In-House Counsel’s Duty in Discovery & Privilege  
- Issues From A Shipping Perspective

Introduction

In common law jurisdictions, like Singapore, discovery is a pivotal part of the adjudication process. It is intended to allow parties to evaluate the merits, narrow down the issues, reduce surprises at trial and encourage settlement. The extent of the duties owed in discovery were brought into sharp focus in the recent Singapore Court of Appeal decision of Teo Wai Cheong v Credit Industriel et Commercial [2013] SGCA 33 (“Teo Wai Cheong”).

In this Update, we discuss the take-away points from Teo Wai Cheong, its relevance to the shipping industry, and the importance of obtaining proper discovery advice.

Teo Wai Cheong

Credit Industriel et Commercial, a bank, claimed against its client, Teo, for losses (about S$6 million) arising from financial products purchased by Teo through his relationship manager, Ng. Teo’s main defence was that he did not authorize the transactions. At the 1st Appeal, the Court found that the bank had failed to comply with its discovery obligations, and ordered a re-trial.

By the time of the re-trial, Ng was no longer available to testify. Teo’s counsel could not cross-examine Ng on the previously un-discovered documents, specifically, Ng’s transactions with other customers and internal correspondence between Ng and the bank. The Court excluded Ng’s evidence and with that, the bank failed to prove that the transactions were authorized.

Discovery

It is uncontroversial that a litigant must disclose all relevant documents during discovery. However, the question of relevancy, as well as privilege, is far more complex and certainly beyond the scope of this Update.
Off hand, we can think of numerous categories of documents and correspondence which may potentially be admissible as evidence, such as crew statements, internal correspondence between the client, its in-house counsel and the case handlers at the P&I Club or H&M underwriters, and investigation reports commissioned by Class or flag state authorities.

Following *Teo Wai Cheong*, it is clear that a litigant cannot rely on errors in its own assessment or lack of legal advice to excuse a failure to produce relevant documents. The Court of Appeal highlighted the role of solicitors in the discovery process, and that “a client cannot ordinarily be expected to realise the entire scope of his discovery obligations without the aid and advice of his solicitor”.

Therefore, it is important for litigants to obtain legal advice regarding discovery at the very outset of a dispute, or a serious casualty. As the Court stated, it is essential that a solicitor is brought on board to:

(i) Explain the requirements of discovery;

(ii) Examine the disclosed documents to ensure no relevant documents have been omitted; and

(iii) Examine the corporate structure of the litigant so as to ensure that information regarding discovery obligations is properly passed on to all the necessary employees.

A litigant’s in-house counsel, or intermediary case handlers, for instance, those at P&I Clubs or H&M underwriters, also have a role to play. Apart from providing preliminary advice on discoverable documents, they must make reasonable inquiries on the exact scope of its discovery obligations if there is any doubt. The co-operation of a solicitor, in-house counsel and such other intermediary case handlers is thus vital, and in *Teo Wai Cheong*, it was the apparent failure of the bank’s in-house counsel to obtain proper external advice on discovery which ultimately led to the failure of the bank’s claim.

**Legal Privilege**

Finally, it should be noted that all communications, advice and documents between a solicitor and client are subject to legal privilege, meaning that the litigant cannot be compelled to disclose it.

This privilege applies to all such information and correspondence made for the purpose of
the solicitor’s engagement for legal advice or for upcoming litigation. Correspondence for other dominant purposes may not be thus protected.

Shipping corporations should thus be wary about the implications of the International Safety Management Code (“ISM Code”). Rule 9 of the ISM Code requires that all accidents and hazardous situations must be reported to the corporation, and then analysed for purposes of promoting safety. Therefore, if a solicitor is not brought on board at an early stage to examine all reports for disclosure, these reports may be found to be for the dominant purpose of fulfilling the ISM Code or other internal protocols instead, and thus lose the protection of legal privilege.

Concluding Words

Discovery in disputes, specifically, shipping disputes, is often a complex matter, and the Court of Appeal has emphasized the importance of obtaining proper legal advice before deciding on disclosure. A litigant’s discovery obligations are strict, and a failure to make full disclosure could potentially lead to very adverse results before the Court.
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