JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO COA2022CV00030

APPLICATION NO COA2022APP00048

BETWEEN	**WEST INDIES PETROLEUM LIMITED**	**APPLICANT**
AND	**SCANBOX LIMITED**	**1ST RESPONDENT**
AND	**WINSTON HENRY**	**2ND RESPONDENT**
AND	**COURTNEY WILKINSON**	**3RD RESPONDENT**
AND	**JOHN LEVY**	**4TH RESPONDENT**

Miss Shavaniese Arnold and Ms Stephanie Williams instructed by Henlin Gibson Henlin for the applicant

Lemar Neale and Miss Oksana Kennedy instructed by Nea Lex for the 1st and 2nd respondents

Mrs Symone Mayhew QC and Miss Ashley Mair instructed by Mayhew Law for the 3rd and 4th respondents

24 May and 27 July 2022

IN CHAMBERS

F WILLIAMS JA

Introduction

[1] By this application, West Indies Petroleum Limited ('the applicant') is seeking preservation orders, pending the determination of this appeal. The appeal arises out of its unsuccessful application for similar orders before a judge of the Commercial Division of the Supreme Court ('the learned judge'). Its notice of application, filed on 4 March 2022, sets out the orders desired against the 1st and 2nd respondents, as follows:

"1. An order, pending appeal, to maintain and preserve data/information relating to the 1st and 2nd Respondent's unauthorized access, escalation and modification of access and/or facilitation of unauthorized access, escalation and modification of access to the Appellant's servers including but not limited to the following:

a. All electronic data in any format, media, or location, including data on hard drives, zip drives, CD-ROMs, CD-RWs, DVDs, backup tapes, PDAs, cell phones, smart phones, memory cards/sticks, or digital copiers or facsimile machines or cloud storage;

b. Any e-mail, electronic message, letter, memo or other document;

c. All data storage backup files including previously existing backups;

d. All data from servers and networking equipment logging network access activity and system authentication;

e. A list of all the employees involved in correspondence;

f. All electronic data generated or received by employees who may have personal knowledge of the facts involved in the matter between the parties;

g. Any and all computer, electronic, or e-mail message or pst or backup files of any type created, as well as any computer messages whether generated or received by the 1st Respondent and/or its agents including the 1st Respondent [sic];

h. Electronic data created to the date of this order;

i. All information and documents relating to all and any payments received by the 1st and 2nd Respondents including banking transit nos, date, name and address of payee."

[2] The applicant also sought against the 3rd and 4th respondents an order in the exact terms as order one paras. a. – i. (stated immediately above), save that in respect of sub-para. e., the applicant sought a list of all the "parties" (instead of 'employees') involved

and in relation to sub-para. i., an order was sought for all the information and documents relating to all and any payments "sent by/and or received by" the 3rd and 4th respondents. The applicant also sought orders that:

> "3. The Respondents shall produce to the court, only in a sealed envelope, a list of the information at paragraphs 1 and 2 hereof within fourteen (14) days of the date of this order, certifying that they have preserved the information relevant to this matter in accordance with this order.
>
> 4. The Respondents shall certify the steps taken and the tools used to preserve the said information at paragraphs 1 and 2, such certificate to be included in the sealed envelope referred to at paragraph 2 [sic] herein."

[3] The applicant set out 14 grounds as the bases for seeking these orders and supported its application with eight affidavits deposed by two of its officers, Gordon Shirley, Chairman of its Board of Directors and Gerald Charles Chambers, its Chief Executive Officer. I do not propose to set out verbatim the grounds in support of the application but will simply summarize them.

Summary of the grounds of the application

[4] The applicant relied on rules 2.14(2)(b) and (g) of the Court of Appeal Rules, 2002 ('CAR') and rules 26.1(v) and 26.2 of the Civil Procedure Rules, 2002 ('CPR'). These rules collectively address the court's power to make orders which, in the applicant's opinion, ought to have been made in the court below and to make decisions incidental to a matter, pending the determination of an appeal. Further, the applicant contends that the court is empowered to take steps and to give directions and orders for managing cases and furthering the court's overriding objective, even on its own initiative.

[5] In respect of the particular facts of this case, the applicant, which is also the appellant, further grounded its application on the premise that it has a real chance of success on appeal and that the orders sought are necessary, as:

(i) the respondents have gained unauthorized access and/or modified access to the applicant's servers and email servers with the likelihood that they have documents and records on their devices and/or servers, relating to the unauthorized access;

(ii) the respondents have demonstrated a tendency to be surreptitious and/or to destroy, withhold and conceal information or evidence;

(iii) the applicant is unable to ascertain the extent of the respondents' unauthorized modification of access and the 1st and 2nd respondents have refused to co-operate;

(iv) the respondents are in control of information that is relevant to the trial of the matter, and which may be rendered useless either deliberately or with the passage of time; and

(v) The nature of the material is such that it may be easily destroyed, deleted or altered, even unintentionally and the cost to recover the information may far exceed any remedy which may be awarded by the court.

The affidavit evidence on behalf of the applicant

[6] The circumstances which are said to have given rise to this application, as gleaned from all the affidavit evidence filed in support of the application, are somewhat extensive. The 1st respondent, Scanbox Limited ('Scanbox'), was hired by the applicant on 21 January 2019 to provide information technology services. Winston Henry, the 2nd respondent, is the Managing Director of Scanbox. On 22 October 2020, Scanbox's services were terminated, as a result of what may be described as an alleged data breach of the applicant's email system.

[7] The 3rd and 4th respondents, Courtney Wilkinson and John Levy, are shareholders of the applicant and also served as directors. Mr Wilkinson served as a director for approximately eight years, while Mr Levy served for just over seven years. They were both removed as directors on 9 February 2021, as a result of an extraordinary general meeting, held as a result of the alleged data breach.

[8] According to Messrs Shirley and Chambers, all four respondents, during the course of their dealings with the applicant, were made aware of information that was private and confidential in nature, which they were duty bound to maintain as such. In the case of Scanbox and Mr Henry, it is contended that they were bound by non-disclosure agreements which they signed and in the case of Messrs Wilkinson and Levy, they are said to be bound by virtue of their position as directors.

