests to the various allegedly violative transactions. Indeed, the defendant has since relied on the allegedly violative transactions to justify the LD Deductions.

77 As for the Unless Order Category 2 documents, the plaintiff made the following points:

(a) AR Koonar was wrong in finding that the plaintiff exercised a significant degree of control over the contents of its advertisements and had failed to exercise reasonable efforts to reach out to the freelance marketers.

(b) Even if it were true that the plaintiff could exercise a significant degree of control over the contents of its advertisements and had not fulfilled its discovery obligations by failing to extract documents provided by the freelance marketers in their replies, the plaintiff's extent of PCP merely stretched to the ambit of a "starter pack", which was merely a "creative content pack". Thus, the plaintiff had no authority and power to compel the freelance marketers to turn over advertisements that had been produced by them, much less the content they had produced, save for the materials provided in the starter pack.

(c) In any event, the advertisements were not material to the defendant's case. The presence of the advertisements did not support the defendant's allegation that the plaintiff had violated the law, ordinances, and statutes of the United States, the United Kingdom, and Germany.

(d) As for the directives, regulations, and standards, while "it cannot be disputed that the [p]laintiff had breached its discovery obligations, [the plaintiff] submit[s] that the directives, regulations or standards still fail to go toward the heart of the dispute".³⁷ To be fair to the plaintiff, Mr Mathew clarified that this sentence in the plaintiff's submissions should be taken to mean that the plaintiff had taken all efforts to comply with its discovery obligations for this sub-category of documents.

³⁷ PWS at para 76.

78 Finally, as for the Unless Order Category 5 documents, the plaintiff made the following points:

(a) AR Koonar was mistaken as to the nature of what he had termed as the “CRM Database”. This is, in fact, a consolidation of information obtained from the database of the plaintiff’s third-party customer relationship manager service provider. It is essentially a PDF file containing information.³⁸ In this regard, the plaintiff had not been concealing the CRM Database; instead, there was simply no reason to disclose this summary of information at an earlier juncture given that the document is a consolidation of information in relation to transactions carried out by the plaintiff. This was thus not directly responsive to Category 5, which pertained to documents showing proof of delivery. Also, the CRM Database is not a crucial source of information since it concerned buyer complaints and/or payment invalidation requests, which do not go to the heart of the dispute in the Suit.

(b) As for the “www.17track.net” screenshots, the source documents are the Send From China (“SFC”) screenshots, which the plaintiff had already disclosed as item 4 of its 4th Supplementary List of Documents (“P4SLOD”). The SFC screenshots are direct source documents for which the plaintiff had obtained each “www.17track.net” screenshot. It was not clear what further source documents had to be obtained to meet the plaintiff’s discovery obligations under Unless Order Category 5.

79 Second, and in any event, striking out was not warranted in the present circumstances. This is because the plaintiff had made every sincere and honest

³⁸ PWS at para 83.

effort in trying to comply with various court orders in the later part of 2023. While the plaintiff acknowledged that there had been some errors in meeting deadlines, it had no intention of deceiving the court, or breaching court orders with contempt. Indeed, the plaintiff's supposed breaches of its discovery obligations in relation to the Unless Order Categories 2 and 5 documents "only go towards the subsidiary issues, if at all, at trial", and it is "difficult to see what these documents (or lack thereof) do to the conduct of the trial".³⁹ As such, the plaintiff submitted that the ultimate sanction of striking out its case at the doorstep of trial would be far too draconian a measure. The court should consider other targeted sanctions, rather than the "blank use" [*sic*] of the striking out weapon.⁴⁰ On this point, Mr Mathew submitted that the applicable law requires the court to consider whether striking out was a proportionate response even if the court finds that there had been an intentional and contumelious breach of an unless order.

80 In response, the defendant made almost the same points that it had made before AR Koonar. In essence, the defendant argued that the plaintiff had abused the court's process with regard to the Category 1 documents, even if it did disclose them. Next, there was non-disclosure of the Unless Order Categories 2 and 5 documents, with the result that the striking out was plainly warranted. Finally, Mr Teo submitted that there was no need to consider if striking out was a proportionate response. This is because, in the face of an intentional and contumelious breach of an unless order, the only proportionate response must be its stated consequences, that is, striking out.

³⁹ PWS at para 96.

⁴⁰ PWS at para 99.

My decision: RA 24 was dismissed

81 After considering the parties' submissions, I dismissed RA 24 for the reasons below.

The applicable law

82 I turn first to discuss the applicable law as to when a court can strike out a party's pleadings since this was the subject of extensive oral submissions before me. In my view, a court can strike out a party's pleadings in two instances relevant to the present case: (a) for breach of an unless order, and (b) for non-compliance with discovery obligations. In some cases, such as the present one, the two instances can be combined. This can occur when a party does not comply with its discovery obligations that were also made the subject of an unless order.

(1) Striking out for breach of an unless order

83 I begin with when a court can strike out a party's pleadings for breach of an unless order. As a preliminary point, while not often stated, the court's power to impose an unless order following a party's failure to comply with its discovery obligations can be located in O 24 r 16(1) of the ROC 2014 or as part of its inherent powers. This is because O 24 r 16(1) provides that a court can make such order as it thinks fit following such non-compliance. This must include the imposition of an unless order. But if an unless order is imposed pursuant to O 24 r 16(1), it must be predicated on there having been non-compliance to begin with. Also, as I will discuss below, O 24 r 16(1) likewise provides the basis for a court to strike out a party's pleadings for its failure to comply with its discovery obligations, without the need for that party to have breached an unless order. Further, while the present case concerned

the ROC 2014, I am preliminarily of the view that the principles that I discuss in relation to O 24 r 16(1) can potentially apply to O 11 r 7 of the Rules of Court 2021. This is because, as has been noted, O 11 r 7 is “substantively similar” to O 24 r 16 with some differences (see *Singapore Rules of Court: A Practice Guide, 2023 Edition* (Chua Lee Ming and Paul Quan eds) (Academy Publishing, 2023) at p 233).

84 Having disposed of this preliminary point, I now turn to the question of what the appropriate test is for striking out for breach of an unless order. In this regard, the Court of Appeal in *Syed Mohamed Abdul Muthaliff and another v Arjan Bhisham Chotrani* [1999] 1 SLR(R) 361 (“*Syed Mohamed*”) (at [15]) accepted the English Court of Appeal’s summary of the applicable principles in *Hytec Information Systems Ltd v Coventry City Council* [1997] 1 WLR 1666 (“*Hytec*”) (at 1674–1675):

(1) An unless order is an order of last resort. It is not made unless there is a history of failure to comply with other orders. It is the party’s last chance to put his case in order. (2) Because that was his last chance, a failure to comply will ordinarily result in the sanction being imposed. (3) This sanction is a necessary forensic weapon which the broader interests of the administration of justice require to be deployed unless the most compelling reason is advanced to exempt his failure. (4) It seems axiomatic that if a party intentionally or deliberately (if the synonym is preferred) flouts the order then he can expect no mercy. (5) A sufficient exoneration will almost inevitably require that he satisfies the court that something beyond his control has caused his failure to comply with the order. (6) The judge exercises his judicial discretion in deciding whether or not to excuse. A discretion judicially exercised on the facts and circumstances of each case on its own merits depends on the circumstances of that case; at the core is service to justice. (7) The interests of justice require that justice be shown to the injured party for the procedural inefficiencies caused by the twin scourges of delay and wasted costs. The public interest in the administration of justice to contain those two blights upon it also weighs very heavily. Any injustice to the defaulting party, though never to be ignored, comes a long way behind the other two.

