Acclime Corporate Services Sdn Bhd & Anor v Wong Youn Kim & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCvC-647–10 OF 2024
RAJA AHMAD MOHZANUDDIN SHAH J
6 MAY 2025

Civil Procedure — Orders — Protective and sealing order — Application for protective order to safeguard sensitive information, including client contact details and pricing structures, from being disclosed during proceedings — Whether protective order was necessary to protect plaintiffs' commercial interest — Whether documents sought to be protected were confidential in nature — Whether defendants' access to sensitive information could cause irreparable damage to plaintiffs — Whether documents ought to be protected in the interest of justice — Personal Data Protection Act 2010 ss 4, 8 & 45 — Securities Commission Guidelines under s 377 of Capital Markets and Services Act 2007

The present case revolved around a legal dispute concerning the protection of confidential documents in a civil suit. The plaintiffs filed the main suit against its former employee ('the first defendant') and a company that was incorporated by the first defendant's husband ('the second defendant') for breach of confidentiality, breach of fiduciary duty, breach of employment contract, and interference with the plaintiffs' business. The plaintiffs subsequently filed the present application via encl 37 for a protective order to safeguard sensitive information, including client contact details and pricing structures, from being disclosed during the proceedings. This protective order aimed to prevent potential harm to the plaintiffs' business interests, arguing that unauthorised access to such information could jeopardise their competitive advantage in the market. In support of their application, the plaintiffs highlighted that the documents in question were essential for their operations and had been accumulated over time, providing them with an edge over competitors. They asserted that the defendants' access to this information could lead to irreparable damage. Conversely, the defendants contended that the plaintiffs were using the protective order as a tactical manoeuvre to hinder their ability to mount a proper defense, arguing that the plaintiffs had failed to provide most, if not all, of the relevant documents in order for the parties, including the court, to be able to get a sense of their nature and aspect.

Held, allowing encl 37 with costs in the cause, with some modifications:

(1) The court found that a protective order was necessary in order to protect the plaintiffs' commercial interests and prevent their competitors from

accessing them. It was important to note that these documents had been collected over time by the plaintiffs, and were non-public information that provided the plaintiffs with a competitive advantage over their competitors. As a result, making the same public or disclosing it without adequate safeguards and a protective order would be extremely risky for the plaintiffs. Additionally, the plaintiffs may face risks related to the Securities Commission Guideline and the potential infringement of the Personal Data Protection Act 2010 ('the PDPA'). Due to the potential risks that plaintiffs would face in comparison to the position of the defendants, the interest of justice would require the documents to be protected. In support of these findings, the court referred to ss 4, 8 and 45 of the PDPA as well as the Securities Commission Guidelines regarding the submission of corporate and capital market product proposals that was issued under s 377 of the Capital Markets and Services Act 2007 (see paras 34–37).

(2) The court failed to see any good reason why the defendants needed to be so concerned about sealing or protecting the documents in the manner that the plaintiffs were seeking. Although there were doubts regarding the full nature of the undisclosed documents at this point, the following aspects stood out: (a) these documents would eventually have to be produced during trial, and only such documents would fall under the protective order, so no harm would come to the defendants; (b) the imposition of this condition on such documents was only temporary pending the outcome of the present case, at least at this point; (c) the imposition of such an order would not prevent the defendants from ventilating their issues and defences fully; (d) the parties had the liberty to apply; and (e) the presiding judge had full discretion to alter, amend and/or modify this order on his own motion, after consulting the parties, and without the need for any application. In any event, the first defendant was also fully aware that the documents sought to be protected were confidential. It was part of her terms of employment as stipulated in the plaintiff's employee handbook and applicable to all the plaintiffs' employees in Malaysia (see paras 41–42).

