

## SIMNET V. NLA

As succinctly put by Justice S. A. Brobbey on page 452 of THE LAW OF CHIEFTAINCY IN GHANA, ALP 2008, '*contempt of court means any conduct that interferes with or undermines the administration of justice*'. The fundamental function of the judiciary to administer justice without interference is outlined in Article 125 of the 1992 constitution in the words

*(1) Justice emanates from the people and shall be administered in the name of the Republic by the Judiciary which shall be independent and subject only to this Constitution.*

*(3) The judicial power of Ghana shall be vested in the Judiciary....'*

Thus this court is under a duty to ensure that no person who appears before it thwarts the proper administration of justice to the detriment of another party. The applicant obtained an order from this court in the following words

- 1. 'That defendant/Applicant I authorised to enter the premises of the Plaintiff through its appointed auditors Ernst & Young for the sole purpose of examining all relevant information and data on its on-line lottery operated electronically by the plaintiff and stored in whatever manner electronically and make copies of all*

*invoices and receipts including data supporting such invoices and receipts*

- 2. Access to defendant operations of the Plaintiff's online operation lottery platform is to be given to plaintiff company and plaintiff's managing director and chief operating officer responsible for defendant's on-line lottery are specifically ordered to grant defendant's auditors access to this information*
- 3. This order may be carried out only during the working hours of plaintiff being 8.30 am to 7.30 pm as stated by plaintiff's representative Mr. Sedalo in court today*
- 4. This order does not include the granting of access to any of the plaintiff's operations outside of defendant's online lottery or the release of codes ad passwords to the said system to defendant'*

On 24<sup>th</sup> November 2011, the applicant set out to execute the order. According to their affidavit, persons from the office of the defendant's agents Ernst & Young, led by a court bailiff and police officer were given access to the plaintiff's IT control room to carry out the order of the court. The applicant's position in this contempt application is that the import of the order was thwarted by the Respondent because 'after granting the bailiff, auditors and the court police officer access into the IT control room, the respondent refused to allow the auditors the right granted by this Honorable Court, to examine all relevant information and data on the plaintiff's on-lie lottery operated

*electronically by the plaintiff and stored in whatever manner electronically and make copies of all invoices and receipts including data supporting such invoices and receipts'. (paragraph 9 of affidavit in support)*

Applicant goes on to say that the Respondent's chief operating officer extracted the data for the auditors and as a result, the entire purpose of the order had been defeated.

Respondent denies this allegation. In his affidavit, its Managing Director, who was specifically ordered to implement the court order informs the court that the plaintiff respondent fully obeyed the court order because the order was one 'one for Discovery'; that the auditors were allowed access to the plaintiff's control room and they were present when the information was extracted, that the plaintiff respondent fully cooperated with the auditors and provided them with all information required. He states that defendant/applicant insisted that defendant's IT officials should be allowed access to plaintiff's system and this was in breach of the court order and that to allow defendant's IT official access to defendant's on-line lottery system '*would have enabled him access to our password by way of reverse engineering which said act allows one access to how the system works.*'

A person cannot commit contempt unless they '*wilfully disobey an order of court requiring him to do any act other than the payment of money or abstain from doing some act; and the order sought to be enforced should be unambiguous and must be clearly understood by the parties concerned*'. **See Republic v.**

**High Court Accra; Ex Parter Laryea Mensah 1998-99 SC GLR 360 at 368.**

The relevant questions to be answered in this application therefore are

**What were the elements of the order of the court in their unambiguous meaning?**

**In the implementation of the order, did the Respondent wilfully disobey any act they were required to do by the order and or did the Respondent take any steps to undermine or interfere with the proper execution of any aspect of the order?**

In answering the first question, there are a number of essential elements of this order. In character, it is an order for discovery, inspection, copying and removal of copied documents. It has four elements to be obeyed ① the granting of access to the location of the inspection, copying and removal of the documents; ② the granting of access to the scope of documents to be inspected, copied and removed; ③ the persons given leave to do the inspection, copying and removal; ④ and persons ordered to ensure the inspection, copying and removal of documents.

Firstly, the particular location for the inspection is not just the premises of the plaintiff but also the online lottery platform of the defendant operated electronically by the plaintiff on which is stored relevant information and data. Access to the online lottery platform was specifically ordered to be granted to the

defendant's auditors Ernst & Young by the plaintiff's managing director and chief operating officer. The second element of the order is the scope of information these auditors were to be given access to. It includes *'all relevant information and data on the defendant's on-line lottery operated electronically by the plaintiff and stored in whatever manner electronically'*. Access to this wide scope of materials is also to be given by the plaintiff's managing director and chief operating officer. The third element of this order is the persons given leave to do the inspection, copying and removal. It is the auditors Ernst & Young acting as agents of the defendant applicant. They were authorised by the order in issue not only to examine all relevant information and data on the defendant's on-line lottery platform and stored in whatever manner but also to make copies of all invoices and receipts including data supporting such invoices and receipts. Lastly, the persons ordered to ensure the access to all relevant information, and capacity to copy this information is the plaintiff company acting by its managing director and chief operating officer. There are three caveats given in this order. Firstly, it may be carried out only during the working hours of plaintiff being 8.30am to 7.30 pm. Secondly, it excludes the grant of access to any operations of the plaintiff outside of the defendant's online lottery. Thirdly, it excludes the grant of access to codes and passwords.

