Macs Associates Pte Ltd and others *v* Siew Kang Yoke (trading as Sky Management Associates) and another

[2021] SGHC 210

Case Number	: Suit No 424 of 2021 (Summons No 3001 of 2021)
Decision Date	: 13 September 2021
Tribunal/Court	: General Division of the High Court
Coram	: Choo Han Teck J
Counsel Name(s)	: Tan Teng Muan, Chua Boon Beng and Loh Li Qin (Mallal & Namazie) for the plaintiffs; Deborah Barker SC, Amarjit Kaur and Jayna Tan Yi Hui (Withers KhattarWong LLP) for the defendants.
Parties	: Macs Associates Pte Ltd — H. Wee & Co LLP — H. Wee Management Consultants Pte Ltd — Siew Kang Yoke (trading as Sky Management Associates) — Lee Soon Weng

Civil Procedure – Anton Piller order

13 September 2021

Judgment reserved.

Choo Han Teck J:

1 On 11 May 2021, the plaintiffs obtained an Anton Piller order ("APO") to enter and search the first plaintiff's former employees' residences, office and car to seize certain documents. The plaintiffs claim proprietary ownership of those documents. The documents were stored electronically or as hardcopies. The APO was executed on 18 May 2021; the defendants now seek to set aside the APO, and apply to have the plaintiffs return the items seized and destroy all duplicates made during the execution of the APO.

2 The first plaintiff provides tax consultancy services, the second plaintiff auditing services, and the third plaintiff corporate secretarial services. The plaintiffs are all owned by one Wee Hian Peng. The first defendant had been an employee of the first plaintiff since 1983, and last held the position of Tax Manager of the first plaintiff until 31 December 2020. The second defendant was also employed by the first plaintiff as a tax manger until 29 December 2020. The defendants had been providing tax advisory and consultancy services when they were employees of the first plaintiff. On 1 February 2021, the first and second defendants set up a sole proprietorship named SKY Management Associates ("SMA"), which the plaintiffs claim to be a competing business.

3 The plaintiffs' claims are that the first and second defendants took and misused confidential information, such as e-mails between the defendants and the plaintiffs' clients which were stored in the defendants' office e-mail accounts (which the first plaintiff claims to own), to advance the interests of SMA. The defendants have thus breached confidence in equity and in contract, breached the duty of fidelity under the employment agreements, converted the plaintiffs' proprietary documents, and that the defendants have conspired amongst themselves by unlawful or lawful means to destroy the businesses of the plaintiffs. The defendants allegedly misused the confidential information to persuade the plaintiffs' clients to switch to SMA, or to provide services to the clients without incurring extra time and expense to source for the same confidential information from the clients or other sources.

4 The plaintiffs were granted the APO on 11 May 2021. The APO permits authorised persons, such as the plaintiff's solicitors and the supervising solicitors from Oei & Oei LLC, to enter the

premises to search for and make copies of listed documents in Schedule 2 of the APO. Schedule 2 to the APO is as follows:

1. All documents, files and correspondence (including electronic mail), whether in paper form or in electronic data form stored in any devices or cloud-based storage systems/platforms;

(a) concerning, relating to, belonging to or originating from the 1st Plaintiff, the 2nd Plaintiff and/or the 3rd Plaintiff;

(b) belonging to, originating from or communicated to each of the 1st and 2nd Defendants, which involve, concern or relate to the 1st Plaintiff's, the 2nd Plaintiff's and/or the 3rd Plaintiff's clients which are identified in the Excel spreadsheet exhibited at page 151, and referred to at paragraphs 50 and 54, of the Plaintiff's affidavit of Lim Seow Hwa filed on 10 May 2021.

2. All articles containing the information described in paragraph 1 of this Schedule which include but are not limited to the following:

(a) The hard disks of personal computers (including but not limited to laptops and/or tablets) and mobile phones of the Defendants and/or personal computers (including but not limited to laptops and/or tables) which are used and/or have been used by the Defendants and Sky Management Associates;

(b) Electronic storage devices of the Defendants and Sky Management Associates or any of Sky Management Associates' staff and/or electronic storage devices (including but not limited to thumb dives and memory cards) which are used and/or have been used by the Defendants and Sky Management Associates or any of Sky Management Associates' staff;

(c) Internet-based data storage platforms (cloud) of the Defendants and Sky Management Associates or any of Sky Management Associates' staff and/or internet-based data storage platforms (cloud) which are and/or have been used by the Defendants and Sky Management Associates or any of Sky Management Associates' staff;

(d) Electronic and/or computer stored data of all email accounts used and/or have been used and/or accessible by the Defendants and Sky Management Associates or any of Sky Management Associates' staff.