85 Thus, the Court of Appeal has held that while an unless order should not be made unless there has been a trend of non-compliance by the defaulting party, the failure to comply with such an order, once made, will ordinarily result in the stated sanctions being imposed (see *Mitora Pte Ltd v Agritrade International (Pte) Ltd* [2013] 3 SLR 1179 (“*Mitora*”) at [35]). The defaulting party can generally only avoid this consequence if it demonstrates that its breach had not been intentional and contumelious (at [35]). That party must also show that it had made positive efforts to comply but was prevented from doing so by extraneous circumstances (at [36]). In laying down this principle, the court relied on Sir Nicolas Browne-Wilkinson VC’s approach in the English Court of Appeal decision of *In re Jokai Tea Holdings Ltd* [1992] 1 WLR 1196 (“*Jokai Tea*”) (at 1203):

In my judgment, in cases in which the court has to decide what are the consequences of a failure to comply with an “unless” order, the relevant question is whether such failure is intentional and contumelious. The court should not be astute to find excuses for such failure since obedience to orders of the court is the foundation on which its authority is founded. But if a party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances, such failure to obey is not to be treated as contumelious and therefore does not disentitle the litigant to rights which he would otherwise have enjoyed.

The rationale for Browne-Wilkinson VC’s opinion can be seen from his explanation a few paragraphs prior (at 1202), where he said:

The basis of the principle is that orders of the court must be obeyed and that a litigant who deliberately and without proper excuse disobeys such an order is not allowed to proceed. The rationale of such penalty being that it is contumelious to flout the order of the court, if a party can explain convincingly that outside circumstances account for the failure to obey the peremptory order and that there was no deliberate flouting of the court’s order, his conduct is not contumelious and therefore the consequences of contumely do not flow.

86 Properly considered, a defaulting party's failure to comply with an unless order is by default taken as being contumelious, unless that party can show that it was prevented by outside circumstances from obeying the said order. If that party can do so, then its failure to comply with the unless order will not be considered contumelious.

87 However, there appears to be some divergence as to the approach in deciding if a defaulting party possessed, loosely speaking, the requisite mental state in breaching an unless order for the purposes of striking out. After all, the Court of Appeal in *Mitora* held (at [36]) that the test of "intentional and contumelious" should *not* be the sole test to decide whether to strike out. And in the earlier case of *Syed Mohamed*, the Court of Appeal had already set out its understanding of "contumelious" by referring (at [14]) to Sir John Megaw's preference in *Jokai Tea* for a test of "contumacy", that is, the "perverse and obstinate resistance to authority" (at 1207). Thus, on one reading, Sir John's test is actually a *narrower* test than what the Court of Appeal has since adopted in *Mitora*. Alternatively, one might argue that Sir John was simply advocating for a more precise English word, without differing on the substance of the test. However, this alternative interpretation is not supported by the Court of Appeal's statements. In *Syed Mohamed*, after referencing Sir John's test, the Court of Appeal then referred (at [14]) to Auld LJ's preference for a *wider* test in *Hytec*, where the learned judge included other tests such as "negligence, incompetence or sheer indolence" (at 1677). This supports my reading of *Mitora* and *Syed Mohamed*, that the approach in Singapore to decide, if a defaulting party had the requisite "mental state" in breaching an unless order for the purposes of striking out, is wider than that adopted by Browne-Wilkinson VC in *Jokai Tea*, who had focused exclusively on whether the defendants there were

“contumelious”. This appears to have affected the relevance of considerations of proportionality, which I discuss below.

88 In any case, regardless of the foregoing, it appears that Browne-Wilkinson VC’s approach in deciding whether a party’s case should be struck out, does *in fact* turn primarily, if not solely, on whether the defaulting party’s failure to comply was contumelious. This is clear from the learned judge’s approach on the facts of *Jokai Tea* itself. In that case, the plaintiff, a bank, sought an order against the defendants for the rectification of the register of members of Jokai Ltd by the striking out of Frenodial Ltd as the holder of certain shares, and for the plaintiff to be inserted as the rightful holder. On 23 January 1986, the plaintiff had served a request for further and better particulars of the defence. When this was not answered, the plaintiff served a summons for an order for the particulars on 10 August 1987. When this was again not complied with despite an extension until 6 November 1987 that was mutually agreed to, a Registrar ordered that the particulars should be served within 56 days, failing which the defence would be struck out. On 5 January 1988, being after the expiry of the 56 days, the plaintiff restored its motion for judgment. The defendants served the further and better particulars on 12 and 13 January 1988, having mistaken the deadline to have been 15 January 1988 instead of 5 January 1988. On 27 January 1988, the defendants also served proposed amendments to their defence, which involved the abandonment of all the paragraphs on which further and better particulars had been ordered. On these facts, Browne-Wilkinson VC held (at 1203) that, apart from the prior question of whether leave to amend the defence should have been granted, he had to decide whether the defendants’ failure in complying with the unless order was contumelious. He held (at 1204) that it was not because the defendants were misled by their solicitors into thinking that the deadline was 15 January 1988. While the learned

judge also thought that the defendants could have acted with greater diligence, he did not think that to be determinative (at 1205). As such, it might be surmised that Browne-Wilkinson VC did not adopt Auld LJ's (admittedly later) approach in *Hytex* of including even negligence as a possible mental state.

89 However, as against this rather strict consequence of breaching an unless order, the Court of Appeal in *Mitora* also observed (at [37]) that “even where it has been established that an intentional and contumelious breach of an ‘unless order’ had been committed, the court must nevertheless determine what sanction should be imposed as a result”. Indeed, the cases reveal “a tendency to be guided by considerations of proportionality in assessing breaches of ‘unless orders’” (at [39]). As such, the court cautioned that the draconian sanction of striking out a litigant’s claim or defence in its entirety should not be the default consequence of an unless order, since this would deprive the litigant of its substantive rights by reason of a procedural default (at [46]). In support of this proposition, the court cited (at [37]) Parker LJ’s approach as follows (see *Jokai Tea* at 1206):

... I have used the expression “so heinous” because it appears to me that there must be degrees of appropriate consequences even where the conduct of someone who has failed to comply with a penal order can properly be described as contumacious or contumelious or in deliberate disregard of the order, just as there are degrees of appropriate punishments for a contempt of court by breach of an undertaking or injunction. Albeit deliberate, one deliberate breach may in the circumstances warrant no more than a fine, whilst another may in the circumstances warrant imprisonment. ...

90 On first impression, the consideration of proportionality would appear to be inconsistent with the Court of Appeal’s earlier statements in *Mitora* that it is “self-evident that the breach of an ‘unless order’ will *automatically* trigger its specified adverse consequences” [emphasis added], and that “[t]he onus will then be on the defaulting party to demonstrate that the breach had not been intentional and contumelious so as to avoid those consequences” (at [35]).

However, this apparent inconsistency can be explained by the Court of Appeal's reliance on what is really Parker LJ's *alternative* approach in *Jokai Tea*, which contemplated there being different degrees of appropriate consequences even where there had been a deliberate breach of an unless order. In contrast, as I have tried to explain above, Browne-Wilkinson VC's approach in the same case, which the Court of Appeal also relied on in *Mitora*, did not consider the possibility of there being different degrees of appropriate consequences in response to a deliberate breach of an unless order. Browne-Wilkinson VC did not have to consider this issue because he concluded that the breach in that case was not contumelious.

91 In sum, it may be better to state that under Singapore law, a court *always* has to consider whether striking out is a proportionate response to a defaulting party's breach of an unless order, even if that breach was intentional and contumelious. Based on a careful reading of *Mitora*, such an approach is based on a preference for Parker LJ's alternative approach in *Jokai Tea*, as opposed to Browne-Wilkinson VC's stricter approach in the same case. As such, it may not be helpful to repeat, in the same space, the seemingly inconsistent principle that the failure to comply with such an order once made will ordinarily result in the stated sanctions being imposed. Instead of the starting point being to enforce the stated consequences of an unless order, the starting point under Singapore law appears to be the consideration of whether striking out would be a proportionate response to the breach of the unless order. However, as I will discuss below, this does not mean that a court will treat as immaterial a defaulting party's intentional and contumelious breach of an unless order.

