

CASE UPDATE

DISCOVERY OBLIGATIONS: THINK BEFORE YOU HIT "DELETE"

K Solutions Pte Ltd v National University of Singapore [2009] SGHC 143

Executive Summary

The Singapore High Court has, in the recent case of *K Solutions Pte Ltd v National University of Singapore* [2009] SGHC 143 (the "*NUS decision*"), signalled that a party who deliberately destroys documents so that it may not be used against him in pending or anticipated litigation risks having his claim or defence struck out even if a fair trial of the action were still possible.

In so doing, the court relied on *Alliance Management SA v Pendleton Lane P & Anor* [2008] 4 SLR 1 (the "*Alliance Management decision*") where the High Court had re-affirmed the principle that a fair trial need not be impossible before pleadings can be struck out for failure to give discovery. In the *Alliance Management* decision, the court struck out the defendants' defence and entered interlocutory judgment for the plaintiff because of the defendants' deliberate and persistent disregard of court orders for the production and inspection of a computer hard disk.

Cavinder Bull SC of Drew & Napier LLC acted for the successful applicants in both the *NUS* and *Alliance Management* decisions, which mark a watershed in the development of Singapore law on discovery obligations. As both decisions resulted in a striking out, they send the starkest possible message from our courts that discovery obligations are to be taken seriously, not only after litigation has commenced but also when litigation is anticipated.

Background

K Solutions Pte Ltd ("**K Solutions**") entered into a contract with National University of Singapore ("**NUS**") to supply an integrated web-based student information system and hardware architecture.

A dispute arose between the parties and NUS eventually terminated the contract on account of various alleged defaults on the part of K Solutions.

K Solutions commenced litigation against NUS for wrongful termination and claimed damages. NUS counterclaimed damages and various other specific sums.

Upon learning that K Solutions had, both before and during the course of litigation, destroyed or suppressed relevant documents, NUS applied to

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strike out K Solutions' statement of claim and defence to counterclaim and sought judgment for damages to be assessed and judgment for specific sums.

NUS' application was first heard by an assistant registrar, who granted its application. K Solutions appealed against the assistant registrar's decision.

Decision of the High Court Judge

Justice Woo Bih Li dismissed K Solutions' appeal.

He found that K Solutions had, in anticipation of litigation, not only *"deliberately sought to destroy and suppress documents and recordings adverse to it"* but also *"lied again and again"* to explain away its failure to comply with its discovery obligations.

The court also gave the following guidance on the consequences of deliberately destroying documents both before as well as after the commencement of litigation.

Post-action deliberate destruction of documents implicitly prohibited by scheme of discovery

Every litigant is required by the Rules of Court to disclose, among other things, all relevant documents which he used to -- but does not now -- have in his possession, custody or power. If he no longer has those documents, he must state when those documents were last in his possession, custody and power and what has become of them.

While the Rules of Court do not expressly prohibit a party from destroying relevant documents in his possession, custody or power, it is *implicit* in the scheme of discovery that he should not do so, especially if he knows that they are relevant to the issues in the litigation.

In the court's view, a litigant would be in breach of his discovery obligations if he deliberately destroys relevant documents after litigation commences. Such conduct may entitle the court to strike out his pleadings pursuant to either Order 24 rule 16(1) of the Rules of Court or the court's inherent jurisdiction.

"Deliberate" destruction in this context refers to *"the destroyer [intending] to put the documents out of reach of the other party in pending or anticipated litigation"*. It is to be contrasted with "intentional" destruction, which simply suggests that the destruction, while not accidental, was not done with the intention of putting the documents out of reach of the opposing litigant.

Pre-action deliberate destruction of documents

The court sees no reason in principle to distinguish between pre-action and post-action deliberate destruction of documents: *"If the deliberate intent is established, then the consequence should be the same as for post-action deliberate destruction"*.

If, therefore, a party deliberately destroys a document so that it may not be used against him in pending or anticipated litigation, the court may order his pleadings to be struck out. This may be the case even if a fair trial still remains possible. However, in such an event, “[a]ll the circumstances have to be considered”. So if, for example, there is other evidence of the documents destroyed or if the documents destroyed are “not critical in the totality of all the available evidence”, striking out might not be the appropriate remedy.

On the other hand, if a party deliberately destroys relevant documents and a fair trial is *no longer* possible, striking out would appear to be the appropriate sanction.

Ultimately, the court noted that there were infinitely varied circumstances in which it might exercise its discretion to order a striking out. The court did not rule out the possibility that striking out might be appropriate even in more difficult cases where the destruction was not deliberate, e.g. where the destruction was negligent or reckless. This emphasises the importance of taking steps to preserve all relevant documents once litigation is on the horizon.

If you would like more information about this update or wish to discuss how it may potentially affect you or your business, please feel free to contact the dispute resolution lawyers in Drew & Napier LLC (please refer to the Directors’ Profiles on our [website](#)), or either of the following lawyers:

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