[9] Further, it is averred, the respondents would have been aware that the applicant stored confidential information on its email servers. According to Mr Shirley, the applicant had rules associated with access to information on its servers. Different users had different levels of access and this access was permitted on a "need to know" or need to "access" basis and was password restricted. In this regard, Scanbox, was tasked to manage access to the applicant's servers by the various users and in keeping with the limits prescribed by the applicant, for each user. Messrs Wilkinson and Levy, in their capacity as directors, were permitted access by virtue of their prescribed email addresses.

[10] In or around September 2020, it appears that a dispute developed between Mr Chambers and Mr Wilkinson. This is seen from a demand letter dated 14 September 2020, that was sent to the directors of the applicant, by Phillipson Partners, attorneys-at-law, on behalf of Mr Wilkinson. By this letter, Mr Wilkinson outlined several issues in relation to the conduct of the affairs of the company by Mr Chambers and demanded, among other things, that Mr Chambers resign as CEO. This letter was exhibited by Mr Shirley in furtherance of his evidence intended to show that Mr Wilkinson breached his duty of confidentiality to the applicant.

[11] Mr Shirley deposed to two particular situations that aroused his suspicion to the possibility of a data breach, the second of which coincided with the time period that the abovementioned letter was sent to the board. First, Mr Shirley averred that he was advised by Mr Chambers that he was experiencing issues accessing his email. Second, that Mr Levy, "without notice" and apparently without invitation, attended a meeting at the applicant's principal place of business, on 29 September 2020. Apparently the information in relation to the meeting could only have been procured by unauthorized access to an email.

[12] Mr Shirley states that, arising from his suspicions, he ordered a forensic analysis of the applicant's system. This analysis reportedly revealed that there was unauthorized access and unauthorized modification of access to the applicant's system between the period 29 August 2020 and 30 November 2020. More specifically, the applicant asserts that Messrs Wilkinson and Levy caused Scanbox and Mr Henry to modify their access to the applicant's email server which resulted in unauthorized access to and extraction of sensitive company-related information. Scanbox and Mr Henry are also accused of manipulating the email addresses of other authorized persons within the company so as to extract and access sensitive and confidential information from executive directors, among other persons.

[13] Included in the information said to have been extracted are trade secrets, bank account information, supplier and customer contracts, invoices for customers, invoices from suppliers, legal contracts, information on potential customer negotiations and contact information, sales emails and customer analyses. The information extracted, according to Mr Shirley, was sent to certain email addresses belonging to and/or affiliated with Messrs Wilkinson and Levy.

[14] The details in relation to the respondents' alleged unauthorized access and modification of access were set out in an expert report prepared by Shawn Wenzel, Information Technology Management Consultant and founder of CaribTek Inc. and dated 23 December 2020. In his report, Mr Wenzel outlined how the alleged unauthorized

modification of access was achieved. According to Mr Shirley, he was reliably informed by Mr Wenzel that:

> "a. The 1st and 2nd [respondents] installed an outlook back-up tool called 'Outlook Backup' which allowed him [sic] to dump entire users mailbox [sic] into a Personal Storage Table (PST) file.
>
> b. Creating PST backup schedules for the Claimant's directors Charles Chambers, Tarik Felix, Arnella Gobault and Mohammed Dennaoui.
>
> c. The 1st and 2nd [respondents] then forwarded emails of Director Tarik Felix and Director Charles Chambers to the … unauthorized accounts.
>
> d. Assigning the Tarik Felix's backup account to … (an inactive account).
>
> e. Changing the passwords of Charles Chambers, Tarik Felix, Arnella Gobault and Mohammed Dennaoui and allowing unauthorized access to the 2nd 3rd [sic] and 4th [respondents] and to the exclusion of the [applicant's] authorized servants and/or agents.
>
> f. Permitting unauthorised access to these mailboxes with the new passwords. The said mailboxes contained confidential information concerning the [applicant].
>
> g. Misusing the authorisation given to the 1st and 2nd [respondents] to increase the [applicant's] storage space to facilitate the unauthorised access."

[15] By letter dated 28 December 2020, the applicant's attorneys-at-Law wrote to Scanbox, for the attention of Mr Henry, demanding that they, "maintain, preserve, retain, protect and not destroy any and all documents and data, both electronic and hard copy … related to the unauthorised access to the [applicant's] email server(s) and/or exchange platform". The letter also demanded that they provide the applicant's attorneys-at-law with all the information and documents relevant to the matter in machine-readable format. According to Mr Shirley, there has been a failure to comply with this request, with the result that the information may be destroyed, thereby rendering the applicant unable to ascertain the extent of the unauthorized access and so unable to prove its claim.

[16] In his bid to further demonstrate what he asserts is the necessity of the preservation orders, Mr Shirley stated that:

1. The respondents attempted to conceal their activities by using a "VPN", that is, "a network … used to mask the real identity of the user …".

2. The 4th respondent, John Levy, in related proceedings, "destroyed, concealed or refused to supply information … requested of him".

Mr Shirley said that, in these circumstances, he had a genuine "fear that the information in the possession of … the [respondents] may be destroyed" or its integrity undermined, prior to trial.

[17] Still further, in support of the application for preservation orders, Mr Shirley, in his third affidavit, made reference to a related claim by Island Lubes Distributors Limited ('Island Lubes') (a subsidiary of the applicant), against, among other defendants, Messrs Wilkinson and Levy. He asserted that in that related claim, an issue arose regarding the email account of Island Lubes. This account, he stated, could not be accessed, as Island Lubes did not have the password for the account and the recovery email address was an address belonging to Mr Levy. Mr Shirley outlined that the court had to, in effect, strongly encourage Mr Levy to co-operate so as to provide Island Lubes with access to its own account. Upon provision of the relevant credentials, Mr Wenzel was instructed to access the email account and to preserve the information therein. His preliminary report showed, according to Mr Shirley, that the contents of the account had been intentionally "cleaned out" sometime in or around 6 May 2021.

[18] As indicated earlier, this application was also supported by affidavit evidence from Gerald Chambers. By his affidavit, Mr Chambers cited examples of correspondence in which Messrs Wilkinson and Levy alluded to information, of which, according to Mr Chambers, they would not have been aware in their capacity as non-executive directors

and shareholders and which, they could only have known through what he said was their unauthorized access.

