

Deutsche Bank AG v Chang Tse Wen and others
[2010] SGHC 125

Case Number : Suit No 731 of 2009 (Summons No 1188 of 2010)
Decision Date : 26 April 2010
Tribunal/Court : High Court
Coram : Yeong Zee Kin SAR
Counsel Name(s) : Ms Tan XEAUWEI and Ramesh Kumar (Allen & Gledhill LLP) for the plaintiff and the 1st & 2nd defendants in counterclaim; K Muralidharan Pillai and Julian Soong (Rajah & Tann LLP) for the defendant and the plaintiff in counterclaim
Parties : Deutsche Bank AG — Chang Tse Wen and others

Civil Procedure – Discovery of documents – Electronic discovery – Practice Direction No 3 of 2009 – Electronic discovery protocol – good faith collaboration – Opt-in framework – Who to apply

Civil Procedure – Discovery of documents – Electronic discovery – Practice Direction No 3 of 2009 – Electronic discovery protocol – whether necessary to order – Consideration of factors in paragraph 43D

Civil Procedure – Disclosure of documents – Electronic discovery – Practice Direction No 3 of 2009 – Reasonable search – Key words

Civil Procedure – Disclosure of documents – Electronic discovery – Practice Direction No 3 of 2009 – Discovery in stages

Civil Procedure – Disclosure of documents – Providing electronic copies of electronically stored documents in lieu of inspection

26 April 2010

Judgment reserved.

Yeong Zee Kin SAR:

1 This is an application by the Defendant under Practice Direction No 3 of 2009 ("PD 3/2009") for an order that parties comply with an electronic discovery protocol when general discovery of documents is given in this case. The Plaintiff's objections to this application may be summarised in the following manner: First, PD 3/2009 applies during general discovery only where parties have agreed to adopt an electronic discovery protocol and allows parties to refer any disputes over terms in the protocol to the court for resolution. Since parties in this case have not agreed to adopt an electronic discovery protocol for the purposes of general discovery, there is no basis for this application. Further, the Plaintiff objects to adoption of such a protocol as it would unfairly prejudice them since they are ready to proceed with general discovery by providing a list of documents and photocopies of documents disclosed in the list in the traditional manner.

Procedural history

2 The underlying claims in this matter may be summarised as follows. The Defendant was a customer of the Plaintiff bank. The Defendant owes about USD 1.8 million under a loan facility granted by the Plaintiff. The Plaintiff commenced action by writ filed on 27 August 2009 and sued for recovery

of the outstanding sums under the loan facility. In its defence and counterclaim filed on 2 September 2009, the Defendant counterclaimed against the Plaintiff and (in an amendment filed on 3 November 2009) its employee, the Plaintiff's former relationship manager, for misrepresentation and breaches of fiduciary duties and duties of skill and care. The Plaintiff's reply and defence to counterclaim was filed on 19 October 2010.

3 The issue of electronic discovery was first raised by the Defendant during pre-trial conference ("PTC") on 23 October 2009. The court's record shows that Defendant's solicitors had suggested that parties proceed with electronic discovery in this case and sought directions for parties to discuss and agree to an electronic discovery protocol. Plaintiff's solicitors are recorded to have said that they did not think that electronic discovery was necessary and they would need to take instructions on this matter. The court directed that parties update the court during the next PTC as to whether parties are amenable to proceeding with electronic discovery. Further, directions were given for lists of documents to be exchanged by 29 January 2010 and for inspection to be completed by 26 February 2010.

4 Subsequent to this, there were telephone discussions between counsel on 5 and 6 January 2010, ahead of the PTC on 8 January 2010. There is some dispute over the content of the telephone discussions. The Defendant's solicitors' account is that they raised again the issue of electronic discovery during these telephone discussions and sought opposing solicitors' agreement to defer electronic discovery issues to a subsequent PTC to be fixed before me. The Plaintiff's solicitors' recollection is that the discussions focused mainly on agreeing to an adjournment of the 8 January 2010 PTC as there were pending interlocutory applications at that time. A PTC briefing note tendered by the Defendant's solicitors during PTC on 8 January 2010, which is as near to a contemporaneous record of these telephone discussions as is available to me, records that the Defendant's solicitors had broached the issue of electronic discovery during these telephone conversations and sought to have a PTC fixed before me to explore how parties may collaborate on electronic discovery issues in accordance with PD 3/2009. It is also recorded that the Plaintiff's solicitors communicated their view that there is no scope for discussion and they would object to moving the PTC; further, they had requested that a formal application for electronic discovery be made.

