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THE PROCESS OF GATHERING EVIDENCE IN CIVIL CASES: ITS APPLICATION IN CIVIL AND SYARIAH COURT

by

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Abstract

The process of gathering evidence is also known as a pre-trial process. Its objective is to gather relevant evidence before the trial. This process is very important since both parties must produce only relevant, reliable and authentic evidence in order to establish a reasonable claim or defence. Nevertheless, in civil court the procedures of gathering evidence seems to be more details and applicable to all type of civil cases while in Syariah court the procedures for gathering evidence is quite limited and confined to limited cases only. This is evidence in the relevant procedural rules laid down in both civil court procedure and Syariah court civil procedure. This paper will discuss the above process by referring to the Rules of High Court 1980 and the Syariah Court Civil Procedure (Federal Territory) with the objective of providing relevant information on the process of gathering evidences in civil cases in both courts. The discussion will also examine on the possibility of harmonizing any relevant procedures in the civil procedure rules. It is also hoped that the discussion will provide useful guidelines in enhancing the above process.

Introduction

The procedural law in Malaysia is based on common law practice and procedure. Its history can be traced back to 1808 when the British established the Courts of Judicature in the Straits Settlements.¹ In 1878² the English Civil Procedure Ordinance was introduced to govern procedural matters, followed by the enactment of the Civil Procedure Code in 1907. The Code was however repealed by the Courts Ordinance 1934, which was itself replaced by the Supreme Court Rules 1935 (SCR). The Rules were used as reference until 1957. In the Federated and

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¹ See J.W Norton Kyshe, "A Judicial History of the Straits Settlements: 1786-1890", *Malaya Law Review* 38, 1969, Vol 11, No.1, at 77. The Crown granted the power to the East India Company to set up a Court of Judicature in the Straits Settlements namely, Penang, Malacca and Singapore. The opening of the court on 31st May 1808 in Penang was launched during the introduction of First Charter of Justice (1808-1826) in Penang.

² The Courts Ordinance 1878 was introduced to amend the law relating to the constitution of the civil and criminal courts of the Straits Settlements. See further, Abdul Hamid Omar, *The Judiciary in Malaysia*, Asia Pacific Publications Sdn. Bhd, 1994, at 7-14 and James Foong, *The Malaysian Judiciary: A record from 1786 to 1993*, Malayan Law Journal Sdn. Bhd, 1994, at 19-29.

Unfederated Malay states, the civil procedure law of India was followed,³ which had been introduced through an Enactment in each state. An attempt to unify the procedural law was made with the codification of the Civil Procedure Code 1918 to govern procedural matters in both the Federated and Unfederated Malay States. This situation continued until independence when the Civil Procedure Code (Repeal) Ordinance 1957 repealed all the separate enactments.⁴

At present, there are separate rules governing the procedural laws in various Malaysian courts. The Rules of High Court 1980 (RHC) govern civil proceedings at the High Court, and the Subordinate Courts Rules 1980 (SCR) govern the proceedings at the Magistrates Courts and Sessions Courts. The higher courts, namely, the Federal Court and the Court of Appeal, are governed by the Rules of the Federal Court 1995 and Rules of the Court of Appeal 1994, respectively. The Courts of Judicature Act 1964 govern both these Rules. Among the above Rules, the Rules of High Court 1980 is the most complete, governing matters such as the commencement of the case, the disposal of the case, enforcement of judgment, appeal and taxation costs. For this reason this paper will focus on the Rules of High Court 1980, particularly on the methods of gathering evidence. The RHC 1980 provides three methods for gathering evidence namely, Discovery and Inspection of documents under Order 24, Interrogatories under Order 26 and Admissions under Order 27.⁵

1. Discovery and Inspection of Documents (O 24 RHC 1980)

Discovery is a recognised method of gathering evidence in civil litigation. It was first introduced in the Nineteenth Century by the English equity procedures.⁶ Discovery or disclosure involves a process whereby parties to the action disclose to each other documents in their possession, custody or control as preparation for trial. The process is conducted by exchanging lists of documents between the parties, either by mutual agreement or by order of the court after the close of pleadings.⁷

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

³ See for example Selangor Regulation 11 of 1893.

⁴ See Wu Min Aun, *An Introduction to the Malaysian Legal System*, 2nd edit, 1999, Chapter 6, at 144-150. Nevertheless, Chief Justice Tun Ahmad Fairuz Sheikh Abdul Halim has said that a Civil Procedure Code will be introduced in 2008 to expedite the civil trial process and ensure fairness in the judicial system and the Magistrates will also get manual or Bench Book. See 'Civil procedure Code in 2008, says Chief Justice,' *malaysian legalalert*, Vol 1, Issue 18, 9 July 2007.

⁵ See also Order 20(Discovery), Order 21(Interrogatories), Order 22 (Admissions) of the SCR 1980 and *Malaysian Court Practice: Subordinate Courts, Practitioner edition*, Malayan Law Journal Sdn. Bhd, 2004.

⁶ See Paul Matthews and Hodge M. Malek, *Disclosure*, Sweet & Maxwell, 2000, at 7-16 and Bernard C. Cairns, *The law of discovery in Australia*, The Law Book Company Limited, 1984, at 8-17.

⁷ See O18 r 20 of the RHC 1980. Pleadings in action are deemed to be closed (a) at the expiration of 14 days after service of the reply or, if there is no reply but only a defence to counter claim, after service of the defence to counter claim; or (b) if neither a reply nor a defence to counter claim is served, at the expiration of 14 days after service of the defence.

other party into either financial exhaustion or early settlement. On this point Menzies J in *Mulley v Manifold*⁸ states:

“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 process of discovery or disclosure in civil proceedings requires the party seeking disclosure to establish that the documents in question are relevant and able to assist in the case. However, this discovery process has its limitation.

Discovery and its type

In Malaysia, the process of discovery and inspection of documents is provided by Order 24 of the RHC 1980. Discovery process is divided into two, namely;

- i) mutual (automatic) discovery and
- ii) discovery by the order of the court (non automatic).

Order 24 rule 1 (1) and rule 2 of the RHC 1980 provides that mutual discovery is only allowed between parties⁹ after the close of pleadings and shall be applicable to actions commenced by writ only. In mutual discovery four processes are involved, namely:-

- i. agreement by both parties to list all relevant documents that are or have been in their custody, possession and power,
- ii. exchange of the lists of documents;
- iii. mutual inspection of documents stated by both parties’ lists; and
- iv. production of the documents during trial

In other words in discovery by mutual consent, the parties have mutually agreed to exchange lists of documents which are or have been in their possession, custody or power relating to the matters in question. Initially, this discovery was not allowed in cases involving accidents on apprehended collision.¹⁰ However, after an amendment to the RHC 1980,¹¹ mutual discovery

⁸ (1959) 103 CLR 341 at 345.

⁹ The discovery of documents cannot be applied to stranger even though he may have been privy to the relationships between the parties as there is no cause of action against the stranger to subject him to the due process of law. See *Teoh Peng Phe v Wan & Co* [2001] 1 AMR at 367. See *Malaysian Court Practice: High Court, Practitioner edition*, Malayan Law Journal Sdn Bhd., 2004, at 299. But in Singapore, rule 7A of O24 RC1996 allows discovery of documents before the commencement of proceedings (r7A(1)) and after the commencement of proceedings against a non-party. See Jeffrey Pinsler, (2000). *Civil justice in Singapore: Developments in the course of the 20th century*. Singapore: Butterworths Asia. , at 327-337 and O24 rule 2 RC 1996 on mandatory mutual discovery after the close of pleadings.

¹⁰ O24 r2 (2) RHC 1980.

can be conducted in personal injury actions, but the parties are still subject to the court's discretionary power not to allow discovery if it is deemed not to be necessary.¹²

The procedure for mutual discovery begins with the filing of Form 40 of the RHC 1980.¹³ The Form consists of two Schedules. Schedule I contains two Parts whereby a list of documents that is in the possession of the applicant will be enumerated in Part 1. Part 2 consists of a list of documents in his possession which he objects to producing. This part is important because he may seek refuge under the protection of privilege thereby rejecting inspection of the documents.¹⁴

Issue on legal professional privilege was raised in *Dato' Anthony See Teow Guan v See Teow Chuan & Anor*¹⁵. The issue was whether legal professional privilege over a document could be lost by disclosure in the List of Documents under O 24 r 5(1) in Part 1 of the Schedule when privilege is expressly claimed in respect of the document in Part 2. On this issue the Federal Court held that;

'Although the appellant/Defendant had placed the legal opinion under Part 1 of the Schedule instead of Part 2, which carried a list of privileged documents, this did not amount to a waiver of privilege. The appellant had already raised specific objection to production of the legal opinion on the ground of legal privilege under para 2 in the List of Documents. Order 24 of the RHC merely provides a right of inspection of documents disclosed in the List of Documents and cannot be taken as overriding the substantive legal provisions governing legal professional privilege contained in s 126(1) of the Act.'