[Bahasa Malaysia summary

Kes semasa berkisar tentang pertikaian undang-undang mengenai perlindungan dokumen sulit dalam saman sivil. Plaintif-plaintif memfailkan saman utama terhadap bekas pekerjanya ('defendan pertama') dan sebuah syarikat yang telah diperbadankan oleh suami defendan pertama ('defendan kedua') untuk pelanggaran kerahsiaan, pelanggaran kewajipan fidusiari, pelanggaran kontrak pekerjaan, dan campur tangan ke atas perniagaan plaintif-plaintif. Plaintif-plaintif kemudiannya memfailkan permohonan semasa melalui lampiran 37 untuk perintah perlindungan bagi melindungi maklumat sensitif, termasuk butiran hubungan pelanggan dan struktur harga, A daripada didedahkan semasa prosiding. Perintah perlindungan ini bertujuan untuk mengelakkan potensi bahaya kepada kepentingan perniagaan plaintif, dengan alasan bahawa akses tanpa kebenaran kepada maklumat sedemikian boleh menjejaskan kelebihan daya saing mereka dalam pasaran. Bagi menyokong permohonan mereka, plaintif-plaintif menekankan bahawa B dokumen tersebut adalah penting untuk operasi mereka dan telah dikumpul dari semasa ke semasa, memberikan mereka kelebihan berbanding pesaing mereka. Mereka menegaskan bahawa akses oleh defendan-defendan kepada maklumat ini boleh membawa kepada kerugian yang tidak boleh diperbaiki. Sebaliknya, defendan-defendan berhujah bahawa plaintif-plaintif C menggunakan perintah perlindungan tersebut sebagai gerakan taktikal untuk menghalang keupayaan mereka untuk melancarkan pembelaan yang sewajarnya, dengan alasan bahawa plaintif-plaintif telah gagal memberikan sebahagian besar, jika tidak semua, dokumen yang berkaitan untuk membolehkan pihak-pihak, termasuk mahkamah, memahami sifat dan aspek D dokumen tersebut.

Diputuskan, membenarkan lampiran 37 dengan kos dalam kausa, dengan beberapa pengubahsuaian:

E (1) Mahkamah mendapati bahawa suatu perintah perlindungan adalah perlu untuk melindungi kepentingan komersial plaintif dan menghalang pesaing mereka daripada mengaksesnya. Adalah penting untuk diambil perhatian bahawa dokumen-dokumen ini telah dikumpulkan dari semasa ke semasa oleh plaintif-plaintif, dan merupakan maklumat bukan F awam yang memberikan plaintif kelebihan daya saing berbanding pesaing mereka. Akibatnya, menzahirkan dokumen tersebut kepada umum atau mendedahkannya tanpa perlindungan yang mencukupi dan perintah perlindungan akan menjadi sangat berisiko untuk plaintif-plaintif. Selain itu, plaintif-plaintif mungkin akan menghadapi G risiko yang berkaitan dengan Garis Panduan Suruhanjaya Sekuriti dan potensi pelanggaran Akta Perlindungan Data Peribadi 2010 ('APDP'). Disebabkan oleh potensi risiko yang akan dihadapi oleh plaintif-plaintiff berbanding dengan kedudukan defendan-defendan, kepentingan keadilan memerlukan dokumen tersebut dilindungi. Bagi menyokong H dapatan-dapatan ini, mahkamah merujuk kepada ss 4, 8 dan 45 APDP serta Garis Panduan Suruhanjaya Sekuriti berhubung penyerahan cadangan produk korporat dan pasaran modal yang dikeluarkan di bawah s 377 Akta Pasaran Modal dan Perkhidmatan 2007 (lihat perenggan 34–37).

I (2) Mahkamah tidak melihat apa-apa sebab yang munasabah mengapa defendan-defendan perlu mengambil berat tentang pengedapan atau perlindungan dokumen tersebut mengikut cara yang dimohon oleh plaintif-plaintif. Walaupun terdapat keraguan mengenai sifat penuh dokumen yang tidak didedahkan tersebut pada ketika ini, namun aspek-aspek berikut adalah jelas: (a) dokumen ini akhirnya perlu dikemukakan semasa perbicaraan, dan hanya dokumen tersebut akan berada di bawah perintah perlindungan, jadi tiada bahaya akan datang kepada defendan-defendan; (b) pengenaan syarat ini ke atas dokumen sedemikian hanyalah sementara, sementara menunggu keputusan kes semasa, sekurang-kurangnya pada ketika ini; (c) pengenaan perintah sedemikian tidak akan menghalang defendan-defendan daripada mengutarakan isu dan pembelaan mereka sepenuhnya; (d) pihak-pihak mempunyai kebebasan untuk memohon; dan (e) hakim yang bersidang mempunyai budi bicara penuh untuk mengubah, meminda dan/atau mengubah suai perintah ini atas usulnya sendiri, selepas berunding dengan pihak-pihak, dan tanpa memerlukan apa-apa permohonan. Walau apa pun, defendan pertama juga menyedari sepenuhnya bahawa dokumen yang ingin dilindungi tersebut adalah sulit. Ia adalah sebahagian daripada syarat pekerjaannya seperti yang ditetapkan dalam buku panduan pekerja plaintif dan terpakai kepada semua pekerja plaintif di Malaysia (lihat perenggan 41–42).]

