



SM Shanmugam  
**Corporate & Commercial Disputes**  
T: +603 6208 5865  
E: [ssm@lh-ag.com](mailto:ssm@lh-ag.com)

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### **Pre-Action Discovery for Lost Documents**

Yesterday, the High Court dismissed a plaintiff's pre-action discovery for misplaced or lost documents against a defendant company.<sup>[1]</sup>

The defendant company was represented by our partner, SM Shanmugam, and associate, Shona Anne Thomas, from the firm's Corporate & Commercial Disputes Practice.

#### **Brief facts**

Eight years ago, the plaintiff and the defendant company entered into an agreement for the provisioning of cleaning services. Three years later, the plaintiff's services came to an end.

The plaintiff claimed that it required several contractual documents that had since gone missing for the purposes of ascertaining a viable cause of action against the defendant company. Hence, the filing of the pre-action discovery by the plaintiff.

The defendant company argued that the pre-action discovery was premature, an abuse of process and that the plaintiff failed to satisfy the required threshold test. The judge agreed with the defendant company and held, among other things, that the rules<sup>[2]</sup> governing a pre-action discovery do not apply to situations where a party had misplaced or lost its documents.

#### **Significance of decision**

The takeaway from this is that contracting parties need to observe proper documentation practices, as any attempt to recover a lost document by way of a pre-action discovery is not proper. That being said, the pre-action discovery mechanism is a useful tool to a party attempting to identify a potential defendant or for ascertaining a viable cause of action.

#### **Pre-action discovery — What is it?**

A pre-action discovery serves the modest purpose of assisting a potential plaintiff who suspects he has a case, to obtain the necessary information required to commence proceedings.<sup>[3]</sup> In other words, it is an action filed *before* a potential plaintiff commences a claim.

However, this mechanism is not to be used to augment one's case or to add flesh to the bones of the claim. If a claim can be filed without a pre-action discovery, the potential plaintiff ought to file the claim prior to applying for discovery. This would explain why according to case law, pre-action discovery may not relate to contractual parties unless a rare exception applies.<sup>[4]</sup>

Due to the cautious approach adopted by the court in dealing with such actions, a party seeking a pre-action discovery order must also be able to demonstrate why pre-action discovery and *not* discovery in the course of proceedings is necessary.<sup>[5]</sup>

Shona Anne Thomas ([sat@lh-ag.com](mailto:sat@lh-ag.com))

If you have any queries, please contact the author or her team partner [SM Shanmugam](mailto:ssm@lh-ag.com) ([ssm@lh-ag.com](mailto:ssm@lh-ag.com)).

**Lee Hishammuddin Allen & Gledhill**

Level 6, Menara 1 Dutamas  
Solaris Dutamas  
No. 1, Jalan Dutamas 1  
50480 Kuala Lumpur  
Malaysia

T +603 6208 5888  
F +603 6201 0122/0136  
E [enquiry@lh-ag.com](mailto:enquiry@lh-ag.com)  
W [www.lh-ag.com](http://www.lh-ag.com)

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<sup>[1]</sup> Kuala Lumpur High Court Originating Summons No WA-24NCVC-1707-08/2019

<sup>[2]</sup> Rules of Court 2012, O 24 r 7A

<sup>[3]</sup> *Ching Mun Fong v Standard Chartered Bank* [2012] 2 SLR 22 (HC)

<sup>[4]</sup> *Bandar Utama Development Sdn Bhd & Anor v Bandar Utama 1 JMB* [2018] 1 LNS 770 (CA)

<sup>[5]</sup> *Infoline Sdn Bhd (sued as trustee of Tee Keong Family Trust) v Benjamin Lim Keng Hoe* [2017] 6 MLJ 363 (CA)