Schedule II/2 contains a list of documents which had been in the possession, custody or power of the applicant, but were no longer so at the date of service of the list.

Another type of discovery is known as non-automatic discovery or discovery by court order (O24 r3 RHC 1980). This process is not automatic because one party needs to obtain an order from the court to compel another party to make and serve the list of documents and additionally to make, file and serve an affidavit verifying such a list of documents which are or have been in the possession, custody or power of the other party relating to any matter in question in the cause or matter (r 3(2)).¹⁶ This rule is not limited to an action begun by writ. It is also applicable to a cause or matter begun by originating summons, originating motion or petition. In *Am Finance Bhd (Formerly Known As MBF Finance Bhd v Teras Cemerland Sdn Bhd & Anor*,¹⁷ Abdul Wahab Patail J held that production of the document would not merely

¹¹ Rules of the High Court (Amendment) Rules 1981 (PU (A) 47/81) para 2. See also O25 r8-Summons For Direction; Practice Note No 1 of 1969 (Agreed Bundle of Documents) and Practice No 3 of 1970. (Agreed statement of facts). See further *Malaysian court practice: High court, Practitioner edition*, at 301-302.

¹² O24 r2 (5)(a)(b) RHC 1980. This provision is similarly applicable in non-automatic discovery. But, the application for discovery in judicial review proceedings (O53 RHC 1980) will usually be dismissed by the court if it is not necessary. See *Datuk Amar James Wong Kim Min & Anor v Pendaftar Pertubuhan* [2004] 6 MLJ 235, (HC, KL) and *Rekapacific Bhd v Securities Commission & Anor and Other Appeals* [2005] 2 MLJ 269, (CA, Putrajaya).

¹³ O24 r5 (1) RHC 1980. See Form 40 (List of documents).

¹⁴ Sections 121 until 132 of the Evidence Act 1950 provide for documents which are considered privilege from production. See Gurmit Kaur, *Civil procedure*, Malayan Law Journal Sdn. Bhd., 2001, at 191-196.

¹⁵ [2009] 3 CLJ 405, [2009] 3 MLJ 14(FC), Civil appeal

¹⁶ O24 r3 (1) RHC 1980. See *Yekambaran Marimuthu's case* n.23.

¹⁷ [2008] 6 AMR 0373

contribute to the disposal of the case, but that it is necessary for the fair disposal of the cause or matter or for saving costs.

The procedure for non automatic discovery begins with the service of the list of documents by the party who received the court order to another party who applied for the order (applicant). If the party so ordered fails to comply with such order, the court may order the defaulting party to make and file an affidavit verifying the list of documents and serve its copy to the applicant (r 3(2)). However, rule 3(2) is not limited to a situation where a party fails to make discovery at all, but extends to one where it is considered that a party has not made a full or sufficient discovery, despite the obligation to make full discovery. An order may be obtained for a further and better list of documents.¹⁸

The discovery process is governed by the 14-day rule. The exchange of lists (Form 40) must be made within 14 days after the date that the pleadings are deemed to be closed,¹⁹ whereas inspection of documents listed in Form 40 may be done within 7 days of service of the notice for inspection (Form 42).²⁰ This notice may be served together with the affidavit verifying the list of documents (Form 41) and the inspection may be done at the place specified in the notice.²¹

The discovery of documents is limited to documents that are or have been in the parties' possession, custody or power²² and relating to the matters in question. Furthermore, the parties may also limit discovery of documents, or dispense with discovery all together, provided both parties agree.²³

The question of relevancy of documents is very subjective, because sometimes they are not admissible or relevant as evidence but are likely to shed light on the case.²⁴ The classic authority on the test for relevance in the context of discovery is a statement made by Brett LJ in *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co.*²⁵ He said this:

“It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words ‘either directly or indirectly’, because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences.....”

¹⁸ See *Malaysian Court Practice: High Court, Practitioner edition*, n.9 at 312.

¹⁹ See O18 r20 on close of pleadings.

²⁰ O24 r9 RHC 1980. See Form 42 (Notice to inspect documents).

²¹ O24 r5 RHC 1980. See Form 41 (Affidavit verifying List of Documents).

²² O24 r 1(1) RHC 1980. See also *Malaysian Court Practice: High Court, Practitioner edition*, n.9 at 300-301. In order to determine whether the parties have power or not over the documents, see statement Shaw LJ in the case of *Lonrho Ltd v Shell Petroleum Ltd* [1980] QB 358 at 375.

²³ O24 r1 (2) RHC 1980.

²⁴ *Merchants' and Manufacturers' Insurance Co Ltd v Davies* [1938] 1 KB 196 at 210.

²⁵ (1882) 11 QBD 55 at 63.

Therefore, the test of relevance here is that any documents containing information that either directly or indirectly enables the party seeking information to either advance his own case or damage the other party's case may be subject to discovery proceeding.

The above mentioned passage has been referred to and followed by Malaysian judges when discussing issues on discovery of relevant documents. For example, *Yekambaran Marimuthu v Malayawata Steel Berhad*²⁶ involved an application by the plaintiff 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 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 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.²⁷

It must be noted that rule 3 of O24 RHC 1980 provides that the court order is limited to certain documents or classes of documents only. This rule is similar to rule 2(5)(a) where 'upon an application for an order the court may order that the parties to the action or any of them shall make discovery under rule 2(1) of such documents or classes of documents only, or to such only of the matters in question.' Rules 3 and 7 must be read together or subject to rule 8.²⁸ Furthermore, Order 24 will only be granted if it is necessary and relevant.²⁹

Rule 4 of Order 24 RHC 1980 further provides that the court may order for determination of issues, etc, before discovery. The order is usually made where the court finds that there are issues or questions that need to be determined before the order for discovery of documents is made under rules 2 or 3 of O24 RHC 1980. Nevertheless, as the rules permit discovery to extend to 'any matter in question.....in the action' (r 2(1)), the court may, if appropriate, expand discovery beyond the immediate issues.³⁰ And rule 5(1) of Order 24 RHC 1980 clearly indicates that the list must contain a description of each document which is sufficient to identify it.

²⁶ [1994] 2 CLJ 581 at 585. (HC, Penang), [1993] MLJU 96 (unreported); *Manilal & Sons (Pte) Ltd v Bhupendra KJ Shan (t/ a JB International)* [1990] 2 MLJ 282 at 288 and *ABX Logistics (Malaysia) Sdn Bhd v Overseas Bechtel (Malaysia) Sdn Bhd* [2003] 7 CLJ 357.

²⁷ See *Malaysian court practice: High court, Practitioner edition*, n.9 at 304-305.

²⁸ See *ABX Logistics (Malaysia) Sdn Bhd v Overseas Bechtel (Malaysia) Sdn Bhd* [2003] 7 CLJ 357. In this case, the defendant failed to state clearly or to define specifically in his application for discovery, the relevant documents in the plaintiff's possession, custody or power. The appeal by the defendant was dismissed because their action clearly amounted to a fishing expedition.

²⁹ See O24 r2 (5)(b) and rule 8 RHC 1980. Under rule 2(5)(b) the court may order that there shall be no discovery of documents by any or all of the parties either at all or at that stage of the action if and so far as it is of opinion that discovery is not necessary. While rule 8 provides that, the court may dismiss or adjourn the application and shall in any case refuse to make such order if it is of opinion that the discovery is not necessary. The test of relevant is also applicable on this type of discovery. See *Faber Merlin Malaysia Bhd v Ban Guan Hin* [1981] 1 MLJ 105, FC.

³⁰ See *Malaysian court practice: High court, Practitioner edition*, n.9 at 311.

As mentioned earlier, discovery is necessary when the documents required are relevant and able to support the facts at issue. In *Kenwood Electronics (Malaysia) Sdn Bhd v People's Audio Sdn Bhd & Ors*³¹ the plaintiff applied to the court for further discovery of documents which was alleged to have been omitted to be disclosed by the 2nd, 3rd and 4th defendants. The plaintiff tried to show to the court that the documents relating to the issue of whether or not the 4th defendant sold Kenwood audio-visual equipment originally supplied by the plaintiff to the 1st defendant for sale only to retailers between the months of November 1997 and April 1998 were necessary for him in order to establish his allegation of fraud against the defendants. However, the plaintiff's application was dismissed on the ground that the documents sought by the plaintiff, though relevant to prove his allegation of fraud, were not relevant to the plaintiff's cause of action for conspiracy to defraud against the defendants. Furthermore, such a disclosure will shift the legal burden of proving fraud from the plaintiff to the defendants, whereas in cases of fraud the burden of proof is always on the plaintiff.