- (2) Striking out under O 24 r 16(1) of the Rules of Court 2014 for breach of discovery obligations

92 Against this instance concerning the breach of an unless order, I turn to the court’s power to strike out a party’s pleadings for non-compliance with its discovery obligations pursuant to O 24 r 16(1) of the ROC 2014. As the Court of Appeal suggested in *Mitora*, a court’s power to strike out a claim or defence for non-compliance with discovery obligations under O 24 r 16(1) exists in parallel to the unless order regime (at [47]). Order 24 r 16(1) provides as follows:

**Failure to comply with requirement for discovery, etc.
(O. 24, r. 16)**

16.—(1) If any party who is required by any Rule in this Order, or by any order made thereunder, to make discovery of documents or to produce any document for the purpose of inspection or any other purpose, fails to comply with any provision of the Rules in this Order, or with any order made thereunder, or both, as the case may be, then, without prejudice to Rule 11(1), in the case of a failure to comply with any such provision, the Court may make such order as it thinks just including, in particular, an order that the action be dismissed or, as the case may be, an order that the defence be struck out and judgment be entered accordingly.

As such, in response to a party’s non-compliance with its discovery obligations, O 24 r 16(1) provides the court with the power to make any order that is just, including the dismissal of the action and/or striking out of the defence, with judgment to be entered accordingly.

93 The rationale behind the court’s power to make such draconian orders, even in the absence of an unless order, is to give effect to the parties’ obligation to conduct litigation with their “cards face up on the table” (see the Court of Appeal decision of *Teo Wai Cheong v Crédit Industriel et Commercial and*

another appeal [2013] 3 SLR 573 (“*Teo Wai Cheong*”) at [41]). As the Court of Appeal further elaborated in *Teo Wai Cheong* (at [41]–[42]):

41 Discovery is a fundamental rule in our system of litigation ... litigation is conducted “cards face up on the table”. There are several reasons for this cardinal principle of litigation. The broad rationale of any system of discovery is said to be the just and efficient disposal of litigation ... The just and efficient disposal of litigation can only be achieved by ensuring that parties disclose the relevant evidence before any hearing of the matter, thus allowing counsel and the parties to evaluate the strength of their respective cases, clarify the issues between them, reduce surprises at the trial and encourage settlement ... Such a philosophy recognises that although our system remains an adversarial one, it is not one that condones a litigant winning on “tactical considerations” alone ...

42 ... the principle that litigation is to be conducted with “cards face up on the table” helps ensure that “real justice between opposing parties” is done. Unless the court has before it *all* the relevant information, such an object cannot be achieved. In our view, this principle is equally designed to ensure that a party has an effective and unimpaired opportunity to conduct its cross-examination. Without the relevant evidence disclosed before the hearing of a matter, a litigant cannot be said to be in a position to adequately prepare his cross-examination and so to effectively test a witness’s testimony.

[emphasis in original]

94 Andre Maniam JC (as he then was) in the High Court decision of *Saxo Bank A/S v Innopac Holdings Ltd* [2022] 3 SLR 964 summarised the applicable principles in relation to when a court is to strike out pleadings under O 24 r 16(1) in the face of a party’s non-compliance with its discovery obligations. The learned judge’s very helpful summary, which, in my respectful view, warrants setting out in full, is as follows (at [94]):

(a) The exercise of the discretion whether to strike out is a fact-sensitive inquiry (*Alliance Management SA v Pendleton Lane P and another and another suit* [2008] 4 SLR(R) 1 (“*Alliance Management 2008*”) ([51] *supra*) at [6]), taking all circumstances of the case into account, including prejudice suffered by the innocent party (*Mitora Pte Ltd v Agritrade International (Pte) Ltd* [2013] 3 SLR 1179 (“*Mitora*”) at [38] and

[48]), and considerations of proportionality are relevant in assessing the consequence of a breach (*Mitora* at [35]–[41]).

(b) Cases sit on a spectrum between procedural defaults of a technical complexion (unlikely to warrant striking out) and striking out being justified by: (i) procedural abuse or questionable tactics; (ii) contumacious failure to comply with peremptory orders; or (iii) persistent defaults amounting to contumacious conduct (*Alliance Management 2008* at [6]).

(c) “It is self-evident that the breach of an ‘unless order’ will automatically trigger its specified adverse consequences” (*Mitora* at [35]).

(d) When an “unless order” has been breached, “[t]he onus will then be on the defaulting party to demonstrate that the breach had not been intentional and contumelious so as to avoid those consequences (*Mitora* at [35]); more fundamentally, “the party seeking to escape the consequences of his default must show that he had made positive efforts to comply but was prevented from doing so by extraneous circumstances” (*Syed Mohamed Abdul Muthaliff and another v Arjan Bhisham Chotrani* [1999] 1 SLR(R) 361; *Mitora* at [36]).

(e) “[E]ven where it has been established that an intentional and contumelious breach of an ‘unless order’ had been committed, the court must nevertheless determine what sanction should be imposed as a result” (*Mitora* at [37]).

(f) It is relevant whether, notwithstanding earlier breaches, all discoverable documents have subsequently been disclosed (*Mitora* at [41]); however, “an action or defence can be struck out for failure to make discovery of documents even if the defaulting party rectifies his non-compliance” (*Mitora* at [47]).

(g) “The court’s power to strike out an action may be properly invoked in cases involving an inexcusable breach of a significant procedural obligation. It follows that the breach of an ‘unless order’ which compels discovery will be susceptible to such an order.” (*Mitora* at [47]).

(h) “Although the normal prerequisite for the striking out of an action under r.16 is the existence of a real or substantial or serious risk that a fair trial will no longer be possible, in cases of contumacious conduct, the deliberate destruction or suppression of a document or the persistent disregard of an order of production would engage the court’s jurisdiction and justify a striking-out order even where a fair trial was still possible. Wilful disobedience is not required, as a failure to comply with court orders through negligence, incompetence or sheer indolence may justify a striking out”: *Singapore Civil*

Procedure 2021 vol 1 (Cavinder Bull gen ed) (Sweet & Maxwell, 2021) at para 24/16/1; *Mitora* at [48].

- (3) Two broad situations for striking out due to non-compliance with discovery obligations

95 To summarise the discussion above, there are two broad situations when a court may order a striking out due to a party’s non-compliance with its discovery obligations. In my respectful view, it is helpful to distinguish the two situations, which may require the application of different principles.

96 The first situation is concerned with the situation where a party breaches discovery obligations that have been made the subject of an unless order, with striking out stipulated as the consequence of non-compliance with the unless order. In this situation, unless the defaulting party can show that its breach had not been intentional and contumelious, then the consequence of striking out should apply, but *always* subject to the consideration of proportionality.

97 In my respectful view, while the Court of Appeal stated that it is always necessary to consider proportionality in deciding whether striking out is the appropriate sanction for breach of an unless order, this must necessarily be on a more *limited* basis as compared to a situation where there had not been an unless order. Otherwise, there would be no practical consequence to the imposition of an unless order. Also, if proportionality were to overwhelm all practical consequences of the unless order, then it would reduce the potency of the various judicial statements that an unless order is a defaulting party’s “last chance to put his case in order” and that “a failure to comply will ordinarily result in the sanction being imposed” (see *Hytex* at 1674–1675, accepted by the Court of Appeal in *Syed Mohamed* at [15], and also in *Mitora* at [42]). In my respectful view, the Court of Appeal could not have intended for such an outcome, which is what the plaintiff effectively argued for in the present case.

98 In saying this, I am aware that the Court of Appeal in *Mitora* held (at [44]) that because unless orders are such potent tools, they must therefore be used with due care. However, that simply underscores the point that the consideration of proportionality cannot overwhelm the practical consequences of an unless order. Accordingly, the court pertinently pointed out (at [45]) that “[s]ince it is axiomatic that ‘unless orders’ must mean what they say, it is imperative that such orders are drafted with due care and consideration”. Further, the court cited a learned academic text to the effect that parties will only take unless orders seriously if they believe that they will be enforced (at [45], citing *Zuckerman on Civil Procedure: Principles of Practice* (Sweet & Maxwell, 2nd Ed, 2003) at para 10.143). It appears to me that the court’s concern in *Mitora* was that unless orders should not be imposed indiscriminately. But once an unless order is legitimately imposed, then I fail to see why its effect should be considerably softened. This risks parties not taking them seriously.

