

ENL LIMITED & ANOR v THE FINANCIAL CRIMES COMMISSION & ORS

2025 SCJ 501

Record No.: 120653

THE SUPREME COURT OF MAURITIUS

In the matter of:

- 1. ENL Limited**
- 2. Rogers and Company Limited**

Applicants

v

**The Financial Crimes Commission
(previously known as “Independent Commission Against Corruption”)**

Respondent

In the presence of:

- 1. The Financial Services Commission**
- 2. New Mauritius Hotels Limited**
- 3. Swan Life Ltd**

Interested Third Parties

Interlocutory Judgment

This is an application for an order authorising the applicants to make a “*tierce opposition*” against the Order granted on 14 June 2018 by the Judge in Chambers (the *ex parte* Order) against the Interested Third Party No. 1, the Financial Services Commission (“the FSC”) ordering it to disclose to the Independent Commission Against Corruption (ICAC) within two weeks as from the service of the Order “*all data, information and documents and files in relation to –*

- (i) *minutes of proceedings of Board meetings held at the FSC in relation to the New Mauritius Hotels Ltd (NMH) matter;*
- (ii) *reports of Committees which made preliminary enquiries in the matter;*
- (iii) *correspondences (letters and emails) received from, and addressed to stakeholders, including but not limited to, New Mauritius Hotels Ltd (NMH), ENL Land Ltd (ENL Land), Swan Life Ltd (Swan Life) and Rogers & Co Ltd (Rogers);*

- (iv) *a list of all private pension plans administered by Swan Life as at February 2016, and their underwriting conditions;*
- (v) *all documents required to be filed by Swan Life, in accordance with Private Pension Act, Rules and Regulations as well as the Financial Services Act 2007; and*
- (vi) *all records kept by the FSC in relation to NMH for the years 2015, 2016 and 2017,*

which are kept and stored in a computer system by it."

It is undisputed that the FSC has already provided all the information referred to in the *ex parte* Order, except for a report which was produced by Mr Kriti Taukoordass (the "Report") which the respondent contends falls within the purview of paragraph (ii) of the said Order.

The applicants have made an application by way of a "*tierce opposition*" pursuant to Article 474 of the Code de Procédure Civile and Rule 22 of the Supreme Court Rules 2000 seeking an Order as follows:

- "(a) *Granting to the Applicants a Tierce Opposition and ordering the discharge and the setting aside of the Order dated 14 June 2018 delivered by the Honourable Judge in Chambers, Mr Justice David Chan;*
- (b) *In the alternative, if the Court is minded to order that the "Report" is to be made available to the ICAC (which ENL/Rogers submit it cannot lawfully be), it should not do so without having ruled on the matters set out in Part C of the affidavit in support of the present application and without having made binding declarations that:*
 - (i) *the "Report" is null and void for all intents and purposes;*
 - (ii) *The Respondent may not and should not rely on any of the findings of the "Report";*
 - (iii) *The Respondent may not and should not use the "Report" other than as evidence that such a report was issued and not as evidence for any conclusions reached in the "Report"; and*
 - (iv) *no action should be taken by the Respondent based on any "findings" or other matter in the "Report".*

- (c) *In the yet further alternative, and for the same reasons, any disclosure of the “Report” to the Respondent ordered by the Court should only be made on the basis of binding restrictions – either by way of an order from the Court or of binding undertaking of the Respondent to the Court - as to the use which could be made of the report making it clear that, given the serious failings in the “Report”, the Respondent could only ever use it as evidence of the fact that such a “Report” was made and nothing more. In particular the said binding restrictions should make it clear that the Respondent could not rely in any way upon the “Report” as proof of any statement contained therein, or on any material in the report as evidence or support either for (i) any conclusion in the “Report” or (ii) any separate conclusion reached by the Respondent in respect of the same subject matter as the investigation of the report.*
- (d) *such other Order as the Court may direct.”*

The background facts leading to the present application can be gauged from the following extract from the case of **ENL LIMITED & ANOR v. INDEPENDENT COMMISSION AGAINST CORRUPTION** [\[2023 SCJ 190\]](#):

“Following the issue of the ex parte order, the FSC at the outset made an application by way of motion on 9 July 2018 for the setting aside of the said order and joined ENL, Rogers, NMH and Swan as third parties (hereinafter referred to as the “FSC application”)

On the same day ICAC made an application to the Supreme Court for the above third parties to be put out of cause (hereinafter referred to as the “ICAC application”). In a judgment delivered on 21 July 2020, the Court granted ICAC’s application holding that the presence of the third parties was not necessary to enable the Supreme Court to determine the FSC application. The third parties appealed against the said decision; the appellate court upheld the Court’s decision to put the third parties out of cause.

The third parties thereafter made an application for leave to appeal to the Judicial Committee of the Privy Council. On 24 March 2022 leave to appeal was refused by the Supreme Court and the application was set aside. The third parties have since made an application for special leave to appeal to the Judicial Committee and for a stay of the said application pending the determination of the present application which they have entered on 29 September 2020.

