

Discovery obligations relating to electronically stored documents



By Jansen Lim

It is a feature of modern civil litigation that parties almost invariably rely on documents stored in an electronic format, such as emails and databases. This in turn gives rise to interesting issues within the discovery process such as how to enable inspection of electronically stored documents, and the format in which copies of such electronically stored documents should be provided.

The recent decision by Singapore's High Court in *Fermin Aldabe v Standard Chartered Bank* [2009] (Fermin's case) therefore provides timely guidance as to how the Singapore courts approach this prosaic aspect of litigation. In Fermin's case, the Defendant had taken out an application for, inter alia, an order allowing it to give inspection of emails listed on its 'List of Documents' either by providing printed copies or in the electronic format. The Court disagreed that the Defendant could give inspection simply by providing printed copies, and held that the Plaintiff was entitled to physically inspect the email messages.

The Defendant used Microsoft Outlook as its client-email software. Depending on how the program is configured, a copy of emails sent or received in an email account is stored on the hard disk of the personal computers in question, or the Defendant's email server, or both. To give inspection of the "original" emails, therefore, would entail allowing the Plaintiff access to either such of those personal computers concerned, or a means to look at the emails by retrieving them directly from the email server.

The Court directed the Defendant to provide the technical means necessary for the Plaintiff to inspect the emails, and opined that "a sensible approach would be for the Defendant to assist by providing an operator who would retrieve each of these emails and display them on screen for the Plaintiff's inspection, and call up the metadata information (e.g. header information) which the Plaintiff intended to inspect."

The Court further directed that all electronically stored

documents that were discoverable be exchanged electronically, by saving these documents in their native formats on optical storage devices. In preferring electronic exchange, the Court explained that providing copies of electronic documents in their native formats carried practical benefits such as ease of transfer and preservation of metadata information. Further, where such documents are voluminous, printing should be discouraged.

The Court also had to determine the exchange format because the Defendant had proposed to provide the discoverable emails in the PST format (which is proprietary and requires Microsoft software to access), whereas the Plaintiff used a Linux computer and could not read PST files.

The Court directed that, subject to the parties' agreement, the Defendant should provide the emails in the PDF format as requested by the Plaintiff. On the facts of the case, this decision was sensible for the following reasons: the Defendant was a bank whereas the Plaintiff was an individual with limited resources; the Defendant did in fact have the capability to meet the Plaintiff's request; and it was the Defendant who was trying to fulfill its discovery obligations.

The Supreme Court Practice Directions (No. 3 of 2009), which had been issued on 30 July 2009 and which took effect from 1 October 2009, would have dealt directly with the issues in Fermin's case but for the fact that it did not come into force until after the decision. Similar provisions are mirrored in the Subordinate Courts Practice Directions (No. 1 of 2009).

A consonant reading of Fermin's case and these Practice Directions leaves no doubt that, even as technology is embraced for its facilitation of legal processes and procedures, the Singapore courts are mindful of the practical difficulties posed to litigants.

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