[19] With respect to Scanbox and Mr Henry, Mr Chambers asserted that the equipment used by them to perform their services on behalf of the applicant, was not given to them by the applicant - the implication being that they may have retained confidential information in relation to the applicant which is still in their possession and which would therefore need to be preserved.

[20] In summary, Messrs Shirley and Chambers asserted that the respondents misused information that was confidential to the applicant and breached their duties to the applicant, resulting in irreparable harm and damage. Thus, it is contended, the preservation orders are critical to enable the applicant to prove its claim and to ensure that the information will not be destroyed or damaged.

The evidence in response on behalf of Scanbox and Winston Henry

[21] Mr Henry gave evidence in his own behalf and on behalf of Scanbox, essentially denying all allegations of wrongdoing. He indicated that Scanbox did not retain any information belonging to the applicant after its services were terminated and that all the materials and equipment given to Scanbox to carry out its functions, were the property of the applicant and were retrieved by the applicant at the time of termination. Mr Henry admitted to signing the relevant non-disclosure agreements on behalf of Scanbox but stated that they were never in possession of any confidential information which the applicant has alleged that they accessed without authorization.

[22] He agreed that individual emails were accessed by way of passwords and that Scanbox was hired to manage and enable access to the emails. He, however, denied modifying the access of Messrs Levy and Wilkinson and denied manipulating the email addresses of other authorized users. He also denied extracting sensitive and confidential information from the executive directors and their assistants.

[23] Mr Henry asserted that, "multiple individuals employed to the [applicant] had access to the administrative password for the purpose of administering the platform". He said this included the former ICT Consultant Administrator. Mr Henry denied the contents of the report of Shawn Wenzel and denied having any information that would be relevant to the proceedings and therefore needing to be preserved.

[24] Mr Henry explained that, among the services offered by Scanbox to its clients was document-management services, which means that Scanbox has in its possession highly confidential documents belonging to other clients. Therefore, any preservation order may cause Scanbox to be in breach of its duty of confidentiality to other clients.

[25] In his second affidavit, Mr Henry detailed that on 7 February 2022 police officers attended his residence as well as the offices of Scanbox and executed a search warrant which empowered them to search for computer material and other evidence which they thought relevant in proving an offence under the Cybercrimes Act. Pursuant to that warrant, the police seized two laptops, seven cellular phones and SIM cards, and also arrested and charged Mr Henry for breaches of the Cybercrimes Act. Subsequently, on 16 April 2022, one of the laptops was returned, as it belonged to Mr Henry's wife. Accordingly, Mr Henry claims, inter alia, a right to privilege against self incrimination, as a basis for asking this court to refuse the preservation orders.

[26] In his affidavit filed in this court on 16 May 2022, Mr Henry definitively stated that he was issued a laptop by the applicant, for the purposes of carrying out the work that was assigned to him and that, upon termination of his services, he returned the laptop. As such, neither he nor Scanbox has anything in their possession that belongs to the applicant and therefore have nothing to preserve.

The evidence in response on behalf of Messrs Wilkinson and Levy

[27] So far as relevant, both Messrs Wilkinson and Levy categorically deny involvement in any data breach relating to the applicant's email server and/or exchange platform.

They further reject the applicant's assertions that they gave instructions to Scanbox and Mr Henry to access information from the applicant's servers and email addresses.

[28] They deny being aware of any express rules about access to the information of the applicant. On the other hand, they admit receiving confidential information about the company, but contend that this information was received in their capacities as directors and shareholders. They highlighted that the applicant is a small private company that is closely run, with all the directors being actively involved in the operations of the company. Mr Levy deposed that, in their capacity as directors, he and Mr Wilkinson would "often time" carry out executive functions, for which they were remunerated. He said management decisions were usually taken at the board level and that discussions at board meetings spanned a wide range of issues. As such, much of the confidential information that the applicant has alleged to have been procured by way of a data breach, was available to them, in their capacity as directors and through discussions at board meetings and with fellow directors. They accordingly deny having any need to "hack" into the applicant's servers, as the applicant contends. Mr Levy also indicated that the applicant's financial information was available to them, as all directors are signatories on the company's bank account.

[29] Both Messrs Levy and Wilkinson deny being in possession of information belonging to the company except for information that they received, "in the ordinary course of business as directors and which information [they] were entitled to receive as directors and shareholders". They also both deny being the holders of the email addresses which are said to be linked to them and said to be the email addresses to which information was sent pursuant to the data breach.

[30] They refute the contents of and the conclusions reached in Mr Wenzel's report and state that these conclusions are erroneous. Mr Levy went as far as stating that Mr Wenzel's report lacked evidence linking him to the alleged data breach. Mr Levy indicated that Mr Wenzel's report completely ignored the fact that he could have obtained information from other sources, to include other employees of the company.

[31] With specific reference to the meeting on 29 September 2020, Mr Levy states that he was made aware of the meeting by, "an employee who was surprised to know that [he] was not invited". With respect to the information that they set out in their various letters to different stakeholders in the company, Mr Wilkinson indicated that the information in those letters was information that was within his and Mr Levy's knowledge, based on their role as directors and shareholders and was not obtained by means of any data breach.

[32] Mr Levy specifically denied the allegations that he had destroyed, concealed or refused to supply information to the company. He indicated that he and his wife had remained in possession of some documents for Island Lubes after they had sold their shares in that company, because they maintained a certain level of oversight in respect of Island Lubes. He stated that their possession of these documents did not become an issue until after he was removed as a director. In relation to the issue raised regarding the email address for Island Lubes, he asserted that he delivered up all such information and did not remain in possession of same. He also indicated that he was advised by his wife (whose email address formed the recovery email for Island Lube's email account), and verily believed that she did not delete the contents of that email account.

[33] Mr Levy asserted that, by contrast, it was Mr Chambers who had withheld pertinent information about different matters, from the board of the company in order to further his own interests.

[34] As did Mr Henry, Messrs Levy and Wilikinson also asserted, as an additional basis upon which the court is asked to refuse the preservation orders, that they are exercising their right to privilege against self-incrimination, in light of the existing criminal proceedings relating to the alleged data breach. The relevant details were set out in the affidavit of Ashley Mair, attorney-at-law, on their behalf. By this affidavit it was detailed that on 7 February 2022, police officers executed a search warrant under the Cybercrimes Act, at Mr Wilkinson's residence and subsequently at his place of business. The police

seized four computers and a cellphone. Further, on 10 February 2022, both he and Mr Levy were arrested and charged for breaches of the Cybercrimes Act.