5 The PTC on 8 January 2010 dealt mainly with pending interlocutory matters and an interlocutory appeal. During this PTC, pending discovery directions were ordered to be held in abeyance as parties were directed to make a decision as to whether they would proceed with electronic discovery under PD 3/2009. In particular, the Defendant was directed to write to the Plaintiff with a proposed electronic discovery protocol by 22 January 2010 and the Plaintiff was directed to reply by 5 February 2010. The Defendant was further directed to write in by 12 February 2010 to request for a PTC to be fixed before me if they wish to discuss electronic discovery issues.

6 Eventually, several PTCs were held on 18 February, 3 and 8 March 2010 before me to explore the possibility of adopting an electronic discovery protocol for the conduct of general discovery. Parties were not able to agree, hence this application before me.

Outline of issues

7 During submissions, the following issues were raised. First, whether PD 3/2009 applies in a situation where parties had *not* reached an agreement to adopt an electronic discovery protocol during general discovery; in other words, whether PD 3 2/2009 applies during general discovery *only if* parties have already agreed to adopt an electronic discovery protocol but were not able to agree on some of its terms subsequently.

8 Second, whether an order should be made in this case for an electronic discovery protocol to be adopted when the Plaintiff is ready to provide general discovery by giving photocopies of documents disclosed in its list of documents (which, though not filed, is ready to be filed). Was there any delay on the part of the Defendants that makes the adoption of an electronic discovery protocol during general discovery unnecessary in this case for the fair disposal of this matter or for saving costs?

9 Third, if parties are to comply with an electronic discovery protocol for general discovery, should the Plaintiff be required to provide the categories of documents described as well as conduct a reasonable search based on the key words set out in Part I of the draft electronic discovery protocol. I shall now deal with these issues in turn.

Applicability of PD 3/2009

10 The Plaintiff's preliminary objection to this application is that PD 3/2009 does not apply to a situation where parties have not reached a prior agreement to adopt an electronic discovery protocol during general discovery. The Plaintiff argues that the opt-in nature of PD 3/2009 means that, insofar as its applicability during general discovery is concerned, both parties must *first* agree to adopt an electronic discovery protocol *before* PD 3/2009 applies during general discovery. This argument turns on a construction of PD 3/2009 that, stated briefly, amounted to the following:

- (a) During general discovery, paragraph 43B of PD 3/2009 applies initially when parties discuss whether to adopt an electronic discovery protocol. If parties are able to agree to adopt one, but they are unable to agree on some of the terms in the protocol under discussion, then an application may be made under paragraph 43B(3).
- (b) If, however, parties are unable to reach an agreement whether to adopt an electronic discovery protocol for the purposes of general discovery, paragraph 43B of PD 3/2009 ceases to be applicable such that the party seeking electronic discovery may not make an application under paragraph 43B(3). In such circumstances, general discovery should be conducted in the classical style where documents are disclosed in a list of documents, inspection given of hard copies and photocopies of discoverable documents provided. Under this construction, the Plaintiff argues that PD 3/2009 is only applicable after general discovery: in other words, paragraph 43B is not applicable but paragraph 43C, *et seq* are applicable to requests for further discovery or specific discovery.

11 The Defendant's argument is that the court has extensive powers to order compliance with protocol during discovery. This is either part of the court's inherent powers (preserved under Order 92, rule 4) or derived from the specific provisions in Order 34A, which is the source of the court's powers to make appropriate directions for the just, expeditious and economical disposal of a matter. Counsel cites the cases of *Alliance Management SA v Pendleton Lane P and another and another suit* [2007] 4 SLR(R) 343 and *Fermin Aldabe v Standard Chartered Bank* [2009] SGHC 194 as authorities for his proposition that the courts have the power to order discovery of electronic documents and in so doing, order that parties comply with a protocol. Both of these cases were decided before PD 3/2009 came into effect.

12 The Plaintiff's preliminary objection arises from the construction of the phrase "If parties are unable to agree on an electronic discovery protocol" in paragraph 43B of PD 3/2009. The Plaintiff seeks a construction of this phrase to mean "If parties *having agreed to adopt an electronic discovery protocol* are unable to agree on *some of the terms in the electronic discovery protocol*".

The Plaintiff argues that this gives effect to the opt-in nature of PD 3/2009: in other words, both parties must agree to opt-in before PD 3/2009 applies. The Defendant seeks a broader construction for this phrase to include both situations where parties are unable to agree to adopt an electronic discovery protocol or, having agreed to adopt one, there are disputes over some of its terms. Under this construction, the opt-in framework operates either by agreement of parties or when one party (in this case the Defendant) opts into PD 3/2009 by making an application thereunder.