Cases referred to

Kingtime International Ltd & Anor v Petrofac E&C Sdn Bhd [2020] 11 MLJ 141, HC (folld)
Mobil Oil Australia Ltd & McDonalds Australia Ltd v Guina Developments Pty Ltd [1996] 2 VR 34, SC (refd)
Sherman Estate v Donovan [2021] 2 SCR 75, SC (refd)
Tokai Corporation v DKSH Malaysia Sdn Bhd [2016] MLJU 621, HC (refd)
Warner-Lambert Co v Glaxo Laboratories Ltd [1975] RPC 354, CA (refd)

Legislation referred to

Capital Markets and Services Act 2007 s 377
Personal Data Protection Act 2010 ss 4, 8, 45

Joshua Teoh Beni Chris (with Teng Wei Hun) (Skrine) for the plaintiff.
Chok Zhin Theng (with Michelle Chin Zi Shan and Zhe Qi Cheong) (Cheah Teh Su) for the first defendant.
Cheong Su Yin (with Tan Zhi Ching) (Cheong Su Yin & Co) for the second defendant.

Raja Ahmad Mohzanuddin Shah J:

PRELIMINARY

[1] By way of encl 37, the plaintiff is seeking from this court to have a protective order imposed over the documents they intend to produce pending the determination of this action, allegedly so as to protect the confidentiality of those documents as stated in 'Schedule A'.

[2] In order to better understand the nature of this application, the original version of encl 37 is reproduced below:

> 1) That the information and contents of the documents as listed and/or described in Schedule 'A' to this Notice of Application ('Protected Information') be subject to a Protective Order or sealing order;
>
> 2) That all or part of the information and content in the Protected Information, which is confidential, disclosed and produced or caused to be disclosed and produced in these legal proceedings, and in any subsequent appeals, be always subjected to the following conditions:
>
> (a) That the Protected Information and/or document containing the Protected Information will only be used for purposes of these proceedings and any use of the Protected Information for other purposes are prohibited;
>
> (b) The Protected Information and/or any document which contains the Protected Information shall not, directly or indirectly, be disclosed, detailed, described, characterised, reproduced or communicated, either by itself or together with any other information, in any manner or form whatsoever to any person except:
>
> (i) The Judge hearing this action, or any other Judge that subsequently exercises its original and/or appellate functions related to this action;
>
> (ii) Court staff and officers directly assisting the Judge in this action as required;
>
> (iii) Solicitors and counsel acting for the parties in this action including the supporting officer or staff directly assisting in this action;
>
> (iv) Any person with the consent of the Plaintiffs or allowed by this Honourable Court; (hereinafter referred to either individually and/or collectively as 'Recipient of Protected Information')
>
> (c) The Recipient of Protected Information and/or documents that contain the Protected Information shall not in any manner or form discuss, disclose, detail, describe, characterise, reproduce, relay or communicate the Protected Information or any part of it to any person who is not the Recipient of the Protected Information or to any person not entitled to receive or be disclosed the Protected Information under the terms of this Order;
>
> (d) Where any document which contains information and contents of the Protected Information is required, or necessary, to be filed in Court, the parties shall, pursuant to Order 63A rule 7(4) of the Rules of Court 2012, file the said document by way of physical service and separated from the other documents in the Judge's or Judges' chambers;

(e) In accordance with paragraph (d) above, each document containing information and contents of the Protected Information which has been filed or served on the Court shall be placed and remain in custody of the Court until further order;

(f) Subject to paragraph (b) above, each document that contains information and contents of the Protected Information which has been filed and served on the Court shall not be disclosed to, or accessible by, or made available for public inspection by any person who is not the Recipient of Protected Information;

(g) For avoidance of doubt, all documents containing information and contents of the Protected Information that have been filed prior to this Order, whether through electronic filing, manual filing or other applicable methods, such documents shall be removed from the part of the file accessible to the public or third parties, and such documents must be treated in accordance with conditions in paragraphs (c), (d), (e) and (f) above;

(h) During the course of this action or any subsequent appeals, copies of the documents containing information and contents of the Protected Information which has been filed and/or served pursuant to paragraph (d) and (e) above or otherwise shall be in the Court or Judge's chambers at all times, and those documents shall be returned to the Plaintiffs at the end of the trial and/or appeal, or if the documents are necessary for purposes of the consideration of the case, until after the Judge renders the decision;

(i) For any information and contents of the Protected Information read in Court or referred to in a manner that discloses its contents, or that becomes part of the record or transcript of the proceedings, the same shall be protected from any disclosure to any party which is not the Recipient of Protected Information, including any notes recorded or taken by those present during the trial or hearing; and

3) That the content of this application and the affidavits filed, whether by the Plaintiffs or Defendants or other parties, in connection with this application are subject to the conditions stated in paragraph (2) above;

4) That the Court may, on its own motion, or upon application by one of the parties, alter, amend and/or modify the terms of this Order;

5) That the costs for and in relation to this application be made costs in the cause; and

6) Such further or other reliefs deemed fit and proper by this Honourable Court.

