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Discovery in Cayman Islands Litigation

In this guide Harneys considers the scope of a party's duties with respect to the discovery of documents in Cayman Islands litigation.

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Discovery is such an important component of any piece of litigation that disputes arise frequently between the parties as to the meaning and application of the various rules.

"Discovery", the process by which documents that are relevant to the issues raised in a dispute are provided by one party to their opponent, is a fundamental component of litigation in most civil justice systems. Documents tell their own story and the provision of them avoids surprises and permits the strengths and weaknesses of the parties' respective cases to be tested at trial and often before a trial.

This brief guide sets out the basics of the discovery framework which exists under the Cayman Islands' rules of court, the obligations with which parties to litigation in the Cayman Islands must comply and the sanctions for non-compliance. It also highlights useful things which may be done in the early stages of litigation to ensure that discovery happens without causing too much pain or embarrassment later in the proceedings.

In what proceedings does an obligation to give discovery arise?

Wherever a case commenced in the Cayman Islands court involves a disputed question of fact an obligation will arise to give discovery. Thus most claims brought by one commercial actor against another will require the discovery of documents at some point.

A claim that involves a disputed question of fact will be begun by writ. Where the court is just being asked to decide what the law is on a given set of facts that are uncontroversial as between the parties discovery obligations do not usually arise. Discovery obligations also do not automatically arise in winding-up proceedings brought against Cayman structures in the Cayman court, but orders for discovery are available in certain types of winding-up proceedings (for example winding-up

proceedings which are in substance disputes between shareholders or which involve allegations of management impropriety).

What is a document?

The definition of a document is extremely broad. It includes the obvious - information which is recorded on paper, whether that be in the form of writings, pictures or plans. It also includes audio, video and other analogue or digital recordings, information stored on microfiche, electronic versions of documents, email and information sent over services such as Bloomberg and also the content of portable devices (such as SMS and information communicated over instant messaging services).

It also includes, in the case of digitised documents, metadata to the extent that the metadata is relevant to the issues in proceedings.

A document which is an altered version of an original is a separate document. For example a memo is a document, and a copy of the memo that someone has made notes on is a different document. Depending on the contents of the notes which have been made, the annotated memo may also be discoverable.

Preservation of documents

Once litigation is contemplated a party should take such steps as are necessary to preserve the documents which may be relevant to the potential dispute. Routine document destruction should be put on hold, and if there is a document destruction policy in place those with responsibility for the implementation of it should be informed of the potential litigation to ensure that appropriate action is taken to preserve documents.

It is also sensible for the party to start thinking at this stage about the people within the organisation who were involved in the matters which have given rise to the dispute and to contact those people to let them know that they should also preserve such documents as they may have - for example the contents of portable devices - which will not necessarily be caught by the suspension of a document destruction policy.

What has to be discovered and when?

Once the parties have pleaded out their respective cases they are obliged to discover those documents that are or have been in their "possession, custody or power" which are relevant to the matters in question in the litigation. The rules contemplate that discovery will be given two weeks after the pleadings close; in practice this rarely occurs and there will usually be case management hearings in court to determine among other things a timetable for the further conduct of the proceedings, including when discovery is to be given.

Possession, custody or power

Generally being in physical possession of a document (irrespective of whether the party has any right to possess the document) means it has to be discovered. 'Possession' is broadly possessing the document and having the right to do so; custody means being in possession without a right permanently to possess. Power, in relation to a document, means the party has a presently enforceable legal right to call for the document. So where an accountant or a broker holds a document which the party can require the accountant or broker to produce to him, that document will be discoverable.

Interesting and sometimes difficult questions can arise where discoverable documents belong to a subsidiary or affiliated company within a group or to a trustee where the party is a beneficiary of the trust.

Relevant to the matters in question in the litigation

The pleaded cases of the parties determine what matters are in question in the action, but relevance has been given a broad meaning. Documents are therefore relevant if they may assist, however slightly, one party to advance his case or to damage that of his opponent on any of the live issues in the litigation or which might lead to a train of enquiry having that result.

Documents relevant to the relief claimed - for example documents evidencing losses or additional costs incurred as a result of the matters complained of - are also relevant and discoverable.

The search

Parties must conduct a careful and thorough search for all relevant documents. If the party operates in different countries or from different premises those locations where it is reasonable to expect relevant documents to exist must be searched. Central computer and paper storage facilities, email and document servers, the hard drives of computers and portable devices of individuals who had an involvement in the matters leading to the dispute must also be searched.

As technology improves it is becoming easier and more cost-effective to ensure that all documents that are stored electronically are gathered in and searched for relevance. Where there are a particularly large number of potentially relevant electronic documents it is advisable for the parties to look to agree a process for searching those documents; the quality of software programmes which are used to search documents is constantly improving such that it is now possible to identify documents not only that contain key words or phrases which are considered relevant but also to identify documents by reference to concepts which may be relevant to the matters in question.

How is discovery given?