On 5 January 2023 the Judicial Committee has granted a stay of that application for special leave pending the determination of the present application.”

The ICAC (now the Financial Crimes Commission (“FCC”)) had initially raised preliminary objections to the present application on two limbs: limbs A and B.

Under limb A, where it is its contention that there is a multiplicity of proceedings and an abuse of process, the grounds of objection are as follows:

- (i) the application for “*tierce opposition*” amounts to a multiplicity of actions having the possibility of the same issue. i.e., the setting aside of the *ex parte* Order issued by the Judge in Chambers being tried twice with the possibility of different results;
- (ii) the applicants are seeking the same reliefs which they had sought in the application made by the FSC and which the Supreme Court refused to entertain;
- (iii) the application for “*tierce opposition*” amounts to an abuse of process and a backdoor mechanism through which the applicants are trying to relitigate issues and prayers they had raised in the FSC application;
- (iv) the application for “*tierce opposition*” amounts to an “*abuse of processes of the Supreme Court*” to deliberately forestall the investigation being carried out by the respondent under the provisions of the Prevention of Corruption Act (“POCA”);

Under limb B, it is the respondent’s contention that prayers (b) and (c) of the application amount to a disguised form of judicial review which is not open to the applicants in an application for “*tierce opposition*” and that the said prayers are hypothetical at this stage and should be dealt with during the course of a criminal trial in the event they are prosecuted. The respondent further contends that the Supreme Court should refrain from entertaining alternative prayers (b) and (c) of the applicants’ motion paper.

Prayers (b) and (c) were dropped by the applicants who are now only pressing on prayer (a) of the application for “*tierce opposition*” so that we are no longer concerned with the grounds of objection raised under limb B.

When the case came for hearing of the preliminary objections before us, learned Counsel for the applicants moved that the complete record of the application for the *ex parte* Order made before the Judge in Chambers be produced before us. The respondent objected to the motion but, following a ruling from this Court, it disclosed that the application for the *ex*

parte Order had been made under section 13 of the now repealed Computer Misuse and Cybercrime Act 2003 (CMCA).

It was agreed by all the parties that, if the Report does not constitute data, the matter would be disposed of. Notwithstanding that the consideration of the said issue will only arise if the preliminary objections are set aside and the application for *tierce opposition* is to proceed on the merits, we decided to consider the said issue at the outset.

Given that we are not in presence of the Report, learned Counsel for the FSC was requested to inform the Court whether the Report being sought under paragraph (ii) of the *ex parte* Order is recorded in a form in which it can be processed by equipment operating automatically and is data. As a result, the FSC filed an additional affidavit wherein it stated that it has ascertained that a soft copy of the interim report of Mr Kriti Taukoordass, the special investigator appointed by it, was received by email on 19 May 2017 and a soft copy of the revised report was received on 22 May 2017. Both reports have been stored on the server of the FSC. Subsequently on 23 May 2017, hard copies of the annexes were received by dispatch and scanned by it.

Learned Counsel for the applicants and the interested parties Nos. 2 and 3 forcefully argued that the Report is not data and therefore the learned Judge could not have granted paragraph (ii) of the Order, while learned Counsel for the FSC joined in their submissions. Learned Counsel for the respondent for his part submitted that the Report is data and that the learned Judge could grant the said Order.

We have carefully considered the affidavits filed on record and the documents attached thereto, as well as the oral and written submissions of Counsel.

In a gist, the submissions of Counsel for the applicants and third parties Nos. 2 and 3 are as follows.

1. The Report, which has been the subject of many communiqués by the FSC, made headlines for over 6 months in Mauritius and it was known that Mr Kriti Taukoordass had made a special investigation widely known and reported in the media. This special investigation was conducted under a specific provision of the law and it was not the report of a “committee” or an “inquiry”.
2. The FSC, which is the regulatory body of financial services in Mauritius, had appointed Mr Kriti Taukoordass to investigate into the transactions concerning the

shares of the New Mauritius Hotels Ltd by Rogers and Company Limited, ENL Land Ltd and Swan Life Ltd and had, after considering the Report, decided that no further regulatory action was required.

3. It was open to question whether the respondent had complied with its duty of making a full disclosure before the Judge in Chambers given the vagueness of the *ex parte* Order which should have mentioned that it was the report by Mr Kriti Taukoordass that was being sought.
4. Section 13 of the CMCA cannot be interpreted as conferring power on the respondent to obtain a copy of any document which is kept in electronic form on the basis of an assertion that it requires same for an investigation.
5. The obtention of the Report on an *ex parte* basis is abhorrent to the rule of law and contrary to the very essence of due process for the reasons given by Lord Leggatt in **Potanina v Potanin [2024] UKSC 3** where it was stated that:

“1. Rule one for any judge dealing with a case is that, before you make an order requested by one party, you must give the other party a chance to object. Sometimes a decision needs to be made before it is practicable to do this. Then you must do the next best thing, which is- if you make the order sought - to give the other party an opportunity to argue that the order should be set aside or varied. (...) 31. First and foremost, to deny the party adversely affected by an order any opportunity to say why the order should not be made is patently unfair. It is contrary to what I referred to at the start of this judgment as rule one for judges. 32. Second, as well as being patently unfair, such a procedure is also foolish. For obvious reasons, judges make better decisions if they hear argument from both sides rather than from one side only. This is one of the main benefits of an adversarial process.”