[3] In the following paragraphs, I have reproduced verbatim what the plaintiffs described as Schedule A:

(a) 'Contacts (31122021) 1 to 1000.csv' (Item 2 of Schedule 'A') is an internal Microsoft Excel file of the plaintiffs which contains the names of 995 of the plaintiffs' clients (past and present), the names of the contact person for each specific clients, email of the contact person and physical address of the client and phone numbers of each client including handphone number of some of the clients' contact person.

(b) 'Copy of Customer Master DB02 HMC (30092020)' (Item 3 of Schedule 'A') is an internal Microsoft Excel file of the plaintiffs which contains the names of 2772 of the plaintiffs' clients and the standard and nonstandard/negotiated pricing information of the monthly fee charged by the plaintiffs for the services offered to those clients.

(c) 'Contacts (31122021) 1001 to 2000.csv' (Item 4 of Schedule 'A') is an internal Microsoft Excel file of the plaintiffs which contains the names of 968 of the plaintiffs' clients (past and present), the names of the contact person for each specific clients, email of the contact person and physical address of the client and phone numbers of each client including handphone number of some of the clients' contact person.

(d) The Forensic Report prepared by Akash Rosen ('Forensic Report') (Item 5 of Schedule 'A') contains parts of the information described in items 2 to 4 of Schedule 'A' of the Application for Protective Order.

(e) The Independent Contractor Agreement dated 30.6.2023 ('ICA') (Item 6 of Schedule 'A') is an agreement entered into between the first plaintiff and first defendant which contains the list of clients currently in the preparation of or in the process of undertaking the initial public offering (IPO) exercise in Schedule 1 of the ICA.

[4] Regarding item (a) above, the plaintiffs have hired a forensic expert who has demonstrated that the first defendant allegedly transferred these documents out of the plaintiffs' company.

AN OVERVIEW OF THE FACTS OF THE CASE

[5] The first plaintiff is a member of the Acclime Group. Acclime Group is a group of companies that provides corporate secretarial services across several Asian countries, including Malaysia.

[6] The second plaintiff also provides corporate secretarial services. As of 31 December 2021, the first plaintiff became it sole owner after completing an acquisition process.

[7] The first defendant was employed by the second plaintiff between 2 May 2010 and 30 June 2022 and was a member of the board of directors of the second plaintiff since 16 January 2012.

[8] As a result of the acquisition of the second plaintiff by the first plaintiff, the employment of the first defendant was transferred from the second plaintiff to the first plaintiff effective 1 July 2022.

[9] The first defendant resigned on 15 January 2023 and served her notice until 30 June 2023.

[10] As for the second defendant, it offers management consultancy services and corporate secretarial services.

[11] It is alleged that the first defendant's husband incorporated the second defendant on 31 January 2023.

[12] The plaintiff commenced this action against the defendants for breach of confidentiality, breach of fiduciary duty, breach of employment contract, and interference with the plaintiff's business.

[13] In this regard, the plaintiffs claim that the defendants misappropriated and misused confidential information belonging to them. Accordingly, the plaintiffs seek an injunction to prevent the defendants from using and disclosing the confidential information further, as well as the return of documents allegedly taken out, and compensatory damages.

[14] The plaintiffs claim that the confidential information includes list of names of the plaintiffs' clients, list of physical addresses of the plaintiffs' clients, list of names of the plaintiffs' clients' contact persons, list of the email addresses of the plaintiffs' clients' contact persons, list of telephone numbers of the plaintiffs' clients', a table of pricing, fees quoted and charged by the plaintiffs to the plaintiffs' clients, and information about other information relating to plaintiffs' clients'.

[15] As illustrated above, the first plaintiff and the first defendant had on 30 June 2023 entered into the ICA for the provision of certain services by the first defendant to the first plaintiff after the first defendant's employment ended.

[16] Thereafter, and prior to the commencement of this action, the plaintiffs had also engaged a forensic expert to conduct the necessary digital forensics and prepare a report in relation to the first defendant's alleged breach of confidentiality and unauthorised misappropriation of information.

[17] In response, the first defendant disputes the said allegations and claims that the reason for her resignation was the numerous issues she had faced while employed by the first plaintiff. As an example, she received numerous complaints from clients about the first plaintiff's poor service quality and poor management, as well as its toxic work environment.

[18] The first defendant then claims that a small portion of the first plaintiffs former clients are now using the first defendant as their company secretary. Those clients have been nurtured and managed by the first defendant since 2010, who then followed the second defendant to her new job.

[19] Apart from that, this is due to the first plaintiff's own mismanagement of its business, which includes increasing its professional fees and failing to have succession planning after the first defendant resigned.

[20] Additionally, the first defendant contends that the plaintiffs' action herein is initiated in bad faith to cover up the above failures on the plaintiffs' part.

