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Note on the Discovery Obligation in Jersey litigation

Introduction

Cases can stand or fall by virtue of the information contained in the documentary record. Arguably, therefore, the most important stage of any litigation is discovery, namely the process by which each party makes available to the other all documents that it holds relevant to the matters in issue.

Discovery usually takes place after the closure of pleadings. Specific rules concerning discovery are set out in the Royal Court Rules 2004 as amended ("the Rules"). Under the Rules, the Court may order any party to give to the other a list of documents which are or have been in his possession, custody or power relating to any matter in question in the cause or matter and to verify such list by affidavit.

Documents

The word "documents" refers to anything on which information is recorded and can range from paper records and computer databases, discs and storage devices through to diaries of key personnel, photographs and films and even video and audio tapes. Where documents are stored both on paper and electronically (for example, email) both electronic and hard copies are discoverable. The distinct advantage of the electronic record is the fact that it also contains metadata, which can provide vital clues as to when a particular document was first created, by whom, when last modified and so on.

The obligation to give discovery is a continuing obligation. Therefore, if relevant documents were to emerge during proceedings or after a list of documents has been produced, such documents must be disclosed by way of a supplemental list. In view of the paramount importance of a party complying with its discovery obligations, it is advisable when litigation is instituted or contemplated to send an internal memorandum to all relevant staff notifying them of the need to exercise caution in relation to the creation, preservation and storage of documents. We can assist clients in relation to the formulation of such a communication.

Relevance

A document is discoverable if it relates to any matter in question in the cause or matter. In practical terms, the issues between the parties to litigation will be determined by the content of the pleadings. The Peruvian) Guano test of relevance remains applicable in Jersey, since Jersey's rules of civil procedure are closely modelled on the Rules of the Supreme Court before the Woolf reforms. Thus, a document will relate to the matters in question in the action, and therefore be discoverable, if it is reasonable to suppose that it contains information which may M not which must M either directly or indirectly enable the party requiring discovery either to advance his own case or to damage the case of his adversary, or if it is a document which may fairly lead him to a train of enquiry, which may have either of these two consequences. It is possible for the Court to limit discovery to a particular class or category of documents.

Possession, custody or power

Possession means the right to possession of a document. Custody means the actual physical holding of a document regardless of the right to possession, for example a holding of a document by a party as servant or agent of the true owner. The question of whether a particular document is within a party's "power" is more complicated. A document can be said to be within the power of a party if that party has "a) presently) enforceable) legal) right) to) obtain) from) whoever) actually) holds) the) document) inspection) of) it) without) the) need) to) obtain) the) consent) of) anyone) else" (Lonrho) v) Shell) [1980] 1 W.L.R. 627). In Lonrho, the House of Lords held that documents in the possession of subsidiary companies were not in the "power" of their parent companies, since the parents had no presently enforceable legal right to obtain the subsidiaries' documents without their consent.

List and Verifying Affidavit

The standard form to be adopted in relation to the list of documents is set out in Practice Direction 05/4. The list is divided into two schedules. The First Schedule comprises of two parts: Part 1 lists the documents which each party has in its possession, custody or power and which it will produce to the other parties for inspection; Part 2 describes in more general terms documents in respect of which the party claims exemption from production on the grounds of privilege. The Second Schedule lists documents which the party had, but which are no longer in its possession, custody or power. Examples of such documents would be the originals of letters sent to other parties.

Jersey is unusual in that it requires the accuracy of the discovery list to be verified by sworn affidavit in the prescribed form (as set out in the Practice Direction). In respect of companies, the affidavit will usually be sworn by either the company secretary or by a director with knowledge of the action.

At the trial of the matter, the deponent of the affidavit may well be cross-examined and any deficiency in the list of documents will be exposed to forensic scrutiny which could be damaging both reputationally for the individual / company concerned and damaging in terms of the prospects for that party in the main action.

The Rules provide that the party receiving the list must be allowed to inspect all listed documents (which are not privileged) and to take copies within 7 days.

Legal Privilege

There are two types of legal privilege – legal advice privilege and litigation privilege. Legal advice privilege relates to communications between (i) a lawyer in his professional capacity and (ii) his client. Such communications are privileged from production if they are confidential and for the purposes of seeking or giving legal advice. In view of the greatly expanded role of lawyers as advisers, the advice given must be directly related to the lawyer's performance of his professional duty as the client's legal adviser, in other words where the lawyer is (as Lord Rodger put it) "wearing) his) legal) spectacles" when giving advice (Three) Rivers) District) Council) v) Bank) of) England (No. 6) [2005] 1 A.C. 610). Legal advice privilege will not cover, however, situations where lawyers advise clients on matters of business such as investments or financial policy, as such advice may be lacking a "relevant)legal)context".

Lawyers include inMhouse and foreign lawyers provided they are working as lawyers and not as employees or executives performing a business role. The privilege only extends to the lawyer advising his client; communications between the lawyer and third parties (not being the agent of the client or the lawyer for the purposes of such communication) will not be privileged. For example, a letter to the company's auditors advising them of the client's legal affairs may not be advice to the client, the auditor being independent of the client, and hence the letter in the auditors' hands will not be privileged.

Litigation privilege concerns communications made after litigation is commenced or contemplated between (a) a lawyer and his client, (b) a lawyer and his nonprofessional agent or (c) a lawyer and a third party, for the sole or dominant purpose of such litigation. Again, it is necessary that such communications be confidential. The basis of litigation privilege is not simply that the documents have been brought into being for the purposes of litigation but "because of the light they might cast on the client's instructions to the solicitor or the solicitor's advice to the client regarding the conduct of the case or on the client's prospects" (Re)Barings Plc [1998] A All E.R. 673.

Applications for specific discovery

There is no express provision governing applications for specific discovery in the Rules. However, the Court has jurisdiction to make orders for specific discovery. The leading authority is the Court of Appeal in Victor Hanby Associates Ltd v Oliver (1990) JLR 337 which provides that the party seeking specific discovery must persuade the court that, despite the affidavit verifying the list, his opponent has not complied with the order. In order to establish such an application, the applicant must show "by evidence on oath, not only a "prima facie" case that his opponent has, or has had, documents which

have not been disclosed, but also that those documents must be relevant to matters in issue in the action". If the applicant establishes merely that the documents may or may not be relevant that would not be sufficient to persuade the Court to disregard the oath of the party who, having seen and examined the documents with the assistance of his advocate, has sworn, in effect, that they are not relevant.

The Royal Court has recently considered the duty on a party's advocate in relation to the discovery process in circumstances where for pragmatic and / or practical reasons, the file review is undertaken by professional third parties. In Alhamrani (Jersey Unreported, 4 June 2008) the Court noted as follows: "In practice, the principal role and obligation of any solicitors and advocates in a similar situation is to do their best to ensure that those engaged in the primary document gathering exercise have an understanding of what it is that they are supposed to be looking for and of the nature and extent of the obligation on a party to make discovery of documents; to satisfy themselves as best they can that the ensuing exercise is carried out effectively which, to some extent, will depend on the nature and extent of the client's organisation; to bring a critical eye to the assessment of the materials with which they are supplied for the purpose of discovery; and to be astute to detect whether there appear to be other potentially discoverable documents or classes of document that may exist but have not yet been located or produced to them by their client."

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