The dismissal of the plaintiff's application in the above case shows that the court will not simply grant the order for discovery if such an order is not necessary and the result will not be fair to the other party. In fact, the court also has discretion to dismiss the action or to strike out the defence and enter judgment against the defaulting party if the order for discovery or production for inspection of documents has not been complied with. The party who fails to comply with such an order shall also be liable to committal.³²

It must be noted that the process of discovery is not similar to the process of obtaining further and better particulars of a pleading,³³ nor with the process of obtaining an unsworn admission of fact.³⁴ However, there is a situation where a party may apply to the court for further and better discovery of documents in favour of the applicant.³⁵

In short, the discovery and inspection of documents as described in the above cases have provided opportunities to the parties in the proceedings to prepare their case well for trial. However, there are cases whereby the court refused to grant the order when the parties failed to prove the relevancy and necessity of such an order. The court has also dismissed applications when they amount to 'fishing expedition.' The discovery in the above cases relates to discovery of paper documents. The procedural rule governing the matter is quite clear. Nevertheless, problem may arise if discovery principles are to be applied in cases where data or information is not available in paper format and it is believed to be in other party's possession. The issue is whether the existing procedure for discovery (automatic and non automatic) is sufficient to accommodate electronic discovery of electronic document. Another issue that may also arise is

³¹ [2003] 5 CLJ 436. (HC, Penang).

³² See O24 r 16(1)(2) RHC 1980 on failure to comply with requirement for discovery, etc. This Order is to be read with rules 3(2) and 11(1). See also *Malaysian court practice: High court, Practitioner edition*, n.9 at 309.

³³ O18 r12 (3) RHC 1980 provides that, the court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or in any affidavit of his ordered to stand as a pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the court thinks just.

³⁴ Order 27 r2 RHC 1980 provides that, a party to a cause or matter may not later than 14 days after the cause or matter is set down for trial serve on any other party a notice (in Form 52) requiring him to admit (in Form 53), for the purpose of that cause or matter only, the facts specified in the notice.

³⁵ *Kenwood Electronics (Malaysia) Sdn Bhd v People's Audio Sdn Bhd & Ors* [2003] 5 CLJ 436. (HC, Penang).

on determining the relevancy of the document or data stored in the other party's computer? However, this paper will not discuss about e-discovery and its application.

2. Interrogatories (O 26 RHC 1980)

The discovery of documents can also be done by way of interrogatories which delivery of written questions by one party to another seeking answer that are relevant and material to the issues in dispute.³⁶ The question will be addressed to the relevant person handling the management of the data or the computer system. For example, the questions may contain the following: the specific location of the data, the date as to when it was stored and for how long, whether the data has been deleted or not, the accuracy of the data kept in the computer and the nature, as well as the extent of the opponent's computer system and files.³⁷ In short, interrogatories can reveal information such as the structure of the organization and the identity of the appropriate individuals to testify concerning computer system use and maintenance and the procedure necessary to obtain evidence.

The objective of interrogatories is to allow the applicant to interrogate the other party in order to establish facts and to attempt to obtain an admission from him.³⁸ In this way, the applicant can locate the evidence in the computer, strengthen his case and destroy that other party's case. However, this application is subject to the court's leave and discretion. In this regard, Gopal Sri Ram JCA stated in *Rekapacific Bhd v Securities Commission & Anor and Other Appeals*:³⁹ (at p 276)

'....[t]he general rule as to interrogatories is that: Although interrogatories must be confined to matters which are in issue, they may under some circumstances extend to facts the existence or non-existence of which is relevant to the existence or non-existence of the facts directly in issue. See *Marriott v Chamberlain* (1886)17 QBD 154; *Osram Lamp Works Ltd v Gabriel Lamp Co* (1914) 2 Ch 129). In considering whether the interrogatories should be allowed or not the court must consider whether they are designed to obtain admissions of facts which will reduce the issues, shorten the length of the trial and thus save costs (per Gill CJ (Malaya) in *Sheikh Abdullah bin Sheikh Mohamed v Kang Kock Seng* [1975] 1 MLJ 89).'

However, in Australia for example, there are contrary views on discovery by interrogatories. Among those views are that interrogatories are an unnecessary source of delay, a potential source of oppression and duplication of information obtained in other ways,⁴⁰ they are

³⁶ *Sheikh Abdullah v Kang Kock Seng* [1974] 1 MLJ 174.

³⁷ See Anthony Tarricone, (1999, December). Discovery and spoliation of electronic evidence, *Trial*, Vol.35, Issue 13, pp5-64, Washington; Devin Murphy, (2001). Electronic commerce in the 21st century: Article the discovery of electronic data in litigation: what practitioners and their clients need to know. 27 *William Mitchell Law Review* (*Wm. Mitchell L.Rev.*) 1825 and Peter Lacouture, "Discovery and the use of computer-based information in litigation," 45 *Rhode Island B.J.* 9, 9 (1996). <http://cyber.law.harvard.edu/digitaldiscovery/library/preservation/lacouture.html>

³⁸ *Hennessy v Wright* (1980) 24 QBD 445 at 447. It was held that interrogatories are to seek admissions.

³⁹ [2005] 2 MLJ 269.

⁴⁰ K Marks, "The interventionist court and procedure" 18 1 (1992) *Monash Law Review* 10.

costly to administer but generally are easier to formulate than to respond to⁴¹ and they are not helpful. However, some view that this method is still important and useful to aid a settlement.⁴²

a) Procedures for Interrogatories

The applications for interrogatories are normally made after the close of pleadings⁴³ and after the process of discovery and inspection of document (O24 RHC 1980). The procedure for the application is laid down by Order 26 RHC 1980 which provides that a party to any cause or matter may apply by summons in Form 48 to the Court for an order giving him leave to serve on the other party interrogatories relating to any matter in question between the applicant and that other party and requiring that other party to answer the interrogatories on affidavit within a specific period.⁴⁴ A copy of the proposed interrogatories must be in accordance with Form 49.⁴⁵ The Court then will grant the application or Order in Form 50, if it thinks necessary.⁴⁶ This Order must be served by the applicant to the other party against whom it is made. The answers to the interrogatories must be in Affidavit in Form 51 which must be filed and its copy should be served on the interrogating party within the time named in the Order. (O26 r1 (6))⁴⁷

In *Ultra Dimension Sdn Bhd v American Home Assurance Co (Rewardstreet.com (M) Sdn Bhd, third party)*⁴⁸, the issue was whether there could be disclosure of documents by witnesses while giving evidence and whether witness during cross-examination may be asked to produce documents not filed in court. The High Court held that, the burden is on the plaintiff to produce the relevant evidence to show that they are the copyright owners in law. This necessarily means the plaintiff must have disclosed the relevant documents before the trial. This requirement cannot be compromised by the plaintiffs counsel during the course of trial as it happened in this case to say that they can produce the supporting documents relating to the transfer of copyright. It is too late to do so. Further, as a general rule, it is improper for counsel during examination or cross examination of witness to ask witness to produce documents which has not been filed in court. Issues in respect of documents must be completed in discovery stage or obtained by way of interrogatories or where relevant, to issue notice to produce etc. There cannot be disclosures of documents by witnesses while giving evidence, and for that purpose seeking adjournments. The trial court is bound not to entertain such requests or adjournments to produce documents.

Basically, the party served with an interrogatory must answer to the best of his knowledge and belief. In this regard, Order 26 rule 3 RHC 1980 provides that the interrogatories can be conducted on a body corporate by directing questions to the company secretary or any other officer who has the best knowledge for instance, about the company's computer system, the location of the data and the procedures that need to be followed in obtaining the information.

⁴¹ D Ipp, "Reforms to adversarial process in civil litigation- Part II" 69 (1995) Australian Law Journal 790, 794.

⁴² See "The use of Discovery and interrogatories in civil litigation", Australian Institute of Judicial Administration, Melbourne 1990, 22 and D Bailey, "Are interrogatories necessary?" 69(6) (1995) Law Institute Journal 522.

⁴³ O18 r20. After the close of pleadings mean after plaintiff files its reply and defence to counterclaim, if applicable.

⁴⁴ O26 rule 1(1)(a) and (b) of the RHC 1980. The interrogatories may also be made without leave of the court. (O26 r2 RHC 1980).

⁴⁵ See O26 r1(2) RHC 1980.