13 In determining the proper construction to be adopted, it is necessary to commence with an appreciation of the nature of practice directions. I can do no better than to quote Professor Jeffrey Pinsler's *Singapore Court Practice (2003 Edition)*, at § 1/1/6, on the role and function of practice directions:

... practice directions issued by the courts have a fundamental role in supplementing the rules of court. ... They may explain the proper practice under the rules, and show how those rules are to be complied with. ... Practice directions may provide the details which may not be included in a particular rule. ...

Although practice directions may not have the force of substantive law (see *Hume v Somerton* (1890) 25 QBD 239, at 243; *Barclays Bank International v Levin Bros (Bradford)* [1977] QB 270; *Jayasankaran v PP* [1983] 1 MLJ 379 (concerning a practice note: court said that it is not intended to be more than a direction for administrative purposes and 'cannot be exalted into a rule of law')), non-compliance may result in adverse orders against the defaulting party. ...

In a case concerning the effect of practice directions, *Ooi Bee Tat v Ah Chim & Sons* [1995] 3 MLJ 465, at 470, Zakaria Yatim JCA, who delivered the judgment of the Supreme Court, stated that practice directions 'are intended to be no more than a direction for administrative purposes' (also see *Jayasankaran v PP* [1983] 1 MLJ 379, at 380, which is cited for this proposition). *Therefore, it is clear that a practice direction does not have the force of a rule of court and cannot vary the force of the latter.* [Emphasis mine.]

14 PD 3/2009 does not set out to change the law on discovery; it merely sets out procedures which parties have to comply with when dealing with discovery of electronically stored documents. Where the court already has powers to order that parties comply with a protocol when discovery of electronically stored documents is given, PD 3/2009 does not subtract from these powers. However, any failure to comply with the requirements of PD 3/2009 may be relevant when the court has to exercise its discretion.

15 It is not disputed that the court has powers to order compliance with a protocol where one is necessary. Protocols are no more than procedures intended to guide conduct of parties; and an electronic discovery protocol is no more than a label applied to a protocol for the discovery of electronically stored documents which parties agree to for the purpose of conducting general discovery. In the context of electronic discovery, a protocol will set out the procedures for, *inter alia*, safeguards against unauthorised trawling (see above, *Alliance Management SA v Pendelton Lane P*), inspection of electronic documents and provision of copies of discoverable electronic documents (see above, *Fermin Aldabe v Standard Chartered Bank*). Bearing in mind that the court already has the power to order that parties comply with a protocol, I do not think that the construction of paragraph 43B(3) put forth by the Plaintiff should be adopted. To do so would amount to saying that whereas before PD 3/2009 was issued, the court could make an order for parties to comply with a protocol during discovery, it can no longer do so now in a situation where parties cannot agree to adopt one. This tantamounts to elevating PD 3/2009 to a rule-making function with the effect of removing the court's power to order compliance with a protocol in a situation where there is no pre-existing

agreement between parties to adopt one. Further, the opt-in framework would operate differently at different stages of litigation under the Plaintiff's construction: during general discovery, paragraph 43B operates only by mutual consent, but for applications for further or specific discovery, paragraph 43C operates by both mutual consent or the election of one party. To my mind, such inconsistency in the application of PD 3/2009 is undesirable and should be eschewed when an alternative construction capable of avoiding such internal inconsistencies is available.

16 I prefer the construction put forth by the Defendant. PD 3/2009 in effect establishes a procedure whereby parties are required to make attempts to collaborate in good faith by engaging in discussions of electronic discovery issues before an application may be made under paragraph 43B. The opt-in nature of PD 3/2009 allows both parties to agree not to apply these procedures whether expressly or tacitly by conduct. Where one party wishes to make an application under PD 3/2009, he must comply with the procedures set forth therein and he must support his application with an affidavit providing an account of efforts made in good faith collaboration as well as include a draft electronic discovery protocol with his application. This construction does not subtract from the court's power to order compliance with a protocol when discovery of electronically stored documents is ordered. It also gives effect to the opt-in nature of PD 3/2009: unlike other practice directions which apply to all cases, PD 3/2009 applies either on mutual agreement of parties or when one party opts into the electronic discovery framework by making an application thereunder.

