Duties in discovery

Cavinder Bull SC and Chia Voon Jiet of Drew & Napier examine the role of lawyers and in-house counsel in discovery for litigation proceedings in Singapore

Modern commercial litigation is often characterised by the voluminous documents which have been disclosed in the proceedings. Increasingly, litigants are also in possession of a huge quantity of potentially relevant documents which require significant (and costly) man hours to filter, review and compile. Having to deal with such vast amounts of documents can render the prospect of discovery daunting for lawyers and their clients. After all, the failure to comply with discovery obligations can potentially lead to the striking out of one’s claim or defence (see K Solutions Pte Ltd v National University of Singapore [2009] SGHC 143).

Therefore, deliberate care and thought must be put into how discovery ought to be managed and executed during the litigation.

In May 2013, the Singapore High Court and the Singapore Court of Appeal handed down two decisions in short succession: Teo Wai Cheong v Crédit Industriel et Commercial and another appeal [2013] SGCA 33 and Global Yellow Pages Limited v Promedia Directories Pte Ltd and another suit [2013] SGHC 111.

In both decisions, the courts seized the opportunity to address various issues relating to discovery in litigation proceedings in Singapore. These decisions are timely as they clarify the duties of solicitors and in-house counsel in ensuring proper discovery and examine the role of technology in discovery of electronic documents.

What happened in CIC

The litigation in Teo Wai Cheong v Crédit Industriel et Commercial (CIC) was aptly described by the Court of Appeal as having suffered “a long and tortuous history”. The case had the ignominy of a retrial, and went before the Court of Appeal on no less than three separate occasions. The first time the matter was before the Court of Appeal, it was for an interlocutory application for further discovery against the defendant bank, which was allowed. The matter subsequently proceeded to trial, in which the bank prevailed.

The plaintiff, a former customer of the bank, then appealed to the Court of Appeal for a second time. On this occasion, the Court of Appeal directed the bank to disclose further new documents, and ordered a retrial so that the trial judge could consider the new documents. At the retrial (“the Retrial”), notwithstanding the new documents that were now before the court, the bank once again prevailed. This precipitated yet another appeal by the plaintiff.

In this third appeal, the Court of Appeal took notice of the fact that the bank’s initial non-disclosure of the new documents had a detrimental effect on the proceedings. This was because a critical witness, namely the plaintiff’s former relationship manager in the bank, could not be located after the first trial and was therefore unable to attend and testify at the retrial. In particular, the court noted that the plaintiff was deprived of the opportunity to cross-examine this witness on the new documents.

The Court of Appeal found in favour of the plaintiff, and dismissed the bank’s claims. In a written judgment by Chief Justice Sundaresh Menon, the court noted that the plaintiff’s right and opportunity to cross-examine the witness was “materially impaired” as a result of the bank’s breach of its discovery obligations. As much of the new documents were potentially prejudicial to the bank, the court felt cross-examination on these documents may have “gravely undermined” the bank’s witness’s testimony. Thus, the bank’s failure to comply with its discovery obligations meant that a fair trial for the plaintiff was compromised.

Significance

The case of CIC is significant as the Court of Appeal, which is the apex court in Singapore, made several important observations about the obligations of litigants in discovery which has implications for lawyers as well as in-house counsels.

First and foremost, CIC serves as a timely reminder to all lawyers that they owe a duty to the court and to their clients in ensuring that discovery is carried out properly and diligently. It also provides valuable guidance to lawyers on the extent of their duties, and their role in the discovery process.

Specifically, a lawyer advising a client in litigation proceedings would be well advised to dispense adequate and comprehensive advice to the client on obligations in discovery. This entails advising the client on what the obligations in discovery are. One would imagine that lawyers will be required to not only inform their clients about their obligations under the law, but also explain the meaning of “relevance” and warn their clients of the consequences of breach. The client must be made aware that even documents which go against his interest must be disclosed. Thus, a perfunctory reference to the relevant rule would not be sufficient to discharge this duty. The lawyer must ensure that his client is fully aware of and appreciates his obligations in discovery.

As a matter of good practice, dispute resolution firms and lawyers may find it useful to instil a practice of providing comprehensive written advice to their clients on the scope and obligations of discovery. Given the importance attached to this duty by the Court of Appeal in CIC, it would be prudent for such advice to be properly documented, not least because it ensures that the advice may be efficiently and accurately circulated within the client’s organisation.

