

## Discovery and Inspection of Documents under the Malaysian and English Civil Procedure: A Study on Cases against the Internet Service Providers

<sup>1</sup>Duryana Mohamed

<sup>2</sup>Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia, Malaysia

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**Abstract:** In civil procedure, parties are allowed to gather relevant documents before the trial. The parties may use any of the four methods namely, Discovery and Inspection of Documents, Interrogatories, Admission and Anton Piller Order. These methods are provided by the Rules of Court 2012 (Malaysia). While in the UK Civil Procedure Rules 1998 methods of gathering documents include depositions and exchange of witness statements. However, in choosing the most appropriate method the parties need to consider whether they are able to satisfy the requirements for method to be used. In discovery process, the plaintiff or the party needs to satisfy the court that the documents to be discovered are relevant and they are in the possession, custody or power of the opposite party. Meanwhile the opposite party is expected to comply with the court order for discovery by providing relevant documents or information. This paper attempts to discuss the process of discovery in Malaysia and United Kingdom by studying how the process works against the Internet Service Providers (ISPs) in both countries. The discussion will also include types of documents or information, which are discoverable and not discoverable from the ISPs and the effect of non compliance with the court order. For this purpose, the author will refer to the relevant laws, procedures and decided cases available in both countries.

**Key words:** Discovery, documents, information, court rules, the Internet service providers

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### INTRODUCTION

Discovery and inspection of documents refer to the process of gathering relevant documents from the opposite party before the trial. This process may be adopted by any of the parties when preparing and completing their case. It becomes effective after the court grant the order for discovery. The Rules of Court 2012(RC) and the Civil Procedure Rules 1998 (CPR) provide a specific provision on discovery and explain how the process is conducted. However, the UK CPR has been reviewed and updated in 1998 by inserting a specific provision on disclosure of electronic documents. This provision is not included in the RC 2012 passed in August 2012. Nevertheless, both court rules provide that the parties using discovery method have to satisfy certain requirements for discovery particularly on the relevancy of documents or information. There shall be no fishing expedition or attempt to discover unrelated documents. In some cases, the court may order the ISPs to produce relevant documents, which in turn will either comply with the court order or raise objection against the discovery request. Hence, this paper will attempt to discuss on how discovery and inspection of documents is conducted against the ISPs under the above court rules, the types of documents or information, which are discoverable and not discoverable from the ISPs and the effect of non compliance with the court order. In order to further understand the process, the author will refer to relevant decided cases in both countries.

### MATERIALS AND DISCUSSION

#### ***Definition Of Discovery And Inspection Of Documents:***

Discovery or disclosure of document is not defined in the Rules of Court 2012 (RC) or the Civil Procedure Rules 1998 (CPR). However, the definition can be referred to several decided cases. According to Menzies J in *Mulley v Manifold* [1959] 103 CLR 341 at p345,

“Discovery is a procedure directed towards obtaining a proper examination and determination of these issues - not towards assisting a party upon a fishing expedition. Only a document which relates in some way to a matter in issue is discoverable, but it is sufficient if it would, or would lead to train of inquiry which would, either advance a party’s own case or damage that of his adversary.”

The above statement emphasises that discovery or disclosure should be conducted on relevant documents only and with the intention to determine certain issues. There shall be no fishing expedition or discovery of unrelated documents. The need to fulfill principles for discovery is also mentioned in *Yekambaran Marimuthu v Malayawata Steel Berhad* [1994] 2 CLJ 581 at 585. (HC, Penang)]. The plaintiff in this case has applied for discovery of medical reports and his excess Employees’ Provident Fund contributions from his former employer (the defendant) who has wrongly dismissed him. Edgar Joseph Junior SCJ (as he then was) held that it was

**Corresponding Author:** Duryana Mohamed, Assistant Professor, Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia, Malaysia  
E-mail: mduryana@iiu.edu.my

indisputable that the items sought were documents and were in the possession, custody or power of the defendant. The application for discovery was allowed because only by obtaining the relevant documents could the plaintiff proceed with his action. He further stated that the essential elements for an order for discovery in Order 24 RHC 1980 (previous court rules) are threefold, namely first, there must be a 'document', secondly the document must be 'relevant' and thirdly, the document must be or have been in the 'possession, custody or power' of the person against whom the order for discovery is sought. (Malaysian Court Practice, 2004). Thus, in seeking for discovery, the parties must ensure that documents listed in the List of Documents (Form 38 of the RC) are in the other parties' possession, custody or power and they are not privileged documents. These are the requirements for discovery process.