17 Additionally, the construction put forth by the Defendant accords with the plain reading of paragraph 43B(3). The phrase "If parties are unable to agree on an electronic discovery protocol", to my mind, is sufficiently broad to deal with both situations: the situation where there is a pre-existing agreement to adopt an electronic discovery protocol but disputes remain over some of its terms, as well as the situation where parties are unable even to agree to adopt an electronic discovery protocol. Under the Defendant's construction, the opt-in framework operates consistently both during general discovery and when applications for further or specific discovery are made:

- (a) During general discovery, where parties have a pre-existing agreement to adopt an electronic discovery protocol, they may refer any disputes over any proposed term to the court for directions, and where one party seeks to adopt an electronic discovery protocol but the other does not agree, the party seeking discovery may make an application under PD 3/2009.
- (b) Post general discovery, any party seeking further discovery or specific discovery may make an application under PD 3/2009. No case is shut out under this construction, unless parties in the case agree not to apply PD 3/2009 either expressly or tacitly by conduct.

Whether there was delay in initiating discussions for an e-discovery protocol

18 The Plaintiff also objects to an electronic discovery protocol on the ground that the Defendant's delay in commencing good faith discussions prejudices it. The Plaintiff's submission is that during the PTC on 23 October 2009, the Defendant's solicitors stated that they were considering electronic discovery. However, the Plaintiff's solicitors did not understand this to mean that the Defendant was definitely proceeding with electronic discovery, but merely considering it as an option. During the telephone discussions on 5 and 6 January 2010, there were (according to Plaintiff's solicitors) no substantive discussions about electronic discovery as parties were discussing a possible adjournment of the PTC on 8 January 2010 in light of other pending interlocutory applications and an interlocutory appeal. There was some discussion for the adjournment of the PTC on 8 January 2010 and for the adjourned PTC to be fixed for hearing before me for the purpose of discussing electronic

discovery issues, but there were no substantive discussions of electronic discovery issues. As far as the Plaintiff's solicitors were concerned, the first time that they knew that the Defendant was indeed pursuing electronic discovery was when they received a letter from the Defendant's solicitors on 22 January 2010 on this issue.

19 The Defendant's version is that their solicitors first raised the issue of electronic discovery during PTC on 23 October 2009. Further, although the court gave directions for the filing of lists of documents during the PTC, parties were directed to discuss whether an electronic discovery protocol should be adopted and to update the court at the next PTC on 8 January 2010. According to the Defendant's solicitors, one of the topics discussed during the telephone conversations between counsel on 5 and 6 January 2010 was for the possibility that the upcoming PTC on 8 January 2010 be adjourned to be heard by me for the purpose of discussion electronic discovery issues. During the telephone conversations, the Plaintiff's solicitors had requested that a formal application for electronic discovery be made.

20 The court's record reflects that Plaintiff's solicitors had consistently raised the issue of electronic discovery from the first PTC on 23 October 2009 onwards: see paragraphs 3 to 5 above for a summary of the history of exchanges on the issue of electronic discovery during PTCs. Further, the record shows that the Plaintiff's solicitors had been consistently non-committal and that they had requested for a formal application under PD 3/2009.

21 Paragraph 43B of PD 3/2009 establishes the timeframe for parties to commence discussion of electronic discovery issues for the purpose of general discovery: this is to take place "immediately after the close of pleadings". In this case, the Reply and Defence to Counterclaim was filed on 19 October 2009. When the issue of electronic discovery was first raised during PTC on 23 October 2009, pleadings had not yet closed. Evidently, there has been no delay on the part of the Defendant at all.

Whether an order for compliance with an electronic discovery protocol for the purposes of general discovery should be ordered

22 I turn now to consider whether the facts of this case merit an order for the adoption of an electronic discovery protocol during general discovery. Paragraph 43D enumerates a list of factors which the court has to consider during the exercise of its discretion as to whether an order for discovery or inspection of electronically stored documents should be made under the framework for electronic discovery in PD 3/2009. The list is not exhaustive and is intended to be inclusive: some of the factors may be relevant some of the time, but not all of them all of the time.

Number of electronic documents involved

23 During submissions, it was made clear that the volume of documents in this case, though not trivial, is not exactly voluminous either. The majority of the documents reside with the Plaintiff. The Plaintiff had printed all the relevant documents and these amounted to about 9 arch lever files, out of which 5-6 were comprised of e-mails, which form the majority of discoverable documents. It was submitted on behalf of the Plaintiff that the benefits of electronic discovery lie in the ability to access metadata information, the ease of management of voluminous documents and the ability to conduct key word searches. Since the extent of discoverable documents in this case is not voluminous, the Plaintiff submitted that the benefits of management and key word searches would not be reaped. It was further submitted that since metadata information is not relevant to the issues in this case, there was no reason left to consider electronic discovery.

