

Sanae Achar v Sci-Gen Ltd
[2011] SGHC 87

Case Number : Suit No 222 of 2010 (Registrar's Appeal No 441 of 2010)
Decision Date : 08 April 2011
Tribunal/Court : High Court
Coram : Lee Seiu Kin J
Counsel Name(s) : Joana Teo (Harry Elias Partnership LLP) for the plaintiff; William Ong and Sylvia Tee (Allen & Gledhill LLP) for the defendant.
Parties : Sanae Achar — Sci-Gen Ltd

Civil Procedure

8 April 2011

Lee Seiu Kin J:

Introduction

1 This was an appeal by the plaintiff, Sanae Achar ("Achar"), against the decision of the learned assistant registrar ("AR") who allowed the application of the defendant, Sci-Gen Ltd ("Sci-Gen"), in Summons No 4406 of 2010 ("Summons 4406/2010") for specific discovery of documents pursuant to O 24 r 5 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("Rules of Court"). After hearing both parties, I dismissed Achar's appeal. I now set out the reasons for my decision.

Background

2 Achar was a former employee of Sci-Gen. She commenced Suit No 222 of 2010 ("the Suit") against Sci-Gen for salary and benefits allegedly owed to her by Sci-Gen under the terms of her employment with Sci-Gen.

3 Achar's claim against Sci-Gen is based on her employment contract with Sci-Gen ("the Employment Contract"), which commenced in April 2008 and was due to expire three years later in April 2011. According to Achar, the Employment Contract provided that in the event Sci-Gen terminated her employment by notice prior to the end of her employment period with Sci-Gen (*ie* April 2011), Sci-Gen was to pay to Achar the balance of her salaries until the end of that employment period. Achar alleged that she was terminated by Sci-Gen with notice on 1 December 2008, less than eight months through her employment contract. Notice for Achar's termination was allegedly given for and on behalf of Sci-Gen by Saul Mashaal ("Saul"), Sci-Gen's chairman and chief executive officer at the relevant time. Accordingly, Achar maintained that she was entitled to be compensated for the remaining months up till the end of the Employment Contract in April 2011.

4 Sci-Gen's position, however, was that it had not terminated Achar's employment on 1 December 2008. Rather, the alleged notice of termination and related documents therein had only been given by Saul to Achar after the former's termination as Sci-Gen's chairman and chief executive officer on 20 April 2009, and backdated to 1 December 2008. Backdating was done so as to allow Achar to procure the remainder of her employment benefits under the Employment Contract without performance of her duties thereunder. As Sci-Gen believed that Achar had falsely alleged that she

had been given the notice of termination, Sci-Gen terminated Achar's employment pursuant to the Employment Contract on 29 May 2009.

The AR's decision

5 In the course of the Suit, Sci-Gen took out an application for discovery of particular documents. The AR heard Sci-Gen's discovery application on 27 October 2010 and allowed discovery of the following documents:

- (a) An electronic mail ("email") from Saul to Achar allegedly dated 1 December 2008 ("the Alleged 1 December Email").
- (b) An email from Saul to Achar allegedly dated 15 December 2008 ("the Alleged 15 December Email").
- (c) All emails from Saul to Achar received between 1 December 2008 and 29 May 2009, stored on Achar's computer(s), notebook(s), external hard drive(s), external hard disk(s) or any other external storage device or medium, and/or Achar's online email account on the domain yahoo.com.
- (d) All emails from Achar to Saul sent between 1 December 2008 and 29 May 2009, stored on Achar's computer(s), notebook(s), external hard drive(s), external hard disk(s) or any other external storage device or medium, and/or Achar's online email account on the domain yahoo.com.
- (e) All emails which include any of the following search words or phrases or any combination thereof, viz, "Saul", "Saul Mashaal", "termination", "terminate", "leave", or "vacation", stored on Achar's computer(s), notebook(s), external hard drive(s), external hard disk(s) or any other external storage device or medium, and/or Achar's online email account on the domain yahoo.com, the duration of discovery being limited to the period between 1 December 2008 and 31 July 2009.

The documents in respect of which the AR ordered discovery can be broadly grouped into three categories. The first category, corresponding to items (a) and (b) at [5] above, consisted of emails allegedly terminating Achar's employment with Sci-Gen (henceforth referred to as "the Category 1 Documents"). The second category, corresponding to items (c) and (d) at [5] above, consisted of email exchanges between Achar and Saul between 1 December 2008 and 29 May 2009 (henceforth referred to as "the Category 2 Documents"). The third and final category, corresponding to item (e) at [5] above, consists of emails sent and received between 1 December 2008 and 31 July 2009, which contain various search words and phrases (henceforth referred to as "the Category 3 Documents").