The purpose of discovery is to provide the parties with all the relevant documentary evidence in each party's possession and to avoid trial by ambush or element of surprise. However, the process could also be used as mechanism to delay, harass as well as driving the other party into either financial exhaustion or early settlement. (Duryana, 2008 & 2011) Since discovery involves the process of gathering relevant document it is appropriate to understand the meaning of 'document' itself.

According to section 3 of the Evidence Act 1950 (EA)(Malaysia) the word 'document' refers to 'any matter expressed, described, or howsoever represented, upon any substance, material, thing or article, including any matter embodied in a disc, tape, film, sound track or other device whatsoever,' by various means including by means of '(c) any sound recording, or any electronic, magnetic, mechanical or other recording whatsoever, and howsoever made, or any sounds, electronic impulses, or other data whatsoever' while section 29(1) and (2) of the Penal Code (Malaysia) defines 'document' as 'a matter recorded, stored, processed, retrieved or produced by a computer.' Further, the Rules of Court 2012 (RC) defines 'document' as 'anything in which information of any description is recorded and includes a claim, summons, application, judgment, order, affidavit, witness statement or any other document used in a Court proceeding'. (Order 1 rule 2 of RC). On the other hand, the UK Civil Procedure Rules 1998 (CPR) defines 'document' as 'anything in which information of any description is recorded' (Part 31.4). This definition extends to electronic documents which include electronic messages (email) and other electronic communications (Practice Direction 31A:2A of CPR). (Duryana, 2012)

Meanwhile, the Oxford Dictionary defines 'information' as 'facts provided or learned about something or someone or what is conveyed or represented by a particular arrangement or sequence of things or genetically transmitted information which also includes data processed, stored, or transmitted by a computer. (The Oxford Dictionary available at <http://oxforddictionaries.com/definition/english/information?q=information>). In short, document refers to anything or whatever information recorded, stored, processed, retrieved or produced by a computer or by any means. The document may contain information which is also available in electronic format or known as 'electronically stored information' (ESI). This ESI may be found in places such as network servers, backup tapes, voicemail and e-mail systems, disks, hand-held computerised personal organisers and personal home computers. The email contents, Wall posts, private email messages and many others are considered information. (Duryana, 2012) When discovery is conducted on ESI the term used to describe this process is electronic discovery or e-discovery.

#### ***Discovery of documents under the Rules of Court 2012:***

In Malaysia, the High Court has power to order for discovery. This provision is clearly mentioned by section 25 (2) and Para 14 of the Courts of Judicature Act 1964 (CJA). Para 14 expressly requires that these powers are to be exercised in accordance with any written law or rules of court relating to the same. According to Order 24 rule 3 of the RC 2012, discovery of document is only allowed upon application by any party to the case and after the court making discovery order. (Rules of Court 2012 available at <http://www.kehakiman.gov.my/sites/default/files/document3/Banner/BI.pdf>) The Rules of Court 2012 provides certain forms in discovery procedures and this will be explained in the following discussion.

#### ***Discovery of documents under the Civil Procedure Rules 1998:***

In the UK, discovery method has been practiced since the Nineteenth Century by the English equity procedures. This English civil procedural law had been amended several times before the coming into force of the Civil Procedure Rules 1998 (CPR). In 1995, the CPR was amended to include specific provision on discovery (called 'disclosure' in UK). Part 31 of the CPR allows disclosure and inspection of document. (Part 31 of CPR- Disclosure and inspection of document; Practice Direction 31 available at [http://www.dca.gov.uk/civil/procedurerules\\_fin/contents/practice\\_directions/pd\\_part31.htm](http://www.dca.gov.uk/civil/procedurerules_fin/contents/practice_directions/pd_part31.htm))

This part provides that a party discloses a document by stating that the document exists or has existed. This part also limits disclosure to Standard disclosure. Part 31.6 states that, Standard disclosure requires a party to disclose only—

- a) the documents on which he relies; and
- b) the documents which—
  - (i) adversely affect his own case;

- (ii) adversely affect another party's case; or
- (iii) support another party's case; and
- (c) the documents which he is required to disclose by a relevant practice direction.

The above provision is quite similar to Order 24 rules 7 and 12 of the RC 2012. Apart from this Rule there is a good faith discussion between the counsels. This session will help the counsels or e-discovery practitioners to manage the scope of documents that need to be produced during discovery process. The disclosure of electronic documents extends to disclosure of e-mails and other electronic communications, word processed documents and databases. This includes metadata and even deleted documents. Further, under s2A.2 and s2A.3 of the Practice Direction to Part 31, parties are required to discuss any issues that may arise regarding searches for and the preservation of electronic documents before the first case management conference. Additionally, the parties are also required to co-operate at an early stage as to the format in which electronic copy documents are to be provided on inspection. The above provisions are very specific and provide a clear explanation on electronic documents. (Duryana, 2012) In fact, discovery may also be conducted in stages and this approach was allowed in Singapore.