24 To my mind, I think that the premise that electronic discovery is only beneficial for cases where documents are voluminous needs to be re-examined. This misconception stems from the association of electronic discovery with forensic techniques of acquiring electronic documents (eg cloning of storage devices like hard disk drives) and the use of key word searches to locate documents (eg forensic tools to search for key words in the unallocated space and file slack of hard disk drives). These concepts should be dissociated. It is not in every case that forensic techniques are required for the preservation of evidence when litigation is contemplated or when litigation has commenced. There may be some categories of cases where forensic techniques are required *de rigueur*, for example cases involving falsification of accounts or forgery of documents. In the majority of cases, all that may well be required is an appreciation, when identifying and setting aside (or making copies of) electronic documents for the purposes of giving discovery, that electronic documents may be altered inadvertently when they are accessed and changes saved. It may oftentimes be sufficient to make a copy of potentially discoverable documents in an optical read-only medium (eg CD or DVD RW discs) and to take care not to delete the originals. Once the cost of forensic acquisition is obviated, the purportedly high cost of electronic discovery diminishes significantly. To draw an analogy with discovery of paper documents, one would not employ forensic techniques to preserve paper documents and look for fingerprint evidence in every case. What most lawyers advise is that the originals of potentially discoverable documents be set aside and working copies made. We should deploy the same measure of temperance when dealing with electronic documents and guard against treating electronic documents with a surfeit of caution. This horses for courses approach is succinctly put in principle 5 of the Ontario Bar Association's *E-Discovery Guidelines*:

As soon as litigation is contemplated or threatened, parties should immediately take reasonable and good faith steps to preserve relevant electronic documents. However, it is unreasonable to expect parties to take every conceivable step to preserve all documents that may be potentially relevant.

25 When the preponderance of documents these days originates and is stored in an electronic form, it is desirable that discovery be given in an electronic form as well, preferably in the native format. Granted, the benefits of electronic document review software platforms that are available are more readily appreciated where documents under review are voluminous. However, this should not lead to the opposite conclusion that little or no benefit will be reaped if the volume of documents is comparatively lower such that the costs of deploying a document review software platform is not commensurate with the benefits. Most operating systems come with advanced search engines these days and the utility of discoverable documents in text searchable format when preparing affidavits of evidence-in-chief and preparing for trial cannot be denied. Hence, even where the volume of documents is not voluminous, parties should consider the proportion of electronic documents *vis-a-vis* the total volume of documents that are to be discovered. I should think that it will be in the increasingly rare situations where the volume of electronic documents is insignificant compared to the total volume of documents to be discovered that electronic documents should be produced in printed form during discovery. For the majority of cases, electronic documents should be produced in native format during discovery unless there is good reason not to do so, or parties agree otherwise.

Nature of case and complexity of issues

26 The Plaintiff's claim is one for the straightforward repayment of a loan. The crux of this case lies in the Defendant's counterclaim against the Plaintiff which raises issues of breaches of fiduciary duties, breaches of duty of care and misrepresentation against the Plaintiff; and breaches of warranty of authority and misrepresentation against his relationship manager, an employee of the Plaintiff whom the Defendant joined as a defendant in the counterclaim.

27 During submissions, it became clear that this case had international dimensions: although the account was maintained in the Plaintiff's branch in Singapore, the Plaintiff's key employees who are involved in this matter reside in Hong Kong and the Defendant is a Taiwanese resident. Most of the documents to be given during discovery lie with the Plaintiff. E-mails form the majority of electronic documents which are discoverable (6 out of 9 arch lever files). The original e-mails of the Plaintiff's key employees and its electronic customer records are held in Hong Kong. The Defendant's e-mails are held in Taiwan. The originals of the electronic documents are therefore outside jurisdiction.

28 The Plaintiff appears to have operated under the assumption that by providing printed copies of electronic documents for inspection, it would have discharged its obligations to give inspection of the electronic documents. This assumption needs to be examined. The obligation lies on a litigant to provide the best evidence and where the original is available, to produce the original in evidence and, *a fortiori*, for inspection. *Per* Belinda Ang J in *Alliance Management SA v Pendleton Lane P and another and another suit* [2008] 4 SLR(R) 1, at [35]:

Inspection involves the examination of the originals and in this case that means the Hard Disk where the electronic documents ordered to be discovered are stored. [Emphasis mine.]

Hence, where electronic documents are available, inspection should be given of the original and not merely a printed copy. In this case, where e-mails are accessible from either the e-mail servers in Hong Kong or the employees' personal computer or notebook computer, the originals should be produced for inspection unless there is good reason not to do so. Where authenticity is not disputed, it would not be desirable to incur the costs of inspecting such originals if a reasonable substitute may be given. Such reasonable substitute may have been printed copies in days past, but given the level of technology and connectivity today, the feasibility of providing a soft copy in the native format should be considered in preference to printed copies.

