

Case Summary

Next Digital Limited (壹傳媒有限公司) and Others v Commissioner of Police

HCMP 1217-1222/2020; [2021] HKCFI 1128; [2021] 2 HKLRD 857
(Court of First Instance)

(Full text of the Court’s ruling in English at
https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=135263&currpage=T)

Before: Hon Wilson Chan J

Date of Hearing: 26 February 2021

Date of Ruling: 26 February 2021

Jurisdiction – application for variation of order to compel plaintiffs to provide security information to police for gaining access to contents of seized digital devices – application refused – “liberty to apply” provision limited to work out order already made, not to vary order itself – no exceptional circumstances established justifying review of order pending sealing – plaintiffs being charged with NSL offence or fraud not a material change of circumstances

Powers of police and courts – no statutory or common law powers to compel provision of such security information

Background

1. At a hearing on 19 November 2020, the Court considered the issue of whether the Plaintiffs should be compelled to provide security information (including but not limited to numerical, alphabetical and/or biometric passcodes and/or encryption key) to enable access by the Defendant to the contents of the digital devices seized (“the Security Information”), and decided that the Plaintiffs should not be compelled, but should be at liberty, if so advised, to provide the passcodes to the

Defendant (“the 19 November Hearing”). The Defendant subsequently proposed to include a mandatory order compelling the Plaintiffs to provide the Security Information (“the Application”).*

Issue(s) under consideration

2. In considering whether the Plaintiffs had an obligation to enable access to the digital devices, the Court discussed:

- (a) whether the Court had jurisdiction to entertain the Defendant’s Application; and
- (b) whether the police and the courts had statutory or common law power to compel the Plaintiffs to provide the Security Information.

Summary of the Court’s rulings

(a) Whether the Court had jurisdiction to entertain the Defendant’s Application

3. The Court held that such a drastic “revision” of the order decided on 19 November 2020 was not permissible under any of the three sources of jurisdiction relied on by the Defendant to vary the Court’s previous order: (paras. 3 and 9)

- (a) The court’s power to supplement and/or vary the order pursuant to the “liberty to apply” provision was limited to doing what was necessary to work out the order already made, and could not be extended to allow the variation of the order itself. The Defendant sought to change rather than facilitate the implementation of the order. Such drastic and contradictory revisions could not be considered necessary for the “working out” of the order. (paras. 5 and 10)

- (b) A judge had power to review and revise his orders before they

* Editor’s note: For further developments, see *Next Digital Limited and Others v Commissioner of Police* [2021] HKCFI 1677 (10 June 2021).

were sealed, but it was only available in limited circumstances. The Defendant had not established any exceptional circumstances which would justify an exercise of the limited power to review pending the sealing of an order. (paras. 6 and 11)

- (c) A court of co-ordinate jurisdiction had jurisdiction to vary a previous order to suit a change of circumstances or for the purpose of managing the case and furthering the underlying objectives of the rules of the court. The fact that three of the Plaintiffs had since the 19 November Hearing been charged with offences of fraud and/or under the NSL was not a material change of circumstances. This was not a possibility which the Defendant could not reasonably have foreseen at that hearing. (paras. 7 and 12-13)

4. In the premises, the Court held that the Application should be dismissed *in limine* for want of jurisdiction to hear it. (para. 14)

(b) Whether the police and the courts had statutory or common law power to compel the Plaintiffs to provide the Security Information

5. In any event, there was neither statutory power (whether under the NSL, the Police Force Ordinance (Cap. 232) or any other ordinance) nor common law power for the police or the courts to compel the Plaintiffs to provide the Security Information sought by the Defendant: see *Sham Wing Kan v Commissioner of Police* [2020] HKCA 186 on the absence of the above common law power. (paras. 15-16)

6. For the above reasons, the Court refused the Application. (para. 19)

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