[21] Ironically, despite all the allegations of wrongdoing, the first plaintiff still demanded that the first defendant continue serving the first plaintiff's clients after she resigned.

[22] In regard to the second defendant, it contends that it is irrelevant to this dispute as it has no knowledge of the purported confidential information.

COURT'S ANALYSIS AND FINDINGS

[23] To begin with, let me examine the nature and extent of such an application for a protective order.

[24] In this aspect, it seems trite that the court has the power to grant a protective order by virtue of its inherent power. This is supported by the guidance I received from His Lordship Wong Kian Kheong J's (as His Lordship then was) decision in the case of *Kingtime International Ltd & Anor v Petrofac E&C Sdn Bhd* [2020] 11 ML J 141 at pp 154–158:

> [20] I am of the following view regarding a protective order:
>
> (1) a protective order may be granted pursuant to the court's inherent jurisdiction, court's inherent power and/or O 92 r 4 of the RC. Such a power is necessary to ensure that confidential information is disclosed to the court to enable the court to decide justly the case at hand and at the same time, to preserve the confidentiality of the information in question. I rely on the judgment of Lee Seiu Kin J in the Singapore High Court in *BBW v BBX and Others* [2016] SCD 263; [2016] 5 SLR 755 at paras [21]–[30], as follows:
>
> > The court's power to grant a sealing order

[21] The sealing order is no doubt part and parcel of our civil procedure. In *Navigator Investment Services Ltd v Acclaim Insurance Brokers Pte Ltd* [2010] 1 SLR 25 ('Navigator'), the Court of Appeal affirmed as much when it noted (at [66]) that '[there are, in fact, procedures in place for the sealing of court files'. Likewise, Prof Pinsler in *Singapore Court Practice 2014* Vol 2 (LexisNexis, 2014) describes the sealing order (at para 60/4/4) as 'well-established'. Yet, despite its ubiquity, the source of the court's power to grant a sealing order seems to be, hitherto, an open question.

[22] As observed by Prof Pinsler in *Singapore Court Practice 2014* Vol 1 (LexisNexis, 2014) (at para 42/1/17), the sealing order is not provided for in any statute or the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ('ROC'). It also appears that no provision is made for it in the Supreme Court Practice Directions (1 January 2013 release). Neither have our courts pronounced on this question; indeed, it has been noted that 'the legal status of [the sealing] order in general proceedings has yet to be judicially examined' (Singapore Court Practice 2014 Vol 1 at para 42/1/17).

[23] Academic writers, however, have suggested that the court has the inherent power to grant a sealing order. In Singapore Court Practice 2014 Vol 1, Prof Pinsler takes the view (at para 42/1/17) that the court 'may have the inherent power to grant a sealing order pursuant to O 92 r 4 [of the ROC] in the interests of justice', although this 'has yet to be declared as the juridical basis of the remedy'. In Vol 2 of the same text, Prof Pinsler argues (at para 60/4/4) that in the absence of a specific provision in the ROC, 'it may be contended that a court has the inherent power ... to make a sealing order in the interest of the administration of justice'.

...

[24] This view is also shared by Asst Prof Goh Yihan ('Asst Prof Goh') in his article 'The Inherent Jurisdiction and Inherent Powers of the Singapore Courts: Rethinking the Limits of their Exercise' [2011] SJLS 178. ...

[25] In my view, the suggestion by Prof Pinsler and Asst Prof Goh makes ample sense, and I agreed that the court has the inherent power to grant a sealing order.

[26] First, if the sealing order is indeed an accepted part of our civil procedure (see [21] above) and if there is indeed no statutory basis for it (see [22] above), then it must necessarily follow that the court has the inherent power to grant a sealing order. To conclude otherwise would lead to the unlikely (and somewhat absurd) corollary that our courts have, through the years, been acting ultra vires in granting sealing orders.

[27] Second, the sealing order also falls within the descriptions given of the court's inherent power. The inherent power of the court is reflected in O 92 r 4 of the ROC ... The court's inherent power 'stems from the court's status and role as the adjudicating organ of the legal system' and 'is to be exercised in exceptional circumstances when there is a pressing need to ensure a just outcome' (*Principles of Civil Procedure* at para 01.006). It has been said that 'the concern is with the ability of the court to make appropriate orders to ensure the achievement of justice and the efficacy of its administration' (Singapore Court Practice 2014 Vol

1 at para 1/1/7). In the arbitration context, the decision to grant a sealing order is made by weighing the principle of open justice against the need to preserve confidentiality in arbitration (see [39] below). Thus, the sealing order is fundamentally concerned with a just outcome' as well as the 'achievement of justice and the efficacy of its administration'. This brings it squarely within the aforementioned descriptions of the court's inherent power.