29 To my mind, the international features of this case lend their weight in favour of ordering electronic discovery. As the originals of the electronic documents are outside jurisdiction, there will be costs involved in producing them for inspection. For e-mails residing on e-mail servers in Hong Kong, arrangements may have to be made for inspection to be carried out by giving reasonable means and assistance pursuant to paragraph 43F(1). This may involve providing remote access to the e-mail servers from the Plaintiff's offices in Singapore. For e-mails residing on personal computers and notebooks of employees, these may have to be brought into Singapore. These options will incur an amount of cost and a degree of inconvenience which, to my mind, may not be necessary at this stage given the nature of the issues which are in dispute. The provision of electronic copies in their native format as part of discovery will kill two birds with one stone. The Defendant will obtain copies of discoverable electronic documents and these will be in native format with minimal alteration, as close to inspection as may be achieved without having to access the e-mail servers in Hong Kong or requiring the employees to produce their personal computers or notebook computers in Singapore.

Value of claim and financial position of each party

30 The Plaintiff's claim is for USD 1.8 million, while the Defendant's counterclaim is for USD 48 million. The Plaintiff is an international bank and the Defendant, its former private banking customer. Both parties have appointed solicitors in well-resourced firms. I do think that neither the value of the claim nor the financial position of either party get in the way of electronic discovery.

Ease and expense of retrieval of electronic documents

31 The Plaintiff does not deny that electronic documents exist. The Plaintiff's main objections lie in

the fact that its solicitors had already prepared a draft list of documents for exchange and in so doing, had worked with printed documents provided by the Plaintiff. During submissions, it was clarified that as instructions were given and documents received in either printed form or as scanned pdf documents, the Plaintiff's solicitors would set discoverable documents aside and maintain a set of such documents in printed form, ready for photocopying for the purpose of giving copies as part of general discovery. To require electronic discovery at this juncture would mean that costs would (in its view) be unjustifiably incurred in the subsequent electronic discovery exercise.

32 To my mind, the workflow between solicitor and client and how they choose to manage documents passing between them should not be held up as a hurdle to the discovery process. In present times where a significant number of commercial transactions are conducted over e-mails and electronic documents are accepted for commercial transactions (see *Joseph Mathew and another v Singh Chiranjeev and another* [2010] SLR 338, where the contract to grant an option to purchase land was made over e-mails; and *SM Integrated Transware Pte Ltd v Schenker Singapore (Pte) Ltd* [2005] 2 SLR(R) 651, where a lease over warehousing space was similarly concluded over e-mails), the fact that solicitor and client chose to print all electronic documents alone, without more, cannot deprive a litigant of his entitlement at law to inspection of the original electronic documents and to take a soft copy. Further, as observed in paragraphs 3–5 and 18–20 above, the Defendant had raised the issue of electronic discovery within the time frame set forth in paragraph 43B of PD 3/2009: there was no delay on his part. As such, if there was any party that is at risk of unfair prejudice, it would be the Defendant, if the Plaintiff and its solicitors' chosen method of managing electronic documents was permitted to become an obstacle to electronic discovery.

33 The Plaintiff further objected to producing e-mails in native format because the Plaintiff and its solicitors were on different e-mail systems. The Plaintiff uses the Lotus Notes e-mail platform while its solicitors use the Microsoft Outlook e-mail platform. In both systems, e-mails are not stored in individual files but in a composite file akin to a miniature database. It is possible to copy selected e-mails (including attachments) into a single composite file for the very purpose of providing copies of these selected e-mails and attachments. The Plaintiff's solicitors argued that it did not have the software to access the composite files in .nsf format produced by Lotus Notes platform used by its clients; and it raised concerns that conversion of composite Lotus Notes e-mail files into Microsoft Outlook's .pst composite file format may lead to the loss of metadata information. In support of these concerns, the Plaintiff relied on two articles downloaded from the Internet and notes of a general telephone inquiry its solicitors had with an electronic discovery service provider. These were subsequently enclosed as exhibits in a supplemental affidavit.

34 The Defendant had previously, by letter dated 16 March 2010, suggested a method of converting a .nsf composite Lotus Notes e-mail file to a .pst composite Microsoft Outlook e-mail file. In an affidavit filed by Mr Mohamed Musthafa Kalander Mohideen, the Assistant Director of the Defendant's solicitors' Information Technology department and an IT professional with 16 years experience, detailed steps were laid out to show how this conversion may be carried out without the need for additional software apart from software available as part of the Lotus Notes and Microsoft Outlook e-mail platforms.

