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Dispute Resolution

# High Court Sets Out Law on Striking Out of Pleadings for Non-Compliance with Discovery Obligations

## Introduction

When submitting a dispute to the courts, litigants also submit themselves to the rules and procedures of the court system. Should a litigant fail to comply with court orders meant to facilitate proceedings, it may face serious consequences, including the striking out of its case.

In *Saxo Bank A/S v Innopac Holdings Limited* [2021] SGHC 214, the Singapore High Court set out the applicable principles on when it would exercise its discretion to strike out a litigant's pleading for non-compliance with the Rules of Court ("**ROC**") or orders of court specifically in a situation where discovery obligations have been breached.

Here, the defendant had repeatedly failed to comply with its discovery obligations, including those subject to an "unless" or peremptory order. Applying the relevant principles, the High Court struck out the defendant's Defence and Counterclaim and entered judgment for the plaintiff.

The plaintiff was successfully represented by Harish Kumar, Daniel Quek, Low Weng Hong and Edina Lim of Rajah & Tann Singapore LLP.

## Brief Facts

The plaintiff bank had brought a claim against the defendant, a publicly-listed company, for breach of a Memorandum of Understanding ("**MOU**") between the parties. The defendant took the position that the agreement was not legally binding, and also raised a counterclaim against the plaintiff.

In the usual course of legal proceedings, and prior to the actual trial of the suit, parties were subject to the usual obligations on general discovery to disclose and/or produce documents and information relevant to the suit. The defendant committed numerous breaches of its general discovery obligations, including failing to provide its initial list of documents verified by affidavit on time, having a list of documents whose descriptions failed to match the documents produced, producing discrepant documents which were missing key information and failing to disclose relevant correspondence that took place during the material time.

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Subsequently, the plaintiff applied for specific discovery of the defendant's internal documents and correspondence relating to the negotiations on the terms of the MOU and on the effect of the MOU. The plaintiff's application was granted and upheld on appeal, despite the defendant's attempts to persuade the court that no such internal documents or correspondence existed. As such, on appeal, a Further Discovery Order was made for the defendant to file: (i) a further and better list of documents verified by affidavit stating whether the documents listed had at any time been in the defendant's possession, custody or power ("**PCP**"); (ii) the steps that the defendant took to locate the documents; and (iii) if these documents had been but were no longer in the defendant's PCP, when the defendant parted with them and what had become of them.

Following this, the defendant failed to comply with the Further Discovery Order within the stipulated timeline. As such, an Unless Order was made against the defendant, in which judgment would be entered in favour of the plaintiff unless the defendant complied with the Further Discovery Order by a certain date. However, the defendant failed to disclose of any document within these categories and to file a further and better list of documents, nor did it file an affidavit stating what had happened to those documents. Instead, the defendant filed an affidavit stating that the defendant did not have (and never had) PCP of the relevant documents, despite such a position being wholly untenable and having previously been rejected by the court. In light of the defendant's breach of the Unless Order, the plaintiff applied to strike out the defendant's Defence and Counterclaim and for judgment to be entered on its claim ("**Striking Out Application**"). The Striking Out Application succeeded before the Registrar who held that:

- (a) The defendant had failed to comply adequately with the Further Discovery Order;
- (b) The defendant had deliberately failed to preserve possibly relevant documents and/or had failed to take reasonable steps to comply with the Further Discovery Order;
- (c) There was a real risk that the defendant's conduct had prejudiced the conduct of the trial; and
- (d) The defendant's breaches of the Further Discovery Order and Unless Order were intentional and contumelious.

Accordingly, the defendant's Defence and Counterclaim were struck out by the Registrar and judgment was entered for the plaintiff.

The Defendant appealed against the Registrar's decision.

### Holding of the High Court

The High Court upheld the decision of the Registrar. In reaching its decision, the High Court set out the applicable law relating to the striking out of pleadings for non-compliance with discovery obligations.

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### **Court's discretion to strike out**

Order 24 rule 16 of the ROC provides that where there is failure to comply with discovery obligations, the court is empowered to make such order as it thinks just, including for the dismissal of the action or the striking out of the defence.

The High Court set out the principles relating to when it would exercise this discretion to strike out pleadings for breaches of discovery obligations:

- (a) The exercise of the discretion is a fact-sensitive inquiry, taking all circumstances of the case into account, including the prejudice suffered by the innocent party and considerations of proportionality.
- (b) At one end of the spectrum, procedural defaults which are technical in nature are unlikely to warrant striking out. At the other end of the spectrum, striking out is justified by: (i) procedural abuse or questionable tactics; (ii) contumacious failure to comply with peremptory orders; or (iii) persistent defaults amounting to contumacious conduct.
- (c) The breach of an "unless order" will automatically trigger its specified adverse consequences.
- (d) When an "unless order" has been breached, the onus is on the defaulting party to show that the breach had not been intentional and contumelious. The defaulting party must show that it had made positive efforts to comply but was prevented from doing so by extraneous circumstances.
- (e) Even where an intentional and contumelious breach of an "unless order" had been shown, the court must nevertheless determine what sanction should be imposed as a result.
- (f) It is relevant whether, following the earlier breaches, all discoverable documents have subsequently been disclosed. However, an action or defence can still be struck out for failing to disclose documents even if the defaulting party has rectified its non-compliance.
- (g) The court's power to strike out an action may be invoked in cases involving an inexcusable breach of a significant procedural obligation. This would include the breach of an "unless order" which compels discovery.
- (h) The normal prerequisite for the striking out of an action under order 24 rule 16 of the ROC is the existence of a real or substantial risk that a fair trial will no longer be possible. However, in cases of contumacious conduct, the deliberate destruction or suppression of a document or the persistent disregard of an order of production would justify a striking-out order even where a fair

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trial was still possible. Wilful disobedience is not required, as a failure to comply with court orders through negligence, incompetence or indolence may justify a striking out.