6 The AR further ordered that the documents to be disclosed were to be provided in an electronic, text searchable and structured format. They were to also include the names of the electronic files constituting or containing the relevant electronic documents, as well as the file formats (and their versions) of the said documents. The AR also allowed Sci-Gen to inspect the disclosed documents in their native format. Dissatisfied with the discovery order made by the AR, Achar appealed against the same.

The appeal

The law on discovery

7 A party to a litigation has an obligation to disclose to the opposing party all documents which are, or have been, in his possession, custody or power that are relevant to the issues in dispute. This is the process of discovery and the court may make an order to do so under O 24 r 1 of the Rules of Court. Where the court is of the view that any party has not disclosed any such document, the court may order that party to give discovery thereof. This is known as specific discovery which the court may order under O 24 r 5. To be susceptible to an order for specific discovery, a document must fulfil certain requirements.

8 First, the document must be relevant (see *Tan Chin Seng and others v Raffles Town Club Pte Ltd* [2002] 2 SLR(R) 465 ("*Tan Chin Seng*") at [18]). In respect of discovery of specific documents, O 24 r 5(3) of the Rules of Court describes a relevant document to be:

- (a) a document on which the party relies or will rely;
- (b) a document which could -
 - (i) adversely affect his own case;
 - (ii) adversely affect another party's case; or
 - (iii) support another party's case; and
- (c) a document which may lead the party seeking discovery of it to a train of inquiry resulting in his obtaining information which may -
 - (i) adversely affect his own case;
 - (ii) adversely affect another party's case; or
 - (iii) support another party's case.

Whether a document is one on which the party seeking discovery relies or will rely upon, or one which could adversely affect that party's case, or adversely affect or support another party's case, would depend on the issues pleaded by the parties in the action.

9 Second, even if the document is established to be relevant, O 24 r 7 of the Rules of Court further prescribes an overriding principle that discovery is to be ordered only if "necessary either for disposing fairly of the cause or matter or for saving costs".

10 In the context of an application for discovery and inspection (including the supply of copies) of electronically stored documents, the Supreme Court Practice Direction No 3 of 2009 ("the e-Discovery PD") establishes an opt-in framework which parties may adopt (see *Deutsche Bank AG v Chang Tse Wen and others* [2010] SGHC 125, which considered the application of the opt-in framework). The e-Discovery PD supplements the traditional tests of relevancy and necessity by articulating a non-exhaustive list of matters which the court will consider while applying these existing legal principles of discovery. These matters are listed at para 43D of the e-Discovery PD and include:

- (a) the number of electronic documents involved;
- (b) the nature of the case and complexity of the issues;

- (c) the value of the claim and the financial position of each party;
- (d) the ease and expense of retrieval of any particular electronically stored document or class of electronically stored documents, including –
 - (i) the accessibility, location and likelihood of locating any relevant documents,
 - (ii) the costs of recovering and giving discovery and inspection of any relevant documents,
 - (iii) the likelihood that any relevant documents will be materially altered in the course of recovery, or the giving of discovery or inspection; and
- (e) the significance of any particular electronically stored document or class of electronically stored documents which are likely to be located to the issues in dispute.

The phrase “electronically stored documents” is not defined in the e-Discovery PD. In my view, it is not necessary to define this term as it should be given its natural meaning as used in our modern day context. On this approach, this term will include a wide range of electronic documents, *eg*, word processor documents, spreadsheets, presentation slides, and image files. Case law has also included within the scope of “documents” electronically stored documents like:

- (a) Emails – see *PSA Corp Ltd v Korea Exchange Bank* [2002] 1 SLR(R) 871, *Trek Technology (Singapore) Pte Ltd v FE Global Electronics Pte Ltd and others and another suit* [2003] 3 SLR(R) 685, *K Solutions Pte Ltd v National University of Singapore* [2009] 4 SLR(R) 254, and *Fermin Aldabe v Standard Chartered Bank* [2009] SGHC 194;
- (b) Databases – see *Sumitomo Corpn v Credit Lyonnais Rouse Ltd* [2002] 1 WLR 479 and *Derby & Co Ltd And Others v Weldon And Others (No 9)* [1991] 1 WLR 652;
- (c) Backup copies – see *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd and others* [2010] 2 SLR 152 (“*Record TV*”);
- (d) Sound recordings stored as Moving Picture Experts Group 1, Audio Layer 3 (“MP3”) files – see *Sony Music Entertainment (Australia) Limited v University of Tasmania* [2003] FCA 532;
- (e) Video recordings – see *RecordTV*; and
- (f) Storage media (*eg* CD ROM and tapes) and recording devices (*eg* hard disks) – see *Megastar Entertainment Pte Ltd and another v Odex Pte Ltd* [2005] 3 SLR(R) 91 and *Alliance Management SA v Pendleton Lane P and another and another suit* [2008] 4 SLR(R) 1.