35 Further, I had called for both parties to obtain quotations of the cost of acquiring Lotus Notes software licences so that the Plaintiff's solicitors may be able to access the .nsf files produced by their clients. The Plaintiff's quote was SGD 721.80 for 5 Lotus Notes e-mail client software licences; the Defendant's quote was SGD 899 for 10 Lotus Notes e-mail client software licences and 1 Lotus Notes Domino e-mail server licence. Plainly, the cost of acquiring the requisite software in order that the Plaintiff's solicitors may access the e-mails of their client is not prohibitive, particularly in light of the size of the claim and the financial position of the Plaintiff. Purchasing the requisite licences is

probably the most cost efficient means of addressing this disability. Of course, there are lower cost options which the Plaintiff and its solicitors may consider: for example, provision of a notebook with the requisite software by the Plaintiff to its solicitors, or allowing its solicitors access to the Plaintiff's offices (and workstations) to carry out e-mail review.

36 Before leaving this point, I wish only to make the observations that any difficulties in accessing e-mails produced in the native Lotus Notes .nsf format lie with the Plaintiff's solicitors. Both the Plaintiff and the Defendant's solicitors use the Lotus Notes e-mail platform and face no such difficulties. I find it unacceptable that Plaintiff's solicitors should raise objections to electronic discovery that is essentially premised on their (and not the Plaintiff's) lack of the requisite software programme.

Balancing the benefits and costs of electronic discovery

37 Based on the factors traversed hereinbefore, I am of the view that an order ought to be made for parties to comply with an electronic discovery protocol for the purpose of general discovery and do so order. However, I am mindful of the fact that the Plaintiff has ready a draft list of documents. The question I turn to consider is whether the Plaintiff should be required to provide the categories of documents described as well as conduct a reasonable search based on the key words set out in Part I of the draft electronic discovery protocol.

38 Part I of the draft electronic discovery protocol sets out, *inter alia*, categories of documents which the Defendant considers to be necessary for disclosure. These categories are described in both the traditional descriptive as well as by reference to a list of search terms and limited to identified servers and storage locations, and by time periods. With this level of candour, had parties taken the exhortation for good faith collaboration in paragraph 43B(1) of PD 3/2009 in the right spirit, the time spent in discussing the ambit of general discovery will result in a better understanding of what categories of documents the opposing party considers to be discoverable in this matter. This may avert or reduce subsequent requests and applications for further discovery (if there is agreement or compromise), or at the very least serve to accelerate such applications since parties will know at a fairly early stage their respective positions on entitlement to disputed categories of documents. In either case, there is the potential of saving time and costs in the discovery process. This case is an example of how a draft electronic discovery protocol has, at least on the part of the Defendant, provided the Plaintiff with an insight into the categories of documents which the Defendant considers to be discoverable.

39 Had the Plaintiff responded to the Defendant's attempt at good faith collaboration in the right spirit, it should have put forward a similar list. Parties could then have worked out an agreement on what will be disclosed during general discovery and the categories for which it will object to disclosure. In a suitable case with voluminous electronic documents, parties may even agree to conduct general discovery *in stages* by, for example, using agreed sets of keywords to conduct reasonable searches on the e-mails, computers or notebooks of a group of identified persons whom parties consider to be central to the issues in dispute. After disclosure has been given of electronic documents identified in this stage, parties may then explore the extent of discovery which may be required in subsequent stages. A handy summary of discovery in stages is provided by the Senior Master Whitaker in *Goodale & Ors v The Ministry of Justice & Ors* [2009] EWHC B41 (QB), at [22]:

I am quite content that the four key witnesses that have been named by the claimants are the right people whose ESI needs to be searched. Numerous other witnesses and custodians of documents have been mentioned but in a case like this, I do not think that searching the ESI of all of them immediately is the right way to go about this exercise. In terms of a search one should

always start with the most important people at the top of the pyramid, that is, adopt a staged or incremental approach. Very often an opposing party will get everything they want from that without having to go down the pyramid any further, often into duplicate material.

Unfortunately, there was no attempt to collaborate on this aspect of the electronic discovery protocol.

40 Had the volume of documents in this case been larger or had the Plaintiff been less ready (and a draft list of document not already been prepared), I would not have hesitated to order that parties comply with the draft electronic discovery protocol in full. However, since the Plaintiff is ready with its list of documents I do not see any benefit in throwing away legal costs already incurred in its preparation. Hence, I order that the draft electronic discovery protocol be modified by deleting Part I. The Plaintiff can proceed to make soft copies of electronic documents which have already been enumerated in its draft list of documents. This should be a fairly straight forward "drag and drop" exercise of making electronic copies of the electronic documents already enumerated in the Plaintiff's draft list of documents since there are no issues relating to the alteration of the contents of electronic documents or their metadata information based on the pleadings as they stand now. However, this is not to say that the Plaintiff is, by virtue only of this order, released from its common law duty to ensure that the original electronic documents are not intentionally destroyed.