99 Seen in this manner, and mindful of the authority that is binding on me, I respectfully suggest that the mandated consideration of proportionality can be applied on a sliding scale. The application of proportionality should thus depend, not only on the consequences of striking out on the defaulting party, but also on the mental state of the defaulting party. Thus, if the breach was truly intentional and contumelious, then striking out would in most cases be *the* proportionate response because it reinforces the serious nature of an unless order. An alternative analysis is that, a court might take a *much more* limited consideration of the consequences of striking out on the defaulting party in light of its deliberate non-compliance. In my view, both analyses lead to the same result. In contrast, where the breach of the unless order was due to negligence, then a court must take a more generous consideration of proportionality and

avoid striking out. This calibrated application of proportionality would, in my respectful view, better explain the apparent tension between what has often been cited as two important but seemingly inconsistent principles: (a) that the consequences of an unless order (*ie*, striking out) would automatically apply, but that (b) proportionality should apply to temper those consequences.

100 Further, and still on this point, Mr Teo made the interesting argument before me that if a court were to consider the proportionality of striking out following the intentional and contumelious breach of an unless order, that would amount to an attack on the earlier decision to impose the unless order. This is because the imposition of an unless order necessarily embeds with it striking out as an automatic consequence upon breach, functioning, as it were (and to my mind), akin to a smart contract that is “self-executing”. Therefore, it should not be open to a court, when considering if the unless order had been breached, to, in effect, revisit the question of consequences which had already been decided previously, whether by a lower court or another court, especially where the imposition of that unless order has not been successfully challenged. As I reflected to Mr Teo, I found his argument to be very attractive. Indeed, were I not bound by authority, I would have thought that it is axiomatic that an unless order, being variously described as an “order of last resort”, should mean what it says if there had been an intentional and contumelious breach thereof. But bound as I am by authority (and for good reasons), I am compelled to reject Mr Teo’s argument.

101 Apart from the above-mentioned situation where the breach of discovery obligations may result in a striking out, the second situation is concerned with situations where the relevant discovery obligations have not been the subject of an unless order (with striking out stipulated as a consequence of non-compliance). In this situation, a court should consider more *fully* whether the

breach of these discovery obligations would lead to a real, substantial, or serious risk that a fair trial is no longer possible, unless the defaulting party's conduct is intentional and contumelious. Where the party's conduct is intentional and contumelious, then that would weigh heavily in favour of striking out even if a fair trial is possible. This is where it is strongly necessary to consider whether striking out the defaulting party's pleadings is a proportionate response to the non-compliance with discovery obligations. In short, I find that a fuller consideration of proportionality of striking out in this situation, where there was no unless order (as compared to the more limited approach I had suggested for breach of an unless order), is warranted. This is because such an approach would give real, albeit limited, effect to an unless order, as its consequences would flow more readily as a result of its breach. Thus, in this context, an unless order should mean what it says, provided that it had been legitimately imposed and clearly stated.

102 Accordingly, I would suggest the following analytical framework for a court to decide whether a party's breach of its discovery obligations should result in a striking out of its case:

- (a) First, are the discovery obligations made the subject of an unless order that was legitimately imposed and clearly stated?
 - (i) If so, then move on to (b).
 - (ii) If not, then consider the matter under O 24 r 16(1) of the ROC 2014 and the relevant principles, with an especial consideration of whether striking out the defaulting party's pleadings is a proportionate response.
- (b) Second, did the party concerned breach the unless order?

(c) Third, if so, can the defaulting party show that its breach had not been intentional and contumelious?

(i) If so, then consider the matter with an especial consideration of whether striking out the defaulting party's pleadings is a proportionate response.

(ii) If not, then subject to a limited consideration of proportionality, the consequences of the unless order should apply generally.

103 With the applicable law in mind, I turn now to explain why I dismissed RA 24. To be safe, because I was aware that what I have said above may not be entirely aligned with a strict reading of higher authority (although I have tried to advance an understanding of the law that conforms, in my view, with such higher authority), I proceeded with the more conventional approach that is derived from *Mitora*, the conventional approach being that I considered proportionality on a normal and not limited basis in the present case.

The Second Unless Order was legitimately imposed and clearly stated

104 I start with a threshold point: in my judgment, AR Koonar had imposed the Second Unless Order legitimately and stated it in clear terms. Indeed, Mr Mathew candidly acknowledged that the plaintiff had not appealed against AR Koonar's imposition of the said Order.

105 Further, I did not think that the plaintiff had any scope to challenge the learned AR's imposition of the Second Unless Order. Indeed, AR Koonar provided clear reasons, guided by the Court of Appeal decision in *Mitora*, in his oral grounds to explain his decision to impose the Second Unless Order. The learned AR had made the following points.

(a) First, the plaintiff had been in breach of the First Unless Order. AR Koonar regarded the plaintiff's breaches as being serious in nature and I saw no reason to disagree with that assessment.

(b) Second, the plaintiff had no valid excuse for its failure to comply with the discovery orders. This was especially since the plaintiff had more than a year since 6 July 2022 to comply but had still failed to do so. It was irrelevant that the plaintiff claimed to have become aware of the need to disclose further documents only after receiving the D&N 27 September Letter on 27 September 2023.

(c) Third, this context therefore made it appropriate for the court to impose the Second Unless Order, with the consequence of striking out in the event of non-compliance. AR Koonar noted that while the plaintiff's counsel (who had not been Mr Mathew) suggested that there might be alternatives to an unless order, counsel did not elaborate what such alternatives might be. The learned AR also did not see any viable alternative to an unless order.

(d) Fourth, while the plaintiff's case could have been struck out for its failure to comply with the First Unless Order, AR Koonar thought to give the plaintiff a final opportunity to comply with the Discovery Order. AR Koonar regarded this as an indulgence to the plaintiff, but an outcome that was necessitated by the underlying principle of proportionality.

106 I respectfully agreed with AR Koonar's careful approach in the First Striking Out Application. As such, I regarded the Second Unless Order to have been legitimately imposed and stated in clear terms. In any event, as I already

mentioned above, the plaintiff never appealed against the imposition of the Second Unless Order.

The plaintiff was clearly in breach of the Second Unless Order

107 Following from the above, I found that the plaintiff was clearly in breach of the Second Unless Order.

(1) Unless Order Category 2 documents: advertisements

108 I turn to the Unless Order Category 2 documents and consider first the documents relating to the plaintiff’s advertisements of its products. In this regard, I agreed with AR Koonar’s conclusion that the evidence suggests that there must be further responsive documents in the plaintiff’s PCP that have not been disclosed.

(A) THE SCOPE OF THE PLAINTIFF’S DISCOVERY OBLIGATIONS WAS CLEAR

109 As a threshold point, I found that the plaintiff clearly understood the scope of its discovery obligations in relation to the Unless Order Category 2 advertisements. I came to this conclusion despite Mr Mathew’s suggestion that Category 2 had originally focused on documents as opposed to multimedia advertisements.

110 To begin with, that advertisements were clearly contemplated by Category 2 can be seen from the plain text of the Discovery Order, which refers to “[a]ll correspondence and written documents evidencing that the [p]laintiff had not falsely *advertised* and represented that its products had certain

performance characteristics ...” [emphasis added].⁴¹ Further, the plaintiff itself understood Category 2 to include advertisements. This is evidenced by the plaintiff’s previous disclosure in the PSLOD, back on 8 November 2022, of various online advertisements in respect of its products. Finally, in response to the D&N 27 September Letter that sought disclosure of various advertisements, and expressly requested for (at para 16(w)) “all print and multimedia advertisements generated and/or published by [the plaintiff] in respect of the [p]roducts”,⁴² the Solitaire 2 October Letter expressly agreed to “[provide] discovery of the documents referred to at paragraphs ... 16(w)”.⁴³ Thus, it is far too late for the plaintiff to argue that the Category 2 documents, especially in relation to the advertisements, had somehow shifted in meaning over time, or that it had somehow subsequently come to misunderstand the scope of Category 2.

