

CASE NOTE: SINGAPORE

CASE CITATION:

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

NAME AND LEVEL OF COURT:

High Court

DATE OF DECISION:

26 April 2010

MEMBERS OF THE COURT:

Yeong Zee Kin SAR

LAWYER FOR THE PLAINTIFF:

Ms Tan Xeauwei and Ramesh Kumar (Allen & Gledhill LLP)

LAWYER FOR THE DEFENDANT:

K Muralidharan Pillai and Julian Soong (Rajah & Tann LLP)

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; whether necessary to order; consideration of factors in paragraph 43D; reasonable search; key words; discovery in stages; providing electronic copies of electronically stored documents in lieu of inspection

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 US\$1.8 million and the latter sued to recover the sum. The defendant counterclaimed for an amount of US\$48 million. The court records showed that during a pre-trial conference, the defendant suggested that the parties proceed with electronic discovery, but the plaintiff indicated that electronic discovery was not necessary. Hence the application by the defendant under PD 3/2009 for an order that the plaintiff comply with an electronic discovery protocol (“EDP”).

The plaintiff's arguments

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

First, there is no basis for the application because paragraph 43B of PD 3/2009 is only applicable during general discovery where the parties have agreed to adopt an EDP. The parties in this case had not reached a mutual agreement to adopt an EDP.

Second, the application should not be ordered, because the defendant's delay in making the application would unfairly prejudice the plaintiff, who was ready to proceed with general discovery.

Third, the documents involved were not voluminous, and the plaintiff's documents consisted of 9 arch files, where 5 to 6 consisted of e-mails and the advantages of an EDP, which are: the ability to obtain access to metadata information, the ease of management of voluminous documents and the availability of keyword searches and other such benefits will not be reaped in this case.

Fourth, metadata information was not relevant to the dispute.

Fifth, 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.

Sixth, that there may be difficulties and expense in retrieving the electronic documents because of the plaintiff's solicitors work flow and document handling process.

The 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 the parties are unable to agree on the adoption of an EDP and the parties agree to adopt an EDP, but dispute some of its terms.

Decision

The court dismissed all the plaintiff’s arguments and ordered an EDP. The court dismissed the plaintiff’s first argument for three reasons. First, 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, and paragraph 43C can operate either by mutual consent or by election of one party. Third, 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 a mutual consent to adopt an EDP despite disagreements over some of its terms, and 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 thus fell 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 also benefit from e-discovery. 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 originate 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 because of the absence of any allegation that the documents were altered, 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 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. Additionally, the international dimension of this case, where the account was maintained with the plaintiff in Singapore, the plaintiff’s main employees reside in Hong Kong, and the defendant is a Taiwanese resident, would mean that a number 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 use 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 considered 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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Bryan Tan is a member of the editorial board.

Lee Heng Eam was called to the Malaysian Bar in 2005 and practiced as an advocate and solicitor in Malaysia before moving to Singapore in 2007, and is now a foreign associate with Keystone Law Corporation.