[35] Mr Wilkinson likewise indicated that the contents of his electronic devices include confidential and sensitive information related to other businesses, to which the applicant would have no right and that, as the orders sought are wide, if granted, they would result in a breach of his right to privacy.

Affidavits filed after the hearing of the application

[36] On 26 May 2022, two days after the hearing of this application, the affidavit of Ariana Mills, sworn on the same date, was filed on behalf of the applicant. Ms Mills indicated by this affidavit that she was one of the attorneys-at-law with conduct of this matter. Further, that she was informed by Demetrie Adams of Tavares-Finson Adams, attorneys-at-law with a *fiat* in the criminal matter, that the court ordered the police to return two laptops to Mr Henry, with the result that it was untrue that the 1st and 2nd respondents had "nothing to use to preserve the information". This information was provided on the premise that:

> "At the hearing of this matter on the 24th May 2022, the 1st and 2nd Respondents' Attorneys-at-Law submitted to the court that even if the court was to grant the order for preservation … they have no device to use to preserve the information as the police seized and still have their devices in their possession."

[37] Subsequently, on 6 and 8 June 2022, affidavits were filed on behalf of Scanbox and Mr Henry. By these affidavits Mr Henry averred that on 27 May 2022, police attended his residence with another search warrant, to seize an Apple laptop bearing a particular serial number. The laptop was seized but was then ordered to be returned by a judge of the Parish Court, on a date not stated. Mr Henry maintained that he was unable to comply with any preservation orders that this court may make.

[38] With respect, the contents of these affidavits do not take the matter further on either side. Even if they did, however, in light of the fact that they were filed without the court's permission or direction, no reliance will be placed on them.

Submissions on behalf of the applicant

[39] Miss Arnold, on behalf of the applicant, commenced her submissions by expressing the view that a search order would generally be the norm in a case such as this, in order to achieve the applicant's intended purpose. She submitted, however, that a search order would be inappropriate in the instant case and in fact draconian. Further, that since the "evidence" in the instant case is intangible, and capable of being destroyed, even unintentionally, a less drastic measure would be the grant of an order requiring the respondents to disclose, preserve, and certify the preservation of the "evidence".

[40] Ms Arnold contextualized the powers of this court in relation to this application by referencing rule 2.10(1)(c) of the CAR, which empowers a single judge to order an injunction pending appeal, together with parts 17 (which empowers the court to grant interim remedies) and 28 (which deals with disclosure) of the CPR. She posited that the rules relating to disclosure, as provided for in part 28 of the CPR, do not impose a duty upon parties to preserve evidence and further, that the sanctions for failing to comply with part 28 are limited to striking out and/or precluding a party from relying on documents not disclosed. She asserted further that, although there is no provision in the rules relating to the preservation of electronic evidence, other than in the context of a search order, the court is still empowered to grant such an order.

[41] As concerns the particular facts of this case, Ms Arnold highlighted that the subject matter of the claim is an email server, which is said to have been manipulated and/or modified without permission. As such, it is "highly probable" that the respondents have documents, files and records on their servers and/or devices relating to the allegations of unauthorized access, and which records may be easily destroyed, whether intentionally or unintentionally. She submitted that the court has a duty to ensure that no party gains an unfair advantage by reason of that party's failure to give full disclosure. To support

her point, she relied on the case of **William Clarke v The Bank of Nova Scotia Jamaica Limited and others** (unreported), Supreme Court, Jamaica, Claim No 2009 HCV 05137, judgment delivered 23 February 2010.

[42] She also submitted that the costs associated with restoring the documents, in the event of loss, could be prohibitive, whereas preservation would save costs and further the court's overriding objective and the interests of justice. In contrast to the position of the respondents, Miss Arnold maintained that the preservation obligation does not impose burdensome requirements, but merely requires parties to exercise reasonable and good-faith efforts. In this regard, she cited the Sedona Principles, Third Edition: Best Practices, Recommendations and Principles for Addressing Electronic Document Production, 19 Sedona Conf. J. 1 (2018) and in particular, principles 2. and 5., as well as the case of **Digicel (St Lucia) Ltd and Ors v Cable and Wireless plc and Ors** [2010] EWHC 774 (Ch).

[43] Miss Arnold argued that the applicant has a real prospect of success on appeal, as the learned judge, in refusing the application for preservation orders, failed to consider important matters of fact and law. Among other things, it was asserted that the learned judge erred in applying the **Anton Piller** test, as outlined in the case of **Anton Piller KG v Manufacturing Processes Ltd and others** [1976] Ch 55, instead of a test of lower threshold and failed to consider the need for a preservation order as distinct from an order for inspection and production. Miss Arnold contended that the applicant is not required to demonstrate that it has a strong *prima facie* case, so as to establish the need for a preservation order.

[44] In supplemental submissions, Miss Arnold stated that the test to be applied is that of "trial fairness", that is: (1) the parties' ability to prosecute and defend the proceedings; (2) the nature of the property and its materiality to the litigation; and (3) the purpose of the preservation order. In this regard, reliance was placed on the Canadian case of **BMW Canada Inc v Autoport Limited** [2021] ONCA 42 ('**BMW Canada**').

[45] Ultimately, Miss Arnold stated that the balance of justice lies in favour of granting the orders sought by the applicant in light of the fact that the matter concerns electronic evidence.

Submissions on behalf of Scanbox and Winston Henry

[46] Mr Neale, in opposing the application, posited that, in determining whether to grant the requested orders, this court should consider whether there is a good arguable appeal and whether the granting of the preservation orders would likely produce less injustice between the parties.

[47] In seeking to set the framework for the court's consideration of whether the applicant has a good arguable appeal, he focused on the fact that this is an appeal which seeks to challenge the exercise of a judge's discretion. The result of this is that the appellant would need to demonstrate that the learned judge misunderstood the law or evidence before him or that the judge's decision was so aberrant that no judge, regardful of his duty, could have reached it (**Attorney General of Jamaica v John MacKay** [2012] JMCA App 1 ('**John Mackay**')).