It is also worth noting that in CIC, the Court of Appeal took the unusual step of inviting the bank to waive legal privilege so that its lawyers’ written advice on discovery may be scrutinised by the court.

In addition to advising their clients, lawyers will also be expected to work closely with them to ensure that discovery is carried out diligently. For example, the lawyer should carefully consider the relevant legal and factual issues, and identify the categories of documents that the client should search for...
and compile. Meetings with the client and a visit to their business premises may also be necessary in some instances to better understand how the client’s documents are generated and stored to enable an effective search to be carried out. Once the documents have been retrieved, the lawyer must review them, and where he has reasonable grounds to believe that there are more documents yet to be disclosed, he should follow up accordingly.

In essence, the lawyer must use his legal and professional expertise to supervise the entire discovery process so that he may be reasonably assured that the client has complied with his disclosure obligations. He must take an active role in the process, and if the client is uncooperative, the Court of Appeal in CIC indicated that he must take the drastic step of ceasing to act for that client.

Obviously, such duties should not be taken lightly. In CIC, the Court of Appeal warned that it was not averse to ordering that lawyers who fail to perform their duties in their clients’ discovery may be held personally liable to bear the costs of the proceedings. Lawyers who fall short of the required standard may also find themselves on the wrong end of a negligence suit or disciplinary proceedings.

The burden of discovery, however, is shared with the client. Litigants cannot simply sit back and rely solely on their lawyers to handle the discovery process. In particular, large organisations and corporate entities with in-house counsel are required to take positive steps to ensure that discovery is properly carried out.

In CIC, the defendant was a large international bank. As observed by the Court of Appeal, the bank was “not lacking in resources or sophistication”, and “had an in-house legal team that was also working on this matter”. Such a description would apply equally to most large corporate entities and multinationals engaged in litigation. In this respect, in-house counsels would do well to take heed of the Court of Appeal’s views in CIC.

In the Court of Appeal’s own words, “a litigant, especially one with the sort of institutional support that might be expected of the Bank, runs a risky and dangerous course when it chooses not to implement even elementary steps to ensure that it has complied with its discovery obligations”. In particular, the Court of Appeal stated that it “would have expected the Bank’s in-house legal team to make reasonable inquiries and to initiate elementary steps to understand exactly what the Bank’s discovery obligations were”.

While the Court of Appeal did not elaborate on what these “elementary steps” might entail, one would imagine that this may include seeking the necessary advice and guidance from external lawyers, enlisting the assistance of the relevant persons and departments in the organisation to locate the documents, and ensuring that all documents retrieved from the search are promptly handed over to the external lawyers. In-house counsel would be well advised to take ownership of the disclosure process, and work closely with external lawyers to ensure that the company’s obligations in discovery are met.

We should add that the duty of an in-house counsel in discovery extends to the period prior to the commencement of legal proceedings. Well before the dispute is in Court, the organisation’s document retention policies should be carefully reviewed and implemented. Once legal proceedings may be anticipated, adequate steps should be taken to ensure that documents are preserved and not inadvertently destroyed, especially in the case of electronic documents stored on computers or servers. These steps should also, as far as possible, be documented in the event there is a need to explain and evidence this in Court. In-house counsel should be careful not to overlook this critical aspect of the disclosure obligation, especially since the company may not have the benefit of external legal advice at this early stage of the dispute.

While the duties of lawyers and in-house counsel in discovery may seem onerous at first glance, some measure of diligence and adherence to good practices will ensure that external lawyers and in-house counsel cooperating with one another will assist any litigant to safely navigate the waters of the discovery process.

The facts of Yellow Pages

Global Yellow Pages Limited v Promedia Directories Pte Ltd (Yellow Pages) involved a
claim for copyright infringement of various directories containing a list of companies and businesses and their contact details. At issue before the Singapore High Court in Yellow Pages was an application by the plaintiff for discovery of various electronic documents in the possession of the defendants. Specifically, the High Court had to consider the keyword searches to be used to conduct a search of the documents.

In dismissing the appeals before it, the High Court in Yellow Pages shed light on how discovery of electronic documents should be conducted, and the use of technology to facilitate discovery of such documents. There are a number of useful takeaways from the decision.

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First, there is a recognition by the High Court of the commercial realities that face parties involved in complex litigation involving a large number of electronic documents, namely that complete and absolute disclosure in discovery, taken to its extreme, may be unduly expensive and oppressive, which in turn defeats the ends of justice. This has become particularly apt as the pace of technological advancement has, to borrow the language of the High Court in Santae Abar v Sci-Gen Ltd [2011] 3 SLR 967, led to “an unprecedented explosion of the volume of discoverable documents and the ease of their duplication”.