A party gives discovery by listing out all of the relevant documents and providing that list to his opponent. That is however a very simplistic statement because in all litigation relevant documents exist which, while they have to be discovered in a list, a party can and will object to his opponent seeing, for example legal advice on the strengths and weaknesses of the party's case. There is an added layer of complication to this process in Cayman Islands litigation arising from Cayman's Confidential Relationships (Preservation) Law (***CRPL***), which forbids the disclosure of confidential information in the hands of professionals in the Cayman Islands without the court's permission.

Practically, the list is a prescribed form which contains different schedules with different parts:

- Part 1 of Schedule 1 will list concisely but precisely the relevant documents which are in the party's possession custody and power and which the party discovering them is prepared to allow the other party to see.

- Part 2 of Schedule 1 lists those documents which, while their existence must be stated, the party objects to the other party seeing. These documents need only be listed in general terms.

- Part 3 of Schedule 1 lists those documents which exist but which contain confidential information within the meaning of CRPL. The party will have to make an application to court for directions as to whether these documents may be seen by the other party.

- Schedule 2 lists those documents that were but are no longer within the party's possession custody or power.

The rules of court then provide a mechanism by which the party receiving the list from their opponent can inspect the documents which the party has indicated may be inspected. As a practical matter however it is usual these days for parties to exchange disks containing copies of the documents in Part 1 of Schedule 1 at the same time as they exchange lists of documents. In an appropriate case it will also be prudent to inspect the original of the document which has been provided.

Which documents can a party refuse to allow his opponent to see?

In litigation a party can generally only refuse to allow his opponent to see documents which attract legal professional privilege. A document is protected by legal professional privilege if it meets any of the following tests:

- It is a confidential communication between a client and his lawyer which is created for the purpose of obtaining or giving legal advice. Such documents fall under the "legal advice" category of legal professional privilege and there are separate and important rules that apply to such communications, including in relation to determining who the client is, whether the document is in fact seeking or obtaining legal advice or is purely functional in nature, and whether privilege in the document may have been lost.

- It is a confidential communication between a client and his lawyer or third party, or between the lawyer and a third party which is created for the sole or dominant purpose for obtaining advice in relation to or evidence for use in the litigation and is created at a time when the litigation has begun or is in reasonable contemplation. This is termed "litigation privilege". The dominant purpose test is applied strictly. An internal investigation within an organisation, unless demonstrably commissioned for the dominant purpose of gathering information to pass on to the lawyer in order to prosecute or defend the litigation, will not be privileged.

- A lawyer's working papers and attendance notes and instructions prepared for counsel, and counsel's opinions.

- Proofs of evidence, draft witness statements and expert reports prepared for the purposes of the litigation.

In addition to documents that attract legal professional privilege, “without prejudice” documents should also be included in Part 2 of Schedule 2. A “without prejudice” document (usually correspondence between the parties) is one which seeks to advance the settlement of a dispute. The parties will include such documents in Part 2 of Schedule 2 to prevent parties to the litigation who are not parties to the correspondence, and the court, from seeing such correspondence. Such documents are usually labelled with the rubric “without prejudice” but whether or not a document is in fact “without prejudice” is a question of substance over form; sometimes a document that is not labelled “without prejudice” will in fact be so, and sometimes the converse will be the case.

As a general rule it is advisable to keep to a minimum the number of documents created internally within an organisation which relate to litigation which is contemplated or which is ongoing. In order to ensure that the privilege is not lost it is also advisable to identify and document at an early stage the decision-makers in respect of any given piece of litigation and restrict communications to those individuals.

A document containing confidential information that is not privileged is, subject to CRPL, discoverable. However in the case of trade secrets or other sensitive proprietary information it is usually possible for the parties to agree arrangements under which restrictions are placed on who among the persons on the other side of the dispute may see and review the documents and for the return of the documents (and any reproductions of or notes made from those documents) following the conclusion of the proceedings. It has not yet been necessary for the Cayman court to make orders implementing such confidentiality arrangements but the court has blessed

them in previous cases and there is little doubt that the court has the power to impose such arrangements in an appropriate case where the parties cannot agree such a framework.

What if a party is dissatisfied with the discovery given by the other party?

Sometimes a party will not properly understand the case and will not therefore produce all of the documents that are relevant to the matters in question in the litigation. Often a party will quite well understand the case and decide not to include in their list documents that are damaging to their case or which advance their opponent's case. The court rules provide mechanisms to address such defaults.

Where the list is incomplete a party can be required to produce what is called a further and better list of documents. This will often require further searches for documents to be undertaken. The court can also require a party to swear an affidavit attesting the accuracy and completeness of the list which has been produced; if the affidavit contains an untrue statement this is a contempt of court and is punishable as such. The court can also order discovery of specific documents if it is satisfied that the documents are likely to exist and that their production is necessary for the fair disposal of the proceedings or to save costs. The court can also make an order requiring a party to produce documents to a judge for inspection: this may happen where, for example, a party claims he is entitled to withhold a document from his opponent and that claim is challenged.