### Application

Applying the above principles, the High Court found that Registrar had been correct to exercise his discretion to strike out the defendant's Defence and Counterclaim. The reasons include the following:

- (a) The defendant persistently breached its discovery obligations and approached its discovery obligations in a drip-feeding manner. Importantly, the defendant breached the Further Discovery Order and the Unless Order.
- (b) The defendant took positions which proved to be untrue.
- (c) The defendant's breaches were intentional and contumelious; it was not the case that the defendant had made positive efforts to comply but was prevented from doing so by extraneous circumstances.
- (d) The Court was not satisfied that the defendant had since provided discovery of all the relevant documents.
- (e) The documents which the defendant failed to produce went to the heart of the dispute, and there was a real or substantial risk that a fair trial would no longer be possible.
- (f) Judgment in favour of the plaintiff was the stipulated consequence of a breach of the Unless Order. It was also proportionate to the defendant's breaches of its discovery obligations for judgment to be entered in favour of the plaintiff.

### Concluding Words

The Court's decision provides valuable insight as to how it will approach the question of whether to strike out a litigant's case for non-compliance of discovery obligations. First, it sets out and discusses the various legal principles that apply in such instances, which may guide future litigants in similar applications. Second, the Court's decision also demonstrates the fact-sensitive nature of the inquiry in relation to whether a striking out is warranted in a specific case. In this case, the Court painstakingly considered the defendant's various breaches of its obligations and the implications of the defendant's various statements and actions, which provides guidance on which actions would be deemed to cross the threshold required for striking out.

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The decision also highlights the importance of complying with a party's discovery obligations. While litigants may feel inclined to be conservative in terms of documents disclosed, the purpose of discovery is to ensure that the court has access to all relevant evidence that will enable the right decision to be reached and justice to be served. This decision serves to emphasise the importance of the diligent and conscientious discharge of a party's discovery obligations, and the consequences of a failure to do so. In particular, it is also notable that the Court confirmed that a claim or defence could be liable to be struck out where discovery is provided in a drip-feeding manner, even if the non-compliance is ultimately rectified.

For further queries, please feel free to contact our team below.

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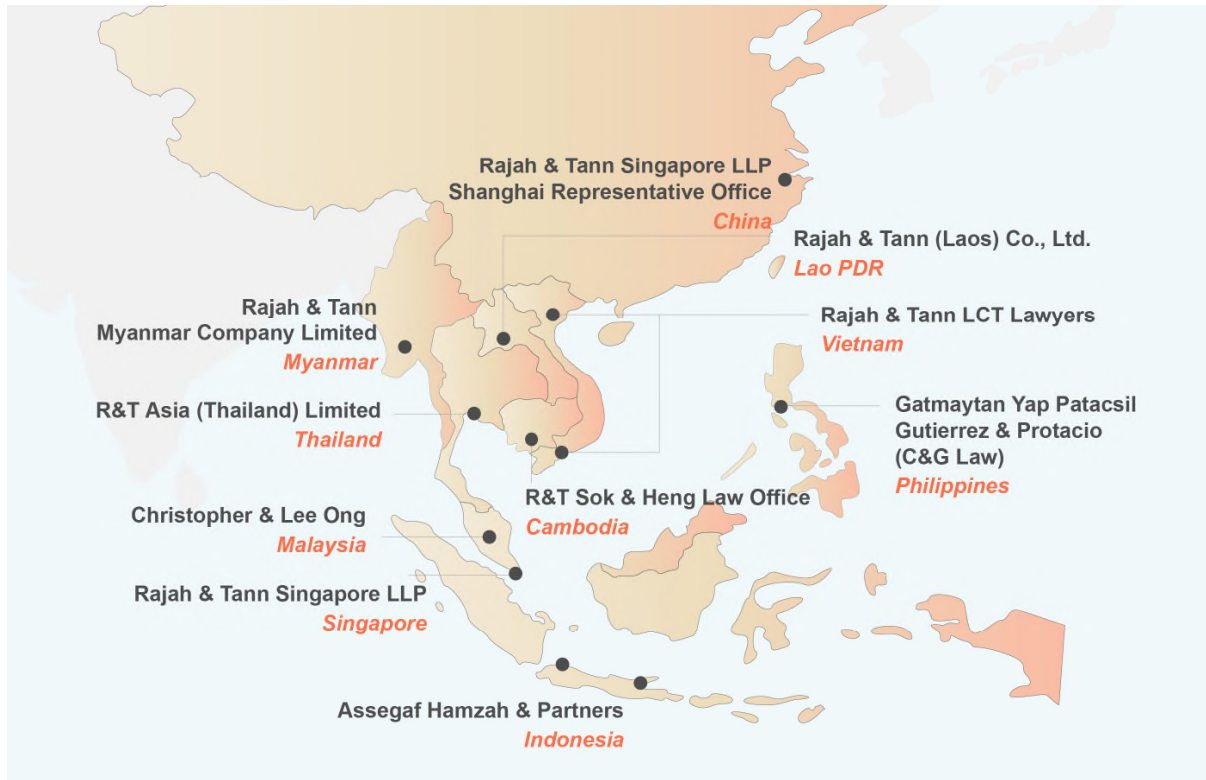
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