CLIFFORD
CHANCE

Briefing note May 2013

Singapore Court of Appeal sends stern warning to in-house counsel on their discovery obligations

Discovery plays a fundamental role in the Singapore litigation system and it is well established that litigation here is conducted "cards face up on the table". The recent case of *Crédit Industriel et Commercial v Teo Wai Chong* [2013] SGCA33 highlights that the Singapore Courts expect the in-house counsel team, as well as external counsel, to properly discharge their discovery obligations.

The litigation between Crédit Industriel et Commercial (**the Bank**) and one of its former clients, Teo, was protracted and costly. The Singapore Court of Appeal found that much of the "*arduous journey*" stemmed from the Bank's "*abject failure*" to make proper discovery.

The Bank claimed damages against Teo for losses arising from certain products which Teo had purchased (**Disputed Products**). Teo denied that he ordered the Disputed Products through the relationship manager. The case turned on whether Teo had authorised the relationship manager to purchase the Disputed Products in the course of their phone calls on 2 and 3 October 2007. Unfortunately, the conversations were not recorded by the Bank as the relationship manager had used her personal mobile phone instead of the landline with a recording facility provided for her use by the Bank.

At first instance, the High Court found in favour of the Bank (**the First Trial**). The High Court accepted the relationship manager's evidence that Teo had instructed her to purchase the Disputed Products.

Teo appealed. In this first appeal, the Court of Appeal found that the Bank had failed to comply with its discovery obligations under Order 24 of the Rules of Court at the First Trial. Material transcripts and other material evidence including 2,700 pages of potentially prejudicial documents were not disclosed. The Court of Appeal ordered the Bank to disclose those documents and ordered a retrial so that newly disclosed evidence could be considered (**the Retrial**).

By the time of the Retrial, the Bank's relationship manager who was their material witness had moved to the Middle East and was not available to testify. The Bank successfully applied to admit the affidavits provided by the relationship manager at the First Trial. Based on the newly disclosed evidence and the affidavits provided by the relationship manager at the First Trial, the High Court found in favour of the Bank at the Retrial.

Teo appealed again. In this further appeal, the Court of Appeal held in favour of Teo and dismissed the Bank's claims.

Key issues

- In-house legal teams are expected to make reasonable enquiries and initiate elementary steps to understand their discovery obligations.
- The Singapore Courts will ask litigants to account for any breach of discovery obligations and may invite them to waive privilege and disclose legal advice received on the issue of discovery and disclosure of relevant documents.
- The Bank was unable to admit affidavits from its key witness to support its case because of its breach of its discovery duty.

The Court of Appeal found that the relationship manager's evidence at the First Trial should not have been admitted at the Retrial since she was not available for cross-examination on the newly disclosed evidence.

The Court of Appeal also asked the Bank to explain the breach of their discovery obligations during the First Trial. The Court of Appeal invited the Bank to consider waiving privilege and disclosing any legal advice it might have received on the issue of discovery and disclosure of the relevant documents. After hearing the Bank's explanation, the Court of Appeal found that the Bank's breaches of its discovery obligations arose from positive steps and misconceived decisions it had taken. The Court of Appeal found that the Bank was not lacking in resources or sophistication. It had an in-house legal team and the Court of Appeal 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.

> "[A] litigant, especially one with the sort of institutional support that might be expected of a 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..."
>
> *Crédit Industriel et Commercial v Teo Wai Chong* [2013] SGCA33

Authors

Harpreet Singh Nehal, SC
Partner
Head, Litigation & Dispute Resolution
Clifford Chance Asia

E: harpreet.singh
@cliffordchance.com

Nish Shetty
Partner
Head, International Arbitration & Dispute Resolution
Clifford Chance Asia

E: nish.shetty
@cliffordchance.com

Joan Lim
Senior Associate
Litigation & Dispute Resolution
Clifford Chance Asia

E: joan.lim
@cliffordchance.com

Managing Your Discovery Obligations

Discovery is the term given to the stage of the litigation process whereby parties exchange all relevant documents which they have relating to issues in the suit. This is to enable parties to effectively and fairly prepare and present their cases for trial. It is essential that discovery is carried out conscientiously. As the *Crédit Industriel* case shows, it can determine the success or failure of a party's case and both the client and their lawyers are under a duty to the court to ensure that the disclosure process is carried out properly. Your credibility may be seriously weakened if it subsequently transpires that you have failed to disclose a relevant document regardless of whether the omission was inadvertent.

- You are required to disclose (a) all documents which you have relied or will rely on, (b) all documents which could adversely affect your case or the other parties' case, and (c) all documents which could support the other parties' case. Hence, even adverse or potentially adverse documents must be disclosed.
- Whether a document could affect your claim or adversely affect or support another party's case will depend on the issues pleaded in the action. You will be required to disclose documents which have a direct bearing on the issues pleaded in the proceedings and your lawyers should advise you on the various categories of documents which you must disclose based on the issues pleaded.
- The discovery obligation is an absolute one and you cannot avoid listing a document because it may be harmful to your case or because it is of a 'confidential' nature. Whilst documents may be redacted, you should seek your lawyers' advice before undertaking this.
- It is important at an early stage to identify, and appoint the person in your organization who will work with your lawyers and take ownership of the discovery process and manage the search for relevant documents.
- The term "documents" includes not only papers but anything in which information is recorded e.g. audio and video tapes, computer data bases, information on handheld devices, computer discs and micro-films. Your designated disclosure officer should work in partnership with the lawyers to identify what documents exist and where they are located.
- Once you have identified and collated the documents, they should be preserved in their existing form and no amendments or redactions should be made without your lawyers' advice.
- Ascertain your company's document retention policy. If you have a routine procedure for destruction of documents such as the deletion of computer back-up files or emails, this should be suspended until the documents have been examined by your lawyers and relevant documents are extracted for disclosure.
- Do not destroy or mark any document which might potentially be relevant to the dispute.
- Some documents are protected by legal advice privilege and/or litigation privilege. Your lawyers will work with you in identifying those documents.
- Properly manage the number of people who receive documents containing legal advice. Such documents should not be shared with third parties without clearing with your lawyers as that may potentially lead to a loss of privilege.

Clifford Chance Asia
Clifford Chance Asia is a Formal Law Alliance
between Clifford Chance Pte Ltd and Cavenagh Law LLP
12 Marina Boulevard, 25th Floor Tower 3,
Marina Bay Financial Centre, Singapore 018982
SINGAP-1-179425-v1

www.cliffordchance.com
www.cavenaghlaw.com.sg