⁴⁶ See O26 r1(5) RHC 1980.

⁴⁷ See O26 r1(6) RHC 1980.

⁴⁸ [2009] 8 MLJ 643

The court has discretion to choose the officer, who of his own knowledge knows most about the matters on which the company is being interrogated.⁴⁹ However, if the court decides the answer is insufficient he may be required to provide another answer on affidavit or be examined orally by the court involving more time and expense on his part.⁵⁰

Nevertheless, if he objects to the interrogatories then he may take the objection in his affidavit in answer as in Form 51 of O26 r5 RHC 1980. One of the objections can be on the ground of privilege which is similarly applicable to discovery of documents. Besides the privilege issue, other objections allowed by the court to be raised as a valid reason for not answering interrogatories are that the information sought is not relevant or necessary, is merely a fishing expedition, the questions can cause injury to the public interest and the answer would disclose evidence which the party proposes to adduce at the trial.⁵¹ However, if a party against whom the Order is made fails to comply with the Order, the Court may order the action to be dismissed or defence be struck out and judgment entered accordingly. (O26 r7)

In short, interrogatories also could be a useful method to discover, locate and obtain data relevant to the breach in civil cases. A complete set of interrogatories or questions can also lead to an admission of certain facts.

3.

Admission (O 27 RHC 1980)

Admission is another method of gathering information or facts about the matter in question.⁵² This method is applicable when a party to the proceedings wishes to admit the truth of the whole or any part of the case of any other party. It can be made by way of pleading or otherwise in writing.⁵³ Section 58 of the Evidence Act 1950 states that the facts admitted by either the parties or their agents (which includes lawyers) need not be proved, thus, reducing the cost and speeding up the court process. It is also very useful to find out about the existence of any data. Admissions must also be clear, unambiguous and voluntary.⁵⁴ If there is any condition attached, such as 'without prejudice communications' the admission is not relevant.⁵⁵ The effect of this condition is that the document becomes privileged and it shall not be disclosed during the trial.⁵⁶

On the other hand, admissions are subject to Order 18 rule 13 RHC 1980. The rule provides that the party is deemed to admit the allegations made in the statement of claim or pleadings if he does not specifically deny or traverse it. Thus, if the party refuses to admit the

⁴⁹ See *Malaysian court practice: High court, Practitioner edition*, n.9 at 343.

⁵⁰ O26 r6 RHC 1980. See also Crispin Rapinet & Allan Leung, *Civil litigation*, 3rd edition, Sweet & Maxwell, 2002, at 353-354. The court would not allow interrogatories that contain oppressive and hypothetical questions.

⁵¹ See Crispin Rapinet & Allan Leung, *ibid.* at 354.

⁵² Section 17(1) of the Evidence Act 1950 provides that 'An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons and under the circumstances hereinafter mentioned.'

⁵³ O27 rule 1 RHC 1980.

⁵⁴ See Hamid Sultan Abu Backer, *Janab's Key to civil procedure in Malaysia and Singapore*, 3rd edition, Janab (M) Sdn Bhd., 2001 at 554.

⁵⁵ *Ibid.* See s23 Evidence Act 1950, *Walker v Wisher* (1889) 23 QBD 335 and *Lim Jjoen Kon v A-B Chew Investments Pte Ltd* (1991) 3 MLJ 4.

⁵⁶ *Id.*, 554-556. See also s126 Evidence Act 1950 and *Yeo Hiap Seng v Australia Food Corp. Pte Ltd & Anor* (1991) 1 MLJ 144.

allegations he must specifically deny each of them or he can make a statement of non-admission.⁵⁷

Procedures of Admission

There are three different methods of making admission namely, admissions at the hearing,⁵⁸ admissions in writing before the hearing and admissions in pleadings or in answers to interrogatories.⁵⁹ To use admission the plaintiff (or defendant) is required to serve notice to admit facts in Form 52 to the defendant (or plaintiff) and that other party (plaintiff or defendant) must send an admission of facts in Form 53. The notice to admit facts mentioned in his pleadings must be served to the other party not later than 14 days after the cause or matter is set down for trial.⁶⁰

O27 r4 RHC 1980 further provides that the admission and production of documents can also be applied to cases where discovery is given by a list of documents, whether verified by affidavit or not. For the purpose of this rule, the plaintiff (or defendant) may send a notice to admit documents in Form 54 or a notice of non-admission of facts in Form 55. However, if there is no refusal by the defendant (or plaintiff) to the notice, the plaintiff (or defendant) then may send a notice to produce specified documents in Form 56.⁶¹ It is advisable for the defendant to consider what is really an issue during his defence and both parties must also make use of notice to admit facts in order to avoid unnecessary discovery. This action may narrow down the ambit of discovery and save cost as well as time.⁶²

Alternative Method on Gathering Evidence

An alternative method that can be adopted in gathering evidence or electronic evidence is Anton Piller Order (APO). Although the APO can only normally be applied in the context of seizure and preserving the assets, it is possible that the APO can also be applied in the process of gathering evidence or electronic evidence in Malaysia.

Anton Piller Order (APO)

The Anton Piller Order is a court order⁶³ requiring a defendant to allow the plaintiff/applicant to search, seize and remove all incriminating materials including computer or computer data believed to be in the defendant's possession. The main objective of the APO is to preserve

⁵⁷ *Mat Roni bin Daud v Siti bte Hussin* [2000] 5 MLJ 605, at 618.

⁵⁸ This admission is made either by the parties or his lawyers during the trial. See *Che Esah & Anor v Che Limah* [1966] 1 MLJ 36 (FC) and *Yap Cheng Kee & Anor v Ow Giam Eng & Anor* [1977] 1 MLJ 177 (FC).

⁵⁹ Admissions can also be classified into five kinds. See Hamid Sultan Abu Backer, n54. at 554.

⁶⁰ O27 r2 (3) -Notice to admit facts and admission of facts. See also *Malaysian court practice: High Court, Practitioner edition*, n.9 at 346-347.

⁶¹ O27 r5 (5) RHC 1980 and *Malaysian court practice: High Court, Practitioner edition*, n.9 at 351.

⁶² See Cranston, Haynes, Pullen and Scott, *Delays and efficiency in civil litigation* (AIJA, 1985), Ch 9 and Bernard C. Cairns, *The uses of discovery and interrogatories in civil litigation* (AIJA, 1990), Ch 7.

⁶³ In UK, the APO is known as 'Search Orders'. See David Bean, *Injunctions*, Thompson Sweet and Maxwell, 8th edn., 2004, Chap.8, at 125. The Precedent 7 is the High Court Form for Search Orders. See David Bean, at 186-193. For further readings see s7 of the UK Civil Procedure Act 1997, Civil Procedure Rules 1998 and Practice Direction-Interim Injunctions, PD 25 and David Bean at 220-222.

material documentary evidence essential to the applicant's case and it is only applicable in exceptional circumstances.⁶⁴ The APO derives its name from the case of *Anton Piller KG v Manufacturing Processes Ltd.*,⁶⁵ According to court decision in *Anton Piller's* case the applicant must establish the following:

- (a) that there is an extremely strong prima facie case against the defendant or genuine case on the merits,
- (b) that he would suffer significant potential and actual damage if the order is not granted,
- (c) it is clearly proven that the defendant holds documents or evidence constituting the offence and
- (d) there is real and admitted possibility that if the order is not executed, the defendant can destroy the evidence before proceedings can be brought.

The above order is granted pursuant to the inherent jurisdiction of the court.⁶⁶ However, in order to obtain the APO, the applicant must first apply by *ex parte* summons in Chambers supported by an affidavit which contains a full and frank disclosure of material facts. Rule 1 sub rule (2A) of Order 29 RHC 1980 provides that:

'the affidavit in support shall contain clear and concise statement:

- (a) of the facts giving rise to the claim against the defendant in the proceedings;
- (b) of the facts giving rise to the claim for the interlocutory relief;
- (c) of the facts relied on as justifying application *ex parte* including details of any notice given to the defendant or, if none has been given, the reason for giving none;
- (d) of any answer asserted by the defendant (or which he is thought likely to assert) either to the claim in the action or to the claim for interlocutory relief;
- (e) of any facts known to the applicant which might lead the Court not to grant relief *ex parte*;
- (f) of whether any previous similar *ex parte* application has been made to any other Judge, and if so, the order made in that previous application; and
- (g) of the precise relief sought.

Besides that, the applicant or plaintiff must also give undertakings as to damages. These procedures imply that there must be a clear nexus between the facts established and the relief sought. Furthermore, so as to avoid any destruction of the property or documents the applicant

⁶⁴ *Computerland Corp v Yew Seng Computers* [1991] 3 MLJ 201.