6. Section 13 of the CMCA is limited to investigations and offences committed under the CMCA.
7. The Report does not constitute data and cannot be processed in the sense required by the CMCA and does not otherwise qualify as data, but would at most constitute an “electronic record” within the meaning of the CMCA. The natural and ordinary meaning of the word “processed” in the context of the CMCA implies an active or dynamic interaction between the “information” and the “equipment” which is

“operating” on that information. It is not simply satisfied by there being a file stored on a computer which can be opened.

8. Learned Counsel for the applicant No. 2 also contrasted the word “process” in the definition of data with the word “access” which is defined under section 2 of the CMCA. He argued that under the CMCA, storage or retrieval is considered “accessing”, not “processing”.
9. The preamble of the CMCA states that it is “to provide for the repression of criminal activities perpetrated through computer systems”.
10. The FSC could not have communicated the Report given that it is bound by the confidentiality provision under section 83 of the Financial Services Act.

We note that many of the above points raised by Counsel in fact require us to deal with issues which can only be considered if we agree that the application for *tierce opposition* should be granted. We must reiterate that, at this stage, we are only concerned with the question as to whether the Report is data. If we determine that the Report is data, we should then consider the preliminary objections of the respondent and it is only if the preliminary objections are set aside that we shall proceed to consider whether the application for “*tierce opposition*” should be granted.

The issue to be determined at this stage of the proceedings is whether the Report is data for the purposes of section 13 of the CMCA which reads as follows:

“13. Production order

- (1) *Where the disclosure of data is required for **the purposes of a criminal investigation or the prosecution of an offence**, an investigatory authority may apply to the Judge in Chambers for an order compelling –*
 - (a) *any person to submit specified data in that person’s possession or control, which is stored in a computer system; and*
 - (b) *any service provider offering its services to submit subscriber information in relation to such services in that service provider’s possession or control.*
- (2) *Where any material to which an investigation relates consists of data stored in a computer, disc, cassette, or on microfilm, or preserved by any mechanical or electronic device, the request shall be deemed to require*

the person to produce or give access to it in a form in which it can be taken away and in which it is visible and legible.” [emphasis added]

A perusal of the CMCA and the Convention on Cybercrime (Budapest Convention) shows that the CMCA is largely inspired from the said convention.

Part I of the CMCA which is entitled “Preliminary” is mostly devoted to the definition of words and terms, Part II which is entitled “Offences” creates a number of offences: Unauthorised access to computer data (section 3), Access with intent to commit offences (section 4), Unauthorized access to and interception of computer service (section 5), Unauthorized modification of computer material (section 6), Damaging or denying access to computer system (section 7), Unauthorised disclosure of password (section 8), Unlawful possession of devices and data (section 9) and Electronic fraud (section 10). Part III which is entitled “Investigations and Procedures” provides for powers of investigatory authorities with regard to criminal investigations into offences, while Part IV concerns miscellaneous provisions.

Under Part III, an investigatory authority may seek the following orders: a preservation order (section 11), an order for the disclosure of preserved data (section 12), a production order (section 13), an order for the real time collection of traffic data (section 15), a deletion order (section 16), as well as a warrant to enter any premises to access, search and seize data (section 14).

It can be gleaned from the Budapest Convention that it provides for definitions under Chapter I. Chapter II which is further subdivided into 3 sections (sections 1 to 3) lays down the measures to be taken at the national level.

Section 1 which is entitled “Substantive criminal law” provides for a number of offences and sanctions, as well as for ancillary liability and sanctions where a person attempts to commit, or aids in and abets the commission of, offences provided for under section 1.

Section 2 which is entitled “Procedural law” concerns legislative and other measures to establish powers and procedures for the purpose of specific criminal investigations or proceedings by State parties. It consists of Articles 14 to 21. Article 14 sets out the scope of the provisions under the said section. Article 15 provides for conditions and safeguards which need to be adopted by State parties under their domestic law to ensure adequate protection of human rights and liberties in relation to the powers and procedures provided for under

section 2. Article 16 concerns the expedited preservation of stored computer data, Article 17 provides for the expedited preservation and partial disclosure of traffic data, Article 18 relates to production orders, Article 19 pertains to the search and seizure of stored computer data, Article 20 deals with real time collection of traffic data, while Article 21 applies to interception of content data.