The court may also order for discovery of documents in cases relating to judgment debt. In 2012, the Court of Appeal (CA) in *North Shore Ventures Ltd v Anstead Holdings Inc* (2012 EWCA Civ 11) has ordered the appellants to produce documents to North Shore pursuant to CPR 71.2(6). The documents in dispute relate to trusts, which the appellants established and under which they were discretionary beneficiaries. They say that they have no such documents in their possession or control. The CA dismiss the appeal on the basis that in particular circumstances of this case the judge was entitled to regard the documents as being in the control of the appellant.

The CPR is different from RC 2012 when there is a provision on Rule 31.22. This provision refers to the use of e-documents in disclosure process. It also explains on the subsequent use of disclosed documents and completed Electronic Documents and Questionnaires. The Rule reads as follow:

(1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where—

(a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;

(b) the court gives permission; or

(c) the party who disclosed the document and the person to whom the document belongs agree.

(2) The court may make an order restricting or prohibiting the use of a document which has been disclosed, even where the document has been read to or by the court, or referred to, at a hearing which has been held in public.

(3) An application for such an order may be made—

(a) by a party; or

(b) by any person to whom the document belongs.

[(4) For the purpose of this rule, an Electronic Documents Questionnaire which has been completed and served by another party pursuant to Practice Direction 31B is to be treated as if it is a document which has been disclosed.]

#### ***Discovery against the ISPs in Malaysia and the United Kingdom:***

There is no specific definition for ISPs. However, ISP may be referred to 'a company that provides individuals and other companies' access to the Internet and other related services such as Web site building and virtual hosting.' (Internet Service Providers: Glossary available at <http://whatis.techtarget.com>) Among the ISPs in the UK are AT & T WorldNet, IBM Global Network, MCI, Netcom, UUNet and PSINet. British Telecommunications plc (BT) is the UK largest broadband. While the top ten ISPs in the UK are XILO, Fast.co.uk, AAISP, SurfAnyTime, ICUK, Zen Internet, Aquiss, IDNet, and Vispa. These ISPs provide internet access to the users who can be of any age and categories. They even have the right to comment on the new law proposed by the UK government. (Mark Jackson, 2012)

While in Malaysia, there are several ISPs namely, Celcom Broadband, izzi, jarring, Maxis Broadband, P1, PenangFON, REDtone, Streamyx, TIMEBroadband, U-Mobile Surf with U and few others. However, TMnet, a subsidiary of Telekom Malaysia, is Malaysia's largest ISP. (ISPs in Malaysia available at <http://www.onestopmalaysia.com/directory/internet/isp/>) Although there is no decided case on discovery against the ISP in Malaysia, if for instance, there is an application for discovery against the ISPs the applicant or the plaintiff should follow the general requirements for discovery. The applicant shall clearly state the relevant documents or information, which is believed to be in the possession, custody or power of the ISPs or the defendant in the List of Documents provided by the RC 2012. The plaintiff should state documents or information needed such as the IP addresses of the internet users. For this reason, the ISPs must keep the information and records of the Internet users properly and they should have a document retention policy. This policy will allow the company to produce relevant documents when requested by the court or the opposite party.

It is quite common for big companies to adopt this policy and keeping records of their clients has been practiced by the companies in both countries. Although keeping clients' records has been the subject of argument by the clients or Internet users the UK government has taken an initiative to propose a new bill to handle this matter. The bill is known as Communications Data Bill. (Irina Bernebring Journiette, 2012)

The ISPS may be sued for illegal activities committed by their internet users. Cases against them include copyright infringement, breach of contractual duty, trademark liability, internet defamation, internet pornography and other types of civil suits. The issue is whether the ISPs should be liable for allowing illegal activities to be committed by their users on the internet. The court decisions pertaining to ISPs' liability are mixed. In certain countries the ISP was held liable for the act of their internet users while in other countries the ISP escapes any liability. (Andy Oram, 1999) In cases of copyright infringement the copyright holders (the plaintiff) will normally sue the ISP for copyright infringement. This is done since the ISP is the provider of the internet or corporate entities with fixed place of business and fixed address. Hence, it is much easier to file suit against them than the internet users whom they cannot trace. The ISPs also have more money to pay the plaintiff than the individual user. The ISPs are expected to cooperate by providing relevant information and this leads to the use of discovery method by the plaintiff against the ISPs. In *Bunt v Tilley and others* ([2006] EWHC 407) the ISPs have applied to strike out claims against them and no order for discovery was made. In this case, the ISP defendants (fourth to sixth) were claimed to be responsible for what have been posted on their website by their clients (first to third) and the claimants sought remedies against all of the defendants including the ISPs. The ISPs refused to be responsible. The court allowed their application for striking out. Eady J. held that '*an internet service provider which performed no more than a passive role in facilitating postings on the internet could not be deemed to be a publisher at common law. It was essential to demonstrate a degree of awareness or at least an assumption of general responsibility, such as had long been recognized in the context of editorial responsibility,.....*'