I will now review what I consider relevant to this application in the reports on the exercise conducted as the implementation of

this court's order. According to the affidavit of Caleb Afaglo, the respondent 'gave extracted copies of all information on the online lottery requested by Ernst & Young...' He goes on to say that the respondent's chief executive officer 'did not prevent and/or restrict officials of either the court and/or Ernst & Young access to any information as ordered by the court'.

The report of the auditors on the other hand states on page 2 that 'Mr. Sedalo instructed his Chief Information Officer Dr. Caleb Afaglo to extract the data for the team...' It goes on to say critically in paragraphs 3b and 3e of the report

*b. The extraction was done by SIMNET employees. The team was allowed to observe what the SIMNET employees did, but had no input or authority as to which additional fields were included in the extraction*

*e. The team was restricted by SIMNET regarding the type and the format of data they were allowed to obtain'*

From the affidavits and supporting reports before me, the respondent allowed the right persons – auditors from Ernst & Young to enter the control room of the plaintiff's premises. Once inside the room, the respondent did not allow the auditors direct access to the on-line lottery platform to enable them ascertain what fields of data were available on the defendant's online lottery operations. They were not allowed to determine the scope of information and data which as defendant's auditors, they would consider relevant for the auditing of defendant's

lottery operations but were guided on what information could be made available to them. Then they were not allowed to directly examine any information or data on the said on-line platform to determine whether it was expedient to make copies of same for further examination. Further, the auditors were also not allowed to make copies or remove any information directly but had await extraction of data the scope of which was determined by the respondent to the extent that the auditors had no access to the exercise of extraction.

It is my clear finding that the barriers raised by the respondent constitute acts that wilfully disobeyed, interfered with and undermined the proper execution of the order made by this court. They undermined the administration of justice and constitute contempt of court. This court is cloaked with a duty to determine the dispute that the parties have brought to it. While the plaintiff is interested in obtaining its fees, which it alleges that the records generated on the defendant's online platform support a claim for, the defendant alleges that the plaintiff is not entitled to its claims because evidence from forensic examination of past operations inform the defendant that the data from of the online lottery by the plaintiff do not have integrity or '*are genuine*'. It also alleges that plaintiff has raised barriers against an audit of the defendant's online lottery operations and seeks the help of this court to conduct this audit in order for a determination to be made as to whether the plaintiff is entitled to its claims or not.

To quote from a Speech delivered by the Honourable Chief Justice at the AGM of the Association of Magistrates and Justice of Ghana on 30<sup>th</sup> September 2010, the traditional role of the common law courts is not to assist any party to achieve their claims but to '*hold the scales evenly and fairly between the parties appearing before*'. Thus The duty of this court is to ensure that each party is assisted in the prosecution of its claims and to this extent, the rules of court provide instruments to assist the parties to obtain a fair trial. Indeed, Order 21 of CI 47, the High Court (Civil Procedure) Rules 2004 directs a mandatory mutual discovery of documents before trial. Because the ultimate generator of the subject matter of the dispute – an online lottery service – is conducted electronically and managed by plaintiff on behalf of defendant, this court ought to assist both parties to have access to this electronically held system for the purpose of fairly resolving the dispute. The purpose of the order is to allow the defendant access to its own online lottery operations to enable an audit of the material therein for the determination of whether or not its case is sustainable as against the case made by the plaintiff. By refusing to allow the defendant's auditors access to the fields of data on the online platform, the respondent contumaciously prevented the process of effective discovery, inspection and unhindered audit that the order was obtained for.

This court notes that the plaintiff expressed misgivings about the possibility of compromising intellectual property within the software in which the data sought for is contained if unhindered access is given to the auditors in obtaining information. And this position was apparently communicated to defendant's auditors prior to the compromised data extraction process. Exhibit NLA2

states in paragraph 3a that '*SIMNET informed the team that the data contained database structures and tables which were proprietary to their database vender (EDITECH). SIMNET added that they were under contractual obligation not to disclose these structures to any third parties and referred to these items as intellectual property*'.

The plaintiff also expressed the fear of the defendant's capacity to reverse engineer the software used to operate the on-line lottery if defendant's technicians were allowed access to the online lottery platform. .

