ARTICLE:

ELECTRONIC DISCLOSURE IN ENGLAND & WALES

WRITTEN BY:
JANET LAMBERT

It is nearly two years since the Commercial Court issued its amended Guidelines in relation to e-disclosure, and a year since the Civil Procedure Rules (CPR) Part 31 Practice Direction brought into effect similar guidance for cases in other courts. This article considers whether the problems of electronic disclosure have been resolved by these new guidelines.

The Problems

The problems most frequently complained of were:

- The lack of guidance as to how the CPR on disclosure applied to electronic documents.
- The lack of clarity about what a "reasonable" and "proportionate" search for electronic documents covers.
- The difficulty and cost of reviewing all the electronic documents, including, for example, the metadata attached to documents.
- The lack of consistency between the parties in relation to e-disclosure. Parties carried out different levels of search, and some none at all.
- The uncertainty regarding a party's duty to preserve or restore electronic data, and whether it includes inaccessible and deleted data.
- The different ways in which parties produce disclosed documents.
- The fear that electronic disclosure requests could become a litigation weapon.
- The fear that the costs of searching, collating, reviewing and producing electronic disclosure would outstrip the damages claimed.

Lack of guidance

The Commercial Court revised Guidelines and the CPR Part 31 Practice Direction now provide a framework for parties who have to deal with the disclosure and production of electronic documents. This framework provides that:

- The parties should discuss how they preserve and propose to search for electronic documents prior to the first Case Management Conference.
- The parties may provide information to each other about the categories of electronic documents within their control, the computer systems, electronic devices and media on which any relevant documents may be held, and their storage systems and document retention policies.
- The parties should co-operate at an early stage as to the format in which electronic copy documents are provided for inspection.
- The new rules set out the factors that the Courts may take into account when deciding what is a reasonable search for electronic documents.
- They also state that it may be reasonable to search some or all of the parties' storage systems, and to search for electronic documents by a keyword search (which should be agreed between the parties), even when a full review of all the documents may be unreasonable.
- Finally, a more detailed disclosure statement must now be signed, in which the parties are required to state that they have carried out a search for electronic documents, and provide a list of what has been searched and also the restrictions placed on that search, by way of date, media, files and key word searches.

The Practice Direction certainly makes clear that the parties should be searching for electronic documents, unless they tell the other party that they have not done so at an early stage in the case, or at the latest in their disclosure statement. It also makes clear that the definition of what is to be searched for extends to all kinds of electronic documents, wherever they may be held. At first sight it might seem that the Practice Direction has widened the scope of e-disclosure. However, it also provides a framework against which the parties and the court can limit a search for electronic documents in appropriate cases.

Clearly, it is preferable for parties to reach agreement on e-disclosure issues, as the Practice Direction provides, but if these issues cannot be agreed, the courts will resolve them based on the new guidelines.

Ideally, parties and their lawyers would have liked to see some case law develop which sets some benchmarks as to how the courts will interpret the new guidelines. However, there have been no such cases. This is not unexpected, because any discussion at Case Management Conferences is unlikely to be reported. This is the reason why the Commercial Court Working Party recommended that some guidelines should be provided.

The only case that has been decided in the last two years, specifically relating to these issues, is one case relating to pre-action disclosure, that of *Hands v. Morrison Construction Services Ltd*.[1] No reference to the Practice Direction was therefore made in this case, but it is nonetheless of interest to review the case to see what facts a Court may take into account when considering searches for electronic documents. The case was heard before Mr Briggs QC, sitting as Deputy Judge in the Technology and Construction Court. In exercising his discretion as to whether to make a pre-action disclosure order, Mr Briggs QC considered the volume of electronic documents which were held on the relevant servers of Morrison Construction, the way in which they had been archived which made it difficult to find the relevant documents, and the time and cost of uploading the documents on to a database in order to carry out a keyword search, even before a legal review for relevance could take place. Mr Briggs QC spoke of "needles and pins" in a huge "haystack". He also took into account the fact that, whilst the ambit of the task could be narrowed by co-operative discussion, no attempt had been made by the party seeking the documents (Mr Hands) to narrow the width of the disclosure sought or the extent of the search to be made. He also stated that it was not a complete answer for Mr Hands to offer to pay the costs of disclosure, as the court had to look at the costs of litigation as a whole. Many of the factors the Deputy Judge took into account in reaching this decision were the factors relevant to the determination of the reasonableness of a search for e-disclosure set out in the Practice Direction, and the result was that he made an order for pre-action disclosure, but limited this to the hard copy documents.

A reasonable and proportionate search

The issue of what is a reasonable and proportionate search is still one that is hotly debated in many cases. Although the Practice Direction now gives parties some guidelines, it is not always easy to apply these to specific cases, particularly when there is little case law. However, the judges are not reporting many e-disclosure issues arising at the Case Management Conferences, which means the parties are either reaching agreement or ignoring e-disclosure.

That must be a matter for the parties, because it is clear from the *Hands* case that the courts are prepared to deal with issues relating to e-disclosure, and to take account of the time and costs involved in searching through a large volume of electronic documents, and the costs of the litigation as a whole, in exercising their discretion as to whether to order e-disclosure.

Clearly, it is preferable for parties to reach agreement on e-disclosure issues, as the Practice Direction provides, but if these issues cannot be agreed, the courts will resolve them based on the new guidelines. As more issues are raised with the courts, this will result in more case law, and the judges will gain more experience in dealing with these issues. Certainly, a case addressing the need to review metadata would be most welcome, although in relation to Commercial Court cases in which the volume of metadata could be enormous, the Commercial Court Guidelines provide that "in most cases metadata is unlikely to be relevant".