Article 14 which is entitled “Scope of Procedural provisions”, so far as relevant, reads as follows:

- “1. *Each party shall adopt such legislative and other measures as may be necessary to establish the powers and procedures provided for in this section for the purpose of specific criminal investigations or proceedings.*
 2. *Except as specifically provided otherwise in Article 21, each party shall apply the powers and procedures referred to in paragraph 1 of this article to:*
 - a. the criminal offences established in accordance with Articles 2 through 11 of this Convention;*
 - b. other criminal offences committed by means of a computer system; and*
 - c. the collection of evidence in electronic form of a criminal offence.***
-” [emphasis added]

Article 14 therefore enjoins State parties to adopt, inter alia, legislative measures as may be necessary to establish the powers and procedures provided for under section 2 of the Budapest Convention, namely the expedited preservation of stored data, the expedited preservation and partial disclosure of traffic data, production orders, the search and seizure of computer data, the real-time collection of traffic data, and the interception of content data for the purpose of criminal investigations or proceedings.

It is significant to note that under Article 14 paragraph 2.c. the parties are enjoined to apply the powers and procedures referred to in paragraph 1, i.e., the expedited preservation of stored data, the expedited preservation and partial disclosure of traffic data, production orders, the search and seizure of computer data, the real-time collection of traffic data, and the interception of content data to **the collection of evidence in electronic form of a criminal offence**. In other words, pursuant to Article 14, State parties are encouraged to enact legislation and take necessary measures to allow **the use of the procedures laid down**

under the said Article for the purposes of collecting evidence which is in electronic form regarding all criminal offences.

It is also apposite to refer to paragraphs 16, 17, 18 and 19 of the Explanatory Report to the Convention which confirm that the procedural powers referred to in Article 14 concern all offences and not only cybercrimes and **the evidence which is in electronic form relating to any offence:**

- “16. The Convention aims principally at (1) harmonising the domestic criminal substantive law elements of offences and connected provisions in the area of cyber-crime (2) providing for domestic criminal procedural law powers necessary for the investigation and prosecution of such offences as well as other offences committed by means of a computer system or evidence in relation to which is in electronic form (3) setting up a fast and effective regime of international co-operation.*
- 17. The Convention, accordingly, contains four chapters: (I) Use of terms; (II) Measures to be taken at domestic level – substantive law and procedural law; (III) International co-operation; (IV) Final clauses.*
- 18. Section 1 of Chapter II (substantive law issues) covers both criminalisation provisions and other connected provisions in the area of computer or computer-related crime: it first defines 9 offences grouped in 4 different categories, then deals with ancillary liability and sanctions. The following offences are defined by the Convention: illegal access, illegal interception, data interference, system interference, misuse of devices, computer-related forgery, computer-related fraud, offences related to child pornography and offences related to copyright and neighbouring rights.*
- 19. **Section 2 of Chapter II (procedural law issues) – the scope of which goes beyond the offences defined in Section 1 in that it applies to any offence committed by means of a computer system or **the evidence of which is in electronic form**** – determines first the common conditions and safeguards, applicable to all procedural powers in this Chapter. It then sets out the following procedural powers: expedited preservation of stored data; expedited preservation and partial disclosure of traffic data; production order; search and seizure of computer data; real-time collection of traffic data; interception of content data. Chapter II ends with the jurisdiction provisions.”* [emphasis added]

We wish to make it clear that we are fully alive to the fact that, in determining the question as to whether the Report is data, we must consider the provisions of the now repealed CMCA. However, we find it relevant to refer to the Explanatory Report to the Budapest Convention from which we can obtain useful and persuasive guidance in determining how to interpret our own legislation.

Coming back to the CMCA, it is apposite to note that pursuant to section 11(3)(a), a preservation order is to remain in force until such time as may be reasonably required for the **investigation of an offence**. Under section 12, disclosure of preserved data may be sought for the purposes of **a criminal investigation or the prosecution of an offence**. Under section 14, a warrant may be sought to enter any premises, access, search and seize data where the data is considered to be relevant for the purposes of **an investigation or the prosecution of an offence**. Under section 15, the collection or recording of traffic data in real time may be sought where the data is considered to be relevant for the purposes of **an investigation or the prosecution of an offence**.

It is clear from the above provisions that they confer powers on investigatory authorities to seek all the orders referred to above, as well as a warrant to enter any premises, access, search and seize data for the criminal investigation or prosecution of **any offence** and not only offences created under the CMCA.

In so far as section 13 is concerned, paragraph (1) provides that where *“the disclosure of data is required **for the purposes of a criminal investigation or the prosecution of an offence**, an investigatory authority may apply to the Judge in Chambers for an order...”*.

The plain meaning of section 13 which is drafted very broadly is that, where the disclosure of data which is stored in a computer system is required for the purposes of any criminal investigation or the prosecution of any offence, an investigatory authority may apply to the Judge in Chambers for an order compelling the person who has possession or control of the data to provide same.