11 The e-Discovery PD was introduced in 2009 with the aim of providing guidance on how existing legal principles pertaining to the discovery process could be applied in respect of electronically stored documents. One of its objectives is to promote the exchange of electronically stored documents in a

text searchable electronic form (in lieu of printed copies) so that parties may capitalise on the twin benefits of digitisation, *viz*, the ability to run keyword searches on the documents in question as well as easy management of the same. This also has the added benefit of avoiding unnecessary photocopying or printing of electronically stored documents. The e-Discovery PD also prefers the inspection and supply of copies of electronic documents in their native formats without any interference with the documents' "metadata information". Metadata literally means "data about data". Paragraph 43A(3) of the e-Discovery PD describes "metadata information" as "the non-visible and not readily apparent information embedded in or associated with electronically stored documents". Metadata information may sometimes be relevant at trial, for instance, when data relating to the authorship history, date of creation and modification of a particular file or document is in issue. Paragraph 43G of the e-Discovery PD prohibits the deletion, removal or alteration of metadata information internally stored in the native format of discoverable electronically stored documents without consent by the relevant parties or leave of court.

12 The introduction of the e-Discovery PD was a response to the increasing tendency for documents to be generated and held electronically. In my view, its introduction was timely, given the unprecedented volume of documents which are created and stored electronically today (attributed, in part, to the ease at which multiple copies of the same document, especially emails, are stored at multiple locations, *eg*, personal computers, servers, network drives, and other assorted backup media, for indefinite periods of time, and at relatively low costs), the relative ease of duplicating such documents (by way of illustration, the same email may be sent to multiple recipients, who may reply to one or more recipients on the email thread, copying in other recipients, or forwarding the message on to others), the often haphazard manner in which electronic documents are stored, the different document retention policies of parties (some may routinely delete electronic documents to maximise the use of storage capacity whereas others may retain records of all electronic documents), the existence of metadata information, and the fact that it is more difficult to completely dispose of electronically stored documents than printed ones (it is common for residual traces of an electronic document to remain on a computer's storage system, despite deletion of the same from the user's active data).

13 With technology fuelling an unprecedented explosion of the volume of discoverable documents and the ease of their duplication, it is not surprising that the traditional manner in which discovery has been carried out is proving increasingly inefficient in achieving the purposes for which the discovery process was developed. Discovery was originally an equitable remedy premised on the idea that it was unconscionable for a party to conceal evidence material to a fair conclusion. Its aim was that of enabling parties to acquire information which is material to their case but in the possession, power or custody of their opponents. Discovery was directed towards the just and fair adjudication of an action as it ensured that all material and relevant facts were placed before the court for its consideration. These purposes remain relevant as ever.

14 One way to cope with the burgeoning volume of discoverable documents is to rely on technology itself. Technology has thrown up countless tools which make editing, copying, reviewing and searching through the textual content of documents considerably less cumbersome than before. For example, parties need not manually trawl through heaps of printed documents in order to identify relevant documents and weed out irrelevant ones. Running simple keyword searches using easy-to-use desktop search engines would suffice. It is also easier to manage and organise electronically stored documents, especially where printed copies of such documents run into tomes and cartons. The e-Discovery PD recognises the tremendous potential of technology in modernising the discovery process. Thus, it encourages the exchange and supply of copies of discoverable electronic documents in soft copy by creating a framework for the inspection and discovery of electronically stored documents within boundaries established by existing legal principles. In supplementing the traditional

tests for whether applications for discovery of documents should be granted (the applicable tests remain that of relevancy and necessity either for the fair disposal of the matter or for saving costs) *vis-a-vis* electronically stored documents, the e-Discovery PD identifies specific factors which are to be considered (see [10] above). These factors were principally adapted from the UK Practice Direction Part 31B on "Disclosure of Electronic Documents". At the same time, the e-Discovery PD also acknowledges that the costs of e-discovery could potentially be disproportionate to the value of the claims and the significance of the issues in dispute. Accordingly, the e-Discovery PD also introduced mechanisms in anticipation of this problem. For instance, the e-Discovery PD contemplates the conduct of general discovery in stages – see para 43B of the e-Discovery PD and also *Goodale & Ors v The Ministry of Justice & Ors* [2010] EWHC B40 (QB), at [22]–[23]. It also sets out rules which require limits to be imposed on the scope of requests for discovery by keyword searches. The factors listed at para 43D of the e-Discovery PD were also introduced to keep costs within reasonable limits.