With the greatest respect to Plaintiff Respondent, this is a court of procedure and it is important that issues are dealt with appropriately and by proper record and without obscuring the issues at stake. The arguments made by the respondent carry the danger of totally obscuring the issues in question. Particularly difficult to appreciate is the argument made in paragraph 4 of Mr. Sedalo's affidavit in opposition where he states that

*"...we refused to do so on grounds that that we have always maintained that the only aim of defendant is to obtain information about how our system works to enable it clone same for its rival system. Indeed to have allowed him access would have enabled him access to our password by way of reverse engineering which said act allows one access to how the system works".*

First, when a court makes an order, if a party has good reason to resist the execution of the order, the entitlement exists to use the processes of the courts to stop the said execution, including the options of review and appeal. No matter what fears a party entertains regarding any loss that may occur as a result of the execution of a court order, no one has the option to disobey a court order wilfully.

As strange and ephemeral as the virtual world of computers and software are, they constitute a part of how society now transacts businesses and the law applying to every transaction remains the same, whether conducted in the physical world or the virtual world of software and the internet. This is important to maintain the integrity of law, the functionality of justice and the rule of law. One set of rules cannot exist for the physical realm of inspection, copying and removal of copies while another set of rules exist for these legal processes necessary for obtaining evidence for the administration of justice when done on a computer. Thus if an order to inspect a physical operating room and documents in files kept there in the physical world requires that a party is allowed to physically enter the room and inspect the folders in there, and to physically touch and open the files and make copies therefrom, the same arrangement applies to the world of computers. An order to give the applicant's auditors access to documents requires that they be allowed to physically open the file located on the computers of the respondent, inspect its contents, choose to upload copies by creation of folders on

the computer and transmission through the same computer to their own resources, or to download files for printing. Any other interpretation of the order just because it related to a computer operated system will constitute violence to the meaning of the order.

**Fortunately, there are many common law societies where the courts have had the opportunity to consider the mysterious world of computers, software and the internet and who have developed firm principles for dealing with issues in this area. And the response has been consistent. Jurists are to apply the same principles applied to the physical realm of transactions when dealing with the virtual world if the same transactions took place in that realm. As I said in my unpublished article What are the computer and internet doing to intellectual property? (Written for publication in the 2011 Judicial Journal,**

*'In the peculiar circumstances of breach of intellectual property rights through the use of infringing software and its use through trading on the internet, it is now largely settled in the United States that the principles, standards, and factors necessary for the applicability of these remedies remain the same, notwithstanding the uniqueness of the electronic terrain'.*

The position is epitomized in the case of **EBAY INC. ET AL. v. MERCEXCHANGE, L. L. C.L.L.C.**, 2006 547 U.S. 388 decided on May 15, 2006 by the Supreme Court of the United States when it jolted industry, academia and the commercial

world by holding that “*The traditional four-factor test applied by courts of equity when considering whether to award permanent injunctive relief to a prevailing plaintiff applies to disputes arising under the Patent Act. That test requires a plaintiff to demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law are inadequate to compensate for that injury; (3) that considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. The decisions to grant or deny such relief is an act of equitable discretion by the district court.....these principles apply with equal force to Patent Act disputes.*” This decision jolted industry, academia and the commercial world because it related to patents on e-commerce processes i.e., business conducted only electronically and on the internet. It had been expected that with the peculiar plethoric nature of e-commerce, the court would be inclined towards issuing an injunction to restrain the use of the patented process when the user was found to have been infringing a patent. The court affirmed that at every material time, whether on land or on line, a court must use the same principles for any area of law to address disputes.

Also importantly in the current dispute, the objection raised by the plaintiff’s officers to implementing the court order in a pristine way by giving the defendant’s auditors ‘*access to defendant’s operations of the plaintiff’s online lottery platform*’ has no basis in the circumstances of this case nor in technology.

The fourth part of the order specifically directed that the order did not include the '*...release of codes and passwords to the said system to defendant*'. This may be a court of law but computers have been around long enough for me to know that access can be given to a system without the release of passwords. It is like unlocking a door, retaining a key and giving a visitor access to a room. All the respondents needed to do were to activate the system with their passwords without divulging them and allow the defendants space to examine the various fields of data within the system, determine what data they find relevant for the audit they seek, and allow them to upload or download the relevant materials. In downloading, if respondent is queasy about the introduction of any ports that can introduce malware into the system, nothing stops the respondent from either ensuring a prior clean up of the defendant's ports before usage, or giving them dedicated external drives for obtaining storage. But even easier would be the option of uploading whatever material the auditors may wish to obtain if such a facility exists or can be created for this order. The sentence '*Indeed to have allowed him access would have enabled him access to our password by way of reverse engineering which said act allows one access to how the system works*' completely horrifies me because to my mind, it attempts a distortion of what the process in issue is about.