41 I further order that the e-mails (including attachments) to be given in discovery by the Plaintiff be disclosed and soft copies provided in Lotus Notes' native .nsf format in *a single composite file for each mailbox*. As provision of the soft copy documents in native format provides the party entitled to disclosure with perfect copies of the originals, I do not think that inspection should generally not be required during general discovery unless authenticity is disputed. The international dimension of this case with the original electronic documents situated in Hong Kong and Taiwan makes inspection of originals a practical difficulty and, based on the pleaded case of parties, unnecessary at this stage for the saving of costs, especially since soft copies will be provided in native format. I therefore order that the provision of soft copies of discoverable electronic documents shall be in lieu of inspection. However, should inspection of an original electronic document become necessary at a later stage, this order shall not prevent the party seeking inspection from making a request for inspection subsequently.

42 In paragraph 2 of Part II of the draft electronic discovery protocol, the Defendant had set forth the information which the list of documents should contain:

- (a) Document identifier;
- (b) Date that the electronically stored document was created;
- (c) Date that the electronically stored document was modified;
- (d) Description of electronically stored document;
- (e) File name of the soft copy electronic document;

(f) File format (and version) of the electronic document;

(g) Hash value of the file;

(h) Location of the electronically stored document in the Plaintiff's server / disk drive;

(i) Author(s);

(j) Recipient(s);

(k) Host. This applies where a document is an attachment to another document. This field will state the Document identifier of the document to which it is attached.

43 As the volume of electronic documents in this case is not so large as to require an extensive set of metadata information about the discoverable documents, I do not think that the Plaintiff should be required to provide all the metadata information listed above. For the purpose of saving costs, I think that in this case it is appropriate that minimal additional information be added to the draft list of documents. In particular, since the Plaintiff already has a draft list of documents ready, I presume that it has already removed duplicate entries from the list and hence the hash value of each electronic document is unnecessary. Similarly, in the interest of reducing the additional costs which will be incurred in finalising the list, and since the electronic documents to be disclosed are not voluminous, there is also no need for the list to contain information relating to their original location. As I am ordering that e-mails be provided in native format with attachments in a single composite file for each mailbox, there is also no need for host information: this is more suited in a scenario where attachments are provided as separate files from the underlying e-mail, which may arise where, for example, e-mails are printed to .pdf format and e-mail and attachments are then disclosed as separate .pdf files. Therefore, I order that the draft electronic discovery protocol be modified by removing from paragraph 2 of Part II, sub-paragraphs (b), (c), (g), (h) and (k). Since sub-paragraphs (b) and (c) are ordered to be removed, they should be substituted with a column for the date of the electronic documents which is presumably already in the existing draft list of documents.

44 I therefore grant an order in terms of the Defendant's application with the attached draft electronic discovery protocol modified to the extent set out above; that copies of electronic documents be provided in their native format at the same time as the exchange of the list of documents; and that provision of electronic copies be in lieu of inspection of the original electronic documents in the Plaintiff's possession, custody or power, except that this order shall not prevent the Defendant from making a request for inspection at a later stage should inspection become necessary.

45 The Defendant has provided in good faith an insight into the categories of documents which he considers to be discoverable for this matter in Part I of the draft electronic discovery protocol. In order to save time and costs, the Plaintiff should have these categories of documents in mind as it finalises the draft list of documents for exchange: categories of documents which it will disclose

should be included in the final list of documents and categories which it disputes should be identified early. This is intended to accelerate any potential application for further discovery of disputed categories of documents. I therefore *further order* that Part I of the draft electronic discovery protocol do stand as the Defendant's written request for further discovery to which the Plaintiff shall provide a written response at the same time as the exchange of lists of documents and copies of discoverable documents.

46 The Defendant had submitted that costs be awarded to him on an indemnity basis. Having reviewed the correspondence between parties and the court's record of discussions during PTCs, I do not think that the Plaintiff's conduct warrants a costs order on an indemnity basis. The Plaintiff had stated early on that it did not think that electronic discovery was appropriate and had requested that a formal application be taken out. Despite such reservations, the Plaintiff did make some effort to collaborate but, given its misgivings, these fell far short of good faith efforts. Much of the discussion between parties centred on the difficulties of providing copies of the Plaintiff's e-mails in native format, and there was little progress beyond this issue. I therefore decline to order costs on an indemnity basis and do fix costs at \$1,600 plus reasonable disbursements to be paid by the Plaintiff to the Defendant forthwith.

Copyright © Government of Singapore.