(B) THERE WAS OBJECTIVE EVIDENCE THAT THE PLAINTIFF HAD NOT DISCLOSED SOCIAL MEDIA ADVERTISEMENTS

111 Next, I found that based on the buyer complaints filed against the plaintiff, the plaintiff had advertised the “Products” on social media platforms such as Facebook. This was clear from the buyer complaints at s/nos 29 and 121 of the list of the buyer complaints filed against the plaintiff disclosed at s/no 72 of the Defendant’s List of Documents dated 22 March 2022. For example, the buyer complaint at s/no 29 stated that “I bought this item through a [F]acebook ad, but never received it ...”. Further, based on the defendant’s investigations carried out by Kroll Associations (S) Pte Limited, the plaintiff had made further

⁴¹ Plaintiff’s Bundle of Documents filed on 9 February 2024 at p 80.

⁴² 7HKD at p 236.

⁴³ 7HKD at p 239.

advertisements for the Products through YouTube, Facebook, product review websites, advertorial pages, online news reporting, tabloid publications, and podcasts.

112 However, despite the defendant raising this issue at the First Striking Out Application and the Second Striking Out Application, the plaintiff had not disclosed its advertisements made through social media, apart from disclosing in its 5th Supplementary List of Documents some of the YouTube advertisements that the defendant had disclosed in its 3rd Supplementary List of Documents. The plaintiff had persisted in doing so despite the defendant being able to locate and adduce evidence that plainly should be in the plaintiff's PCP.

(C) THERE WAS OBJECTIVE EVIDENCE THAT THE PLAINTIFF HAD NOT DISCLOSED ADVERTISEMENTS IT RECEIVED THROUGH FREELANCE MARKETERS

113 Further, the evidence suggested that the plaintiff had been selective in disclosing the type of information that freelance marketers would be able to obtain for each of the individual Products. In the first place, I did not think that the plaintiff had exercised reasonable efforts in locating the required advertisements. In this regard, the plaintiff merely sent out a broad request to the freelance marketers to obtain these advertisements. In fact, as AR Koonar observed, it is telling that the only examples of the plaintiff's advertisements disclosed in the Suit had been provided by the *defendant* through its own forensic efforts. This makes it clear that the required advertisements could have been located through reasonable efforts. The fact that the plaintiff did not manage to find these advertisements led me to infer that it had not exercised reasonable efforts in this regard. Indeed, even when the defendant located advertisements of the Products that contain links to the Stores, the plaintiff denied that the advertisements were connected to it.

114 In this regard, Mr Karim claimed in his 10th and 11th Affidavits that the freelance marketers had only been given the photographs and videos of the Products, which the plaintiff had already disclosed. However, as AR Koonar found, this is contradicted by what the M4Trix Network (“Matrix Portal”) (which is a platform controlled by Mr Karim for the freelance marketers to obtain advertising material from) says, which is that the freelance marketers are provided with a starter pack and a creative content pack that goes beyond merely photographs and videos. Indeed, an email from a freelance marketer, Jasneet Sokhi, contradicts Mr Karim’s account because she stated that she had only copied and pasted material from the Matrix Portal. This means that the freelance marketers were in fact provided with materials *beyond* the photographs and videos of the Products, materials which were under the control of the Matrix Portal and hence the plaintiff. Yet, the plaintiff has not disclosed this other content.

115 Further, even if the plaintiff had exercised reasonable efforts in reaching out to the freelance marketers to obtain the advertisements responsive to its discovery obligations, I agreed with AR Koonar that the plaintiff failed to provide discovery of the relevant responses it received. For example, Jasneet Sokhi had provided the plaintiff with a link to her Pinterest account where the Products were advertised on 4 January 2024. She further informed the plaintiff that she would delete the account in a weeks’ time. Despite coming into possession of this document in the form of Jasneet Sokhi’s Pinterest account, the plaintiff did not provide discovery of it. In fact, the plaintiff allowed the link to expire. Jasneet Sokhi’s Pinterest page would have clearly been relevant to the Suit because she had explained that she had simply copied and pasted material from the Matrix Portal to her page. Had the page been disclosed, it would have shed light on the plaintiff’s degree of control over the content of the

advertisements. In addition to Jasneet Sokhi's email, the plaintiff also received other responses from the freelance marketers who might have been able to provide the plaintiff with the requested advertisements. While the plaintiff had received these responses before 5 January 2024 (which was when Mr Karim filed his un-commissioned 10th Affidavit), the plaintiff had not provided any further discovery of the same.

(D) THE PLAINTIFF HAD NOT PROVIDED A GOOD EXPLANATION FOR ITS FAILURE TO COMPLY

116 Finally, the plaintiff had not provided a good explanation for its failure to disclose the advertisements. In this regard, it had advanced two contradictory explanations as to why it could not provide these documents. At the First Striking Out Application, Mr Karim's evidence was that the plaintiff's related company, Novads (OU) ("Novads"), had engaged affiliate companies to do advertising work for the benefit of the plaintiff and its related companies. Therefore, as Mr Karim explained, the plaintiff could not obtain the advertisements since it did not have a contractual relationship with these affiliate companies that actually carried out the advertising. However, in his 10th Affidavit, Mr Karim stated at para 44 that it was him, acting on behalf of the *plaintiff*, and not Novads, who emailed the freelance marketers on 29 December 2023 requesting for documents. This completely contradicted Mr Karim's evidence that it was Novads which engaged affiliated companies.

117 Moreover, subsequent to the making of the Second Unless Order, Mr Karim's 10th and 11th Affidavits revealed that the plaintiff ran a freelance commission-based marketing program through the Matrix Portal. This account was also confirmed by the affidavits of evidence-in-chief filed by the plaintiff's own witnesses in the Suit. This completely contradicted the plaintiff's earlier account that affiliate companies had carried out the advertising. Instead, the

plaintiff possessed a greater degree of control over the advertisement of its Products through the Matrix Portal than it had previously revealed. Indeed, according to information published on the Matrix Portal, freelance marketers are provided with a starter pack for all offers, which was described as “a creative content pack” that includes “headlines, banners, email marketing text, and presale pages”.⁴⁴ This demonstrates that the plaintiff had a great degree of control over the content of its advertisements, even if I accepted that the freelance marketers were responsible for the placement of those advertisements. As AR Koonar concluded, this showed that Mr Karim had misled the court in explaining why the plaintiff could not provide discovery earlier.

118 For these reasons, I agreed with AR Koonar that the plaintiff was in breach of its obligations in relation to the Unless Order Category 2 documents.

(2) Unless Order Category 2 documents: directives, standards, and regulations

119 As for the directives, standards, and regulations referred to in the certifications and test reports disclosed by the plaintiff, I agreed with AR Koonar that the plaintiff had breached the Second Unless Order. AR Koonar had noted in his oral grounds for the First Striking Out Application that these documents must *prima facie* be within the plaintiff’s power. Furthermore, there was no clear hurdle preventing the plaintiff from writing to its suppliers and manufacturers to obtain copies of these documents. Yet, the plaintiff had failed to take exhaustive steps in this regard, despite Mr Karim’s 10th and 11th Affidavits stating that the plaintiff had reached out to five entities to request for the documents but did not obtain any.

⁴⁴ DWS at para 79(c).

120 First, the evidence showed that the plaintiff had only reached out to three, as opposed to five, entities to request the required documents. Indeed, the plaintiff only disclosed, in P6SLOD, emails to three entities, namely: (a) Hongkong Sanjoyo Co, Limited, (b) EforChina Limited, and (c) Shenzhen SUNSKY Technology Limited. Before AR Koonar, the plaintiff's counsel submitted that Mr Karim had made an error in his 10th Affidavit. However, this did not explain why he did not correct this supposed error in his later 11th Affidavit.