“investigatory authority” is defined as follows under section 2:

“investigatory authority” means the police or any other body lawfully empowered to investigate any offence;”

It therefore leaves no doubt as to the scope of section 13 which clearly covers the investigation of any criminal offence and not only offences which are created under the CMCA.

In so far as the interpretation of the word “data” is concerned, it is apposite to compare Article 18 of the Budapest Convention entitled “Production order” and section 13(1) of the CMCA. Article 18, so far as relevant, reads as follows:

“Article 18 – Production order

1. *Each Party shall adopt such legislative and other measures as may be necessary to empower its competent authorities to order:*
 - a. *A person in its territory **to submit specified computer data** in that person’s possession or control, which is stored in a computer system or a computer-data storage medium; and ...”*

Section 13(1) of the CMCA provides that:

- (1) *Where the disclosure of data is required for the purposes of a criminal investigation or the prosecution of an offence, an investigatory authority may apply to the Judge in Chambers for an order compelling –*
 - (a) *any person **to submit specified data in that person’s possession or control, which is stored in a computer system**;*[emphasis added]

It can be gathered from the above that section 13 of the CMCA uses the same words as the Budapest Convention. It is relevant to refer to the following paragraphs of the Explanatory Report to the Budapest Convention which pertain to Article 18:

- “170. *Paragraph 1 of this article calls for Parties to enable their competent authorities to compel a person in its territory to provide **specified stored computer data**, or a service provider offering its services in the territory of the Party to submit subscriber information. **The data in question are stored or existing data**, and do not include data that has not yet come into existence such as traffic data or content data related to future communications. **Instead of requiring States to apply systematically coercive measures in relation to third parties, such as search and seizure of data, it is essential that States have within their domestic law alternative investigative powers that provide a less intrusive means of obtaining information relevant to criminal investigations.***
171. *A “production order” provides a flexible measure which law enforcement can apply in many cases, especially instead of measures that are more intrusive or*

*more onerous. **The implementation of such a procedural mechanism will also be beneficial to third party custodians of data, such as ISPs, who are often prepared to assist law enforcement authorities on a voluntary basis by providing data under their control, but who prefer an appropriate legal basis for such assistance, relieving them of any contractual or non-contractual liability.***

172. *The production order refers to computer data or subscriber information that are in the possession or control of a person or a service provider. The measure is applicable only to the extent that the person or service provider maintains such data or information. Some service providers, for example, do not keep records regarding the subscribers to their services.*
173. *Under paragraph 1(a), a Party shall ensure that its competent law enforcement authorities have the power to order a person in its territory to submit specified computer data stored in a computer system, or data storage medium that is in that person's possession or control. The term "possession or control" refers to physical possession of the data concerned in the ordering Party's territory, and situations in which the data to be produced is outside of the person's physical possession but the person can nonetheless freely control production of the data from within the ordering Party's territory (for example, subject to applicable privileges, a person who is served with a production order for information stored in his or her account by means of a remote online storage service, must produce such information). At the same time, a mere technical ability to access remotely stored data (e.g. the ability of a user to access through a network link remotely stored data not within his or her legitimate control) does not necessarily constitute "control" within the meaning of this provision. In some States, the concept denominated under law as "possession" covers physical and constructive possession with sufficient breadth to meet this "possession or control" requirement." [emphasis added]*

It can be gleaned from the above that the purport of a production order is to compel a person in possession or control of evidence required for the investigation or prosecution of an offence and which is stored in a computer system to provide same to an investigatory authority as it is *"a less intrusive means of obtaining information relevant to [a] criminal investigation[]"* than for example the investigatory authority proceeding by way of a search and seizure of evidence which it may require for the purposes of its investigation.

It is noteworthy that under the CMCA, an investigatory authority which obtains data pursuant to an order issued by the Judge in Chambers under sections 11 to 15 cannot simply make use of the data as it pleases. Section 17 of the CMCA (which is reproduced below) limits the uses to which data obtained under the said sections may be put.

“17. Limited use of disclosed data and information

No data obtained under sections 11 to 15 shall be used for any purpose other than that for which the data was originally sought except—

- (a) in accordance with any other enactment;*
- (b) in compliance with an order of a Court or Judge;*
- (c) where such data is required for the purpose of preventing, detecting or investigating offences, apprehending or prosecuting offenders, assessing or collecting tax, duty or other monies owed or payable to the Government;*
- (d) for the prevention of injury or other damage to the health of a person or serious loss of or damage to property; or*
- (e) in the public interest.”*

Is the Report data?

The word “data” is defined as follows in the **Concise Oxford English Dictionary (Eleventh Edition, Revised)**:

“n. 1 facts and statistics used for reference or analysis. > Philosophy things known or assumed as facts, making the basis of reasoning. 2 the quantities, characters, or symbols on which operations are performed by a computer.”