⁶⁵ [1976] 1 All ER 405. See David Bean, (2(2004). *Injunctions* (8th edn.). London: Thompson Sweet and Maxwell at 126 and Mohd Akram Shair Mohamad, The Meaning of 'forthwith' in an Anton Piller Order, [1990] 2 CLJ lxxv. <http://www.cljlaw.com/membersentry/articlesdisplayformat.asp?A_1991_17;evidence>

⁶⁶ See *Malaysian court practice: High Court*, MLJ Sdn. Bhd, 1997, at 1327 and O92 r4 RHC 1980.

must serve the order within 21 days of the date it was granted because the order will automatically lapse at the end of 21 days from the date on which it is granted.⁶⁷

Usually, the APO is granted in cases of infringement of intellectual property rights,⁶⁸ such as unlawful copying of video films or software,⁶⁹ as well as fraud and forgery. Thus, once the Order is granted it will compel the defendants to permit the plaintiff or his representatives to enter the defendant's premises to search for materials believed to be in the defendant's possession.⁷⁰ Refusal to permit such entry will amount to contempt of court. The execution of the APO is quite different from the search and seizure process in criminal proceedings because the later will permit the police investigators to enter the suspect's premises to search and seize relevant evidence by conducting a search with or without warrant.⁷¹

However, while conducting the inspection on the defendant's premises the plaintiff must follow the proper procedures as provided by the APO. This is because failure to observe the proper procedures will result in unlawful conduct. Besides that, the plaintiff or the search party must also have power to conduct further search of the computer's content. He must know how to minimise the risk of distortion of computer data during the gathering process.

On the other hand, the defendant against whom the APO is served may rely on the privilege against self-incrimination if the order compels him to disclose information which would incriminate him in a criminal prosecution.⁷² In *PMK Rajah v Worldwide Commodities Sdn Bhd*⁷³ the APO was mentioned together with discovery procedures and the Evidence Act 1950. According to Zakaria Yatim J, section 132 of the Evidence Act 1950⁷⁴ does not apply at

⁶⁷ O29 r1(2B) RHC 1980.

⁶⁸ See *Golf Lynx v Golf Scene Pty Ltd (t/a Custom Golf Club Co)* (1984) 59 ALR 343. In this case, Golf Scene had infringed Golf Lynx's registered trademark and passing off golf clubs under the brand name 'Lynx'. Golf Lynx sued Golf Scene for breach of their intellectual property rights. An Anton Pillar order was obtained as an ex parte interlocutory order against Golf Scene to preserve evidence from being destroyed which would prove Golf Lynx's strong prima facie case of counterfeiting. Subsequently, a Norwich Pharmacal order was obtained to order Golf Scene to reveal the identities of other parties involved in the counterfeiting of 'Lynx' golf clubs. In this case, the APO is supported by the Norwich Pharmacal order. However, in the case of *ESPL (M) Sdn. Bhd. v Harbert International Est Sdn Bhd* [2004] 1 MLJ 296, (HC, Kuala Lumpur), Azmel J agreed with the defendant's counsel argument that the plaintiff's failed to show strong prima facie case against the defendant and therefore the APO should not in law be granted in aid of and/or be supplementary to a Norwich Pharmacal order even though it is true that an APO can be supported by a Norwich Pharmacal order as shown in *Golf Lynx's* case. The Norwich Pharmacal order coupled with and APO are not an interim injunction as envisaged by O29 r1(2B) of the RHC 1980. See *Malaysian Court Practice (MCP) Bulletin* June 2003.20, via LexisNexis: Legal, viewed on 22 March 2004.

⁶⁹ See, 'Note on provisional and protective measures in private international law', <<http://www.acca.com/gadvocate/hague/protect/uk.html>>

⁷⁰ See David Bean, at 128. Therefore, where infringing material is stored on a computer the defendant may be ordered to print out the material in readable form. See also *Lian Keow Sdn Bhd v C Paramjothy* [1982] 1 MLJ 217.

⁷¹ David Bean, at 128. The powers given to the claimant or applicant are less than those given to the police officers executing a search warrant, and the execution of search orders should be quite separate from a search by the police. However, the police officer may be asked to accompany the solicitor serving the order if there is a risk of violence.

⁷² See ALR Joseph, 'Anton Piller Orders and the privilege against self-incrimination in Malaysia and Singapore: Revisited', [1992] 2 MLJ xliii, *Rank Film Distributors Ltd & Others v Video Information Centre & Others* [1980] 2 All ER 273 (CA), [1981] 2 All ER 76 (HL) and *PMK Rajah v Worldwide Commodities Sdn Bhd* [1985] 1 MLJ 86.

⁷³ [1985] 1 MLJ 86.

⁷⁴ Section 132 of the Evidence Act 1950 provides that a witness is not excused from answering any questions on matters relevant to matter in issue in any suit, civil or criminal, on the ground that the answers will directly or indirectly criminate him or will expose him to penalty or forfeiture of any kind.

all to discovery in respect of an APO. Therefore, it is not correct to say that the doctrine against self-incrimination as laid down in the case of *Rank Film Distributors Ltd & Ors v Video Information Centre & Ors*⁷⁵ had been withdrawn in this country by section 132 of the Evidence Act 1950 (EA). He further stated that a witness in the context of section 132 is a person who testifies on oath or affirmation in a court of law or in a judicial tribunal.⁷⁶

Although in *PMK Rajah* and *Rank Film* there is no explanation about gathering of electronic evidence in breach of contract the decision on section 132 of the EA 1950 implies that the applicant who applied for this Order will have to prove that the documents sought from the defendant are not privileged, and that the entry into the premise was for the purposes of obtaining, inspecting and seizing relevant incriminating evidence believed to be in the possession of the suspect. Therefore, the plaintiff must adequately establish the above requirements in his affidavit in support, and know the consequences of applying for this Order so that he can undertake to pay damages. The procedures available for applying the APO are not only complicated and fraught with difficulty. It is also dangerous for the inexperienced.⁷⁷ Thus, the execution of this Order must be properly conducted otherwise it will cause injustice to the other party.

In short, there is a need to have understanding on legal, technical and commercial risks because that will enable one to mitigate them by using an appropriate measure.⁷⁸ Besides the appropriate methods mentioned above, Order 11 of the RHC 1980 which permits service of writ and other process outside Malaysia must also be taken into consideration because it can be invoked in cases concerning Internet disputes.⁷⁹

The process of gathering evidence in other countries: Singapore, the United Kingdom (England), New South Wales (Australia) and the United States (US)

The process of gathering evidence in Malaysia is quite similar to the above mentioned countries. However, these countries had amended their civil procedure law in order to cope with the challenging process of gathering evidence particularly in the information and communication technology (ICT) environment. Many things have changed and developed and materials evidence has also changed its forms. Thus the amendment was made with the objective being to be more cost effective, more efficient and more suitable with the ICT development.

⁷⁵ [1981] 2 All ER 76.

⁷⁶ See further ALR Joseph, 'Anton Piller Orders and the privilege against self-incrimination in Malaysia and Singapore: Revisited'.

⁷⁷ See Edward Wilding, *Computer Evidence: A Forensic Investigation Handbook*. Sweet & Maxwell, 1997 at 82.

⁷⁸ See "The legal picture in electronic trading", *New Straits Times (Business Computing)*, 4 August, 1999, 2.

⁷⁹ The order provides that one may apply for leave for service outside Malaysia. The grounds are- the persons carrying on business in Malaysia, the contracts are governed by Malaysian law, the contracts entered into confer jurisdiction on Malaysian courts to resolve disputes and the breach of such contract, torts committed in Malaysia and injunctions to prevent defendants from doing or to compel them to do an act in Malaysia. However, the Order does not sufficiently covers the tortious liability where the tort occurs outside Malaysia, but the damage is suffered in Malaysia. See Sharon Tan Suyin, 'Unlimited opportunity versus unlimited risks', 3rd MSC International Cyberlaws Conference, 2-3 March 2004, Kuala Lumpur.

In the UK, the Honorable Lord Woolf commented that the uncontrolled discovery process has resulted in unnecessary costs in civil litigation. Thus, a reform was made in 1995 and a new Civil Procedure Rules 1998 (CPR) came into being. This CPR came into force on 26th April 1999.⁸⁰ The CPR contains Part 31 on disclosure and inspection of documents. Rule 31.4 explains on the meaning of document as 'anything in which information of any description is recorded'. This definition is very broad and covers also electronic documents. Practice Direction 31 supplements Part 31 of CPR 1998. The Practice Direction explains further on types of electronic documents and the process of electronic disclosure and inspection of documents.⁸¹ 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. 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. Discovery can also be made on the storage medium. As regards to databases, discovery of databases requires the identification of discoverable records that is relevant and necessary and there is a need to disclose only extracts of these records, not the entire database.