[28] Third, the notion of the court having the inherent power to grant a sealing order has been accepted by other courts. In *Nova Scotia (Attorney General) v MacIntyre* [1982] 1 SCR 175 ('MacIntyre'), the majority of the Supreme Court of Canada alluded to this when it observed (at 189) that:

> Undoubtedly every court has a supervisory and protecting power over its own records. Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose ...

...

[29] Indeed, numerous cases emanating from the provincial superior courts of Canada have noted (more explicitly) that the court has the inherent power to grant a sealing order. ...

[30] For the above reasons, I was of the view that the court has the inherent power to grant a sealing order.

(2) the following UK cases have granted protective orders:

(a) in the Court of Appeal case of *Warner-Lambert Co v Glaxo Laboratories Ltd* [1975] RPC 354 at pp 359–360, Buckley LJ ordered that only the court, counsel and certain persons from the party applying for discovery could have access to the confidential information in question; and

(b) in *Roussel Uclaf v Imperial Chemical Industries plc* [1990] RPC 45 at pp 50–52 Aldous J (as he then was) in the High Court imposed certain conditions on the discovery of confidential information, namely the plaintiffs (who applied for discovery) had to undertake:

(i) that the person to whom the confidential information was to be disclosed, should not be involved in similar proceedings in a French court; and

(ii) to pay the defendants any sum the court might decide that the defendants (who disclosed the confidential information) had suffered by any wrongful disclosure of the confidential information.

The above decision by Aldous J has been affirmed on appeal to the Court of Appeal;

(3) protective orders have also been granted in the following Australian cases:

(a) in *Mobil Oil Australia Ltd & McDonalds Australia Ltd v Guina Developments Pty Ltd* [1996] 2 VR 34 at pp 39–40, Hayne JA (as he then was) in the Court of Appeal of the State of Victoria held that in ordering a discovery of confidential information, the court may restrict access to such information to counsel, solicitor and nominated experts only; and

(b) the judgment of Finkelstein J in the Federal Court in *Conor Medsystems Inc v University of British Columbia (No 4)* [2007] FCA 324 at paras [7]–[13]; and

(4) protective orders have been granted in many jurisdictions such as Singapore, UK, Australia, United States of America and Canada. It will be an anomaly, if not an injustice, if our courts do not have the power to grant protective orders; and

(5) in deciding to grant a protective order or otherwise:

(a) the court should balance the following competing considerations:

(i) public interest requires all relevant evidence to be disclosed to the court so as to enable the court to decide justly the case at hand;

(ii) the plaintiff's right to apply for discovery of all relevant documents in support of the plaintiff's claim; and

(iii) the need to protect the defendant's proprietary interest in the confidential information in question;

(b) there is no universal or general formula to be followed — please see the judgment of Russell LJ (as he then was) in *Warner-Lambert Co* at p 362; and

(c) the learned judge should inspect the documents himself or herself to decide whether a protective order should be granted or not — please see *Mobil Oil Australia* at p 40. If parts of the confidential information are not relevant to the case in question, the court may redact those parts. Such a redacting power is clear from the following cases:

(i) please see the judgment of Lord Wilberforce in the House of Lords in *Science Research Council v Nasse; BL Cars Ltd (formerly Leyland Cars) v Vyas* [1979] 3 All ER 673 at p 680; and

(ii) *Tokai Corporation v DKSH Malaysia Sdn Bhd* [2016] MLJU 621 at para [26](1) and (2).

[25] So much for the law.

[26] Let me now turn my attention to the current issues.

[27] In this regard, the plaintiffs claim that the documents that they sought to protect contain, amongst others, contact information and the pricing of the plaintiffs services, which they have accumulated over time, as well as non-public information that gives the plaintiffs an edge over its competitors in the same field from a business and commercial standpoint.

[28] As a result, the plaintiff argues that the defendants would not be prejudiced in any way, as opposed to the irreparable harm that would occur to their commercial interests if those documents fell into their competitors'.

[29] The defendants, however, launched a vigorous attack on encl 37. According to the defendants, there are tactical manoeuvres on the part of the plaintiffs to prevent them from filing a proper defence without seeing those alleged confidential documents, which were the subject of their notices to produce. Here, I note that both defendants have filed notices to produce to provide those documents in order to be able to respond properly to the plaintiffs allegations.

[30] Aside from that the defendants argue that the plaintiffs failed to provide most, if not all, of the relevant documents in order for the parties, including this court, to be able to get a sense of their nature and aspect. This failed to comply with the relevant case law that required the party seeking such a protective order to comply with the strictest tests.