The above decision shows that the ISPs cannot be held liable for illegal activities committed by their subscribers or any internet users. They may also refuse to produce or disclose any information requested by the plaintiff if they can justify their refusal for disclosure of such information. (Duryana, 2012) In *Golden Eye (International) Limited v Telefonica UK Limited* ([2012] EWHC 723) the plaintiff ("Golden Eye") and thirteen other Claimants claim for a Norwich Pharmacal order against Telefonica UK Ltd trading as O2 ("O2"). O2 is one of the six largest retail internet service providers ("ISPs") in the UK. The object of the claim is to obtain disclosure of the names and addresses of customers of O2 who are alleged to have committed infringements of copyright through peer-to-peer ("P2P") filesharing using the BitTorrent protocol. (P2P filesharing using BitTorrent is described in *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd* (2012 EWHC 268 (Ch) at pp 19-20.) The court held that disclosure is necessary and allowed the Claimants to obtain relevant documents from the ISPs.(Telefonica or O2).

As regards to disclosure of personal data, section 35 of UK Data Protection Act 1998 has stated as follows;

"(1) Personal data are exempt from the non-disclosure provisions where the disclosure is required by or under any enactment, by any rule of law or by the order of a court.

(2) Personal data are exempt from the non-disclosure provisions where the disclosure is necessary –

(a) For the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings), or

(b) For the purpose of obtaining legal advice, or is otherwise necessary for the purposes of establishing, exercising or defending legal rights."

From the above-mentioned cases and the section it is clear that discovery of personal data is allowed if it is done for the purpose of establishing, exercising or defending legal rights. Hence, in cases where the ISPs are being sued for copyright infringement or trademark liability the same rule will apply. The ISPs may refuse to disclose and produce such information if the application for discovery is unreasonable and unnecessary. They may argue that such disclosure and production may threaten their client's right to privacy and security. But it is still subject to the court's discretion either to order for discovery or production of documents. The test is necessity and not fairness, This point was emphasised and decided by the Court of Appeal (CA) in *Nguang Chan aka Nguang Chan Liquor Trader & Ors v Hai-O Enterprise Bhd & Ors* (2009 5MLJ 40). In this case, the CA held among others that '*Under O 24 r 13(1) of the RHC, an order for the production of documents for inspection is not to be made unless the court is of opinion that such order is necessary either for disposing fairly of the case or matter or for saving costs. It is for the party seeking production to satisfy the court that such production is necessary for the purpose specified in r 13(1). The court would dismiss a plaintiff's application for discovery if the plaintiff is merely fishing for evidence to prop up his case and to allow him discovery would be unduly oppressive to the party giving discovery*'.(at p 47)

Other than providing information the ISPs also play an important role in blocking access to certain websites. In April 2012, the UK High Court has ordered British ISPs to block access to The Pirate Bay (TPB). Five ISPs – Virgin Media, TalkTalk, BSkyB, Everything Everywhere and Telefonica – are involved in this case, which was brought by nine record labels. In February, Justice Arnold gave the labels the green light to pursue

blocking orders. Back then, Arnold ruled that the ISPs were jointly liable for infringement: "The operators profit from their activities," he declared, "thus they are jointly liable for the infringements committed by users." (Team Register, 2012) Many ISPs in UK started blocking access to The Pirate Bay (TPB) in May 2012. (Zack Whitaker, 2012)