The **Chambers Concise Dictionary** defines “data” as follows:

- n (originally *pl* but now generally treated as sing) **1** one or more pieces of information or facts, especially those obtained by scientific observation or experiment. **2** information in the form of numbers, characters, electrical signals, etc, that can be supplied to, stored in or processed by a computer. [17c: Latin, meaning ‘things given’; see also DATUM]

However, although in ordinary language, facts or information would qualify as “data”, for the purposes of the CMCA, “data” is defined as follows:

“data” means information recorded in a form in which it can be processed by equipment operating automatically in response to instructions given for that purpose, and includes representations of facts, information and concepts held in any removable storage medium;”

Thus, under the CMCA, information which is in a form in which it can be processed by equipment operating automatically in response to instructions given for that purpose would qualify as data.

Learned Counsel for the applicants argued that the Report does not qualify as “data”, but would at most constitute an “electronic record” within the meaning of the CMCA. He also argued that the Report which is to be found on the server can only be accessed as opposed to being processed, and since it cannot be processed, it does not qualify as “data”. In support of his contention, he relied on the definitions of “access” and “process”.

We do not agree with the above submissions for the reasons given below.

“Access” is defined as follows under section 2 of the CMCA:

“access”, in relation to any computer system, means instruct, communicate with, store data in, retrieve data from, or otherwise make use of any of the resources of the computer system;”

The term “electronic record” is defined as follows under section 2 of the CMCA:

“electronic record” means a record created, generated, sent, communicated, received or stored by electronic means;”

The word “process” is not defined in the CMCA, but it is defined as follows in the **Concise Oxford English Dictionary (Eleventh Edition, Revised)**:

““process” n. 1 a series of actions or steps towards achieving a particular end...”

It is of interest to note that “data processing” is defined as follows in the **Concise Oxford English Dictionary (Eleventh Edition, Revised)**:

“data processing” n. a series of operations on data, especially by a computer, to retrieve, transform, or classify information.” [underlining ours]

It can be culled from the above that the definitions of “data” and “electronic record” are not mutually exclusive. Data can form part of an electronic record, while an electronic record is made up of data.

It is not disputed that the Report was made by Mr Kriti Taukoordass who was appointed by the FSC to investigate into the transactions concerning the shares of the New Mauritius Hotels Ltd by Rogers and Company Limited, ENL Land Ltd and Swan Life Ltd. There is also on record the affidavit evidence of the FSC that a soft copy of the interim report was received by email on 19 May 2017 and the soft copy of the revised report was received on 22 May 2017. Both reports have been stored on the server of the FSC. Subsequently on 23 May 2017, hard copies of the annexes were received by dispatch and were scanned by it and we understand that they have also been saved on the server of the FSC.

The Report which was sent by email and stored on the server was clearly *“sent, communicated, received or stored by electronic means”*. Therefore, it falls within the definition of an electronic record. In addition, the Report, which is stored on the server, is information recorded in a digital form. It is therefore *“information recorded in a form in which it can be processed by equipment operating automatically in response to instructions given for that purpose”*, for example, a computer can open, read, or edit the Report based on software instructions.

In the light of the above, we are of the considered view that the Report stored on the server of the FSC falls within the definition of “data”. In the same breath, we observe that, taking into consideration the definitions above, any information, document or file in electronic form which is saved on the FSC’s server would also qualify as data.

We are comforted in our view by the fact that the FSC has already disclosed to the FCC, the information which fall within the purview of paragraphs (i) and (iii) to (vi) of the Order. The said data, information, documents and files disclosed under the said paragraphs are as follows –

- (i) *minutes of proceedings of Board meetings held at the FSC in relation to the New Mauritius Hotels Ltd (NMH) matter;*
- (ii) ...

- (iii) *correspondences (letters and emails) received from, and addressed to stakeholders, including but not limited to, New Mauritius Hotels Ltd (NMH), ENL Land Ltd (ENL Land), Swan Life Ltd (Swan Life) and Rogers & Co Ltd (Rogers);*
- (iv) *a list of all private pension plans administered by Swan Life as at February 2016, and their underwriting conditions;*
- (v) *all documents required to be filed by Swan Life, in accordance with Private Pension Act, Rules and Regulations as well as the Financial Services Act 2007; and*
- (vi) *all records kept by the FSC in relation to NMH for the years 2015, 2016 and 2017,*

which are kept and stored in a computer system by it.” [emphasis added]

Since the FSC has already complied with paragraphs (i) and (iii) to (vi) of the Order, it follows that it agrees that minutes of proceedings of Board meetings, correspondences (letters and emails) received from, and addressed to stakeholders, the list of all private pension plans administered by Swan Life as at February 2016, and their underwriting conditions, documents required to be filed by Swan Life, in accordance with Private Pension Act, Rules and Regulations as well as the Financial Services Act 2007 and records kept by it in relation to NMH for the years 2015, 2016 and 2017 constitute data for the purposes of section 13 of the CMCA.

