

Examining The Opt-In Nature Of The Electronic Discovery Practice Direction

Introduction

The release of Practice Direction No 3 of 2009 (“PD3/2009”), which deals with the adoption of electronic discovery and inspection, acknowledged the realities of an increasingly prevalent technological culture. It sets out a framework within which parties could conduct electronic discovery, as well as rules which allow parties to make relevant applications to court.

In the case of *Deutsche Bank AG v Chang Tse Wen* [2010] SGHC 125, the Singapore High Court had the opportunity to clarify the function and application of PD3/2009 – specifically, its opt-in nature; whether PD3/2009 applies only on the basis of mutual agreement of both parties, or the Court has the inherent power to order compliance with an e-discovery protocol, and is not prevented from doing so merely because parties cannot agree to adopt one. This applies equally during the stages of general and specific discovery.

SAR Yeong Zee Kin also highlighted the need for parties to collaborate in good faith in seeking to reach an agreement on e-discovery. Not only would it save time and resources in the conduct of proceedings, evidence of such good faith efforts would also aid a party applying to Court under PD3/2009.

Furthermore, SAR Yeong held that electronic discovery is not only applicable where documents are voluminous, or where parties cannot produce printed copies of electronic documents. In light of the above holding, it is expected that electronic discovery, and thus the application of PD3/2009, will become increasingly common.

The Defendant in this case was successfully represented by Rajah & Tann LLP's K. Muralidharan Pillai.

Brief Facts

- (1) The Plaintiff brought an action for recovery sums due under a loan facility against the Defendant, and the Defendant counterclaimed for misrepresentation and breach of fiduciary duties and duties of care and skill.
- (2) The issue of e-discovery was raised by the Defendant during the first PTC. However, the Plaintiff did not think an e-discovery protocol was necessary.

- (3) Over the next few months, further negotiations between the Plaintiff and Defendant failed to yield an agreement as to whether they would proceed with e-discovery under PD3/2009.
- (4) The Defendant eventually applied to Court under PD3/2009 for an order that parties comply with an e-discovery protocol when general discovery of documents is given.

Issues

In deciding whether to grant an order for compliance with the Defendant's draft e-discovery protocol, the Court had to determine the following issues:

- (i) Whether PD3/2009 applies where parties had not reached an agreement to adopt an e-discovery protocol during general discovery; and
- (ii) If PD3/2009 was applicable, whether the facts of the case warranted an order for compliance.

Holding Of The High Court

The Court held that it could in fact order compliance with an e-discovery protocol even where the parties had not agreed to adopt one. In balancing the costs and benefits of e-discovery in the circumstances, it was found that an order for compliance ought to be made.

Application Of PD3/2009

The Plaintiff sought to argue that PD3/2009 applies where the parties have already agreed to adopt an e-discovery protocol but cannot agree on its terms, but not where the parties cannot agree on the adoption of a protocol altogether. This interpretation was based on the phrase "If parties are unable to agree on an electronic discovery protocol" in paragraph 43B of PD3/2009, which the Plaintiff took to refer to disagreement over the terms of an e-discovery protocol. Therefore, PD3/2009 would only apply where both parties have 'opted-in', giving effect to the 'opt-in' nature of PD3/2009.

However, the Court rejected the Plaintiff's interpretation, clarifying the exact function of PD3/2009's opt-in nature.

- (i) PD3/2009 creates a procedure whereby parties must collaborate in good faith in attempting to agree on an e-discovery protocol before applying to Court.
- (ii) PD3/2009 applies where both parties have mutually agreed on its application. Conversely, parties may agree not to apply its procedures.
- (iii) PD3/2009 also applies where only one party 'opts into' the e-discovery framework. That party must make an application to the Court under PD3/2009 and comply with the procedures set out thereunder.

The Court's interpretation of the contested phrase was based on the following:

- (i) The Court – apart from PD3/2009 – already has powers to order compliance with a protocol where one is necessary.
- (ii) A practice direction may explain proper practice, but does not have the force of substantive law.
- (iii) Therefore, PD3/2009 only sets out the procedures which parties have to comply with when dealing with e-discovery. It does not subtract from the Court's power to order compliance with a protocol when discovery of electronically stored documents is given.

Whether Order For Compliance Should Be Granted

The Court then assessed the costs and benefits of e-discovery to assess whether or not to order compliance with an e-discovery protocol in this case. On a balance of all factors, including those specifically listed in paragraph 43D of PD3/2009, the Court decided to grant the Defendant's application for an order.

The following factors were taken into account:

- (i) There was no delay in the Defendant's initiation of discussions for an e-discovery protocol.
- (ii) The case had international dimensions as the originals of most of the electronic documents were outside jurisdiction. The provision of electronic copies would thus save costs and produce the documents in their native format.
- (iii) Although the documents in this case were not voluminous, there were still benefits to be obtained from e-discovery, albeit not as immediately appreciable.
- (iv) The expense and effort required to retrieve the electronic documents was not prohibitive.

Nonetheless, the Court took into account the fact that the Plaintiff had already incurred costs by preparing a draft list of documents for exchange. Therefore, although the Plaintiff was required to produce the categories of documents described in the Defendant's draft e-discovery protocol, it could make soft copies of the electronic documents already enumerated in its draft list.

Concluding Words

Need For Good Faith Collaboration

Throughout his judgment, SAR Yeong highlighted the need for parties to make efforts in good faith to agree on an e-discovery protocol, discussing the time and cost benefits that such collaborative efforts would bring. Furthermore, the exercise of this spirit in e-discovery negotiations was shown to affect the Court's decision to exercise its discretion to grant an order of compliance.

- (i) Compliance with the Defendant's draft e-discovery protocol was ordered in part because the Defendant had shown such good faith collaborative effort.
- (ii) Costs were ordered against the Plaintiff because it fell short of good faith efforts.

Wide Application Of E-Discovery

SAR Yeong also highlighted that the scope of e-discovery is wider than solicitors currently make it out to be.

- (i) E-discovery is not only beneficial for cases where documents are voluminous. The hypothetical costs of e-discovery come mainly from forensic acquisition, which is not always necessary. Thus, the cost of e-discovery is not as high as imagined.
- (ii) The preponderance of documents these days originates and is stored in an electronic form. It is thus desirable that discovery be given in an electronic form as well.
- (iii) Parties do not discharge their obligation to give inspection of electronic documents just by providing printed copies. The best evidence must be provided, and where the original is available, it should be produced for inspection.

This holding recognizes that e-discovery is more applicable than its current prevalence suggests. E-discovery will only continue to become increasingly common. Therefore, the significance of PD3/2009 and related judicial insights should be recognized, and efforts should be made to collaborate on e-discovery protocols under PD3/2009.

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