(e) Hard copy documents and correspondence.

5 Undertakings were given by the plaintiffs' solicitors, including an undertaking to return the originals of all documents obtained as a result of the APO as soon as possible, and in any event within two working days of their removal. During the search, hard copies of documents, the plaintiffs' electronic devices such as phones and storage devices were seized.

6 The defendants now want to set aside the APO on the basis that there were procedural breaches of the APO, which resulted in grave injustice to the defendants. In addition, they say that the threshold requirements of APO were not satisfied. There is no strong *prima facie* case to justify the order, and there would there be serious damage suffered if APO was not granted. There is no likelihood that the defendants would destroy the documents. In any event, the APO was out of proportion to the legitimate object of the order. The defendants' counsel also submits that the APO was obtained by material non-disclosure.

7 On the issue of procedural breaches by the plaintiffs in executing the APO, the defendants claim that the plaintiffs indiscriminately seized documents that fell outside the scope of the prescribed APO. There was no proper and complete contemporaneous inventory of items seized to the defendants, which is a breach of Clause 2(f) of the APO. Further, the plaintiffs and supervising solicitors commenced the search at the first defendant's residence in the first defendant's absence, despite Clause 2(g) of the APO stating otherwise. The defendants also complained that the supervising solicitors continued to retain the hard copy original documents seized to date, despite the requirement for such documents to be returned as soon as possible, or within two days. The plaintiffs and the supervising solicitors have also refused to deliver documents with disputed ownership to the defendants' solicitors for safekeeping, which contravenes Schedule 4(3) of the APO. Other complaints include the late proposal of search terms by the plaintiffs, the misplacement of a hardcopy original document seized from the second's defendant's residence, the failure of the plaintiffs' solicitors to present the supervising solicitors' report to the court and the defendant "as soon as it is received".

8 The defendants claim that the plaintiffs seized documents such as bills and old letters issued by SMA to its clients, and other client information which belong to SMA's clients. These documents fall outside of the ambit of the APO which should be restricted to documents concerning, belonging to or originating from the plaintiffs or the plaintiffs' clients. For instance, there were files belonging to SMA's clients not listed in the plaintiffs' table, or files belonging to the former client of the plaintiffs, such as one Uner Investments Pte Ltd. There were also documents that were dated after the defendants' cessation of employment with the first plaintiff. Further, personal photographs, personal financial, and family information were also seized, none of which are relevant to the suit.

9 The plaintiffs' response is that there was no indiscriminate seizure of documents. The defendant's solicitor was present when the APO was executed, and did not raise any objection. There was no breach of Clause 2(f) of the APO, as there was an inventory list compiled by the supervising solicitors, signed by the respective defendants at the respective locations where the search was executed. The plaintiffs also deny that they wrongfully retained items past the stipulated timeline. Instead, there was a variation of the terms of the APO, as negotiated by the defendants' and the plaintiffs' solicitors, that the seized hard copy documents would be delivered to the supervising solicitors to be imaged, and the electronic devices will be brought back to the premises of the forensic experts, FTI, to be imaged. It was also agreed that there would be no search of the imaged devices until parties have agreed to the search terms. As these documents are in the supervising solicitors' possession, the previous undertaking by the plaintiff's solicitors cannot be performed. The supervising solicitors took the position that any dispute between the plaintiffs and defendants should be dealt with by agreement between the parties, or by the court's discretion if parties fail to agree. As for the electronic devices, they have all been returned to the defendants on 19 May 2021.

10 I find that these are at best technical breaches of the APO that have not caused substantial prejudice to the defendants to warrant it being set aside. Irrelevant material seized can always be returned without setting aside the order itself. The plaintiffs have shown an inventory for the seized items. The retention of items past the two-day limit in the Plaintiffs' solicitors undertakings arose from a variation of the terms of the APO by the solicitors, although the solicitors should have varied the undertakings by applying to court, instead of leaving it as an agreement between parties, since the undertakings under the APO are owed to the court and should be varied only with the leave of the court. As for the misplaced letter seized from the second defendant's residence, the supervising solicitors explained that photographs had been taken of them for record. Even if it had been a lapse of care, given the number of documents taken, the inadvertent misplacement of a single document does not amount to an egregious breach. In any event, since a photograph was taken of the same document, the defendants did not suffer any real prejudice. Hence, there were no breaches of the APO of sufficient gravity that warrant setting it aside.