We fail to understand how it may be argued that all the above information *kept and stored in a computer system by the FSC and* provided by the FSC to the respondent constitute data, but that the Report is not data.

For all the reasons given above, we find that the Report is data.

Preliminary objections

Having concluded that the Report constitutes data, we shall now turn to consider the preliminary objections of the respondent. We find it appropriate to set out the preliminary objections raised under limb A anew:

- “(i) *the application for “tierce opposition” amounts to a multiplicity of action having the possibility of the same issue. i.e., the setting aside of the ex parte Order*

issued by the Judge in Chambers being tried twice with the possibility of different results;

- (ii) the applicants are seeking the same reliefs which they had sought in the application made by the FSC and which the Supreme Court refused to entertain;*
- (iii) the application for “tierce opposition” amounts to an abuse of process and a backdoor mechanism through which the applicants are trying to relitigate issues and prayers they had raised in the FSC application;*
- (iv) the application for “tierce opposition” amounts to an “abuse of processes of the Supreme Court” to deliberately forestall the investigation being carried out by the respondent under the provisions of the Prevention of Corruption Act (“POCA”);*

We shall deal with the preliminary objections raised under paragraphs (ii) and (iii) together and then consider those raised under paragraphs (iv) and (i) in the above order.

Under paragraphs (ii) and (iii), it is the respondent’s contention that the present application should not be allowed to proceed on the ground of abuse of process as the applicants are relitigating the issues and seeking the same prayers as in the FSC application, when the Supreme Court has refused to grant the said prayers.

Although the applicants are trying to litigate issues they had raised in the FSC application, it is apposite to note that the respondent had moved that the applicants be put out of cause on the ground that allowing them to remain as parties in the said application would enable them to “*peep into the investigation of the respondent*”. The Supreme Court has not ruled on the issues raised in FSC application and did not refuse to entertain the applicants’ case on the ground that they cannot seek the reliefs which were being sought, but has simply put the applicants out of cause on the ground that their presence is not necessary for the FSC to proceed with its case and for the Court to adjudicate on the FSC’s application.

More importantly, although the same relief is being sought in both the FSC application and the present case, namely the setting aside of the *ex parte* Order, the Supreme Court has not yet determined whether the relief sought should be granted. It is pertinent to note that the applicants have, after lodging an application for special leave to appeal the ruling of the Supreme Court in the FSC application before the Judicial Committee of the Privy Council (“JCPC”), sought and obtained a stay of the application for special leave and have expressly

stated that they will not proceed with that application if they are successful in the application for “*tierce opposition*”.

In this regard, it is relevant to refer the following extract of the applicants’ affidavit in support of the application for the stay of the application for special leave to appeal:

- “17. *If in the Tierce Opposition Proceedings, the Mauritian Court upholds the Applicants’ challenge to the Order, the Applicants will have had a forum available to seek to challenge the Order and in those circumstances they would not need to maintain the present appeal.*
18. *Unfortunately, however, the applicants cannot proceed on the basis that the Applicants will be able to challenge the Order via the Tierce Opposition Proceedings. They contend they can do so as of right. However, ICAC has contended in the Tierce Opposition Proceedings that the Applicants are not entitled to challenge the Order via tierce opposition. That question is yet to be decided. As matters stand, it should be the subject of argument on 30 September 2022. If ICAC’s position is accepted by the Mauritian Court, the applicants will have been denied access to any forum in Mauritius to challenge the Order, which, so the Applicants contend, would give rise to fundamental issues regarding the right of access to justice. The correctness of the Mauritian Court’s decision in the Tierce Opposition Proceedings will itself in due course be susceptible of coming before the Board, either on appeal as of right or by way of an application for leave to appeal. Such an appeal would likely raise closely related issues to those which arise in the Applicants’ present Leave Application (such as, for example, ICAC’s arguments about when an order such as the one ICAC has obtained in this case can be challenged as a matter of law).*
19. *In those circumstances, the Applicants respectfully propose that the present Leave Application be stayed and that no decision on the application be made until a decision has been delivered by the Mauritian Courts as to whether the Applicants can indeed proceed to challenge the Order in Mauritius by way of the Tierce Opposition Proceedings.*
20. *If the Mauritian Courts hold that the Order can be challenged by the Applicants by way of Tierce Opposition, the Applicants will not need to maintain the present special leave petition.*

21 *If the Mauritian Courts hold that the Order cannot be challenged by the Applicants by way of Tierce Opposition, that will enable the Board to consider the two applications, raising similar issues, together; and also to see issues in the round.”*

For the above reasons, we find no merit in the preliminary objections raised under paragraphs (ii) and (iii) and they are accordingly set aside.