Oral discovery and discovery by interrogatories

The Cayman court rules permit orders to be made for oral discovery. The object of an order for oral discovery is to obtain information which is relevant to the matters in question in the litigation but which has not been recorded in a document. Among the offshore jurisdictions oral discovery is unique to Cayman Islands litigation procedure; adopted by the Cayman Islands some years ago from Canadian rules of civil procedure, the use of oral discovery has generally been deprecated by the Cayman court.

The rules also permit a party to serve on an opponent a list of questions that are relevant to the matters in question between the parties in the litigation. A party who receives such a list is obliged to answer the questions. Where the answer given to any question is insufficient the court can order the person giving the answer to provide a further answer either by affidavit or by way of an oral examination.

Continuing obligation

The obligation to give discovery continues beyond the production of the list of documents and up to the end of the trial and judgment. Documents may be created later in the proceedings which are discoverable, or it may be that as the case develops documents which were not at the outset relevant to the litigation do subsequently become relevant. Often documents that are relevant to the amount claimed or counter-claimed by the parties will continue to be created until a late stage in the proceedings: all such documents will need to be discovered. It is not uncommon in substantial case for a party to serve a number of supplemental lists of documents on their opponent during the course of the proceedings.

Who is responsible for discovery?

It is the duty of the party to the proceedings to ensure that they comply with the rules as to discovery. In the Cayman Islands as in other common law jurisdictions it is also the duty of the party's lawyer to ensure that the party is properly advised as to their obligation to preserve relevant documents and documents which are potentially relevant to the dispute.

Non-compliance

Parties are often tempted not to discover documents which are unhelpful to its case or which help the opponent's case. This is rarely sensible. In addition to being a breach of the rules for which there are sanctions, parties rarely get away with it and it often leads to unhelpful surprises and distractions during the proceedings and can be a source of considerable embarrassment to the party.

A party who tries to avoid giving full discovery may be subject to applications for further and better lists, specific discovery or requests that the accuracy of the list be verified on affidavit. In addition, a party's witness may often be ordered while giving evidence at the trial to conduct further searches for documents, or subjected to cross-examination as to the non-discovery of documents which can seriously undermine the witness's (and thus the party's) credibility.

A party who wilfully destroys documents after the commencement of litigation may commit the offence of perverting the course of justice and may also find that their claim or defence of the claim is brought to a peremptory end because of that conduct. In most cases the failure or refusal to discover documents or the destruction of them will not automatically result in the party being prevented from advancing or defending a claim, but it may do so if the court takes the view that the failure or refusal to discover or the destruction of the document means that it is not possible to have a fair trial of the litigation. A failure to comply with discovery obligations can also lead to the court making orders for costs against the defaulting party. In addition, if the court is satisfied that relevant documents have not been disclosed it may draw inferences against the party in default as to the content of those documents and/or the party's credibility. Losing the case because of a failure to give discovery of documents (which might not actually have been that important or relevant or which could have been dealt with if they had been known about by a party's lawyer in advance) tends to defeat the object.

Discovery from third parties and discovery overseas, pre-action discovery

Third parties resident within the Cayman Islands can be made the subject of a subpoena for the production of relevant documents and testimony by a party to litigation. A party can also apply to the court for an order requiring a deposition to be taken from a person who is within the Cayman Islands in a case when the court is satisfied that it is in the interests of justice to do so.

Where a person is not resident in the Cayman Islands the court may also issue letters of request to the court of the country or place where the person resides asking that court to require that person to provide evidence that is relevant to the dispute.

The Cayman court has confirmed that in exceptional circumstances, domestic and foreign depositions may be taken without the need for the court to issue a letter of request if they are deemed necessary to assist with preparation of the case for trial.

Section 1782 of Title 28 of the US Code permits a party to legal proceedings outside of the United States to apply to a US court to obtain documents and evidence for use in the non-US proceeding. An applicant for such an order must satisfy the court that he is an "interested party" involved in proceedings which are before a foreign tribunal and the person from whom the evidence is sought is in the district of the court before which the application has been filed. A party to Cayman civil litigation seeking documents and testimony in the US would meet these criteria.

The Cayman court has upheld the right of a party to avail itself of the 1782 procedure, although it is cautious to ensure that the taking of such foreign depositions does not amount to oppressive or abusive conduct in the context of the Cayman Islands litigation. In particular a party will not likely be allowed to use evidence obtained

from an opponent under 1782, and a party may well be restrained from seeking that relief by the Cayman court, if the purpose of the exercise is to cross-examine in advance of a trial in the Cayman litigation a witness who intends to come and give evidence at the trial.

Discovery against parties or non-parties before the formal commencement of proceedings is not generally permitted, but the court has the power to make orders against persons within its jurisdiction for the production of documents where it can be shown that that person has become mixed up, innocently or otherwise, in wrong-doing.

Use of documents discovered by an opponent

A party may not use for any purpose other than the litigation a document, or information which can be gained from a document, which the opponent provides by way of discovery. The obligation not to use the document for a purpose outside of the litigation continues after the conclusion of the case, unless during the course of the proceedings the document is read to or by or referred to in court. Even when a document is read or referred to in court the court can order that any such document cannot be used for any further purpose.

A party who uses a discovered document for a purpose unconnected with the litigation commits a contempt of court.

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