



Guide to Discovery in Proceedings in the Grand Court of the Cayman Islands

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PREFACE

This Appleby Guide outlines the obligations of parties to litigation in the Grand Court of the Cayman Islands to preserve and disclose relevant documents during the course of the proceedings. It also advises on the limited extent to which documents obtained from others during the course of the proceedings can be used, and on the sanctions for misuse. This Guide deals with the obligations of discovery in general terms. Advice should always be taken on the application of the general principles to any given case.

Appleby
August 2010

1. Introduction

“Discovery” is the term given to the stage of the litigation process when each party is required to disclose to the other the existence of all documents relevant to the issues in the litigation, regardless of whether those documents support the case of the party disclosing them. In cases where large numbers of documents are involved, discovery is likely to be a lengthy exercise involving a significant amount of time. It is nonetheless essential that it is carried out conscientiously since it can determine the success or failure of a party’s case and the parties’ attorneys are under a duty to the Court to ensure that it is done properly.

Discovery in Grand Court proceedings is governed by Order 24 of the Grand Court Rules 1995.

The Grand Court Rules require all the parties to prepare and exchange a List of Documents following the close of pleadings (ie usually after the defendant(s) have filed their Defence). Each party then has the opportunity to inspect documents on the other party’s List.

2. Discoverable Documents

Each party is required to disclose the existence of those documents which are, or have been, in his possession, custody or power (see below) and which relate to any matters in question in the action. It should be noted that there is a requirement to disclose the existence of all relevant documents. It matters not that a document is prejudicial to a party’s case; it must still be disclosed if it is relevant. A party cannot choose which documents to disclose.

In addition, any document referred to in a pleading or affidavit is immediately discoverable, but should also be included in the formal List of Documents in due course.

In the context of discovery, “documents” includes anything on which information is recorded in an intelligible manner. This includes all forms of paper documents, including photographs, plans, drawings, video and sound recordings, micro-filmed records and diaries. It also includes electronic documents including e-mails, other electronic documents and data contained on blackberries or mobile phones.

In relation to electronic documents, “metadata” showing, for example, when the document was created and accessed, will often be available. In some cases, in particular if there is a dispute as to when a document was created and by whom, this data may be discoverable in addition to the document itself.

Even if electronic documents have been deleted they may be recoverable and, if they are sufficiently relevant, a party’s discovery obligations may extend to recovering them. In order to avoid having to incur the costs of recovering deleted documents, parties should ensure that relevant documents are not deleted in the first place.

(a) Relevance

A document is relevant if it relates to the matters in question in the action, defined by reference to the allegations made in the pleadings. Relevance is widely construed and documents that might not ordinarily be thought relevant often have to be disclosed. A document is relevant if it may assist one or other of the parties, however slightly, to advance his own case or damage his opponent’s in relation to any issue, or if it may lead to a train of enquiry which may (indirectly) have that result. Note that such a result need not be inevitable: if disclosure of the document may have that result, disclosure must be made.

There are limits to the documents which will be considered relevant. The matters in question in the action are those defined in the pleadings. Accordingly, a plaintiff cannot seek discovery from a defendant of documents relating to an allegation against the defendant that does not appear in the Statement of Claim or subsequent pleadings. That would be to “fish” for documents in the hope of finding sufficient grounds for mounting a claim he has not been prepared to put forward formally. “Fishing” is not permitted.

Documents which shed light on the amount of damages claimed should also be disclosed. So, where a claim for breach of contract is made and expenses have been incurred in consequence of the breach of contract, all documents evidencing those expenses (receipts and time-sheets etc) should be preserved and disclosed.

(b) Possession, Custody or Power

A party must disclose all documents that are or have been in his “possession, custody or power”. This means that documents must be disclosed if a party has physical possession of them (whether or not he has a right to possess them), or if he could obtain them by enforcing some right to possession. Thus, the documents of a party’s agent (such as an insurance broker), which the agent can be compelled to release, must be disclosed. Documents of an associated company may not have to be disclosed and this should be checked with an attorney before such documents are collected.

The discovery obligation extends to the disclosure of the existence of documents that used to be in a party’s possession, custody or power. So if documents have been lost or have been disposed of in the course of routine destruction of files prior to litigation, those documents must be described and an explanation given of the circumstances in which they were lost or disposed of.

3. Preservation of Documents

It is important to preserve intact all relevant documents from the time litigation is contemplated. If you have a routine procedure for destruction of documents, this should be stopped until the documents have been examined by your attorneys and confirmed to be non-discoverable. Documents of any possible relevance to a pending action (including emails and other electronic documents, manuscript notes and diaries including electronic diaries) must not be destroyed. It is important to ensure that all persons within an organization who may have relevant documents are aware of this.