A consistent approach

The Practice Direction now provides for transparency between the parties as to the searches they have carried out for electronic documents, the categories of electronic documents they control and the computer

[1] *[2006] EWHC 2018 (Ch).*

systems, storage systems and electronic devices and media on which such documents are held. This should provide consistency for the parties in litigation. However, in practice, it appears that some parties are still not searching for or disclosing electronic documents. If this is the case, it is a matter for the other party, as the failure to search for electronic documents must have been made clear in the disclosure statement.

Preservation of electronic documents

The retention of electronic document is probably the biggest difficulty for most IT directors, company secretaries (who have the responsibility for the retention of records), in-house lawyers and Boards of Directors, particularly where their organisation operates in several jurisdictions, and different retention and privacy rules apply. The problems of the volume and duplication of electronic documents, and how to manage and store these documents continue. The difficulty is in putting in place an effective litigation hold. This is causing some concern, particularly in multi-national organisations. However, the Practice Direction makes clear that all electronic documents, wherever they are stored and even 'deleted' electronic documents, may be the subject of disclosure. It is therefore prudent for organisations to get their document retention and preservation policies and document management policies in order - and check how these policies are actually put into practice - particularly as these may come under scrutiny by the other party and the court.

Costs of electronic disclosure

One of the biggest concerns relating to e-disclosure are the costs involved due to the large volume of electronic documents which need to be searched for, collated and reviewed. The costs can increase if back-up tapes, laptops, mobile telephones and instant messaging systems have to be searched. As more parties become aware of their obligations to consider all forms of electronic data, the more the concerns about costs increase. Individuals and small businesses that may not have the expertise to collate, and search for, relevant electronic data, are also expressing concern about the cost of instructing IT experts to help them comply with their disclosure obligations.

The short-term answer to these costs concerns has to be "proportionality". This is a concept which has not been fully embraced in the United States, but which the courts have applied here. The judgment in the *Hands* case shows how it can be used to address the potential costs of e-disclosure. The courts are also in a position to control the costs of e-disclosure by applying the overriding objective and making appropriate and imaginative orders at Case Management Conferences and special disclosure applications.

However, it should not be forgotten that there are cases, such as those involving litigation that has its roots in the past and fraud cases, where it is necessary to carry out a thorough search through electronic records, including back-up tapes and metadata, just as it has in the past been necessary to search through archived documents in the warehouse in appropriate cases. In such cases, technology is already being used to reduce the costs of e-disclosure by assisting with the search and collation of electronic documents and the reduction in the volume of electronic documents a party needs to review. This may be the long term answer to controlling the costs of e-disclosure. Technology is catching up with the problem it originally created.

The courts also have the final say over the costs of e-disclosure, because they have a wide discretion to make costs orders at any stage in the case. The Practice Direction does not provide for the party requesting disclosure to pay the costs ("costs shifting"), but the court is always in a position to consider such an order, as it did in the *Hands* case where it was offered by the applicant.

The Commercial Court Working Party in its Report dated 6 October 2004 recommended that where substantial costs were incurred in dealing with e-disclosure, at the conclusion of the trial (or earlier if appropriate), judges should give separate consideration as to the costs incurred in relation to e-disclosure and who should pay those costs, having regard to the reasonableness and proportionality of the disclosure requested and given, the relevance of the disclosure given or ordered to be given to the issues in the case presented at trial, and the conduct of the parties generally in relation to disclosure. If judges followed this recommendation, parties would have to think carefully before producing large volumes of electronic documents and before making unreasonable and costly requests for e-disclosure.

Production for inspection

The Practice Direction provides for the parties to co-operate in relation to the format in which electronic

documents are produced for inspection. This is how the parties have been dealing with this question for some time. It is not a problem which should give rise to a dispute, but if it does or the parties need help as to how to produce the documents, LiST has produced a draft Data Exchange Protocol which can be found on its website. [2]

New Problems

Since the Practice Direction was introduced, some parties have expressed concerns about the content of the new disclosure statement, particularly where they do not have the IT expertise to complete this, and also about the requirement for them to provide information about the key word searches they have used. The purpose of the revised disclosure statement was to introduce some transparency about the search for electronic documents, as it was difficult for the requesting party to make a meaningful application for specific disclosure when it was unclear what computer systems, media and devices and storage systems were used, and which of these had been searched for electronic documents. In many cases this new transparency is enabling parties to have a meaningful discussion about the level of e-disclosure to be given, and the continued use of a disclosure statement with this level of information and clarity is to be encouraged.

A further problem in some cases is the difficulty and delays in obtaining access to and reviewing electronic documents stored in overseas locations (particularly other European countries), where these might contain personal data, and to process or transfer the data could result in a breach of local data protection and privacy laws. Parties are trying to overcome these problems, but they are adding to the time and cost of e-disclosure.

The future

The problems of e-disclosure will not be solved overnight by the introduction of new guidelines. However, it is encouraging that parties are seeking to resolve issues between themselves, and that there has not been a large amount of satellite litigation since the Practice Direction was introduced. How e-disclosure develops in the future, and how the costs of e-disclosure are controlled, remains in the hands of the parties, but hopefully aided by the Practice Direction, the courts and technology.

Janet Lambert is a Partner in the firm of Barlow Lyde & Gilbert. Janet was a co-author of the Commercial Court Working Party Report on electronic disclosure dated 6 October 2004, which resulted in the Commercial Court's Guidance Note on Electronic Disclosure and changes to the Civil Procedure Rules on electronic disclosure, and is also a member of The Sedona Conference.

jlambert@blg.co.uk
http://www.blg.co.uk

[2] *http://www.listgroup.org/,*