[48] Mr Neale then went on to examine the decision of the learned trial judge in an effort to demonstrate that the applicant did not have a good arguable appeal. He maintained that the learned judge was correct to have applied the **Anton Piller** test, the appropriateness of which test was confirmed in the case of **Universal City Studios Inc et al v Mukhtar & Sons** [1976] 2 All ER 330 ('**Universal City Studios**'). Mr Neale highlighted that in the **Universal City Studios** case, the applicant did not seek a search order – yet, nonetheless, the court formed the view that the circumstances still fell within the boundaries of the **Anton Piller** test, even in the absence of a request for a search order. As such, he submitted, **Anton Piller** considerations still applied.

[49] Mr Neale submitted that the learned judge was correct to have accepted the position that the applicant was required to show that the orders were necessary and proportionate. Mr Neale insisted that the orders sought are unduly wide and

disproportionate and that the applicant faces no real prejudice by the refusal of the orders. In all the circumstances, he argued, there could be no serious contention that the learned judge misunderstood the law.

[50] Mr Neale then went on to consider the learned judge's application of the law to the facts. He argued that the learned judge carefully assessed the evidence and did not arrive at a decision that could be said to be palpably wrong or equivalent to a misunderstanding of the evidence. Based on the evidence before him, the learned judge was also entitled to find that the applicant had delayed in making its application for preservation orders, another appropriate basis for refusing the application.

[51] It was also Mr Neale's position that, as a result of the conduct of the applicant, any grant of a preservation order would result in prejudice to Scanbox and Mr Henry. He alluded to the search order obtained by the applicant from the criminal courts, and the resulting seizures. The relevant items are still in the possession of the police and therefore compliance with any order from this court, would be difficult.

Submissions on behalf of Messrs Wilkinson and Levy

[52] Mrs Mayhew QC, on behalf of Messrs Wilkinson and Levy, adopted the submissions of Mr Neale and submitted further that the court should be guided by the principles of necessity and proportionality, in determining whether to grant the preservation orders. She cited the cases of **M3 Property Ltd v Zedhomes Ltd** [2012] EWHC 780 (TCC), **McLennan Architects Ltd v Jones** [2014] EWHC 2604 (TCC) and the **BMW Canada** case and asserted that the applicant has failed to demonstrate that the orders sought are necessary and proportionate.

[53] Learned Queen's Counsel also posited that the applicant has failed to establish a strong *prima facie* case in relation to Messrs Wilkinson and (especially) Levy, in keeping with the **Anton Piller** test, which she maintained should still be used as the standard, albeit the applicant is no longer seeking a search order.

[54] Mrs Mayhew submitted that the report of Mr Wenzel failed to disclose any wrongdoing against Mr Levy and that the addendum to his report, which sought to make a linkage between the alleged wrongdoing and Mr Levy, was not disclosed to the court. She stated that the evidence against Mr Levy is circumstantial, at best.

[55] She maintained that the applicant would not suffer any denial of justice if the orders were refused, as they already have an expert report on which they are likely to rely at trial, to prove their case. Further, the applicant has the necessary access to the information that was allegedly taken.

[56] Mrs Mayhew, in making the point that the applicant has not satisfied the requirement of proportionality, argued that the cost that would be associated with the grant of the preservation orders would be disproportionate to the likely benefits, especially as the applicant has not provided any undertaking in damages. Further, the orders sought are prejudicial to Messrs Wilkinson and Levy as they are in very broad terms, with the result that those respondents would be prevented from modifying or altering anything on their devices.

[57] Like Mr Neale, Mrs Mayhew referenced the criminal proceedings instituted by the applicant, and submitted that, as a result of those proceedings, it would be virtually impossible for Mr Wilkinson to comply with preservation orders, as his devices are not at present in his possession, but rather, in the possession of the police.

[58] She also pointed to what she described as the applicant's failure to set out clearly the category of confidential information that it alleges is in the possession of the respondents, for a careful consideration of whether it warrants protection of the law. This failure of the applicant to identify the information, also makes the orders sought disproportionate, especially in circumstances in which Mr Wilkinson has indicated that his devices contain confidential information relating to other companies unrelated to the applicant.

[59] Of note, Mrs Mayhew submitted that this application amounted to the applicant seeking to have an issue, that is to be determined on the substantive appeal, dealt with by way of a sidewind, which this court should not permit. In the circumstances, she asked this court to refuse the application.

Discussion and analysis

[60] The following issues arise for this court's determination on this application:

(i) Whether this court is empowered to grant a preservation order;

(ii) If so, the applicable test to be used in determining such applications;

(iii) Whether the applicant has met the requirements of the test and is therefore entitled to the grant of such orders.

[61] It is important to mention as well that what is before me is not the hearing of the substantive appeal from the decision of the learned judge; but an application for preservation orders.

Issue (i): Preservation orders and this court's powers

[62] Queen's Counsel and other counsel for all parties involved agree that a single judge is empowered to grant the orders which have been sought by the applicant. This view also finds favour with me and I will therefore only deal with the point briefly.

[63] I am guided by rules 2.9(1) and 2.10(1)(e) of the CAR, which rules clearly recognize the power of a single judge of appeal to hear and determine procedural applications. These rules provide:

> "2.9 (1) Any application (other than an application for permission to appeal) to the court must be made in writing in form D1 in the first instance and **be considered by a single judge**." (Emphasis added)
>
> "2.10 (1) A single judge may make orders –

> (a) for the giving of security for any costs occasioned by an appeal;
>
> (b) for a stay of execution of any judgment or order against which an appeal has been made pending the determination of the appeal;
>
> (c) for an injunction restraining any party from dealing, disposing or parting with possession of the subject matter of an appeal pending the determination of the appeal;
>
> (d) as to the documents to be included in the record in the event that rule 1.7(9) applies; and
>
> **(e) on any other procedural application** including an application for extension of time to file skeleton submissions and records of appeal**.**" (Emphasis added)

[64] My learned sister, McDonald Bishop JA, in the recent case of **Cable & Wireless Jamaica Limited v Eric Jason Abrahams** [2021] JMCA APP 19, examined these rules, and considered the meaning of the term "procedural application". She concluded that procedural applications are the same applications which were formerly referred to as "interlocutory applications" (see paras. [44] – [46]). She then went on to explain the meaning of interlocutory applications, by reference to the decision of **William Clarke v Bank of Nova Scotia** [2013] JMCA App 9, in which case Morrison JA (as he then was) stated at para. [102] that:

> "… Examples of interlocutory matters in this court are, it seems to me, applications to preserve the status quo pending the hearing of an appeal (such as applications for stays of execution or for interim injunctions) or applications to determine the manner in which an appeal is to be conducted (such as a case management conference). …"

[65] Morrison JA had also cited the case of **Gilbert v Endean** (1878) 2 Ch D 259, at pages 268-269 in which Cotton LJ provided a definition for the term "interlocutory applications" as follows:

> "…those applications...which do not decide the rights of parties, but are made for the purpose of keeping things in status quo till the rights can be decided, or for the purpose of obtaining some direction of the Court as to how the cause is to be conducted, as to

> what is to be done in the progress of the cause for the purpose of enabling the Court ultimately to decide upon the rights of the parties."