11 As for the threshold requirements of obtaining a search order, the plaintiff must satisfy four conditions: first, the plaintiff must have an extremely strong *prima facie* case; second, the damage suffered by the plaintiff would have been very serious; third, there was a real possibility that the defendants would destroy relevant documents; fourth, the effect of the search order must not be out of proportion to the legitimate object of the order (*Asian Corporate Services (SEA) Pte Ltd v Eastwest Management Ltd (Singapore Branch)* [2006] 1 SLR(R) 901 ("*Asian Corporate*") at [14]).

12 To set aside the order, the defendants need to show that there were breaches in the execution of the APO that had caused prejudice to them: *Expanded Metal Manufacturing Pte Ltd v Expanded Metal Co Ltd* [1995] 1 SLR(R) 57 at [19]. Alternatively, the defendants must show that the plaintiffs did not meet any of the conditions needed to obtain a search order, or that the plaintiff did not make full and frank disclosure in the *ex parte* application (*Bengawan Solo Pte Ltd v Season Confectionery Co* (Pte) Ltd [1994] 1 SLR(R) 448 at [12]).

13 In this case, the plaintiffs had pleaded various causes of actions against the defendants. But the underlying factual basis is that the defendants have taken confidential information belonging to the plaintiffs to advance their own business interests in setting up SMA, which the defendants claim to be a competing business set up by the defendants after they left the first plaintiff's employment at the end of December 2020.

14 To establish a breach of confidentiality in equity, the plaintiffs will need to show that the information has the necessary quality of confidence, and that the information was given to the defendants in circumstances importing an obligation of confidence. If these two requirements are fulfilled, the burden of proof shifts to the defendants, and they have to prove that their conscience was unaffected: *I-Admin (Singapore) Pte Ltd v Hong Ying Ting and others* [2020] 1 SLR 1130 ("*I-Admin*") at [61]. The defendants must produce evidence to show that that there was no misuse or abuse of the confidential information (*Angliss Singapore Pte Ltd v Yee Heng Khay (alias Roger)* [2021] SGHC 168 at [50]).

15 The plaintiffs' counsel submits that there is a strong *prima facie* case that the defendants have breached their obligations of confidence in contract and in equity, have converted the confidential information belonging to the defendants, and have breached the duty of fidelity. The confidential information in question includes the e-mails and attachments between the defendants and the plaintiffs' clients or third parties stored in the plaintiffs' Hotmail accounts and EBCA accounts, as well as hardcopy documents relating to the tax, auditing and other business operations of the plaintiffs. The Hotmail and EBCA accounts were created by the first plaintiff's staff, and they belong to the first plaintiff, as they were used by the defendants to communicate with the first plaintiff's clients. The defendants unlawfully took the plaintiffs' confidential information so as to give SMA a competitive advantage to offer clients a seamless transition of services from the first plaintiff to SMA, without which the defendants would have needed to collate information from the clients from scratch.

16 Referring to code of conduct for tax professionals and accountants, the plaintiffs' counsel argues that there is a relationship of confidence between the plaintiffs and their clients, and thus the work-related documents are confidential in nature. Alternatively, he submits that the defendants also owe a contractual duty of confidence to the first plaintiff, under the confidentiality clauses in the defendants' employment contracts with the plaintiffs. The clauses imposed express obligations of confidentiality on the defendants, that "[a]ny trade secrets or other confidential information which belong or relate to the [first plaintiff] and that of clients must not be discussed with or divulged to any outside parties at all times. …" These clauses explicitly include information of the clients, and it is therefore no defence for the defendants to claim that the duty of confidentiality is only owed to the

clients and not the first plaintiff.

17 The plaintiffs claim that they had lost 73 clients who were persuaded to switch over to SMA, or to other auditing service providers, because of the defendants' conduct. The confidential information gave SMA a significant competitive advantage as the clients may have otherwise hesitated to switch over to SMA. Hence, there is a causal link between the alleged breaches of confidentiality and loss suffered by the plaintiffs. In any event, the possession of these documents without the consent or authorisation of the first plaintiff would constitute conversion.

18 In respect of the claim for a breach of fidelity, the plaintiffs claim that the defendants had approached the first plaintiff's clients, such as one Yukon Success, to persuade them to use the first defendant's services after she set up SMA.

19 The defendants' counsel submits that the first requirement of obtaining an APO was not met. With respect to the claim of breach of confidence, the defendants say that the information in question is not confidential *vis-à-vis* the first plaintiff. There is no confidentiality owed to the plaintiffs because the documents belong to the clients, and not the first plaintiff. Further, these clients are at best the first plaintiff's former clients, and have given the defendants permission to retain their documents so as to provide tax consultancy services to them. Even if the first two requirements set out in *I-Admin* were satisfied, the defendants' conscience remains unaffected, as it was the respective clients who independently approached SMA to act as their tax agents. The clients would have provided the same information to the defendants.

