

## CASE NOTE: SINGAPORE

CASE CITATION:

**Sanae Achar v Sci-Gen Ltd [2011] SGHC 87**

NAME AND LEVEL OF COURT:

**High Court**

DATE OF DECISION: **8 April 2011**

MEMBER OF THE COURT: **Lee Seiu Kin J**

*Discovery; e-Discovery Practice Direction; electronically stored documents; relevance; whether necessary*

**This High Court decision considers the rationales of the law on discovery under the Supreme Court Practice Direction No 3 of 2009, and the circumstances where an application for discovery of electronically stored documents is seen as relevant and necessary.**

### **Background**

The plaintiff, Sanae Achar, was a former employee of the defendant, Sci-Gen Ltd. It was alleged by the plaintiff that she had received termination of her employment contract by written notice through the defendant's chairman and chief executive officer ("CEO"), Saul Mashaal ("Saul") on 1 December 2008 ("alleged termination"). Based on her employment contract, the plaintiff claimed that the termination entitled her to be compensated.

However, the defendant contended that the alleged termination took place only after Saul had been removed as chairman and CEO of the company. As such, Saul's notice did not constitute notification by the defendant to the plaintiff. In addition, the defendant believed that the plaintiff's claim was a false allegation, thus it applied for the discovery of particular documents pursuant to O24 r5 of the Rules of Court. On 29 May 2009, the defendant terminated the plaintiff's employment pursuant to her employment contract ("eventual termination").

### **Assistant Registrar's decision**

The Assistant Registrar passed judgment in favour of the defendant. He allowed the discovery of the following categories of documents:

1. The first category ("Category 1 Documents") consisted of electronic mails ("e-mails") that were

sent on two specific days.

2. The second category ("Category 2 Documents") consisted of all e-mail correspondences between Saul and the plaintiff. Discovery was limited to the time period between the plaintiff's alleged date of termination, and her eventual termination date by the defendant in late May 2009.
3. The third category ("Category 3 Documents") consisted of all e-mails containing certain search words between the period of the plaintiff's alleged date of termination and 31 July 2009. These search words included "Saul", "Saul Mashaal", "termination", "terminate", "leave" and "vacation".

The Assistant Registrar also ordered that the above documents to be presented in an electronic, text searchable and structured format. Dissatisfied, the plaintiff appealed against the Assistant Registrar's decision.

### **Objections raised by plaintiff on appeal**

The plaintiff's grounds of appeal were based on the irrelevancy of the documents discovered under the preceding three categories. The plaintiff contended that:

1. Category 1 Documents were not directly relevant as the amended statement of claim, and the defence made no reference to the relevant documents.
2. Categories 2 and 3 Documents were irrelevant, because the Assistant Registrar's order for discovery was overly wide.

### **Decision**

The High Court eventually dismissed the plaintiff's appeal. In his judgment, the learned Justice Lee Seiu Kin reiterated the general law on discovery before giving his reasons for the decision.

### The law on discovery

It was emphasized that the law on discovery is based on the obligation of the parties to disclose relevant documents. The doctrine of discovery was initially an equitable remedy based on the idea that it was unconscionable to withhold material evidence. As such, the main rationale for the doctrine is to ensure that there is a just and fair adjudication of disputes, ensuring that all material and relevant evidences have been adduced before the court for its consideration. Pursuant to O24 r5 of the Rules of Court, the court is imbued with the power to order specific discovery of documents.

Traditionally, documents qualify for specific discovery only if they are relevant and if discovery is a necessity. According to O24 r5(3) of the Rules of Court, relevant documents are those which can adversely affect or support either party's case, and those which either party relies on. In addition, O24 r7 of the Rules of Court provide that discovery will only be ordered if it is "necessary either for disposing fairly of the cause or matter or for saving costs".

With regard to the discovery of electronically stored documents, the traditional tests of relevance and necessity are still employed. However, the test is supplemented with the additional consideration of a non-exhaustive list of factors prescribed in paragraph 43D of the Supreme Court Practice Direction No 3 of 2009 ("e-Discovery PD"). These include, amongst other things, costs of retrieving documents, accessibility of documents, likelihood of documents being material, and the value of the claim.

As the phrase "electronically stored documents" is undefined, the learned judge offered the opinion that a natural meaning of the phrase should be preferred. Reference to case law was made to establish the scope of the word "documents". He held that it should be read to include e-mails, databases, backup copies, sound and image recordings, and storage media.

### Reasons for decision

#### Relevancy of Category 1 documents

The court found the e-mails under Category 1 documents were relevant and necessary, as these e-mails provided proof of the alleged termination by Saul. The fact that no express references was made to the Category 1 documents in the pleadings was immaterial. If discovery is only limited to documents in the pleading,

the amount of documents excluded from discovery would be very large. As such, explicit references to documents in the pleadings would be useful, but not a prerequisite to establish relevancy.

#### Relevancy of Category 2 documents

The plaintiff contended that the order effectively allowed the defendant to trawl through all of her e-mails in the hope of finding some useful evidence. However, the argument was rejected as the discovery of Category 2 documents could evince the plaintiff's employment status during the employment period. The discovery of such information could adversely affect or support either party's case. As the discovery order was confined from the alleged termination date to the eventual termination date, it was deemed to be within a reasonable time frame.

#### Relevancy of Category 3 documents

The court was convinced that there was sufficiently likelihood that the results retrieved from the search using the specified keywords would be relevant. This is especially since the keywords are aimed at finding evidence that supported the plaintiff's allegations. Moreover, the discovery of Category 3 documents would find relevant documents that fell outside the ambit of Category 2 documents. An example would be relevant e-mails that have been sent to third parties.

The judge, however, amended the end date for the discovery of Category 3 documents. It was brought forward from 31 July 2009 to 29 June 2009, which was the date when the plaintiff's access to the company's e-mail account was removed. The judge took the view that the new time frame ensured that the searches of Category 3 documents were within reasonable limits.

#### Scope of parties' obligation in a discovery order

Upon the passing of the discovery order, an obligation is imposed on the plaintiff. To discharge this obligation, the plaintiff is required to execute the search as stated in the order, and to disclose all results of the search. As long as the terms of the order have been complied with, the defendant has to accept that the plaintiff has fulfilled her obligations. This is regardless of the fact that there remains material evidence left undiscovered as a result of the search engine employed. Justice Lee endorsed the view of Morgan J in *Digicel (St Lucia) Ltd v Cable & Wireless Plc* [2008] EWHC 2522 (Ch), [2008] All

ER (D) 226 (Oct), that such an approach is “justified by considerations of proportionality”. The judge further recommended that a detailed agreement outlining the technical aspects of the discovery should be reached prior to the commencement of any searches.

### **Commentary**

Undeniably, the searching of documents by reference to certain keywords represents a more thorough and perhaps, pervasive method of discovery. However, the obligation to be discharged by the party whom discovery is sought against should not be raised to impractical standards. As such, to prevent a disproportionate discovery order, judges will have to consider factors listed in paragraph 43D of the e-Discovery PD while applying the traditional principles of discovery.

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