[66] In my view, the requested preservation orders fall squarely within the definition of "interlocutory applications" and by extension "procedural applications", with the result that, although it is not specifically listed in rule 2.10, and although part 17 of the CPR is not specifically incorporated into the CAR, a single judge is empowered to hear and determine this application.

Issue (ii): The applicable test

[67] According to the learned authors of the text Civil Court Practice ('The Green Book') at para. 25.1[51], in commenting of rule 25.1 of the English Civil Procedure Rules, which rule is practically in identical terms to our rule 17.1, these orders appear to have originated in the **Universal City Studios** case, cited by Mr Neale. In that case, the applicants held the copyright for a drawing of a shark's mouth with an accompanying slogan "Jaws". They sought *ex parte*, against the defendants (in relation to whom they had evidence that they were selling T-shirts, in breach of the copyright), orders requiring, *inter alia*, that all infringing T-shirts be placed in the custody of the persons serving the order. In granting the orders, Templeman J, in pronouncing on the applicable considerations for the grant of such an order, stated at pages 570 to 571:

> "The order which I was asked to make by the present plaintiffs is a strong order, albeit less stringent than that ordered in *Anton Piller KG v. Manufacturing Processes Ltd.* by the Court of Appeal. It does not involve entry on the defendants' premises, but that the defendants should hand over the infringing articles for safe custody. It is a form of relief which the court will grant with great reluctance and which should seldom be sought and more seldom granted. That appears from the three judgments of the Court of Appeal and the headnote, which reads as follows:
>
> '… that in most exceptional circumstances, where plaintiffs had a very strong prima facie case, actual or potential damage to them was very serious and there was clear evidence that defendants possessed vital material which they might destroy or dispose of so as to defeat the ends of justice before any application inter partes

> could be made, the court had inherent jurisdiction to order defendants to 'permit' plaintiffs' representatives to enter defendants' premises to inspect and remove such material …'
>
> The present circumstances fall within the principles of that case and justify putting infringing articles in safe custody." (Emphasis added)

[68] The order sought in the **Universal City Studios** case could perhaps be described as a 'custody order', which, as will be seen from rule 17.1(1)(c) of the CPR (which I have set out below), falls within the same category as a 'preservation order'. What is also clear from the case is that the **Anton Piller** principles were of paramount importance in determining whether to grant or refuse the relief sought.

[69] Rule 17.1 of the CPR, on which the applicant relied in the court below, provides, so far as relevant, that:

> "17.1 (1) The court may grant interim remedies including -
>
> (a) an interim injunction;
>
> (b) an interim declaration;
>
> (c) an order
>
> (i) for the detention, custody or preservation of relevant property;
>
> (ii) for the inspection of relevant property;
>
> (iii) for the taking of a sample of relevant property;
>
> (iv) for the carrying out of an experiment on or with relevant property;
>
> (v) for the sale of relevant property (including land) which is of a perishable nature or which for any other good reason it is desirable to sell quickly; and
>
> (vi) for the payment of income from a relevant property until a claim is decided;
>
> (d) an order authorising a person to enter any land or building in the possession of a party to the proceedings for the purposes of carrying out an order under sub-paragraph (c);

(e) an order to deliver up goods;

(f) …

(g) an order directing a party -

(i) to provide information about the location of relevant property or assets ; or

(ii) to provide information about relevant property or assets, which are or may be the subject of an application for a freezing order;

(h) an order (referred to as a "search order") requiring a party to admit another party to premises for the purpose of preserving evidence etc.;

(i) …

(j) …

(k) …

(l) …

(m) …

(2) In paragraph (1)(c) and (g), '**relevant property**' means property which is the subject of a claim or as to which any question may arise on a claim.

(3) The fact that a particular type of interim remedy is not listed in paragraph (1) does not affect any power that the court may have to grant that remedy.

(4) The court may grant an interim remedy whether or not there has been a claim for a final remedy of that kind.

(5) The Chief Justice may issue a practice direction as to the procedure for applying for an interim order including, in particular, interim injunctions, search orders and freezing orders." (Emphasis supplied)

[70] I have set out in such extended terms the provisions of rule 17.1 in order to demonstrate that, the powers granted to the court under this section are very wide and far-reaching. In my considered view, based at least in part on dicta in the **Universal City**

Studios case, such orders really ought to be made only in exceptional circumstances, and on the basis of strong evidence. Also evident from this rule is that there are no express provisions setting out the factors which the court ought to consider in determining applications made under this section. Perhaps this is because it was recognized by the framers of the rules that any number of disparate situations may exist, which could give rise to such applications, resulting in a need for flexibility on the part of the court in responding to the various circumstances.

[71] As will also be seen from the cases that will be reviewed below, these rules have been adapted to respond to the changes in the creation and storage of information, occasioned by technological advancements. In the result, such orders may be used to facilitate the preservation not only of tangible material, as in the **Universal City Studios** case, but also documents and information stored on electronic devices, as sought to be done in the instant case.

Preservation orders

[72] The learned authors of the Green Book indicate also at para. 25.1[51] that:

> "A preservation order requires a respondent to deliver up possession of specified documents to the applicant's representative and/or **to give that representative access to computers containing specified documents to enable those computers to be searched for such documents by the representative.**" (Emphasis added)

[73] A preservation order in respect of electronic information, was granted in the case of **Patel v Unite** [2012] EWHC 92 (QB). Mr Patel sought an order to allow an independent expert to access the defendant's database, with a view to taking an image or some other copy of the database, in order to prepare a report, limited to identification of the information which Mr Patel sought in connection with his claim for defamation. The learned judge, Parkes QC, although noting that the orders sought by Mr Patel were "intrusive", was nonetheless satisfied that the orders were "necessary and proportionate" and in keeping with the court's overriding objective. Notably, in granting the order, the

learned judge did not make reference to the **Anton Piller** case or the principles stated therein.