20 With respect to the conversion claim, the defendants claim to be the respective owners of the Hotmail Accounts, as the defendants set up the Hotmail accounts on their own to communicate with the clients. As for the EBCA accounts, the defendants aver that they have made these accounts available to the first plaintiff's staff after their resignation. The defendants also contend that there must be a positive wrongful act of dealing with goods in a manner that is inconsistent with the owner's right, as well as an intention to deny the owner's rights, so as to prove a claim of conversion. This has not been satisfied because the mere possession of the documents in question alone is insufficient to show a "positive wrongful act". Furthermore, the hard copies of these documents are still in the first plaintiff's office.

21 The defendants claim that, in any event, there is no causal link between the alleged losses suffered (namely, the loss of clients) and the defendants' acts. The clients had terminated the first plaintiff's services on their own volition, not because they were solicited by the defendants. Besides, there is no non-competition or non-solicitation clause in the employment agreements. The first plaintiff's clients preferred to work with the first defendant because of their long-standing working relationship. Following these clients' requests for the defendants to be their tax agents, the first defendant then then set up SMA and engaged the second defendant as a freelance service provider.

22 As for the conversion claim, the defendants deny having committed any wrongful act to deprive the plaintiffs their rights to their proprietary documents because retaining the documents and Hotmail Accounts (which belong to the defendants) do not constitute a positive wrongful act.

23 I find that there is a strong *prima facie* case that these documents were clothed with the necessary quality of confidence, and were imparted in circumstances importing an obligation of confidence. These documents include correspondence and attachments from clients sent to the defendants during their employment with the first plaintiff, so as to facilitate the provision of tax services by the first plaintiff. It is no defence for the defendants to claim that these documents are not confidential because they belong to the clients. This is also the position in contract. Clauses 11

and 12 of the first and second defendants' employment agreements state that the defendants "shall treat the [first plaintiff]'s and client's affairs in the strictest confidence". Hence it is clear that for the breach of confidence claim in contract, the clients' documents are confidential. For the same reason, there is a strong *prima facie* case for the claim of conversion that the confidential information is the property of the first plaintiff, and the defendants' deletion of such information would constitute a "positive wrongful act".

24 As for the breach of fidelity claim, the affidavit evidence does not support a strong *prima facie* case that the defendants had solicited the clients of the plaintiffs. For instance, in the case of Yukon Success, the e-mail from the one Jimmy, a business contact of the first defendant, points to the contrary. In the e-mail in November 2020, which is the only e-mail dated before the first defendant left the first plaintiff, Jimmy informed the representative of Yukon Success that the first defendant was setting up her own company, and if Yukon Success wishes to change their tax agent, they can use her. This in itself is not evidence any persuasion on the part of the first defendant. I therefore find that there is no strong *prima facie* case on the breach of fidelity.

25 However, the plaintiffs have not been able to establish a strong *prima facie* case that there is a causal link between the alleged wrongful acts and the loss suffered by the plaintiff. The plaintiffs' case is not that there was a breach of a non-solicitation and non-competition clause. In fact, the plaintiffs have clarified in the amended Statement of Claim that their case is that the defendants misused the confidential information to provide a seamless transition for plaintiffs' former clients who switched over to using the first defendant's services, causing the plaintiffs to lose their clients. But it was the clients' choice, regardless of the defendants' breach, to terminate their engagements with the first plaintiff and to engage SMA. This is evidenced by letters from the clients, such as one MJ Medical Services Pte Ltd, C-Transformation Pte Ltd, and at least nine other clients, confirming that they voluntarily chose the first defendant as their tax agent in place of the first plaintiff. I am not satisfied that there is a strong *prima facie* case of a causal link between the loss and the alleged misuse or conversion of confidential information.

26 On the second requirement to be granted a search order, the plaintiffs submit that the defendants have a propensity to destroy evidence. The first defendant deleted most of the e-mails in his company Hotmail and EBCA Accounts. The first defendant has deleted e-mails dated earlier than December 2020. The forensic evidence shows that the defendants deleted a large amount of e-mails in the latter half of 2020. The plaintiffs claim that it is not feasible for every document and attachment to the e-mails to be kept as hard copies. Only some of the e-mails and attachments were kept in the ring files.