121 Second, and in any event, based on the invoices which the plaintiff disclosed, it had obtained the Products from at least 11 suppliers and manufacturers. Apart from an assertion in Karim's 11th Affidavit that the plaintiff had "reached out by way of email to the relevant suppliers and/or manufacturers",⁴⁵ the plaintiff had not clearly explained why it had only reached out to three of those entities. I could only infer that the plaintiff had not reached out to all of its suppliers and/or manufacturers, in breach of the Second Unless Order.

122 Accordingly, I agreed with AR Koonar that the evidence suggested that the plaintiff must have in its PCP documents responsive to Unless Order Category 2 that it has simply not disclosed. I therefore found that the plaintiff was in breach of the Second Unless Order for failing to disclose these documents.

⁴⁵ 11th Affidavit of Karim Mohamed Astoul filed on 17 January 2024 (Karim's 11th Affidavit") at para 30.

(3) Unless Order Category 5 documents

123 As for the Unless Order Category 5 documents, the plaintiff had to produce source documents relating to the “www.17track.net” documents and summaries disclosed by the plaintiff. As I mentioned above, the plaintiff has disclosed the existence of the CRM Database since the Second Unless Order was made. However, like AR Koonar, I did not think that the plaintiff’s belated disclosure of the existence of the CRM Database discharged its discovery obligations. Instead, for the reasons below, I found that the plaintiff had breached its discovery obligations pursuant to Unless Order Category 5.

(A) THERE WAS OBJECTIVE EVIDENCE THAT THE PLAINTIFF HAD NOT DISCLOSED THE SOURCE DOCUMENTS

124 First, the plaintiff had admitted to having “source information” in its PCP. In this regard, Mr Karim explained in his 10th Affidavit that “after the hearing of [the First Striking Out Application], the [p]laintiff managed to retrieve and extract the relevant source information and primary data (some of which were archived) in relation to the transactions in question from this computerised system as such, and has further compiled and organised the data in a table format”.⁴⁶ While Mr Mathew attempted to draw a distinction between what Mr Karim referred to as “source information”, as opposed to the required “source documents”, I thought that the former must include the latter. As such, as the defendant rightly pointed out, the plaintiff did not disclose the source documents it had. Instead, it disclosed its own *summary table* of its invoice numbers, the buyers’ contact information and addresses, and whether the Products purchased were shipped. The plaintiff therefore disclosed another

⁴⁶ 10th Affidavit of Karim Mohamed Astoul filed on 8 January 2024 (“Karim’s 10th Affidavit”) at para 58.

secondary document that was based on the very source documents which the plaintiff was obliged to disclose.

125 Second, despite clearly having the source information within the CRM Database, the plaintiff chose only to disclose a table compiled based on data extracted from the CRM Database, but not the source information itself. I agreed with AR Koonar that the existence of the CRM Database, which the plaintiff itself acknowledged as “set[ting] out a table of information for 17,531 transactions carried out by the [p]laintiff from June 2020 to July 2021 setting out the following information: ... (e) shipping country... (f) shipping status; (g) the third party shipper company”,⁴⁷ was disclosed only belatedly. Indeed, the CRM Database clearly contains information relevant to Category 5 and further shows that the plaintiff had control over source information that was used to create this table of information to begin with. Yet, the plaintiff had not disclosed the underlying source documents that made up the source information.

126 Third, as to the source documents that the plaintiff had, contrary to its previous position, stated that it disclosed in P4SLOD, these were in fact merely screenshots taken from what the plaintiff claimed to be the website of SFC. Similarly, the plaintiff could not just rely on the “www.17track.net” screenshots as proof of delivery because it is a third-party website that relies on data provided by actual carriers like the SFC. I agreed with AR Koonar that the SFC screenshots (as well as the “www.17track.net” screenshots) do not constitute source documents that evidence proof of delivery. Indeed, SFC would be able to produce further primary documents to show that the Products were delivered. I concluded thus because SFC’s website provides that a tracking number will

⁴⁷ PWS at para 82.

be provided on “the receipt, outer packaging of the package or the email”, and users of SFC’s services will receive “email notifications on package status”:⁴⁸

How do I track my SFC package on 17TRACK?

Step 1: Get your tracking number, you can find it in the receipt, outer packing of the package of the email;

...

Why integrate with 17TRACK Tracking API for SFC tracking?

Track and trace your shipments in bulk.

7/24 tech support online.

Stable service with tracking accuracy of up to 99.9%.

Email Notifications on package status.

Dashboard and Data Analysis Visibility.

Multi-account management, facilitating teamwork.

Logistic event translation, improving user experience.

[text in bold in original]

Accordingly, as Mr Teo submitted, the plaintiff would have received, at the very least, email notifications from SFC, informing the plaintiff of the tracking number for each delivery transaction, as well as the delivery status. However, the plaintiff had not disclosed any of these documents.

127 Moreover, the plaintiff would have had the power to compel SFC to disclose the source documents, but there was no evidence that it had done so, or even attempted to do so. Indeed, Mr Karim explained in his 11th Affidavit that the plaintiff had sought SFC’s assistance in obtaining the screenshots.⁴⁹ Yet,

⁴⁸ Karim’s 11th Affidavit at p 107.

⁴⁹ Karim’s 11th Affidavit at para 32(d).

when confronted with the obvious problem that the screenshots did not constitute source documents, the plaintiff adduced no evidence of it contacting SFC for further assistance, or of it having done so but being turned down by SFC.

(B) THE PLAINTIFF HAS NOT PROVIDED A GOOD EXPLANATION FOR ITS FAILURE TO COMPLY

128 Second, the plaintiff had advanced inconsistent accounts of why it could not comply with its discovery obligations in relation to the Unless Order Category 5 documents.

129 In essence, the plaintiff's position at the First Striking Out Application was that it did not have the documents in its PCP. The plaintiff then advanced a different account in Karim's 11th Affidavit for the Second Striking Out Application. The plaintiff asserted for the first time that it had actually disclosed the source documents at s/no 4 of the P4SLOD. Yet, this explanation is itself contradicted by its assertion in Karim's 10th Affidavit that it only managed to retrieve the "source information" *after* the First Striking Out Application. These various accounts are all inconsistent with one another.

130 Accordingly, I agreed with AR Koonar that the evidence suggested that the plaintiff must have documents responsive to the Unless Order Category 5 that are in its PCP that had simply not been disclosed. I therefore found that the plaintiff was in breach of the Second Unless Order for failing to disclose these documents.

(4) Category 1 documents

131 Finally, I agreed with AR Koonar that while the plaintiff had disclosed the Category 1 documents, the evidence (excluding that which the plaintiff

adduced in SUM 326) suggested that its conduct in relation to its discovery obligations was, at the very least, indolent, or negligent. In particular, I found that the plaintiff had previously provided inconsistent accounts in relation to the Category 1 documents and had, before me, then advanced yet another account.

132 To begin with, the plaintiff's position at the hearing of the First Striking Out Application was that the emails that were responsive to Category 1 had been deleted and could not be retrieved. Yet, when asked to provide an explanation on affidavit, the plaintiff was able to provide the very emails that it claimed had been deleted. In fact, the plaintiff gave yet another reason for its failure to disclose these emails earlier: in his 10th and 11th Affidavits, Mr Karim claimed that the plaintiff had provided the relevant emails to its former solicitors, Chevalier, who had then failed to hand these emails to its current solicitors, Solitaire. However, there is no evidence to substantiate this account. Finally, the plaintiff explained at the hearing before me that, based on the evidence that I allowed to be admitted in SUM 326, Chevalier *did* hand the emails over to Solitaire, and that Solitaire did disclose these emails to Dentons.