In New South Wales (NSW), Australia discovery of documents is provided for by Part 23, rules 3 and 4 of the Supreme Court Rules 1970 (SCR). The Supreme Court of New South Wales has introduced a limited discovery regime under which parties may apply for an order for discovery of documents within a class or classes specified in the order and for discovery of one or more of documents within a class (Part 23, r3 (1) of the SCR 1970). The rules also provide that a class of documents shall not be specified in more general terms than the court considers to be justified in the circumstances (Part 23 r 3(2) and r3 (3) of the SCR 1970).⁸² Besides that, the Supreme Court of New South Wales has also issued Practice Note No. 105 on the use of technology in civil litigation, which includes electronic exchange of court documents and of databases.⁸³

⁸⁰ See Final Report of Woolf Committee, Chapter 21- Information Technology. <<http://www.law.warwick.ac.uk/woolf/report/contents.html>> and CPR 1998 at <<http://www.opsi.gov.uk/si/si1998/19983132.htm>>.

⁸¹ The term discovery and disclosure is used interchangeably by Kenneth J. Withers in 'Computer – based disclosure and discovery in civil litigation, *Journal of Information Law and Technology* (JILT).<<http://elj.warwick.ac.uk/jilt/01-1/withers.html>>. See also Part 31- Disclosure and inspection of document; Practice Direction 31. <http://www.dca.gov.au/civil/procrules_fin/contents/practice_directions/pd_part31.htm> and the Practice Direction (Civil Litigation) Case Management [1995] 1 WLR 262. Rule 31.17 allows a disclosure and inspection of documents to be conducted against a person not a party to the proceedings. Note that, the website under Department of Constitutional Affairs is now accessible through the Ministry of Justice.

⁸² See Geoffrey C. Lindsay, *Guide to the practice of the Supreme Court of New South Wales*, The Law Book Co. Ltd., 1989, at 86-92; Bernard C Cairns, *The law of discovery in Australia: Documents, interrogatories and property*, n.7, at Chapter two; 'Civil Litigation Practice and Procedure', (ALRC IP 20, 7). <<http://www.austlii.org/au/other/alrc/publications/issues/20/07cicill.html>>. See also *BT (Australasia) Pty Ltd v State of New South Wales & Anor* (No 9) (No 7) (1998) 153 LR 722 and *Roger Stafford Atkinson & Ors v State of New South Wales* [2005] NSWSC 400.

⁸³ See Allison Stanfield, *E-litigation*, LawBook Co., 2003, at 43. Also available at <<http://www.lawlink.nsw.gov.au/sc/sc.nsf/pages/index>>

While in Singapore, the amendment made in 1993 introduced changes to the discovery process. Later, in 1996 the Rules of the Supreme Court 1970 (S 274/70) and the Rules of the Subordinate Courts 1986 (S 59/86), were merged and known as the Rules of Court 1996. This rule came into effect in May 1996. The reform made in 1996 had also replaced the previous system of mutual discovery by parties after the close of pleadings to a system of discovery by court order. Besides that, the applicable test was also different. The previous system of mutual discovery by parties was governed by the words 'relating to any matter in question between them in the action'. These words are mentioned in O24 r 2(1) Rules of Court 1996. The words then were replaced by a more specific criteria adopted in O24 r 1(2) Rules of Court 1996.⁸⁴ There is also a Practice Direction No 1 and No 2 of 2005 Supreme Court of Singapore that provide on the use of technology in civil litigation.

The US approach on disclosure is different from the UK because the UK law on disclosure is confined to documents whereas electronic disclosure in the US is more extensive. Rule 26 and 34 of the Federal Rule of Civil Procedure (F.R.C.P- which regulate the production of evidence in litigation) are the critical rules governing discovery of electronic information.⁸⁵ Rule 26 provides for general provisions governing Discovery and Duty of Disclosure.⁸⁶ This Rule covers the following matters:

- (a) Required disclosures; Methods to Discover Additional Matter,
- (b) Discovery Scope and Limits,
- (c) Protective Orders,
- (d) Timing and Sequence of Discovery,
- (e) Supplementation of Disclosures and Responses,
- (f) Conference of Parties; Planning for Discovery, and
- (g) Signing of Disclosures, Discovery Request, Responses, and Objections.

⁸⁴ O24 r 1(2) of RC 1996 reads, 'The document which a party to a cause or matter may be ordered to discover under paragraph (1) are as follows:(a) the documents on which the party relies or will rely; and (b) the documents which could – (i) adversely affect his own case (ii) adversely affect another party's case; or (iii) support another party's case.'

See Rules of Court 1996(S 71/96). <<http://www.supcourt.gov.sg/>> 05; O24 rules 7; *Tan Chin Seng & Ors v Raffles Town Club Pte Ltd* [2002] 3 SLR 345, at pp349-352 and *Info-Communications Development Authority of Singapore v Singapore Telecommunications Ltd.* [2002] 3 SLR 289. Rule 7 states that the discovery must be 'necessary either for disposing fairly of the cause or matter or for saving costs'. See Jeffrey Pinsler, *Civil Justice in Singapore: Developments in the Course of the 20th Century*, Butterworths, 2000, at 346.

⁸⁵ 'The Federal Rules of Civil Procedure: The impact of Digital Discovery,' The Berkman Center for Internet and Society at Harvard Law School, <http://cyber.law.harvard.edu/digitaldiscovery/digdisc_library_4.html>

⁸⁶ See Federal Rules of Civil Procedure: Rule 26-General Provisions governing discovery and Rule 16- Pretrial Conferences, via Legal Information Institute (LII) of Cornell Law School, <<http://www.law.cornell.edu/rules/frcp/Rule26.htm>>

Under Rule 26(a), the parties have an obligation to identify relevant electronic information in their initial disclosures to the opposing party. In addition, Rule 26(f) requires that the court and the parties discuss the preservation and disclosure of ESI at Rule 26 discovery planning conference i.e. parameters of their anticipated e-discovery. The parties must also agree on 'reasonable preservation steps' in conducting e-discovery, but prior to Rule 26(f) conference, the parties shall exchange the following information:

- A list of the most likely custodians of relevant electronic materials, including a brief description of each person's title and responsibilities,
- A list of relevant electronic systems that have been in place at all relevant times and a general description of each system, including the nature, scope, character, organization, and formats employed in each system. The limited accessibility of the electronic documents must also be stated;
- The name of the individual responsible for that party's electronic document retention policies;
- The name of the individual who shall serve as that party's 'e-discovery liaison',
- Provide notice of any problems reasonably anticipated to arise in connection with e-discovery.⁸⁷

The parties then will have to agree on the date to exchange the documents or to submit the issue for resolution by the court. Failure to abide by any court order or directions can result in sanctions being imposed.⁸⁸ Thus, in the US, the court has a role to play in determining any dispute relating to e-discovery.

THE PROCESS OF GATHERING EVIDENCE IN SYARIAH COURT

Since the prime objective of Islamic law of evidence is to do justice to every Muslim witnesses must adduce evidence willingly and not withhold any. Allah says:

“The witnesses should not refuse when they are called on (for evidence).”⁸⁹

The above ayah is a clear command to those who possesses information and evidence to cooperate by giving testimony or evidence. If they refuse to do so this is tantamount to an act of disobedience against Allah and they are considered to have committed a sin. Allah says:

“Conceal not evidence, for whoever conceals it his heart is tainted with sin and Allah knoweth all that ye do.”⁹⁰

Under the Islamic law of evidence, the fact of the case can be proved either by way of *bayyinah*, *shahadah*, *iqrar*, *yamin*, *kitabah*, and *qarinah*.

⁸⁷ See Default Standards for discovery of electronic documents (“e-discovery”). <<http://www.ded.uscourts.gov/SLR/Misc?Ediscov.pdf>>

⁸⁸ *Mosaid Technologies Incorporated v. Samsung Electronic Co., Ltd., Samsung Electronics America, INC., Samsung Semiconductor, INC., and Samsung Austin Semiconductor* 2004 U.S. Dist. LEXIS 25286.