[31] In support of their point, the defendants cite the Canadian case of *Sherman Estate v Donovan* [2021] 2 SCR 75, which held, amongst others, that these three prerequisites must be met before a protective order can be issued:

> A. The Test for Discretionary Limits on Court Openness
>
> [37] Court proceedings are presumptively open to the public *(Maclntyre, at p 189; AB v Bragg Communications Inc* 2012 SCC 46; [2012] 2 SCR 567, at para 11).
>
> [38] The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:
>
> (1) court openness poses a serious risk to an important public interest;
>
> (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
>
> (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.
>
> Only where all three of these prerequisites have been met can a discretionary limit on openness — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative

enactments (*Toronto Star Newspapers Ltd v Ontario,* 2005 SCC 41; [2005] 2 SCR 188, at paras 7 and 22). A

[32] The defendants argue that the said test is a high bar that serves to maintain the strong presumption of open courts that applies to all judicial proceedings. Therefore, it is solely up to the plaintiffs to prove that the court's openness poses a serious risk. This is because openness is the norm and covertness is the exception; a party which initiates a legal proceeding waives its right to privacy. B

C

[33] My anxious consideration has been given to the arguments of both parties.

[34] In this regard, I find a protective order is necessary, at least at this point, in order to protect the plaintiffs' commercial interests and prevent their competitors from accessing them. It is important to note that these documents have been collected over time by the plaintiffs, and are non-public information that provides the plaintiffs with a competitive advantage over their competitors. As a result, making the same public or disclosing it without adequate safeguards and a protective order would be extremely risky for the plaintiffs. D E

[35] Additionally, the plaintiffs may face risks related to the Securities Commission Guideline and the potential infringement of the Personal Data Protection Act 2010. Due to the potential risks that plaintiffs would face in comparison to the position of the defendants, the interest of justice would require the documents to be protected. F

[36] As support for the above findings, I refer to ss 4, 8 and 45 of the Personal Data Protection Act 2010 ('the PDPA') as follows: G

Section 4 of the PDPA:

'personal data' any information in respect of commercial transactions, which —

(a) is being processed wholly or partly by means of equipment operating automatically in response to instructions given for that purpose; H

(b) is recorded with the intention that it should wholly or partly be processed by means of such equipment; or

(c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, I

that relates directly or indirectly to a data subject, who is identified or identifiable from that information or from that and other information in the possession of a data controller, including any sensitive personal data and expression of opinion about the data subject; but does not include any information that is processed for the purpose of a credit reporting business carried on by a credit reporting agency under the Credit Reporting Agencies Act 2010;

Section 8 of the PDPA:

Subject to section 39, no personal data shall, without the consent of the data subject, be disclosed —

(a) for any purpose other than —

(i) the purpose for which the personal data was to be disclosed at the time of collection of the personal data; or

(ii) a purpose directly related to the purpose referred to in subparagraph (i); or

(b) to any party other than a third party of the class of third parties as specified in paragraph 7(1)(e).

Section 45 of the PDPA:

(1) There shall be exempted from the provisions of this Act personal data processed by an individual only for the purposes of that individual's personal, family or household affairs, including recreational purposes.

(2) Subject to section 46, personal data —

(a) processed for —

(i) the prevention or detection of crime or for the purpose of investigations;

(ii) the apprehension or prosecution of offenders; or

(iii) the assessment or collection of any tax or duty or any other imposition of a similar nature,

shall be exempted from the General Principle, Notice and Choice Principle, Disclosure Principle and Access Principle and other related provisions of this Act;

(b) processed in relation to information of the physical or mental health of a data subject shall be exempted from the Access Principle and other related provisions of this Act of which the application of the provisions to the data subject would be likely to cause serious harm to the physical or mental health of the data subject or any other individual;

(c) processed for preparing statistics or carrying out research shall be exempted from the General Principle, Notice and Choice Principle, Disclosure Principle and Access Principle and other related provisions of this Act, provided that such personal data is not processed for any other purpose and that the resulting statistics or the results of the research are not made available in a form which identifies the data subject;

(d) that is necessary for the purpose of or in connection with any order or judgement of a court shall be exempted from the General Principle, Notice and Choice Principle, Disclosure Principle and Access Principle and other related provisions of this Act; A

(e) processed for the purpose of discharging regulatory functions shall be exempted from the General Principle, Notice and Choice Principle, Disclosure Principle and Access Principle and other related provisions of this Act if the application of those provisions to the personal data would be likely to prejudice the proper discharge of those functions; or B

(f) processed only for journalistic, literary or artistic purposes shall be exempted from the General Principle, Notice and Choice Principle, Disclosure Principle, Retention Principle, Data Integrity Principle and Access Principle and other related provisions of this Act, provided that — C

(i) the processing is undertaken with a view to the publication by any person of the journalistic, literary or artistic material; D

(ii) the data controller reasonably believes that, taking into account the special importance of public interest in freedom of expression, the publication would be in the public interest; and

(iii) the data controller reasonably believes that in all the circumstances, compliance with the provision in respect of which the exemption is claimed is incompatible with the journalistic, literary or artistic purposes. E

[37] A set of guidelines has also been issued by the Securities Commission Malaysia under s 377 of the Capital Markets and Services Act 2007 regarding the submission of corporate and capital market product proposals. These guidelines are: F

1.02 It is expected that the Submitting Party adheres to the following principles: G

(a) Integrity
To demonstrate integrity in all professional and business dealings.