133 These are all plainly contradictory accounts. Even if the plaintiff's latest account is correct, the plaintiff was, at the very least, indolent, and negligent in advancing all the previous inconsistent accounts to explain why it had not (so it thought) complied with its discovery obligations for the Category 1 documents. This is a breach of the second aspect of the Second Unless Order in respect of these documents, in that the plaintiff had to file a further affidavit to explain the steps taken to obtain and provide discovery of the documents concerned. It goes without saying that this explanation cannot be unsubstantiated. As it turned out, the plaintiff's explanation in relation to the Category 1 documents in Karim's 11th Affidavit was clearly false, especially that Chevalier had not handed over to Solitaire. Despite the plaintiff's latest seemingly credible explanation through

the evidence adduced in SUM 326 (and I made no conclusive finding in this regard), the fact remained that the plaintiff made up various explanations on affidavit, which was later shown to be false.

134 Accordingly, I found the plaintiff's various purported reasons for not disclosing the Category 1 documents to be inconsistent. The plaintiff's conduct strongly suggested that its conduct towards its discovery obligations for the Category 1 documents was, at the very least, indolent, and negligent.

135 For all these reasons above, I found that the plaintiff had breached the Second Unless Order. The burden fell on it to demonstrate that its breach had not been intentional and contumelious.

The plaintiff failed to show that its breach had not been intentional and contumelious

136 In light of the picture that emerged from the evidence, I found that the plaintiff failed to show that its breach had not been intentional and contumelious. Instead, I agreed with AR Koonar that the the plaintiff had "played a protracted game of cat and mouse with the Court and the Defendant during discovery", and that its conduct was "inexcusable" and constituted "a blatant abuse of process". This is borne out by the following points.

137 First, the plaintiff had seen fit to take up inconsistent accounts to explain why it could not comply with its discovery obligations. For example, its position in relation to the Category 1 documents suggests that it was being untruthful when it stated earlier that the responsive documents had been deleted. Similarly, the plaintiff's changing position as to the degree of control it had over the advertisements clearly showed that it had been untruthful at some point in time, either previously, or when appearing before me. The plaintiff's explanation that

it had appointed affiliate companies to do its advertising, is simply inconsistent with the seeming truth that has since emerged, which is that Mr Karim, its CEO, actually ran the Matrix Portal, which does the plaintiff's advertising. Both cannot be true at the same time, which must mean that the plaintiff was being untruthful in at least one of its explanations.

138 Second, the plaintiff had also avoided disclosing clearly responsive documents that are within its PCP. For example, the email from Jasneet Sokhi clearly disclosed a relevant piece of evidence in relation to the plaintiff's advertisements. Yet, the plaintiff chose not to disclose this and allowed the Pinterest account to lapse. The same goes with the CRM Database. Despite clearly having the source information within the CRM Database, the plaintiff chose only to disclose a table compiled based on data extracted from the CRM Database, rather than the source information itself.

139 In sum, the plaintiff had failed to show that its breach had not been intentional and contumelious.

The striking out of the plaintiff's case is a proportionate response to its non-compliance with its discovery obligations

140 Bearing in mind the more conventional reading of the Court of Appeal's guidance in *Mitora*, I decided that the striking out of the plaintiff's case was a wholly proportionate response to its non-compliance with its discovery obligations.

(1) The materiality of the evidence

141 To begin with, I rejected the plaintiff's argument that the documents in Category 1, Unless Order Category 2, and Unless Order Category 5 are not

material because, among other reasons, they mainly related to the buyer complaints and/or payment invalidation requests, which are no longer relevant given the defendant's amendments to its Defence.

142 I disagreed with this argument because the D&CC2 is plainly still predicated on the defendant establishing these complaints.

143 First, in order to justify its imposition of a Permanent Limitation on the Account, the defendant pleaded at para 14(c) that “the high number of buyer complaints and/or payment invalidation requests filed against the [p]laintiff in less than two months after the Account was set up ... suggested a high risk associated with the Account”. The defendant's pleading still relies on buyer complaints. This renders the documents sought in Category 1 relevant and material.

144 Second, even if I accepted that the defendant did not need to rely on the Permanent Limitation, the defendant also justified the LD Deduction by explicit or implicit reference to the buyer complaints and/or payment invalidation requests. This is because the defendant pleaded at para 18(d) that the plaintiff's sale of the Products was in breach of the AUP in that, broadly, the Products either infringed some intellectual property rights, were counterfeit, or were never in the plaintiff's control or possession. Indeed, the defendant pleaded at para 18(d)(iii) that “approximately 50% of the complaints and/or payment invalidation requests filed by the [p]laintiff's buyers as at 4 August 2020 stated that the buyers never received the products purchased”. This renders the documents sought in Category 1, Unless Order Category 2 (advertisements), and Unless Order Category 5 relevant and material. In this regard, I did not agree with the plaintiff's argument that the defendant “is merely relying on its experts' answers to hypothetical questions (*ie*, that their experts' opinions are

premised on assumptions that the advertisements were received in the relevant jurisdictions) to allege a violation of law, ordinance or regulation”. Unless the defendant has these advertisements in the first place, it cannot even begin to make out its case, let alone rely on its experts’ opinion.

145 Third, the defendant likewise justified the LD Deduction on the basis that the plaintiff violated laws, statutes, ordinances, and/or regulations. This clearly renders the documents sought in Unless Order Category 2 (directives, standards, and regulations) relevant and material because they reveal whether the plaintiff had breached the relevant laws, statutes, ordinances, and/or regulations. This therefore puts paid to the plaintiff’s argument that there is no direct link between the “Breach of AUP Liquidated Damages Clause and this sub-category of documents to be produced in the Suit”.

146 Fourth, the defendant’s counterclaim is clearly based on the plaintiff’s breaches of the AUP and the User Agreement by, among other things, engaging in the restricted activities. In order to make out its case that the plaintiff had engaged in such activities, the defendant would need access to the documents in Category 1, Unless Order Category 2, and Unless Order Category 5.

147 In sum, contrary to the plaintiff’s assertions, the defendant’s pleaded case was based on issues that would have benefited from these documents. These documents were therefore material to the case at hand. In any event, it was too late for the plaintiff to now assert that these documents were immaterial or irrelevant. After all, they were made pursuant to a discovery order that was upheld on appeal. And if the plaintiff’s complaint was that the materiality and relevance of these documents had diminished after the defendant amended its Defence, it could have brought an application to set aside the order on the basis of changed circumstances. But it had not done so.

(2) The real risk of prejudicing a fair trial

148 Further, I found that the plaintiff's failure to comply with its discovery obligations had led to a real risk of prejudicing a fair trial. As a general matter, the defendant's pleaded case is premised on its right to make the LD Deduction, as justified by the plaintiff's breach of the AUP. The documents in question are material and relevant to ascertaining if the plaintiff breached the AUP. If the defendant does not have the documents, it cannot properly mount its defence, founded on the plaintiff's alleged breach of the AUP. This alone prejudiced the defendant's right to a fair trial.

149 More specifically, as for the Unless Order Category 2 (advertisements) documents, the defendant had pleaded at paras 18(d)(i) and 18(d)(ii) of the D&CC2 that the "Air Coolers" and the "T-Watch" are two products that the plaintiff had sold in violation of third-party intellectual property rights. Any advertisements in relation to these products would therefore be probative of the defendant's pleaded case. Also, the plaintiff's refusal to disclose Jasneet Sokhi's Pinterest page had denied the defendant the opportunity to explore the plaintiff's control over its advertising material, which would again go towards establishing any potential breach of the AUP.

150 As for the Unless Order Category 2 (directives, standards, and regulations) documents, the defendant had argued that the three documents that the plaintiff had disclosed do not address the quality and/or characteristics of the Products referred to in the plaintiff's advertisements. Thus:

- (a) The EU Directive 2014/30/EU disclosed at s/no 2(b) of the Plaintiff's 3rd Supplementary List of Documents ("P3SLOD") suggests that the test conducted in respect of the Air Coolers was simply to confirm that electromagnetic emissions from them do not disturb radio

and telecommunication when operated. This had nothing to do with the “characteristics, accessories, qualities, uses and/or benefits” of the product as advertised.