In so far as the preliminary objection raised under paragraph (iv) is concerned, suffice it to say at this stage that the applicants are simply trying to put forward their contention that the *ex parte* Order should not have been granted and should be set aside. They purported to put forward their case before the Supreme Court in the FSC application but were unable to litigate issues raised by them as they were put out of cause. As stated above, the reason given by the Court for the applicants to be put out of cause was that the FSC could proceed in their absence to seek the setting aside of the *ex parte* Order. The applicants are now trying to litigate issues raised by them in the FSC application by seeking a *tierce opposition*.

Taking into consideration the particular circumstances of this case, more particularly, that the applicants have, before the JCPC, sought and obtained a stay of the application for seeking leave to appeal the ruling of the Supreme Court in the FSC application and have expressly stated that they will not proceed with that application if they are successful with their application for *tierce opposition*, we are unable to conclude that this application is an abuse of the process of this Court. The more so, since the JCPC was fully alive to the preliminary objections which are presently being raised by the respondent and nonetheless agreed to grant the applicants a stay of their application for leave to appeal the ruling of the Supreme Court in the FSC application.

It is noteworthy that the stay of the application for seeking leave to appeal the ruling of the Supreme Court in the FSC application was not given for the mere asking. The applicants filed an affidavit dated 20 July 2022 in support of their application for stay. The respondent who resisted the application for stay filed an affidavit dated 3 August 2022 and, in its affidavit, the respondent raised all the preliminary objections which are currently being raised by them. A further affidavit was filed by the respondent on 27 September 2022, and, on 29 September 2022, the applicants replied to the respondent's affidavits. It is only after considering the above affidavits, where, as stated above, the preliminary objections with which we are concerned were raised, that the JCPC granted the stay and ordered as follows :

“The application be stayed pending the decision in the Tierce Opposition proceedings and any local appeal”

As stated by the applicants, the challenge may be right or wrong on the merits but they are entitled to access to justice. We may of course when determining the application on the merits refuse to grant it, but we cannot foreclose the applicants’ access to the Court on the preliminary objection referred to above.

For all the reasons given above, we find no merit in the preliminary objection raised under paragraph (iv) and set it aside.

In so far as the preliminary objection raised under paragraph (i) is concerned, we do not find any merit therein for the reasons given below.

There are two possible outcomes to the present application. This Court or the JCPC, if there is any appeal following the judgment delivered by this Court, may either grant the application which will result in the quashing of the *ex parte* Order or refuse to grant the application and maintain the *ex parte* Order.

If the final decision regarding this application results in the quashing of the *ex parte* Order, it would clearly be futile for the FSC to proceed with the FSC application. Thus, the question of different outcomes being reached regarding the question as to whether the *ex parte* Order should be quashed would not arise.

On the other hand, if the applicants are unsuccessful in obtaining the quashing of the *ex parte* Order, as can be gleaned from the averments in the applicants’ affidavit referred to above, they would proceed with their application for special leave to appeal against the ruling of the Supreme Court where they were put out of cause of the FSC application.

The applicants may be successful or not in the application for special leave. At any rate, once the proceedings relating to the *tierce opposition* are concluded, the FSC would be able to proceed with its application, with or without the applicants as parties, and seek the quashing of the *ex parte* Order.

At any rate, in determining the FSC application, the Supreme Court will be bound by the judgment of the JCPC on appeal, if any, following the judgment delivered by this Court in the present application. And, even if there is no appeal to the JCPC, should the applicants or

the FSC, in proceeding with the FSC application, try to relitigate issues which have been finally determined by this Court in the present application, it will still be open to the respondent to then raise an objection on the ground of abuse of process.

Whilst we agree with the respondent that the possibility of a different outcome being reached in the two applications referred to above cannot be excluded, we, however, do not consider that the applicants should be precluded from proceeding with the present application for this reason. The reasons being invoked by the FSC for seeking that the *ex parte* Order be quashed are not exactly the same as those on which the applicants are relying and the judgment in the FSC application will be based on the grounds invoked in that case and the submissions and arguments put forward in support of that application.

For all the reasons given above we find that there is no merit in the preliminary objection raised under paragraph (i) of limb A which is accordingly set aside.

All the preliminary objections raised by the respondent having failed, the case is to proceed in the light of our decision. The matter will be mentioned before us on 14 November 2025 at 10.30 hrs to be fixed for hearing of the application for "*tierce opposition*" and any outstanding issues.

K. D. Gunesh-Balaghee
Judge

P. M. T. K. Kam Sing
Judge

29 October 2025

Judgment delivered by Hon. K. D. Gunesh-Balaghee, Judge

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For Applicant No. 2	:	Me. U. K. Ragobur, Attorney at Law Me. S. Moollan, King Counsel
For Respondent	:	Me. N. Seetaram, Attorney at Law Me. M. Roopchand, of Counsel Me. T. Naga, of Counsel Me. K. Beeharry, of Counsel
For Interested Third Party No. 1	:	Me. Z. I. Salajee, Senior Attorney Me. D. Basset, Senior Counsel Me. J. G. Basset, of Counsel
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