Shearn Delamore &co.

Discoveries In Maritime Claims: (Part One) Pre-Trial Discovery and Specific Discovery of Documents

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Introduction

Documents are nine tenth of civil litigation. Maritime claims, like most civil litigation stand or fall on the strength of documentary evidence.

Whilst the importance of documentary evidence cannot be overstated, the question remains as to what could a litigant do if the litigant does not have sufficient documents to support his/her claim in Court?

This article will provide an overview of what are the legal armoury available within the Malaysian legal regime for a litigant to gain access to relevant and necessary documents and/or information to support his/her case in Court. This article will also discuss how these legal devices apply in a maritime claim.

Discoveries in general

Pre-trial discovery

In Malaysia, the legislature is cognizant of the need for litigants to have access to all relevant and necessary documents which could support the litigant's case or could undermine the opponent's case.

As such, the Rules of Court 2012 stipulated that any litigant who has **filed** a claim in Court would be subject to the Court's pre-trial directions to disclose all documents which are relevant to the case before the Court adjudicates the case at trial. Those documents disclosed must also be made available for the adverse party's inspection (save where the documents are privileged)[1].

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Relevance test

But what amounts to a "*relevant document*" to be disclosed to the adverse party? Simply put, a document is relevant if the document (a) is a document which the party will rely in Court (b) will adversely affect the party's own case (c) adversely affect the adverse party's case (d) support the adverse party's case.

To add some colour to the scope of "*relevant document*", Malaysian Courts have also ruled that documents are also "relevant" if they could either directly or indirectly enable the party requiring the documents to advance its own case or to damage the case of the adversary.

The notion of "***directly or indirectly***" appears to be a nuanced notion which opens the scope of discovery to an unlimited sea at first glance but this is not the case. What the Court had in mind when His Lordship ruled that discoverable documents must be "*directly or indirectly relevant*" was that a document is "*directly or indirectly relevant*" if the document could **fairly lead the party to a train of enquiry towards exploring materials which may advance its own case or to damage the case of the adversary**.

Specific discovery

Now, we have addressed the issue of "*relevance*", but what if the Court gave pre-trial directions directing parties to disclose all documents which are relevant but the party refuses to comply?

If this happens, the law has it that documents which are not disclosed and/or exchanged with all parties will not be considered by the Court as evidence.

However, what if a litigant really needs the document to prove a burning point at Court and the opponent refuses to disclose? This is when a litigant should resort to make an application for Specific Discovery under Order 24 Rule 7 of the Rules of Court 2012.

As spelt out in its name, the device of Specific Discovery allows a litigant to apply for a Court Order to compel the other party to produce specific documents which:

a. the litigant knows are in the other party's possession.

b. are relevant.

c. are necessary.

Unlike a pre-trial discovery, a litigant must also prove that the documents applied through a Specific Discovery application are ***necessary***.

Necessity test

As daunting as this may sound, the necessity test is not a hurdle to deter a litigant from making an application for Specific Discovery. In fact, the purpose of the necessity test is to ensure that relevant documents are only ordered to be disclosed when the discovery is:

a. necessary to save costs;

b. necessary to ensure a fair disposal of the claim;

c. necessary at that stage in litigation.

In short, if a litigant knows that a relevant document is in the possession of another party and the disclosure of the document at that stage of the proceedings is necessary to save costs (i.e reducing the disputed issues at trial) and/or to ensure the fair adjudication of the claim, then the litigant should make an application for Specific Discovery of the said document.

Timing of an application for Specific Discovery

If a litigant knew from the outset (before parties exchange documents through pre-trial discovery) what documents within the other party's possession he/she wishes to inspect, can the litigant make an application for Specific Discovery without waiting for the pre-trial discovery?

This boils down to one simple question: when is the right time to make an application for Specific Discovery of document?

As the saying goes: "*timing is all about being in the right place at the right time. It's all about having a good intuition for when the time is ripe to make a move*".

Recently, we represented our client in resisting an appeal brought by the adverse party where the lower Court dismissed the adverse party's application for Specific Discovery of document against our client. One glaring infirmity in the adverse party's application for Specific Discovery in the lower Court was that the application was made before parties exchange documents pursuant to the Court's pre-trial directions.