[74] In the case of **M3 Property Ltd v Zedhomes Ltd** [2012] EWHC 780 (TCC) ('**M3 Property**') Akenhead J, in enunciating on the court's power to grant orders under rule 25.1 of the English rules, stated at para. [11] of his judgment:

> "[11] So far as the law is concerned, CPR Pt 25.1 enables the court to grant injunctions or orders 'for the inspection of relevant property' or for the 'preservation of relevant property'. **It is common ground that that the court has the power to make the order sought but the order must be both necessary and proportionate.** This was confirmed in the case of *Patel v Unite* [2012] EWHC 92 (QB). This approach is consistent with the overriding objective." (Emphasis added)

[75] Subsequently in the case of **McClennan Architects Ltd v Jones and another** [2014] EWHC 2604 (TCC), ('**McClennan Architects')** Akenhead J expanded on his statement in the **M3 Property** case, and listed non-exhaustively, factors which the court could consider in respect of these applications. At para. 29. of his judgment, he stated as follows:

> "29. It is primarily to the overriding objective to which one must look as to the basis on which to exercise the discretion to make this type of order. It may be helpful if I list (non-exhaustively) the factors which might properly legitimately be taken into account:
>
> (a) The scope of the investigation must be proportionate.
>
> (b) The scope of the investigation must be limited to what is reasonably necessary in the context of the case.
>
> (c) Regard should be had to the likely contents (in general) of the device to be sought so that any search authorised should exclude any possible disclosure of privileged documents and also of confidential documents which have nothing to do with a case in question.
>
> (d) Regard should also be had to the human rights of people whose information is on the device and, in particular, where such information has nothing or little to do with the case in question.

> (e) It would be a rare case in which it would be appropriate for there to be access allowed by way of taking a complete copy of the hard drive of a computer which is not dedicated to the contract or project to which the particular case relates.
>
> (f) Usually, if an application such as this is allowed, it will be desirable for the Court to require confidentiality undertakings from any expert or other person who is given access."

[76] As in the case of **Patel v Unite**, Akenhead J, in the **McClennan Architects** case, made no reference to the **Anton Piller** test. Notwithstanding this, the principles as outlined in the last three cited cases, in my view, capture relevant matters for a court to consider in seeking to determine applications for preservation orders. However, it would appear from these cases that there has been a shift in the English law, from the initially difficult hurdle which required an applicant to show a strong *prima facie* case, together with a real risk of destruction of the evidence, which could result in the ends of justice being defeated (the **Anton Piller** standard), to a seemingly somewhat more relaxed approach, focused on necessity and proportionality, without necessarily giving due consideration to the strength of the applicant's claim. In my view, given the potentially significant impact that these orders may have on a respondent, it would not be appropriate to adopt an approach which solely focuses on "necessity and proportionality" and entirely dispenses with the **Anton Piller** standard.

[77] Klein J, in the case of **Wild Brain Family International Ltd v Robson and another** [2018] EWHC 3163 (Ch) characterized the necessity and proportionality test as a flexible test. It was his view that that test was flexible enough to enable the court to incorporate the **Anton Piller** standard when giving consideration to these applications. Klein J's words, to be found at para. 18 of his decision, are as follows:

> "18. The necessity and proportionality requirements referred to are sufficiently flexible to permit the court to require, as it ought in my view, that an applicant meets an increasingly heavy burden, before an inspection order is made, the more intrusive the inspection order sought is and, **in an appropriate case, the test which the court is required to apply when considering making a search order may be adopted even though only inspection**

> **and no search of premises is being sought.** There is support for this conclusion in note 25.1.24 of the 2018 White Book, which explains:
>
> '…Where the court is making an order for delivery up or preservation of evidence or property, the court has to consider whether to include in the order similar provisions as are specified for injunctions or search orders…'" (emphasis added)

[78] This statement of Klein J's, in my view, is a more accurate and complete statement of the requisite test to be applied in these cases; and, although the learned judge was considering the question of an inspection order, in my view, undoubtedly, as preservation orders have the potential to also be highly intrusive, especially in the context of digital information, there will likely be cases that compel the court to apply the **Anton Piller** standard. The result of this is that, in an appropriate case, when making an application for a preservation order, the applicant may be required to demonstrate, in addition to the necessity and proportionality of the proposed order, that there is a compelling case or a strong *prima facie* case. In my view, the approach to be adopted should be determined on a case-by-case basis. At the very least however, on all such applications, the applicant must show a *prima facie* case, as must be shown on applications for injunctions.

[79] As regards the **BMW Canada** case relied on by both Miss Arnold and Mrs Mayhew, I agree with learned Queen's Counsel that the test, as stipulated in that case, is fully captured under the requirements of necessity and proportionality. As such, it is not really a separate or a different test. In fact, the test of necessity and proportionality, particularly within the context of the overriding objective, encompasses wider considerations.

[80] On the other hand, with respect to the Sedona Principles, as they are highly specific to electronic document production and clearly relate to rules of practice which are inapplicable to our jurisdiction, I fear that it would be an error of law to import these principles into the interpretation of our rules. Neither would it be necessary to do so.

Issue (iii): Whether the applicant has met the requirements for the grant of preservation orders

[81] In my view, the applicant has failed to satisfy this court of the necessity or proportionality of the orders which have been sought. Neither has it been shown that the applicant has a strong *prima facie* case on appeal, which in my view is a criterion that should be satisfied, given the extensive nature of the orders sought. I will first address the point of necessity.