(b) The summary of harmonised standards published in EU Directive 2014/30/EU disclosed at s/no 10(c) of the P3SLOD also suggests that the test conducted in respect of a “Magnifier” product was simply to confirm that electromagnetic emissions from it do not disturb radio and telecommunication signals when operated. This had nothing to do with the “characteristics, accessories, qualities, uses and/or benefits” of the product as advertised.

(c) The “FCC 47 CFR Part 15 Subpart B” and “ANSI C63.4-2014” standards disclosed at s/nos 11(c) and 11(d) of the P3SLOD, suggest that the test conducted in respect of a “Magnifier” product was simply to check whether the radio frequency of the product was within the legislated-permitted range. This also had nothing to do with the “characteristics, accessories, qualities, uses and/or benefits” of the product as advertised.

151 The plaintiff’s failure to disclose the rest of these documents would therefore deprive the defendant of the opportunity to show that the plaintiff had sold the Products in breach of the AUP. This was a fundamental tenet of the defendant’s defence because it relied on the plaintiff’s breach to justify the LD Deduction.

152 Finally, as for the Unless Order Category 5 documents, the defendant submitted that out of 307 “www.17track.net” screenshots which the plaintiff disclosed (in respect of 425 buyer disputes filed against the plaintiff), only 16 of

the tracking numbers could be verified on “www.17track.net”. Further, out of these 16 numbers, seven contained different information from the screenshots which the plaintiff provided. Thus, in sum, out of the 307 transactions which were supposedly verifiable by reference to the screenshots (furnished by the plaintiff) showing their delivery status, only nine actually had tracking numbers that could be verified on “www.17track.net” and delivery information that was truly consistent with the plaintiff’s screenshots. As such, had the plaintiff disclosed further documents, especially the source documents, the defendant would have been able to advance its defence that the plaintiff had breached the AUP by not being in control or possession of the Products before putting them up for sale. While Mr Mathew suggested that these tracking numbers were created more than four years ago and hence the plaintiff could not be responsible for whether they remained valid or not, the fact remained that the plaintiff could have checked with SFC when confronted with these difficulties. Yet, it did not do so.

153 As such, I found that the plaintiff’s failure to comply with its discovery obligations has led to a real risk that the defendant would be denied a fair trial based on its pleaded case.

(3) The plaintiff’s discovery obligations were ongoing from 2022, and not simply from the point of the D&N 27 September Letter

154 Moreover, to deal with Mr Mathew’s argument that the big picture was that the plaintiff had been given little time from 27 September 2023 (which was when the D&N 27 September Letter was sent) to provide discovery, I made four points.

155 First, the plaintiff’s discovery obligations started from the imposition of the Discovery Order on 6 July 2022. This remains the case even if there was a

period of inaction by the defendant between November 2022 to September 2023. Second, by the Solitaire 2 October Letter, by which the plaintiff agreed to provide further discovery pursuant to the Discovery Order, the plaintiff had effectively admitted that it had failed to comply with certain aspects of the said Order. If not, the plaintiff would not have agreed to provide discovery for some of the requested documents but declined to do so for some of them. Third, the plaintiff has had ample opportunities between September 2023 to even now to fulfil its discovery obligations. Instead, from the evidence, the plaintiff had chosen to advance various inconsistent explanations as to why it was unable to fulfil these obligations. Fourth, and finally, it would be dangerous to allow a party to, in effect, decide when, apart from the imposition of the relevant discovery order, its obligation to disclose started to run (or pause).

(4) The lack of any real alternatives to striking out

156 Finally, I failed to see any real alternatives to striking out the plaintiff's case. The plaintiff suggested that I should consider such alternatives that the Court of Appeal outlined in *Mitora*. Before me, Mr Mathew suggested more specifically that I could either strike out relevant parts of the plaintiff's Statement of Claim (Amendment No 1), or draw an adverse inference against Mr Karim with respect to the relevant issues. For completeness, the Court of Appeal had suggested in *Mitora* the following alternatives (at [45]):

- (a) awarding costs on an indemnity basis;
- (b) ordering the payment of the plaintiff's claim or part thereof into court where the defaulting party is a defendant (see the English Court of Appeal decision of *Husband's of Marchwood Ltd v Drummond Walker Developments Ltd* [1975] 1 WLR 603 at 605);

- (c) striking out relevant portions of the defaulting party's statement of claim or defence rather than the whole;
- (d) barring the defaulting party from adducing certain classes of evidence or calling related witnesses; and
- (e) raising adverse inferences against the defaulting party at trial.

157 I did not consider any of these to be viable in the present case. First, as to costs on an indemnity basis, I did not see how this could be utilised here. Mr Mathew agreed, in my view fairly, with this point. Second, it was not possible to strike out just part of the plaintiff's claim because its case was primarily premised on the defendant's LD Deduction as being wrong in that it did not breach the AUP. Third, it was not possible to bar the plaintiff from adducing evidence of a certain nature because, again, its case against the plaintiff was primarily premised on it not having breached the AUP at all. Finally, while I could raise adverse inferences against Mr Karim or any of the plaintiff's other witnesses at trial, the extent of such inferences was difficult to measure because of the broad nature of the plaintiff's breaches. Indeed, such inferences would overwhelm the plaintiff's case almost entirely.

158 Ultimately, the fact that the parties were close to trial was a factor against the plaintiff. Precisely because the trial dates had been fixed, the defendant could not be given more time to prepare even if the plaintiff had been prepared to disclose the relevant documents. Further, it would not be fair to the defendant to postpone the trial because not only is the defendant entitled to the efficient administration of justice, but this whole state of affairs was the plaintiff's own doing. It cannot be that the plaintiff's own default, in failing to comply with its

discovery obligations, can justify further inconvenience to the defendant. That would plainly not be fair.

159 Thus, the only proportionate response was to strike out the plaintiff's case. I accordingly dismissed RA 24 and upheld AR Koonar's decision to strike out the plaintiff's case.

Conclusion

160 For all the reasons above, I allowed SUM 326 but dismissed RA 24. The practical outcome was that only the defendant's counterclaim remained to be resolved. Before me, Mr Teo, citing the Court of Appeal decision of *Teo Wee Ping Benjamin and another v Grande Corp Pte Ltd* [2020] 2 SLR 308 at [35], suggested that the defendant was entitled to final judgment following the striking out of the plaintiff's case, since it was claiming for liquidated damages. In response, Mr Mathew argued that the defendant was only entitled to interlocutory judgment with damages to be assessed because the veracity of a liquidated damages clause is a mixed question of law and fact, citing the High Court decision of *New Civilbuild Pte Ltd v Guobena Sdn Bhd and another* [2000] 1 SLR(R) 368 at [68]. However, Mr Mathew sought time to better address the point. For practical purposes, I deferred the resolution of the defendant's counterclaim until after the plaintiff's right to appeal against my decision in RA 24 expires on 13 March 2024. I will issue consequential directions on the defendant's counterclaim at the appropriate time, depending on whether the plaintiff decides to appeal and, if so, whether it eventually succeeds in such an appeal.

161 Finally, having considered the parties' further submissions on costs, I awarded costs of \$5,000 in SUM 326 to the defendant, and \$20,000 in RA 24

also to the defendant. While the plaintiff had prevailed in SUM 326, the plaintiff had prayed for costs to be in the cause for that application. Since the defendant was the ultimate party who prevailed in RA 24, I awarded costs in SUM 326 to the defendant. Also, I awarded disbursements of \$1,624.94 to the defendant.

162 In closing, I record my gratitude to Mr Mathew and Mr Teo for their assistance. In particular, while Mr Mathew, stepping in as instructed counsel at a late stage, clearly had a difficult case, he advanced his case fairly and reasonably. I am grateful for that.

Goh Yihan
Judge of the High Court

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