(b) Objectivity
To avoid situations of conflict of interest or any situation that compromise or affect professional or business judgments. H

(c) Professional competence and due care
To demonstrate and maintain professional knowledge and skill at the level expected and exercise due care and diligence in carrying out its functions.

(d) Confidentiality I
To maintain and safeguard confidentiality of information acquired as a result of professional and business dealings, and not disclose such information to any person or use such information, unless there is a legal or professional duty or obligation to do so.

> ...
>
> 5.15 A Submitting Party must ensure the confidentiality of and protect against unauthorised use of or access to applicant's records and information.

[38] To this end, even if some documents are not produced first, as argued by the defendants, it seems reasonable enough to me that the plaintiffs are entitled at this stage to do so, since otherwise the element of confidentiality would lose its significance. What would happen to those documents if the court ultimately decided against the plaintiffs? Should those documents be disclosed prematurely, the plaintiff may suffer irreparable damage.

[39] Further, despite not knowing the exact nature of the documents, the court would still be able to determine their category and what they contained based on the plaintiffs' description. To me, the issue is whether those documents would eventually have to be produced for trial to be protected by the protective order. Following that, the parties would be able to review and deal with them accordingly. This is not the case where the effect of the order is unknown.

[40] In fact, there is more to it than that. Several factors have been taken into consideration in order to reach these conclusions, including, amongst others, the following.

[41] As a starting point, I failed to see any good reason why the defendants need to be so concerned about sealing or protecting the documents in the manner that the plaintiffs are seeking. Although there are doubts regarding the full nature of the undisclosed documents at this point, several aspects stand out. They are as follows:

(a) firstly, these documents would eventually have to be produced during trial, and only such documents would fall under the protective order, so no harm would come to the defendants;

(b) secondly, the imposition of this condition on such documents is only temporary pending the outcome of this case, at least at this point;

(c) thirdly, the imposition of such an order would not prevent the defendants from ventilating their issues and defences fully;

(d) fourthly, the parties have the liberty to apply; and

(e) fifthly, the presiding judge, me at the moment, has full discretion to alter, amend and/or modify this order on my own motion, after consulting the parties, and without the need for any application.

[42] In any event, the first defendant is also fully aware that the documents sought to be protected are confidential. It is part of her terms of employment as stipulated in the Acclime Employee Handbook and applicable to all the plaintiffs' employees in Malaysia:

Clause 8.16 Independence/Confidentiality

i. This clause must be read in conjunction with the company's Confidential Information Policy.

ii. It is inevitable that certain employees will, by the nature of their position, often be in possession of confidential information about the company and/or its associates.

iii. Any such information obtained in the course of company employment should not be used for personal advantage or used improperly.

iv. An employee should not, without proper authority, disclose any confidential information about the company's and/or its associates' affairs to unauthorized persons or use or appear to use such information for the benefit of him or others.

v. All client lists, office manuals, precedent documents, or office documents of any nature whatsoever that you may use or prepare during the course of your employment remain the property of the company at all times.

vi. You are obliged to maintain the confidentiality of all affairs of the company and all its clients, which you may come across during the course of your work and after termination of your employment.

vii. You are required to observe the code of ethics as company secretaries or any professional body at all times.

CONCLUSION

[43] Following the above analysis, encl 37 is therefore allowed with costs in the cause, with some modifications as follows:

(a) the first step would be to delete the words 'and in any subsequent appeals', as well as the word 'always' as it appeared in para 2;

(b) as a next step, the plaintiffs to delete the words 'and/or appellate' in para 2(b)(i);

(c) for para 2(d), to delete the words 'separated from the other documents in the judge's or judges' chambers' and add the words 'to e-file the first page of the relevant bundle of documents' after the word 'and';

(d) in para 2(h), the words 'or any subsequent appeals' and the phrases 'or the Judge's chambers at all times up to the end of the sentence' should be deleted; and

(e) this protective order, however, applies to any appeals relating to interlocutory matters arising out of this action. In order to avoid any doubt, the court is not the custodian of the documents, and no order will be binding on the court.

Order accordingly.

Enclosure 37 allowed with costs in the cause, with some modifications.

Reported by Dzulqarnain Ab Fatar