Thus, the court acknowledged, citing Jacob LJ in Nichia Corporation v Argus Ltd [2007] EWCA Civ 741, that “a ‘leave no stone unturned’ approach in the search for ‘perfect justice’ in every case . . . would actually defeat justice”. The issue is one of proportionality, and the cost and effort expended in searching for documents must be commensurate with the complexity of the dispute, size of the claim and the financial resources of the parties. As the High Court in Yellow Pages rightly pointed out, “[t]he Holy Grail is to arrive at a set of documents of the right size containing all relevant documents without expenditure of disproportionate costs”.

Therefore, discovery in the context of modern litigation involving electronic documents requires a balancing act between competing objectives, and both lawyers and litigants should be mindful of the various considerations that a court would take into account when engaged in the discovery process.

Secondly, the High Court in Yellow Pages explained that the solution to the problem created by technology is technology itself, and advocated the use of technology to overcome the difficulties faced by the court and litigants in striking the right balance. Modern day courts will adopt and in fact embrace the use of technology to assist and facilitate the sorting of electronic documents to enable efficient and cost-effective discovery.

A common and popular technological tool used to filter electronic documents into a more manageable size for discovery is the use of keyword searches, sometimes used in conjunction with Boolean operators. In this respect, the High Court in Yellow Pages has usefully set out its views on the use of search technologies in discovery.

The High Court reiterated its endorsement of an iterative process for keyword searches, which is already provided for in the Supreme Court Practice Directions: parties are to engage in good faith collaboration with the objective of agreeing, as far as possible, on the various aspects of the electronic discovery process, such as the scope of the search, technology to be adopted, data sampling, inspection, and so on.

Importantly, the High Court opined that “the concept of relevance (as traditionally understood) does not apply directly to the issue of which keywords should be used in searches of the relevant electronic devices”. A “relevant” keyword may not necessarily produce the best results. Instead, it is the concept of “accuracy”, namely maximising the number of relevant documents while minimising irrelevant documents, that is more pertinent. Therefore, in devising the keywords and Boolean operators to be adopted for the purposes of discovery, lawyers should keep in mind that the concept of accuracy will be a critical consideration before the courts. One suggestion is the use of unique reference numbers, specific project names, significant events or locations, product names or unique phrases as keywords, depending on the facts and issues in the dispute.

The High Court in Yellow Pages also considered that the “size of the subset which is produced by the relevant search” (the number of hits produced by the search) is another factor that the court will take into account. Preliminary searches are therefore useful to ascertain the size of the subset to enable keywords to be refined so that any search will generate a more manageable quantity of documents that facilitates a manual review.

Thirdly, the High Court indicated that, in the event of a dispute in relation to keywords, the court will “endeavour to aid the party seeking discovery by giving more weight to his proposed keywords”. This is because once the discovery order is made, the party for whom discovery is sought will be able to discharge his obligation by causing the court-sanctioned search to be performed and giving discovery of the results of that search after irrelevant and privileged documents have been removed. At that stage, the party seeking discovery must accept that the outcome of the search may be imperfect, and that some relevant documents may not have been caught by the search.

Help and guidance

Lawyers and their clients alike who are embarking on or embroiled in litigation stand to benefit from acquainting themselves with the findings and observations made by the Singapore Court of Appeal and the High Court in their decisions in CIC and Yellow Pages.

In CIC, it is observed how a bank’s failure to adhere to its discovery obligations ultimately led to a denial of its claims notwithstanding having earlier prevailed in two separate trials. The case can be viewed as a cautionary tale for all litigants and their counsel, and serves as a reminder to remain vigilant and diligent during discovery.

As for the case of Yellow Pages, the High Court made helpful observations as to its approach to electronic discovery and articulated the factors which it considered pertinent when resolving any disputes between the parties. It also builds on the existing case law on electronic discovery.

Parties involved in litigation proceedings in Singapore should therefore conscientiously prepare for discovery by working closely with their lawyers to devise a sensible and effective disclosure protocol. This will enable the litigant to fulfil its discovery obligations in a manner that is cost effective, comprehensive and in accordance with Singapore law. Doing so will not only help to avoid the pitfalls that the discovery process may uncover, but put the litigant and his lawyers in a strong position for the trial and any subsequent appeal.