Introduction

Discovery is an important part of the litigation process, and it is sometimes difficult to assess what should and should not be disclosed. This is particularly so for the banking industry, which may have to balance issues of client confidentiality as well. Nonetheless, in the case of Teo Wai Cheong v Credit Industriel et Commercial [2013] SGCA 33, the Singapore Court of Appeal demonstrated the potential consequences of failing to meet discovery obligations.

The Plaintiff private bank ("the Bank") claimed against its client ("Teo") for losses arising from certain products he had purchased through his relationship manager ("Ng"). Teo’s defence was that he had never authorised the purchase of these products.

At first instance, the High Court found that Teo had authorised Ng to make the purchases. However, the Court of Appeal held that the Bank had failed to comply with its disclosure obligations, and ordered a retrial. By the time of the retrial, Ng was no longer available to testify. The Court of Appeal thus excluded Ng’s evidence. Upon consideration of the admissible evidence before it, the Court then held that the purchases had not been authorised.

The Bank’s case was deeply affected by its failure to meet its discovery obligations at the first trial, leading eventually to the dismissal of its initially successful claim. The Court highlighted that it is the duty of the litigant, its solicitors and its in-house counsel to ensure that all relevant documents are disclosed.

Brief Facts

(1) Teo was a client of the Bank, and Ng was his relationship manager. He had purchased a number of accumulators through Ng.
(2) When the Bank sought to claim for losses on some of these accumulators ("the Disputed Accumulators"), Teo alleged that he had never authorised the purchase of those accumulators.

(3) Unfortunately, Ng had a habit of taking instructions on her personal handphone and not on the Bank’s landline. Therefore, the alleged instructions for the Disputed Accumulators were not recorded.

The First Trial & the First Appeal

At the trial of first instance, the High Court found in favour of the Bank.

However, upon appeal, the Court of Appeal found that the Bank had not fulfilled its discovery obligations. The Bank had not disclosed certain documents relating to Ng’s other customers on the grounds of banking secrecy. Nonetheless, the Court held that this evidence was relevant, and ordered the disclosure of these and other materials. Concerns about banking secrecy could be met by redacting the names of the other customers from the materials.

Upon the further disclosure, the Court found other previously undisclosed documents that were both material and prejudicial to the Bank. These documents – primarily consisting of internal correspondence between Ng and the Bank – showed a separate breach by the Bank of its discovery obligations. The Court ordered a retrial of the matter.

The Retrial & the Second Appeal

The retrial focused largely on one issue – whether Teo had instructed Ng to purchase the Disputed Accumulators. In reaching this decision, the High Court also had to consider whether to allow Ng’s evidence from the first trial. At the retrial, the High Court found in favour of the Bank on both issues, but the Court of Appeal reversed the High Court’s decision on both issues.

The admissibility of Ng’s evidence

By the time of retrial, Ng had moved to the Middle East and was not available to testify. This caused much evidential difficulty, as she was a material witness in the case, and much of the new evidence involved her.
The retrial Judge allowed the admission of Ng’s evidence from the first trial. However, upon appeal, the Court of Appeal allowed Teo’s application to exclude Ng’s evidence on the following grounds:

(i) The Bank had breached its discovery obligations in the first trial, and material evidence had not been disclosed.

(ii) Teo’s counsel had not had the opportunity to cross-examine Ng on the newly disclosed evidence. The cross-examination was thus materially impaired.

(iii) Therefore, Ng’s evidence from the first trial was not admissible.

On the issue of discovery, the Court of Appeal emphasised the importance of complying with one’s discovery obligations, as it allowed “counsel and parties to evaluate the strength of their respective cases, clarify the issues between them, reduce surprises at trial and encourage settlement”. The Court held that it was evident that the Bank’s breaches of its discovery obligations arose from positive steps and misconceived decisions that it had taken. The Court added that it was incumbent upon solicitors to explain to their clients what their discovery obligations were, and to be involved in and supervise the disclosure process. The solicitor must cease to act if he or she is unable to secure the cooperation of his or her client in this respect.

**Whether Teo had instructed Ng**

On an analysis of the admissible evidence, the Court found that the Bank had failed to show that Teo had instructed Ng on the Disputed Accumulators.

The Bank faced a considerable hurdle in being unable to rely on Ng’s evidence. Further, other evidence suggested that Teo had not in fact authorised the transactions. Ng did not contact Teo regarding the Disputed Accumulators for an extended period of time despite facing pressure from the Bank’s credit department, and had in fact lied to the credit department on several occasions. She had also repeatedly failed to tape her calls with clients.

Therefore, having failed to prove its case on the balance of probabilities, the Bank’s claim against Teo was dismissed.
Concluding Words

This case provides a demonstration of evidential pratfalls that may arise in banking litigation. Had Ng recorded her calls with her clients, there would be no dispute over whether instructions had been issued. Had the Bank discharged its disclosure obligations in the first trial, there would have been no need for protracted proceedings, and Ng’s evidence would not have been excluded.

The Court here emphasized that litigants have the duty to disclose all relevant information so as to ensure that parties have their “cards face up on the table”. The responsibility falls not only on the litigants, but on their solicitors and, in the case of large corporations, their in-house counsel. The solicitor must question whether there are missing documents, and must ensure that knowledge of discovery obligations are passed on to everybody in the corporation who might be affected.

It is thus not enough to claim that certain departments were not aware that their correspondence was relevant to the matter, or that the bank had – on its own assessment – wrongly decided on the balance between discovery and client confidentiality. Proper legal guidance must be sought, and all relevant evidence must be disclosed.
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