⁸⁹ Al-Quran, suarah Al-Baqarah, 2: 282

⁹⁰ Al-Quran, suarah Al-Baqarah 2: 283

Muslim judges are also required to do justice when hearing a case. Allah S.W.T mentions the establishment of justice in the following surah in the Holy *Quran*;

“Allah doth command you to render back your trusts to those to whom they are due; and when ye judge between man and man, that ye judge with justice....”
(Surah Al-Nisa’ 4:58)

At present, the methods for gathering evidence in Syariah civil proceeding is provided by the Syariah Court Civil Procedure (Federal Territories) Act 1998 (SCCP(FT)),⁹¹ and for Syariah criminal proceedings is available in the Syariah Criminal Procedures (Federal Territories) Act 1997 (SCP(FT)). However, this paper will only discuss the process of discovery and inspection of documents as well as interlocutory injunctions as provided for by the SCCP (FT) Act 1998.

1. Discovery and Inspection of Documents under Syariah Civil Procedure

The process of gathering evidence under Syariah civil procedure includes discovery and inspection of documents as well as interlocutory injunction (or Anton Piller Order). This is similar to the process of gathering evidence or electronic evidence as provided by Orders 24, 25 and 27 of the RHC 1980.

The process of discovery and inspection of documents is similar to Order 24 of the RHC 1980. This process is acceptable and recognised in Islam because the practice is not contrary to *Shari'ah* or *Hukum Syara'*. In fact, this process will encourage the parties to discovery and inspection of documents to be honest with themselves. This is very important since honesty and sincerity are required in Islam. Allah S.W.T says:

“O ye who believe! Stand out firmly for justice, as witnesses to Allah, even as against yourself, or your parents, or your kin, and whether it be (against) rich or poor. For Allah can best protect both. Follow not the lusts (of your hearts), lest ye swerve, and if ye distort (justice) or decline to do justice, verily Allah is well acquainted with all that ye do”⁹².

Furthermore, the above verse also encourages a Muslim to be a witness of truth, even though it is against himself, his parents and his next of kin. This means that the Muslim witness must reveal what is in his possession, knowledge or power and not to hide any relevant information that can be useful to the case. Only in this way can a Muslim implement justice to everybody. In fact, the revelation of the truth promotes transparency between both parties and they can achieve satisfaction when the matter can be settled fairly. This concept is quite similar to the concept of discovery and inspection of documents under the RHC 1980 because its objectives include to provide fair trial and to benefit both parties in the proceedings.

⁹¹ See also Selangor Syariah Civil Procedure Code Enactment 2003 and Syariah Court Civil Procedure 1999 as well as Penang Syariah Court Civil Procedure (State of Penang) Enactment 1999.

⁹² The Holy Qur'an, Sūrah al Nisā' 4:135.

In the Federal Territories, the relevant provisions for the process of discovery and inspections of documents are provided for by sections 85 to 88 (Part XI) of the SCCP(FT) Act 1998.⁹³ However, the grant of the Order is subject to the judge's discretionary power. This is mentioned in section 85 where it states;

(1) The court may, where necessary and upon such terms as it thinks just,

order any party-

(a) to state on oath, orally or by affidavit what document he has or has had in his possession or power relating to the matters in question, or whether he has or has had in his possession or power any specified document or documents or class of documents and, in either case, the present whereabouts of any documents formerly, but not now, in his possession or power; or

(b) to produce any document in his possession or power.

The above provision empowers the court to grant a discovery order when it thinks necessary and just and the party who receives the order must state on oath, orally or by affidavit the documents in his possession or power or the whereabouts of any document formerly possessed by him or he had power over. Besides that, the court may also when necessary order the party to produce any document which is in his possession or power.

Section 86 of the SCCP(FT) Act 1998⁹⁴ provides for the inspection of documents. This section states:

'Any party shall be entitled to inspect and copy any document in the possession or power of another party and referred to in any pleading, affidavit or other documents filed by him in the proceedings or on oral examination under section 85'.

The above section gives the right to any of the parties to inspect and copy documents in the possession or power of another party. However, if one of the parties without any basis refuses to produce a certain document, can the Syariah Court compel the party to produce it? For this matter, the party has the right to refuse the production of certain documents and to communicate certain things on the ground of privileged communication and documents as provided by section 87 of the SCCP (FT) Act 1998.⁹⁵ But if the refusal is without any basis, then the Syariah Court may refer to the principles mentioned in the case of *Berkeley Administration INC, v Mc Clelland*.⁹⁶ Those principles are:

⁹³ See also sections 76 to 78 of the Selangor Syariah Civil Procedure Code Enactment 2003. However, the provision on discovery under the Selangor Syariah Civil Procedure Code Enactment 2003 is quite different because there is no provision stating that the parties shall not appeal against the order.

⁹⁴ This section is similar to s77 of the Selangor Civil Procedure Code Enactment 2003.

⁹⁵ Section 87 of the SCCP (FT) 1998 provides that 'the production and inspection of documents under this Part shall be subject to the provisions of any law relating to privileged communication and documents'. See also s78 of the Selangor Syariah Civil Procedure Code Enactment 2003.

⁹⁶ (1990) FSR 381. See further Mohd Naim Mokhtar and Tajul Aris Ahmad Bustami, 'The extent of application of civil courts principles in shariah courts of Malaysia,' International conference on Harmonisation of Shariah and civil law, 20-21 October 2003, Legend Hotel, Kuala Lumpur.

- a) whether there is sufficient evidence that the documents exist which the other party has not disclosed;
- b) whether the documents relate to matters at issue in the action; and
- c) whether there is sufficient evidence that the document is in the possession, custody or power of the other party.

Section 88 of the SCCP(FT) Act 1998 further states that;

‘There shall be no appeal against any order of the Court made under Part XI except in any appeal against the judgment of the case as a whole’.

The above section indicates that the parties, including the *peguam syar'ie*, must under any circumstance whatsoever comply with the discovery order made by the judge. The appeal can only be made against the judgment in that case. This provision seems very strict. It is contended that the parties should be allowed to appeal against the order because such a restrictive provision will jeopardise the other party who may have reasons not to disclose the documents. Apart from its issue on privilege, the documents may not be so relevant to the case. This inconsistency will make the party at the Syariah Court feel that the discovery process cannot really provide assistance and their rights are not really protected. Thus, it is suggested that although the Syariah Court will only issue such an order when it is necessary and just the party should be allowed to appeal against the Order or at least should be allowed mutual discovery as provided by the RHC 1980.⁹⁷

As compared to the RHC 1980, the SCCP (FT) Act 1998 does not provide any specific form for discovery and inspections of documents. This is in contrast with the RHC 1980 whereby specific forms are made available for both automatic and non automatic discovery. Further, the SCCP (FT) 1998 also does not provide the following:

- a) Any explanation about mutual (automatic) discovery,
- b) Any specific forms similar to notice to produce and notice to inspect the document,
- c) Specific provision on the production of business books, the right of the court to dismiss or adjourn the application⁹⁸ and to revoke the order.⁹⁹ These limited provisions can be affirmed when the SCCP (FT) Act 1998 only has four sections for the discovery and inspection process whereas the RHC 1980 has seventeen rules that describe the procedures to discover and inspect the document.

The above mentioned inadequacies in the SCCP (FT) Act 1998 have resulted in certain failures in establishing further details about the parties' properties or relevant information. The situation can be elaborated in a case of *Tengku Puteri Zainab v Dato Seri Mohd Najib*.¹⁰⁰ In this

⁹⁷ However, in Selangor there is no provision on whether an appeal can be made against the court order for discovery and inspection. This means the parties may either appeal or not appeal against the order for discovery and inspection of documents.

⁹⁸ Order 24 rule 8 RHC 1980.

⁹⁹ Order 24 rule 17 RHC 1980.

¹⁰⁰ [1999] 5 MLJ 50.

case a wife (claimant/appellant) claimed RM5 million from her husband as *mut'ah*,¹⁰¹ but the husband agreed to pay RM36,000 only and contended that the amount claimed was unreasonable under *Hukum Syara'*.¹⁰² The husband also argued that the claim was against s56 of the Islamic Family Law (FT) Act 1984.¹⁰³ The court then decided that the matter could be resolved if both parties agreed to reach a reasonable *mut'ah* payment and if they agreed, the court would determine the amount based on the position of the claimant and the husband. However, since in this case the wife failed to establish the details of her ex-husband's movable and immovable properties she failed in her claim and her appeal against the decision was dismissed.

It is submitted that, the *Syar'ie* lawyer in the above case should apply for discovery and inspection of documents as to enable the wife to establish the details about her husband's properties.¹⁰⁴ But that procedure was not adopted and there was no explanation on why discovery process was not applied. From the above case, it seems that the process of gathering evidence in the Syariah Court needs to be improved. The existing provisions need to be improved as to enhance the process of gathering evidence in Syariah cases. It is recommended that more specific and details provisions on automatic and non automatic discovery and inspection of documents as available under O24 of the Rules of High Court 1980 should be adopted. This is important because the Syariah Court must ensure that more relevant and material evidence can be discovered and produced before the court without further question.