4. Duty to Search for Documents

There is a positive duty to search for all relevant documents. Scrupulous care should be taken to ensure that all documents of possible relevance to the proceedings are identified and located at the earliest opportunity. A party’s credibility may be seriously weakened if it transpires that he had destroyed or failed to disclose a relevant document, whether or not his omission was deliberate. Damaging documents should not be destroyed under any circumstances.

The following are pointers towards ensuring that all relevant documents are disclosed:

(a) Paper documents

- If a business operates from more than one place, each location should be checked for documents.
- If relevant files have been put into storage, these should be retrieved.

- If, in addition to, or instead of, a central filing system, staff or management keep files of their own, those people should be asked to make their files available.
- Where a document is recorded as having been distributed to a number of people within the organization, all the copies should be located; manuscript notes on copies are frequently important.
- Where meetings have taken place, several people may have made their own notes of the meeting and these should be located.
- Diaries kept by staff or management should be located.

(b) Electronic documents

- As well as the organization’s central server and back-up system (if appropriate), the hard drive and email accounts of each person who is likely to have relevant documents should be searched, as well as their mobile telephones, blackberries and other handheld devices.
- In cases involving very large numbers of electronic documents, the most cost-effective solution is likely to be to instruct an external e-discovery support provider to upload all potentially relevant documents onto a web accessible review platform. Such platforms allow easy searching and are likely to save time and costs in the long run in document-heavy cases.
- Although the obligation is to disclose all relevant documents, this is subject to the Court’s overriding objective of dealing with cases in a proportionate manner. In cases involving large numbers of electronic documents, time and costs are likely to be saved if, rather than reviewing each document individually, the parties run searches only for certain key words, or search documents over only a certain time period. If this approach is being taken, attorneys should try to agree this in advance with the other party, and if it is not possible to reach agreement directions should be sought from the Court.

It is advisable for the party and his attorneys to discuss the logistics of the discovery process at an early stage, as soon as litigation appears likely. It is important that arrangements are put in place to ensure that copies of all relevant documents are provided to the party’s attorneys in sufficient time to enable them to review them and compile a List of Documents in accordance with the Court’s timetable.

5. List of Documents

A party’s discoverable documents must be set out in a List of Documents (the “List”). The List follows a particular form: it will distinguish between documents which a party now has in his possession, custody or power (Schedule 1) and those which he used to have in his possession, custody or power (Schedule 2); and also between (i) those which are not privileged (Schedule 1 Part 1), (ii) those which are (Schedule 1 Part 2), and (iii) those which are confidential and require that a party make an application under the Confidential Relationships (Preservation) Law (2009 Revision) (“CRPL”) before such materials may be inspected (Schedule 1 Part 3). CRPL issues are dealt with further below in Section 9.

The List will give each document a reference number, will specify its date and will give a short description (eg “14. Copy letter-Smith to Jones-1.12.10”), distinguishing between originals and copies. Where there are a great

many similar documents (such as invoices), the rules permit such documents to be bundled and paginated without being individually described.

6. Inspection

Documents whose existence is disclosed to the other side in Schedule 1 Part 1 of the List will normally be subject to inspection by the other side.

Inspection normally takes place immediately following the exchange of Lists. Each party is entitled to inspect and ask for copies of the other party's documents, except for documents which are "privileged" (see below).

7. Privilege

Certain documents, although relevant, may be withheld from the other party on the ground of privilege. Their existence will still be disclosed by being referred to in general terms in Schedule 1 Part 2 of the List, but they will not be subject to inspection. Whether or not a document is privileged can be a matter of contention between the parties. It is often necessary for attorneys to give careful consideration to whether particular documents are privileged. For present purposes, it is sufficient to say that the following categories of documents will be privileged:

- Correspondence between a client and his attorneys, whether or not connected with the litigation, which is confidential and written for the purpose of giving or obtaining legal advice (including correspondence with in-house attorneys, unless it relates to administrative matters and not legal advice).
- Correspondence between a party's attorneys and third persons, where that correspondence is in connection with the litigation (other than open correspondence with the other party's attorneys).
- A party's attorneys' file notes, drafts, instructions and briefs to counsel, and counsel's opinions and notes.
- Experts' reports and witness statements prepared in connection with the litigation (unless and until disclosed to the other party).