At the Appellate Court, the learned Judge dismissed the adverse party's appeal and affirmed the lower Court's decision to dismiss the adverse party's application.

In delivering His Lordship's judgment, His Lordship highlighted that the reason the appeal was dismissed was because the adverse party's application was **pre-mature**. It was **unnecessary** for the Court to make any Order for Specific Discovery at that juncture. The adverse party should wait and see if the requested documents will be disclosed during the pre-trial discovery stage. If the documents are not disclosed, then the time is ripe for the adverse party to make an application.

As such, correct is the saying that "*timing is everything*" and the same can be said in the context of an application for Specific Discovery.

Specific Discovery in Maritime Claim

Whilst an Admiralty and Maritime claim may be subject to a different set of rules under the Rules of Court 2012, the rules in relation to Discoveries and Specific Discoveries apply squarely to Admiralty and Maritime claims.

Given the specificity and nature of a Maritime Claim where some governing principles within the admiralty law may be traced back a long way, the notion of "*relevance*" may not be the most straightforward notion to determine at times.

Custom of trade/agreed practice

Recently, we represented our client in a Maritime claim to claim compensation from two adverse parties for mis-delivery of cargoes. In the simplest terms, a mis-delivery of cargo occurs when a shipper releases a cargo without the presentation of an original bill of lading.

In the claim, the adverse parties argue that they did not mis-deliver the cargoes because there is a "***custom of trade/agreed practice***" where a specific type of cargo delivered between a specific sea-route could be delivered without the presentation of the original bill of lading.

In law, for there to be a "***custom of trade/agreed practice***", the alleged "custom of trade/agreed practice" must be so **notoriously** established in the industry **and all players** in the industry must be bound by it.

Therefore, for the adverse parties to justify that there was a "*custom of trade/agreed practice*" to exonerate themselves from our client's claim, what the adverse parties (being part of the industry) have done to the bills of lading for all other similar type of cargo they delivered through the same sea-route became "relevant" to the disposal of our client's claim.

As such, at the Admiralty Court, our client made an application for Specific Discovery for those correspondence in relation to the specific type of cargo carried and delivered by the adverse parties on the said sea-route within a span of 10 years, particularly:

a. requests made by the adverse parties to collect the bills of lading issued for the carriage of the specific type of cargo.

b. bills of lading that have been collected by the adverse parties upon or following delivery of the specific type of cargo to their receivers.

The Admiralty Court disagreed with our client. The Admiralty Court was of the view that those correspondences only reveal the adverse parties' own practices and the documents will not reveal the industrial practice (a *custom of trade/agreed practice*).

The matter did not rest there as our client lodged an appeal against the Admiralty Court's decision. At the appeal, the Court of Appeal agreed that:

a. the adverse parties are part of the shipping industry.

b. if there truly was a custom of trade/agreed practice, the adverse parties should also be bound by the said custom of trade/agreed practice. As such, the adverse parties' own practice should also reflect the said *custom of trade/agreed practice*.

c. there is a necessity for the adverse parties to produce the requested documents within the span of 10 years. This is because if there truly was a custom of trade/agreed practice, the *custom of trade/agreed practice* must be so notoriously established that it traces back long in time.

On these grounds, the Court of Appeal allowed our client's appeal and ordered the adverse parties to disclose all 10 years' worth of the requested documents to our client.

Conclusion

Documents form a significant part of documentary evidence in supporting a case at Court. Particularly in Maritime claims where documents represent the lifeline of that litigation, the importance of documents and documentary evidence cannot be underestimated.

As such, if there is a relevant document which could help prove a litigant's case and/or undermine the adverse party's claim, the document is in the possession of the adverse party but the adverse party refuses to disclose during the pre-trial discovery stage, the litigant should make an application for Specific Discovery for those documents.

As long as the litigant could prove that the requested documents are **relevant** and **necessary**, the Court will order the adverse party to disclose those requested documents even if the documents go up to tens of thousands of documents.

What's up next?

In this Part One article, we have discussed about Discovery of documents **after** a claim has been filed. In Part Two of this **Three Part Series**, we will discuss about what can a potential claimant do to obtain documents/information to formulate a claim if the potential claimant still does not know:

a. whether he/she has a valid claim; or

b. who to sue.

[1]We will discuss about different types of legal privileges in our next article.

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