Necessity

[82] The report of Mr Wenzel, on which the applicant relies, when reviewed, provides such details as to the alleged data breach, as would, in my view, be adequate to enable the applicant to prosecute its claim. It is difficult to see how any additional information which could be retrieved from the respondents' devices, may be described as "crucial" to the litigation, in light of the information which is shown to already be in the applicant's possession. Of note, the reports produced by Mr Wenzel are not interim in nature but rather, are final reports, in which he has arrived at final conclusions. Mr Wenzel does not express in any of his reports provided to this court, a need for the particular information which is sought to be preserved, or even a need for any additional information. Neither is the application itself supported by an affidavit from Mr Wenzel seeking to explain the necessity for the orders sought. This, in my view, is because Mr Wenzel has received adequate information from the applicant, through the applicant's own computer and electronic mail systems and servers, which have enabled him to conclude that there was a data breach and to enable him to determine the persons that may have been involved. Consequently, the applicant has not shown that in the absence of these preservation orders, it would in any way be hampered or prejudiced by being deprived of information which it claims is needed to pursue its claim against the respondents. I find that the applicant will suffer no prejudice or injustice arising from the refusal of these orders and in the circumstances, the orders have not been demonstrated to be necessary.

Proportionality

[83] It is also my considered view that the orders sought are unduly wide and disproportionate to the ends sought to be achieved. A review of the orders sought, as seen from para. [1] of this judgment, shows the applicant requesting what could reasonably be deemed as all data to be found on all hardware and software in the respondents' possession. The applicant has asked for far more than anything that could be described as reasonably necessary within the context of this case. The fact that the orders are qualified to limit the information being sought to data that relates to the alleged unauthorized access and modification does not assist, since there is nothing in the requested orders or otherwise to pinpoint the specific documents needed or to help differentiate data relating to the alleged data breach from other data that might be irrelevant to this case. This is compounded by the fact that no procedure has been suggested by the applicant for giving practical effect to the orders which have been sought, making the logistics of their execution difficult to envisage. It is not clear whether the applicant wishes for the respondents to deliver up specified documents on their devices or whether they wish to be allowed access to all devices of the respondents, through a representative, in order to facilitate a search of those devices for relevant information. It would have been useful if the application had been supported by an affidavit from, say, an information technology specialist, who could properly identify the information that was desirable to be preserved and give specific details on the methodology being proposed to achieve the result. The absence of any real particularization of the information sought is, in my view, supportive of Mr Neale's submission that the application is more in the nature of a fishing expedition. It is difficult not to conclude that the applicant wishes for the respondents to relinquish all their electronic devices that the information they contain may be copied and preserved for some future potential use. This would be a significant intrusion that would not be justified in light of the information on which the applicant is already relying.

[84] It should be noted that, although rule 17.1(c)(i) of the CPR does not expressly speak to entry onto premises, quite obviously, as seen from rule 17.1(d), orders for

detention, custody or preservation, are nonetheless invasive orders, which have the potential to necessitate orders for entry onto property, in order ensure that these orders have adequate "teeth". Therefore, if this court were to accept that there is in fact a need for preservation orders, and having regard to the allegations that the respondents have acted surreptitiously, very likely, in order to ensure the effectiveness of the orders, additional orders would have had to be made, perhaps requiring impartial and independent third parties to take custody of the devices. Undoubtedly, granting the orders sought in the wide terms in which they have been sought, would have given the applicant access to personal information relating to the respondents as well as information relating to other aspects of their businesses not concerning the applicant, to which the applicant would not be entitled. This would not be in the interest of justice and would in fact be prejudicial to the respondents.

[85] The application also runs afoul of all the considerations identified by Akenhead J in the **McClennan Architects** case (see para. [73] above) and if granted, there would be significant risk of breach of the respondents' right to confidentiality and privacy and the confidentiality and privacy due to their clients and/or other business interests.

[86] As it relates to the evidence from the respondents relating to their arrest and charge and the seizure of several of their devices, in my view, these circumstances would create an understandable practical difficulty for the respondents to comply with any preservation order that this court could make. Conversely, it may well be that, arising from the criminal proceedings, the applicant may become aware of information, found by the police, on the devices of the respondents, which may further assist in the prosecution of its civil claim. This is further demonstrative of the lack of necessity of the proposed orders and their disproportionate nature.

The applicant's prospect of success on appeal

[87] In light of my conclusion that the applicant has failed to meet the test of necessity and proportionality, it is not strictly speaking necessary for me to consider the strength of the applicant's appeal. However, I will address this very briefly.

[88] The appeal primarily concerns the refusal by the learned judge, to grant the orders sought by the applicant for the preservation and inspection of the same data and information sought in orders one and two of the instant application. The applicant also takes issue with some the learned judge's orders for costs.

[89] In refusing the orders for preservation and inspection, the learned judge applied the **Anton Piller** test and concluded that the applicant had not demonstrated a strong *prima facie* case. Further that the orders were not necessary in light of Mr Wenzel's report and the usual rules for disclosure. The learned judge also concluded that the applicant had delayed in making its application to the court, in light of the letter of 28 December 2020. The application was not made until October 2021.

[90] The applicant accordingly contends that the learned judge erred in applying the **Anton Piller** standard, erred in finding delay and erred in concluding that the orders were not necessary. It is clear from this summary of the appeal that the appeal will basically determine most, if not all of the issues raised in this application. Learned Queen's Counsel, Mrs Mayhew, is therefore on good ground with respect to her submission that this application is an attempt to determine this appeal by a sidewind. Be that as it may, having regard to my conclusions relating to the necessity and proportionality of the proposed orders and in light of the principles espoused by Lord Diplock in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042 and as adopted in the **John Mackay** decision, I am unable to agree that the applicant has put forward a compelling appeal in relation to the substantive points which have been raised. Accordingly, the applicant would also fail in meeting the **Anton Piller** standard.

Conclusion

[91] Where an application is made for preservation orders, the court should consider the overriding objective and whether the orders sought are necessary and proportionate. In so considering, the court must also consider the strength of the applicant's claim and determine whether, in light of the proposed orders, the applicant should show a *prima facie* case or a strong *prima facie* case. The applicant before me has failed to convince

me that the orders sought are necessary and proportionate, having regard to the objectives sought to be achieved and has failed to show a strong *prima facie* case on appeal. Whatever test is used, the applicant has failed to meet it. In fact, this court takes the view that the orders sought, if granted, would be unduly prejudicial to the respondents. It is accordingly ordered as follows:

1. The orders sought in the applicant's notice of application for preservation orders pending appeal filed 4 March 2022 are refused.

2. The parties are to file submissions in relation to the costs of the application within seven days of receipt of the written judgment.