27 The defendants' response is that there is no grave danger that the defendants will destroy evidence. It is the defendants' standard practice to clear their mailbox regularly to declutter. They would delete work-related e-mails which they had printed and filed in their physical client folders located in the first plaintiff's office. The first plaintiff has full and unfettered access to the hardcopy files. Hence, the plaintiffs have no basis to assert that the defendants' deletion of the e-mails had prevented the plaintiffs from serving their clients effectively. In any event, the deletion of e-mails did not cause the plaintiffs any loss since there were hard copies available.

28 There must be solid evidence of a real risk that the defendants would destroy or remove documents if not for the search order: *Asian Corporate* at [25], citing *Petromar Energy Resources Pte Ltd v Glencore International AG* [1999] 1 SLR(R) 1152. At the time the APO was granted, such a real risk was present based on the massive deletion of files as shown in the computer expert's forensic evidence. The forensic expert's report shows a drastic increase in the deletion of e-mails by both defendants in July 2020.

29 The defendants' claim that they were merely de-cluttering their inboxes is hard to believe, especially in light of the sharp increase of deleted e-mails in July 2020. 648 e-mails were deleted by the first defendant in July, in contrast to the one e-mail he deleted in April 2020.

30 However, after the execution of the APO, it transpired that a large number of e-mails deleted by the defendants were retained in hard copy in the first plaintiff's office. Although it could be said that the plaintiffs could not have known what was deleted until after the APO was executed, what is before me does not reveal any grave danger that the defendants would destroy evidence for the purpose of the trial. There is no reason why the plaintiffs cannot resort to the ordinary process of discovery and e-discovery to obtain evidence of whether the defendants have unlawfully taken confidential information. There is also no evidence that suggests that the defendants will destroy the hard copy documents. Even if there were, the less intrusive order would have been an order enjoining the defendants from destroying the documents. Now that the documents have already been disclosed, the defence would be adversely affected should they now destroy or lose the documents.

31 Another basis on which the defendants seek to set aside the APO is that the APO is out of proportion to the legitimate object of the order. Schedule 2 of the APO allows the plaintiffs to seize documents in respect of the second and third plaintiffs, with whom the defendants have no contractual relationship. The defendants' counsel submits that there is also no limit on the temporal scope of the documents, which allowed the plaintiffs to seize documents that were originated after the defendants' cessation of employment with the first plaintiff. Additionally, the scope of the APO included six clients of SMA who have ceased to be the plaintiff's clients. To this, the plaintiffs' counsel submit that the order is not disproportionate, given that many documents of the plaintiffs' have been discovered at the defendants' residences or office, and without the APO, the plaintiffs would have been groping in the dark not knowing the extent to which the confidential information was taken.

32 However, I find that to the extent that the search order had no temporal scope and therefore included clients' documents that originated after the defendants' cessation of employment, the scope of the APO was too wide. The financial documents of clients the defendants serviced after the first defendant have no bearing on the pleaded issues. In any event, a search order is not meant to allow the plaintiffs to conduct a comprehensive discovery.

33 The defendants also claim that the plaintiffs obtained the APO through material non-disclosure. In particular, the plaintiffs failed to disclose that the plaintiffs set up the Hotmail accounts themselves and were therefore the owners of these accounts. The plaintiffs represented to the court that the defendants deleted the correspondence and documents without mentioning that the defendants had maintained hardcopy files of the deleted correspondence and documents, which are still in the first plaintiff's office. The plaintiffs also did not disclose the context in which the clients terminated their services with the first plaintiff – it was not a case that the clients were solicited by the defendants, but that they were dissatisfied with the plaintiffs' services.

34 I do not agree with the defendants' counsel that there had been material non-disclosure at the time the APO was obtained. The question of ownership of the Hotmail accounts remains disputed, as there is conflicting affidavit evidence on who created the Hotmail Accounts in question. It is also not within the plaintiffs' knowledge as to why the clients approached the defendants. Before the APO was executed, the plaintiffs also would not have known what the defendants had deleted, or that the deleted e-mails were printed and stored as hardcopies in the first plaintiff's office.

35 But for reasons set out above in [25] and [32], the APO should be set aside. An APO is draconian and oppressive. The plaintiffs must show a strong *prima facie* case, and the propensity of

the defendants to destroy evidence, so as to warrant an APO. The APO is also not a means for the plaintiffs to search for evidence. If the plaintiffs require certain documents in the defendants' possession, they can rely on the ordinary procedure of discovery without an APO. Based on the affidavit evidence, I am not satisfied that the plaintiffs have a strong *prima facie* case and I therefore set aside the APO.

36 Costs will be reserved to the trial judge.