***Discoverable And Non-Discoverable Document:***

The plaintiff or any party who wants to use discovery method must be able to provide a proper list of discoverable and non-discoverable documents. Discoverable documents refer to documents, which do not contain any confidential information or privileged information, which are available for production and inspection. These documents should be mentioned in Schedule 1, Part 2 of the List of Documents (see Form 38 of the RC). For documents, which are not in the possession, custody or power of the party in question they should be mentioned in Schedule 2 of Form 38. Issues on discoverable documents have been raised in many decided cases in Malaysia but most cases are not against the ISPs. Nevertheless, the principles regarding discoverable documents are still relevant and applicable in any cases related to discovery of documents, electronic or non electronic. For instance, the plaintiff in *K Anandaraj a/l Krishnasamy v Dato' Dr Vijayasingam & Anor* (2005 7 MLJ 120 had applied for discovery of documents against the defendant . The plaintiff alleged that he had a cause of action against the defendants in medical negligence and that the documents were required for the purpose of pleading particulars in the claim, which was to be filed by the plaintiff. However, the learned senior federal counsel for the defendants submitted that: (1) the plaintiff was not entitled to the order sought because the plaintiff had failed to satisfy the conditions for the grant of the order, as the plaintiff was not seeking to discover the identity of the wrongdoers within the principle in *Norwich Pharmacal*; (*Norwich Pharmacal Co & Ors and Customs v Excise Commissioners* [1974] AC 133) and (2) the plaintiff was in no doubt as to the identity of the defendants. (at p123). The court held that the application by the plaintiff was eminently premature and misconceived. The court then rejected the application for discovery by the plaintiff.

Similarly, in *Dr Pritam Singh v Yap Hong Choon* (2007 1 MLJ 31) where the Court of Appeal dismissed the appeal by the appellant/defendant and held that 'opinions of medical reports obtained by the plaintiff are the subject of legal professional privilege and hence protected from pre-trial discovery' (at p34). Thus, 'the defendant is not entitled to have an exchange of the reports of medical experts'. (at p 36) The above two cases have shown that the court has discretionary power to reject or to allow the application for discovery. Further, certain documents may also be withheld from the other party on the ground of legal professional privilege.

***Effect Of Non-Compliance With Discovery Order:***

When the court order for discovery of information or document as prescribed under Order 24 rule 12 of the RC 2012, the party receiving the court order is expected to comply with it. If the party fails to comply with it the court may make order that 'the action be dismissed or order the defence be struck out and judgment be entered accordingly.' (Order 24 rule 16 (1)). Nevertheless, this court order is subjected to any written law or any rule of law, which allows the party so ordered to withhold the documents on the ground that the disclosure or production of those documents would be injurious to the public interest. (Order 24 rule 15).

The party who receives the court order for discovery is expected to comply with that order. The court may order for action to be dismissed, or defence be struck out and judgment be entered accordingly if there is a failure to comply with any requirements for discovery (Order 24 rule16). In *Perbadanan Nasional Berhad v. Syed Omar Syed Mohamed* (2011 1 LNS 96 ) the court ordered the case to be struck out for failure to comply with court order for discovery. In fact, the court order may be limited to certain documents or classes of documents and the order will only be granted if it is necessary and relevant to the cause or matter. Hence, it is very important for the applicant to establish the relevancy of the documents or information. Then, the court will order the production of document for inspection. If the applicant fails to comply with discovery requirements the court may reject the application for discovery. This happened in *ABX Logistics (Malaysia) Sdn Bhd v Overseas Bechtel (Malaysia) Sdn Bhd* (2003 7 CLJ 357) where the court dismissed an appeal by the defendant who applied for discovery and held that the application amounted to fishing expedition. However, this case is not about discovery of documents from the ISPs. Since there is no specific case on this matter, discussion and sources on discovery of documents from the ISPs in Malaysia is very limited and the author has to refer cases involving other parties.

In UK, Rule 31.2 of CPR provides that if any party refuses to disclose documents or permit inspection he may not rely on any document, which he fails to disclose or in respect of which he fails to permit inspection unless the court gives permission. This provision is different from Order 24 rule 16 of the RC 2012 mentioned above.

**Conclusion:**

It is submitted that discovery and inspection of documents in civil procedure is allowed to be implemented against parties to the suit including the ISPs. However, the applicant or the plaintiff who adopts this method must satisfy the requirements for discovery of documents and know what types of documents. Discovery is not allowed if it is not necessary and if it involves non-discoverable documents. Cases cited in this article show non-discoverable documents refer to documents, which are considered as privileged documents. They may include opinion of medical expert or consultant. The ISPs are expected to allow discovery of documents in cases against them. However, they may challenge the court order for discovery on the ground of privileged document or customer's right to privacy. It is to be noted that non-compliance of the court order will result with either dismissal of the case or striking out defence. The court may then enter judgment against the ISPs. In UK, the court had in copyright cases ordered the ISPs to produce documents and comply with court order for disclosure. But in Malaysia until November 2012 there is still no case on discovery of documents against the ISPs.

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