The following documents will **not** be privileged:

- Notes regarding the litigation prepared by the party for internal purposes, **unless** for the purposes of:
 - (i) reporting when strictly necessary to others within the party's organization on advice received from attorneys; or
 - (ii) seeking information requested by attorneys.
- Board minutes recording discussion of the proceedings (unless for the purposes described above).
- Notes to the published accounts concerning the litigation and any provision for the proceedings in the accounts (whether or not privilege ever existed, it will have been waived by inclusion in the published accounts); and related correspondence with accountants.

- Written communications between a party and outsiders (such as the party’s parent company or subsidiary, the police and other authorities, insurers and professional advisers other than the party’s own attorneys), or written notes recording such communications, **unless** such documents came into existence for the dominant purpose of obtaining legal advice in connection with existing or contemplated proceedings.

Some general guidelines may be observed:

- Internal notes and memoranda are not privileged just because they are internal.
- Documents are not privileged just because they contain confidential information.
- Marking documents as “privileged” or “confidential” may be a useful thing to do for other purposes (for example to ensure they are not disclosed by mistake), but it does not determine whether in fact those documents are privileged or confidential.
- It should not be assumed that, once legal proceedings are begun, all documents that then come into existence are privileged. Great restraint should be exercised in creating documents relating to the proceedings once the matter has become (or looks likely to become) litigious. Wherever possible, communications with outsiders should be made orally or through attorneys. Where such documents have to be created, they should be either for the purpose of essential internal reporting on advice received from attorneys or for the purpose of assisting the attorneys to conduct the litigation (for example, passing on requests for information). It may then be helpful to mark such documents “privileged” so as to keep them distinct and thus reduce the risk of their being disclosed by accident.
- Great restraint should be exercised in obtaining documents or copies from third parties of use in the litigation. They may not be privileged. Collecting such documents should ordinarily be left to attorneys.
- It is possible to waive privilege in a document unintentionally by disclosing it (or part of it) to third persons.

8. “Without Prejudice” Documents

Documentation, particularly correspondence, which arises in connection with settlement negotiations will normally be, and ought to be, marked “without prejudice”. This means that such documentation cannot be produced to the Court by either side. Such documentation is, to that extent, treated as privileged. The presence or absence of a “without prejudice” marking on a document does not determine its status: that depends on whether it is genuinely part of settlement negotiations. A party should not enter into any such negotiations without first consulting his attorney(s).

9. CRPL Issues

Confidentiality is not a ground in itself to refuse disclosure. However, where documents fall within the scope of CRPL, the party giving discovery may have to seek directions from the Court before proceeding to disclose documents containing such information.

CRPL relates to confidential information held by professionals in the course of conducting professional business in the Cayman Islands.

“Confidential information” is defined as information relating to property which the recipient is not, otherwise than in the normal course of business, authorized by the principal to divulge. This would include, for example, information held by banks about their customers’ accounts.

The existence of documents containing confidential information will still be disclosed by being referred to in Schedule 1 Part 3 of the List. They will not, however, be subject to inspection unless the Court has so ordered on an application under the CRPL.

Whether or not the Court will order disclosure of the documents covered by the CRPL is a matter of judicial discretion. In appropriate cases, the Court may order disclosure and/or inspection on a restricted basis.

10. Continuing Obligation

The obligation to disclose relevant documents to the other party continues after the List is served. Sometimes relevant documents do come into existence, or are found, after the List is served, such as those relating to the amount of damages claimed (for example, the final account in a building contract, where the claim is for the cost of remedial works). Such documents are normally disclosed in a supplemental List or in a letter to the opposing party’s attorneys.

11. Misuse of Documents

Documents and information derived from documents obtained from an opponent on discovery are to be used only for the purpose of the proceedings. They must not be shown or given to third persons or used to assist in developing one’s own business or for any other extraneous purpose. It is essential that this warning is brought to the attention of all members of staff who have any involvement with the proceedings or to whom documents obtained on discovery (or information derived from them) may be communicated. Misuse, even if unintentional, may amount to a contempt of Court. This rule applies equally to documents and information obtained from an opponent or from a third party at any stage of the proceedings as a result of a Court Order requiring the production of documents. It ceases to apply once a document has been read or referred to in open Court, unless the Court orders otherwise for special reasons.

12. Sanctions

If a party is dissatisfied with the extent of his opponent’s discovery, he can press him for further documents. If necessary, an appropriate order can be obtained from the Court requiring a party to give further discovery and/or verify the accuracy of his List on affidavit. Failure to comply with such an order can amount to contempt of Court and may have serious consequences including dismissal of a party’s claim or judgment in default being entered against him.

For more specific advice on Proceedings in the Cayman Islands, we invite you to contact one of the following:

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