2. Alternative Method for Gathering Evidence in Syariah Civil Procedure

Besides the discovery and inspection of documents, the other alternative method available is an interlocutory injunction. The application of this method is similar to the application of interlocutory injunction, interim preservation of property etc., under Order 29 RHC 1980. However, the Syariah Court does not refer to the term Anton Piller Order or injunction when granting such Order, and only the Syariah High Court can grant such order.¹⁰⁵

Interim order is granted by the Syariah Court in order to preserve the status quo of the subject matter. It is considered as temporary order until the case is decided by the court and the court gives the final decision of the case. An application of interim order shall be made in Form MS 50 and must be supported by an affidavit.¹⁰⁶ Furthermore, section 199 of SCCP (FT) 1998 provides that;

¹⁰¹ Section 2 (1) of the Islamic Family Law (Federal Territories) Act 1984 defines *Mut'ah* as 'a consolatory gift that is reasonable according to *Hukum Syara'*, given to a divorced wife'. The relevant quranic provision on this matter is Surah al-Baqarah 2: 241 and 236 and also Surah al-Ahzab 33:49.

¹⁰² Section 2(1) of the Islamic Family Law (Federal Territories) Act 1984 defines *Hukum Syara'* as 'the laws of Islam in any recognised sects'.

¹⁰³ Section 56 of the Islamic Family Law (Federal Territories) Act 1984 provides that, '.....a woman who has been divorced without just cause by her husband may apply to the court for *mut'ah* or a consolatory gift, and the Court may, after hearing the parties and upon being satisfied that the woman has been divorced without just cause, order the husband to pay such sum as may be fair and just according to *Hukum Syara'*'.

¹⁰⁴ See further Mohd Naim Mokhtar and Tajul Aris Ahmad Bustami, n.96.

¹⁰⁵ See Chapter 2 (ss196-207) of the SCCP (FT) 1998 (ACT 585).

¹⁰⁶ See s 197(2) of SCCP (FT) Act 1998.

“The Court may make an order for the detention, preservation or custody of any property which is the subject matter of the cause or matter, or as to which any question may arise therein, or for the inspection of any such property in the possession of a party to the cause or matter.”¹⁰⁷

The above section is quite similar to Order 29 rule 2(1) to (3) of the RHC 1980.¹⁰⁸

The Syariah High Court also is given a power to grant an injunction applied by one of the parties in the proceeding. The application for an injunction may be made *inter parte* or *ex parte* in an urgent case.¹⁰⁹ Even the provision provided in the SCCP (FT) Act 1998 does not provide the expiry date of the *ex parte* injunction, reference can be made to the Practise Direction of the Syariah Court. Practise Direction No 4 of 2000 provides that any order for an injunction is only valid for thirty days from the date the order endorse by the court.

Section 198 of the ACCP (FT) Act 1998 mentions that there shall be no appeal against any interim order made by the Syariah Court. SCCP (FT) Act 1998 also provides the provision for an interim order as to *hadhanah*¹¹⁰ and interim order as to maintenance.¹¹¹ While Order 29 of the RHC 1980 does not mention anything about this matter.

Besides the above statute, the Syariah Court may also refer to the principles established in the judgment made by Justice Gopal Sri Ram JCA in the case of *Keet Gerald Francis Noel John v Mohd. Noor @ Harun b Abdullah & 2 Ors.*¹¹² In this case, the learned judge explained about the duties of a judge hearing an application for interlocutory injunction. There are three duties altogether and one of the duties is the judge should ask himself whether the totality of the facts presented before him disclosed a bona fide serious issue to be tried. If there is no serious issue then the relief should be refused.

From the discussion, it is discovered that discovery and inspection of documents is the only method provided by the Syariah civil procedure in gathering evidence, while the injunction is meant for injunctive relief. Thus, discovery is the most relevant procedure to gather evidence especially documentary evidence. This may include various type of electronic evidence such as SMS in the handphone or email in the computer.

In future, the task of gathering such evidence may be very complicated and challenging to the investigator, prosecutors and Syar'i lawyers. Few issues may arise such as whether the syariah court should adopt the provisions in the RHC 1980, whether electronic discovery is applicable in the Syariah civil procedure and whether other types of gathering evidence may also be applied in the Syariah Court?

It is submitted that the syariah court or the SCCP (FT) Act 1998 may follow RHC 1980 but with certain modifications in order to be in line with *hukum syara'*. Further, if the syariah is

¹⁰⁷ See for example the case of *Wan Puziah bt Wan Awang v Wan Abdullah bin Muda & Anor.* [2000] 14 JH 235.

¹⁰⁸ The other provisions which are quite similar are Order 29 rules 3, 4, 5, 6 and 8 with sections 203, 204, 205, 206 and 207 of the SCCP (FT) 1998, respectively. While sections 201 (an interim order as to *hadhanah*) and 202 (interim order as to maintenance) are not mentioned under Order 29 RHC 1980.

¹⁰⁹ See 200 of SCCP (FT) Act 1998.

¹¹⁰ See s 201 of SCCP (FT) Act 1998.

¹¹¹ See s 202 of SCCP (FT) Act 1998.

¹¹² (1995) 1 AMR 373.

ready to adopt e-discovery then the syariah civil procedures need to be reviewed prior to implementing e-discovery.

The following are the provisions that may be adopted by the syariah court civil procedure, they are:

- a) mutual discovery and discovery without Order (O24rr 1 and 2),
- b) Order for determination of issue, etc, before discovery(O24 r4),
- c) Form of list and affidavit (O24 r5),
- d) Defendant entitled to copy of co-defendant's list (O24 r6),
- e) Order for discovery of particular documents (O24 r7),
- f) production of business record (O24 r14),
- g) document disclosure of which would be injurious to public interest: saving(O24 r15),
- h) effect of failure to comply with the requirement for discovery(O24 r16) and;
- i) revocation and variation of Orders (O24 r17).

However, section 85 of the SCCP (FT) Act 1998 has already contain the gist of the following provisions namely, order for discovery (O24 r3), discovery to be ordered only if necessary (O24 r8), inspection of documents referred to in list (O24 r9) , Inspection of documents referred to in pleadings and affidavits (O24 r10), Order for production for inspection (O24 rr11), Order for production to court (O24 r12) and production to be ordered only if necessary(O24 r13). Nevertheless, there is no specific Form mentioned in this Act.

In addition to that, it is also suggested that there should also be other method of gathering evidence in the syariah court civil procedure such as interrogatories. This method is useful since answers to interrogatories can be used to complete discovery process and may lead to admission of certain facts.

CONCLUSION

As a conclusion it can be said that the RHC 1980 has provided various ways to gather relevant evidence as a preparation for trial. Discovery and inspection of documents for instance, give the opportunity to the parties either to mutually exchange the list of documents according to the principles and procedures mentioned under Order 24 RHC 1980 or to comply for the court order for discovery. What is important is the documents must be in their custody, possession and power and relevant to the case. However, when technology develops the parties must consider the possibility of adopting a new method of discovery such as electronic discovery which has been adopted and applied in the United States of America. (USA). The court should also consider whether the existing procedure for discovery (automatic and non automatic) is sufficient to accommodate electronic discovery of electronic document.

On this regard, lawyers and civil judges need to be prepared as technology develops very fast. There may be challenges and problems ahead. Thus, they should be more IT savvy because one IT consultant states that, "Those who still scoff at high technology are costing their firms and their clients a fortune in wasted time, unnecessary expenses and avoidable errors. The price

of devotion to paper may even include losing the case, since more than 35 percent of corporate communications never reach paper.”

As regard to the procedures of gathering evidence in syariah court it is clear from the discussion above that the SCCP (FT) Act 1998 is not comprehensive enough to guide the parties in the proceeding as well as the court's officers. Certain provisions in the SCCP (FT) Act 1998 need to be reviewed and amended. In a case where the provision is silence on the details of the process of discovery, the court may also refer to the principles enunciated by the civil court. Furthermore, since we are in the developing era, where there are too many electronic gadgets in the information communication technology (ICT) environment syari'e lawyers need to equip themselves with adequate knowledge and skills of gathering evidence. The syariah court judges also need to prepare themselves in the understanding of the evidence tendered by the parties in the case. Finally, the judge may also refer to *hukum Syara'* as provided under s 245(2) of the SCCP (FT) Act 1998.¹¹³

¹¹³ S 245 of SCCP (FT) Act 1998 provides that in the event of a lacuna or where any matter is not expressly provided for in this Act, the Court shall apply *hukum Syara'*.