Intellectual property law deals with various genre of proprietary interests and each of them carries different sets of rights and

responsibilities. Intellectual property law represents a tension between the public policy focus of preventing monopolies while encouraging creativity. It functions in four broad realms – the law of copyright, law on patents or utility models, the law of trademarks and unfair competition and the law of trade secrets. There is a distinction between the law that pertains to patents, trademarks, copyrights, trade secrets and unfair competition subjects of intellectual property law. All of these realms of intellectual property law are applicable to software. The copyright of software may be breached in the copying of the codes that create the software, or the look and feel of the visual and audio elements of the software. The trademark or branding of a software may be infringed when used without lawful reasons or authorisation. If the engineering of the software is patented, then the patent may be infringed if the specifications of the patented method are utilised or duplicated without lawful reason. But these protections all have barriers of time and scope and that is how the law rides the balance of releasing the expression of ideas which are protected into the public realm such that there is no monopolisation of the ideas underlying the protected expressions themselves. Further, this ensures that new creative expressions are released as a public good for society's development. And this answers the issue of reverse engineering that respondent is asking this court to protect by interpreting its orders within borders prescribed by the respondent. Reverse engineering is '*the process of uncovering how a component or application functions by analysing the final product*' See

Glossary, page 1123 Software and Internet Law, Mark Lemley, Menell, Merges, Samuelson, Third Edition, Aspen Publishers 2006.

To make allegations regarding danger to intellectual property requires a clear statement as to which area of intellectual property one alleges. If it is the case of the plaintiff that the engineering of the tabular structures of the software used to store data is a trade secret, the burden lies on them to make such a case to this court in precision and give the court material that should lawfully invite an order that will protect the trade secret they allege, after the application of the right principles, while the court does its work in assisting all parties to access a fair trial. It is important that the jurisprudence of this court does not suffer just because we are referring to what ought to have become the familiar terrain of software. This is because as a general rule, there is no law that restrains reverse engineering as a process for the simple public policy determination that law should not stand in the way of technological advance. Had there been a general rule against reverse engineering, mankind would not have reached this stage in development. What courts protect when intellectual property rights are derived from creative and innovative activity is defined within the barriers of each area of intellectual property law and a consideration of the place of reverse engineering ought to be done within the context of what area of intellectual property law is being discussed. Other than that, there would not be a requirement to spell out the claims and

specifications of patented materials in the public domain as consideration for granting the monopolistic right to patent. This is what occurs to enable the registration of a patent. But by the same registration of the claims of the patent, reverse engineering becomes easy for a new generation of technology.

And indeed, as Lemley et al say on page 28 – ‘*reverse engineering of computer software is not easy*’ If it is done within the context of copyright breach, It may involve ‘decompilation’ of the mathematical components of the object code and translation into readable source code or through ‘black box analysis’ by feeding the software instructions or commands to puzzle out the logical structure of the program’. In all these situations, the analyst will need a copy of the software. This was the reason for my order that the implementation of it should not include giving the plaintiff access to codes and passwords but access to information and data which support the invoices and receipts that this disputes center around. It is also the reason why the responsibility for implementing the order was placed on the managing director and chief operating officer – technical people I expect to have the capacity to open up the defendant’s on line lottery system within the plaintiff’s premises, allow the defendant’s auditors to determine what constitutes relevant information in data fields in the system, assist them to make copies of this information either by downloading or uploading, and give defendant through its agents the satisfaction of having examined all the data supporting its own system so that at the

end of the day, this trial can proceed expeditiously and fairly, having regard to the issues raised in the pleadings.

As I understand from the pleadings of both parties, this on-line lottery was created specifically for the applicant, the only entity authorised by Act to operate lotteries in Ghana. The respondent was supposed to generate all materials on the platform for the applicant and its reward was a direct commission from the income generated by the system for the applicant. Indeed in the current action, the plaintiff is claiming for a percentage of global earnings from defendant's on-line lottery and the defendant does not deny the basic position that the plaintiff is entitled to a portion of defendant's earnings from the on-line platform as remuneration for creating and operating the platform. Thus, in the same way that respondent appreciates their entitlement to the global earnings from the on-line lottery, it is clear that all documents generated for the on-line lottery were for the applicant and no other person, including the respondent. This is the reasoning behind the clear order for applicant to be given access to *'examine all relevant information and data on its online lottery operated electronically by the plaintiff ad stored in whatever manner electronically and allowed to make copies of all invoices and receipts including data supporting such invoices and receipts.'*

I am afraid that plaintiff's arguments for preventing direct access to defendant's auditors as ordered by this court is totally misconceived – whether founded in intellectual property law –

the arena of law that respondent bases its arguments or on the law of evidence, the arena of law on which the applicant bases its plaint before the court, which is also the arena of law in which the present order was made.

I find the defendant, its managing director and chief operating officer liable for contempt and order them to take steps to purge themselves of the contempt.