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

This High Court decision illustrates the factors considered by the courts in determining an application for an order for electronic discovery under Practice Direction No 3 of 2009 ("PD 3/2009") and the circumstances in which such an application can be made.

Facts

The Defendant owed the Plaintiff bank about USD1.8 million and the latter sued to recover the sum. The Defendant counterclaimed for an amount of USD48 million.

Court records showed that during a pre-trial conference, the Defendant suggested that parties proceed with electronic discovery but the Plaintiff indicated that electronic discovery was not necessary, and hence the application by the Defendant under PD 3/2009 for an order that the Plaintiff comply with an electronic discovery protocol ("EDP").

Plaintiff's arguments

The Plaintiff raised a number of issues to resist the Defendant's application. It was argued that:

1. First argument: There is no basis for the application because paragraph 43B of PD 3/2009 is only applicable during general discovery where parties have agreed to adopt an EDP. The parties in this case have not reached a mutual agreement to adopt an EDP;
2. Second argument: The application should not be allowed as the Defendant's delay in making the application would unfairly prejudice the Plaintiff who was ready to proceed with general discovery;
3. Third argument: The documents involved were not

voluminous, and the Plaintiff's documents consisted of 9 arch files, where 5 to 6 consist of emails and the advantages of an EDP which are the ability to access metadata information, ease of management of voluminous documents and the availability of keyword searches and such benefits will not be reaped in this case;

4. Fourth argument: Metadata information is not relevant to the dispute;

5. Fifth argument: The dispute was a straightforward one involving the repayment of a loan and the value of the claim may not be suitable for an electronic discovery; and

6. Sixth argument: There may be difficulties and expense in retrieving the electronic documents due to the Plaintiff's solicitors work flow and document handling process.

Defendant's arguments

The Defendant contended that the Court has extensive powers to order the parties to comply with EDPs during discovery and that the opening words of paragraph 43B(3) which provides "If parties are unable to agree on an electronic discovery protocol" is broad enough to include situations where (i) parties are unable to agree on the adoption of an EDP and (ii) parties agree to adopt an EDP but dispute some of its terms

Decision

The Court in a judgment dated 26 April 2010 dismissed all the Plaintiff's arguments and ordered an EDP. The Court dismissed the Plaintiff's first argument for three reasons. Firstly, the Court, prior to PD 3/2009, has the power to order that parties comply with a similar protocol and it cannot be now limited by the need for a mutual consent to adopt an EDP.

Secondly, the Plaintiff's argument will cause inconsistency in the operation of the opt-in framework under PD 3/2009. The Plaintiff's construction, if accepted, would mean that during general discovery, paragraph 43B operates by mutual consent but for applications for further or specific discovery, paragraph 43C can operate either by mutual consent or by election of one party.

Thirdly, the plain reading of the opening words of paragraph 43B(3) which provides "If parties are unable to agree on an electronic discovery protocol", is broad enough to encompass situations where there is (i) a mutual consent to adopt an EDP despite disagreements over some of its terms and (ii) the situation where one of the parties does not agree to adopt an EDP.

The Court dismissed the Plaintiff's second argument because there was no delay on the part of the Defendant in commencing discussions for an EDP. The Court held that the issue of EDP was first raised before the pleadings had been closed and is thus within the timeframe set forth in paragraph 43B of PD 3/2009.

The Plaintiff's third argument was rejected on the basis that cases not involving voluminous documents benefit from e-discovery as well. The Court gave the example of having the benefit of discoverable documents in text searchable format when preparing for trial and noted that as the bulk of documents originates from and is stored in

an electronic form, it is desirable that discovery be given in an electronic form.

In relation to the Plaintiff's fourth argument, the Court held that even though metadata of the documents involved are not in issue due to the absence of allegation of alteration of the documents, that consideration should be considered together with other arguments put forth for an order for electronic discovery.

The Plaintiff's fifth argument was also dismissed. The Court held that neither the value nor the parties financial position should hinder an order for electronic discovery after weighing up various factors including the value of the Plaintiff's claim and the Defendant's counterclaim; the Plaintiff's financial position as an international bank; the Defendant as its former banking customer; and the fact that they both have appointed solicitors in well-resourced firms.

In addition, the international dimension of this case, where the account was maintained with the Plaintiff in Singapore, the Plaintiff's key employees reside in Hong Kong and the Defendant is a Taiwanese resident would mean that a lot of the original documents are overseas and producing them for inspection will involve considerable costs and inconveniences. Electronic discovery resolves this problem by requiring only the production of electronic copies.

In relation to the Plaintiff's sixth argument, the Court held that the manner in which the Plaintiff's solicitors managed its client's documents should not be a hurdle to electronic discovery. Also, although the Plaintiff and its solicitors are on different e-mail systems, it was possible to purchase software for the purpose of converting the e-mail files and the cost of the software is not prohibitive.

Commentary

The Court considers a wide variety of factors in determining whether to order electronic discovery under PD 3/2009. It is clear from this decision that the Court will not accept arguments at face value, but will analyse and dissect each argument in order to reach a practical decision. More importantly, it is clear that parties can apply for an EDP under PD 3/2009 where (i) there is mutual agreement by the parties; (ii) having agreed to adopt one, there are disputes over some of its terms; and (iii) parties have no pre-existing agreement to adopt one and one party seeks to adopt an EDP but the other does not agree.

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