Application to the facts

15 It was with the e-Discovery PD's guidance on the adaptation of the traditional tests of relevance and necessity in mind, including the matters listed at para 43D therein, that I turned to consider the present application. I was of the view that all three categories of electronically-stored documents which Sci-Gen sought discovery of were either directly or indirectly relevant to the issue of whether Saul had given Achar the notice of termination while he was still in Sci-Gen's employment. I did not think that discovery of the same would lead to costs disproportionate to the nature of the case, the value of the claims and the complexity of the issues in dispute, so long as certain limits were imposed on the scope of disclosure. I also did not consider that the volume of electronic documents to be searched justified not ordering the disclosure of the documents sought by Sci-Gen. I hence ordered discovery of those documents, but within specific defined boundaries.

Category 1 Documents

16 In respect of the Category 1 Documents, the emails therein are relevant to and necessary for the determination of whether Saul had given Achar the notice of termination whilst in Sci-Gen's employment as both the Alleged 1 December Email and the Alleged 15 December Email referred to the alleged termination on 1 December 2008 and their existence would either support Achar's claim and/or adversely affect Sci-Gen's defence that the Category 1 Documents were backdated. The Alleged 1 December Email was stated in Summons 4406/2010 (the Annex section) to read, *inter alia*:

"Further to my communication dated December 1st, 2008 I hereby give you thirty (30) days notice of termination of employment effective December 1st, 2008. As per my letter addressed to you of the same date we shall honour the employment agreement." [emphasis in original]

Similarly, the Annex section of Summons 4406/2010 quoted the Alleged 15 December Email as stating, *inter alia*:

"you need not apply for leave as you have been terminated from your employment on December 1st, 2008 ... You [sic] request for a leave of absence starting April 20th thru [sic] May 15th, 2009 is hereby approved." [emphasis in original]

17 Achar argued that the Category 1 Documents are not directly relevant to the parties' pleaded cases as both the statement of claim and defence had been amended such that all references to the Category 1 Documents had been removed, and that Sci-Gen had not pleaded that the Category 1 Documents were backdated. However, the removal of all references to the Category 1 Documents in the amended statement of claim and defence did not and could not render those documents any less

relevant than they previously were when they were so pleaded, for express reference (or otherwise) of particular documents in the parties' pleadings is independent of the relevancy of those documents to the parties' cases. The relevancy of documents sought in discovery is determined *vis-a-vis* the substance of the parties' pleaded cases or allegations. This test of relevancy goes beyond the perusal of pleadings for express references to the documents sought for. If documents in respect of which discovery could be ordered were restricted to those referred to in the pleadings and no more, the amount of documents which would be excluded from discovery would be significant. It is thus my view that explicit references in the pleadings to documents in respect of which discovery is sought is helpful, but is not a pre-requisite, for establishing relevancy.

Category 2 Documents

18 Turning to the Category 2 Documents, these are also relevant to the parties' pleaded cases, as Achar's claim is premised on her assertion that Sci-Gen, through Saul, had terminated her employment on 1 December 2008, and Sci-Gen's defence in response to Achar's claim is that of backdating, *ie*, Saul had only begun signing and/or sending the various documents purporting to terminate Achar's employment with Sci-Gen on or after he himself had been terminated by Sci-Gen on 20 April 2009. The email correspondences between Achar and Saul from 1 December 2008 (the date Achar claimed she had been terminated) and 29 May 2009 (the date Sci-Gen alleged it had terminated Achar without notice) could shed some light on the status of Achar's employment during this period, thereby supporting or adversely affecting the parties' respective cases.

19 Achar argued that Sci-Gen's request for discovery of all email exchanges between herself and Saul from 1 December 2008 to 29 May 2009 was in effect a request to "fish" through all of her emails in the hope that some beneficial or advantageous evidence might, on the off-chance, surface. However, I was of the view that Sci-Gen's request for the Category 2 Documents was not overly wide, as Sci-Gen had limited the scope of the emails sought to a time period, which boundaries were determined with respect to the disputed dates of termination. To my mind, the proposed time frame was a reasonable one.

Category 3 Documents

20 As for the Category 3 Documents, Sci-Gen requested for emails containing the following search words or phrases or any combination thereof, *viz*, "Saul", "Saul Mashaal", "termination", "terminate", "leave", and/or "vacation". Its request was drafted pursuant to para 43C(2) of the e-Discovery PD, which concerns electronic searches of electronic documents using specified words or strings of words. Paragraph 43C(2) of the e-Discovery PD provides, *inter alia*, that electronically stored documents which form the subject of a discovery request "may be described by specifying or describing a search term or phrase to be used in a reasonable search for electronically stored documents". This paragraph could be said to have arisen from the invention of computer search engines, which allow parties to conduct textual searches of electronically stored documents. The availability of textual searches thus created a new way to describe a class of documents for which discovery is sought. Compared to the traditional manner of describing classes of documents, this new way of describing a class of documents by reference to a search phrase in fact lessens the burden of the party from whom discovery is sought, as it digitises what was once a manual and often tedious process of search and review through huge volumes of documents.

21 To my mind, there is a sufficient likelihood that emails significant and relevant to the action would be retrieved following a search conducted using the requested words or phrases. Sci-Gen explained that the search terms "Saul" and "Saul Mashaal" were intended to capture email exchanges between Achar and Saul which involved Achar's Sci-Gen work email account and which Achar

subsequently forwarded to her personal email account and/or third parties. Sci-Gen presented evidence of such forwarding to me and argued that such emails would fall outside the ambit of the Category 2 Documents. I thus allowed its request in this respect. As for emails which contain the words "termination" or "terminate", Sci-Gen explained that conducting a search using these terms would throw up emails in which Achar's termination was discussed. These emails would thus be relevant to the cases of both parties. Accordingly, I also allowed its request *vis-a-vis* these two words. Finally, Sci-Gen argued that its request for discovery of emails containing the words "vacation" or "leave" arose out of Achar's pleaded case that she had informed Saul in mid-December 2008 of her intention to utilise her annual leave for the period of 20 April 2009 to 15 May 2009, but was informed by Saul in writing that she need not apply for leave as she had been terminated from Sci-Gen's employment on 1 December 2008. As these emails pertain to Achar's position in her pleaded case, I also allowed Sci-Gen's request. However, I restricted the scope of Sci-Gen's request to emails created, received or modified between 1 December 2008 and 29 June 2009. The end date of 29 June 2009 was imposed because Achar claimed that she stopped having access to her Sci-Gen work email account on or about 28 June 2009. I believed that such restrictions by time kept Sci-Gen's searches within reasonable limits.

Possession, custody or power

22 Achar resisted Sci-Gen's discovery application *vis-a-vis* all three categories of documents on the ground that she had since returned the laptop in which all of the emails were situated to Sci-Gen and thus no longer had "possession, custody or power" over the electronic copies of those emails which Sci-Gen sought. She also argued that she did not store any of the said emails on any external storage device or medium. I was of the view that if Achar no longer had possession, custody or power over the electronic copies of the documents which form the subject of the discovery application, the onus would be on Achar, pursuant to O 24 r 5(1) of the Rules of Court, to state this fact on affidavit, together with an explanation of why she no longer had possession, custody or power over them, when she parted with them, and what has become of them.

Scope of the parties' obligations with regard to the discovery of the ordered documents

23 Having explained the basis for ordering discovery of the Category 1, 2, and 3 Documents, I briefly turn to the extent of Achar's and Sci-Gen's obligations. Pursuant to my discovery order, Achar must, *inter alia*, disclose the documents specified in the order, carry out a search to the extent stated in the order, and disclose any documents located as a result of that search. So long as Achar has complied with the terms of that order, as well as all the necessary requirements stated in the Rules of Court, Sci-Gen would have to accept that Achar had fulfilled her discovery obligations, notwithstanding the fact that there could well be emails not caught by the search engine employed. As Morgan J (echoing a point made by Jacob LJ in *Nichia Corporation v Argos Limited* [2007] EWCA Civ 741 at [50] to [52]) articulated in *Digicel (St Lucia) Ltd v Cable & Wireless Plc* [2008] EWHC 2522 (Ch) at [46]:

... [T]he [discovery] rules do not require that no stone should be left unturned. This may mean that a relevant document, even "a smoking gun" is not found. This attitude is justified by considerations of proportionality. ...

In this regard, it would be best if the parties can, prior to any search, agree on which search engine or software is to be used, the preparation of the search engine prior to conducting the searches (eg, updating the search index or causing a fresh search index to be made) and how searches are to be conducted. This would minimise potential disputes as to whether the parties have discharged their discovery obligations.

Conclusion

24 In the result, I dismissed Achar's appeal and upheld, with slight modifications, the AR's order. I ordered Achar to disclose the Category 1, 2 and 3 Documents, with disclosure of the Category 3 Documents to be limited to the period between 1 December 2008 and 29 June 2009. I also ordered costs to be fixed at \$1,500.

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