

E-DISCLOSURE OFFSHORE

Alex Potts – November 2009

Introduction

Electronic disclosure is a hot topic in the USA and in England, and in other onshore jurisdictions. It is also important in offshore jurisdictions, such as Bermuda, the Cayman Islands, and the British Virgin Islands, where a large proportion of international business is conducted electronically.

In offshore businesses such as banking, financial services, and professional services, electronic communications are the norm. Many offshore jurisdictions have specifically enacted legislation that encourages transactions to be conducted electronically, and that allows business documents to be stored electronically¹. Many businesses operate in a paperless environment as a result.

Before rule-makers in the US and England introduced specific rules dealing with electronic disclosure in litigation, arguments would be resolved by the courts on an *ad hoc* basis. Judges would simply apply the procedural rules and case law applicable to the disclosure of paper documents, as appropriate.

Important features of electronic documents

The *ad hoc* approach obviously has some shortcomings. Electronic documents differ from paper documents in important respects. For example:

- (a) it is not always obvious which is the 'original' electronic document;
- (b) there can be many copies, drafts, or versions of electronic documents;
- (c) although some electronic documents are the product of human authorship, many are the product of a computer system;
- (d) electronic documents are created and stored in many systems and media. Common document formats include Word documents; Powerpoint presentations; Excel spreadsheets; Adobe Acrobat scanned documents; Outlook emails; and picture, video, and audio files. Storage media include desktop computers, laptop computers, Blackberries, mobile phones, PDAs, memory cards, memory sticks, servers, and back up tapes;
- (e) electronic documents can potentially be accessed by a large number of employees;
- (f) electronic documents can be deleted as a result of an organisation's routine IT policies (often influenced by electronic storage capacity), as well as a result of employee changes;
- (g) electronic documents can be deleted by the press of a button, the click of a mouse, or by 'loss' of the relevant piece of hardware. Although forensic IT experts can often retrieve 'deleted' electronic documents, software is available that can permanently 'eliminate' it;
- (h) for operational and disaster recovery purposes, many offshore businesses store their electronic documents in more than one location in different jurisdictions;
- (i) electronic documents usually contain background information about their history and operation (metadata). Metadata can reveal the identity of the author of a document, its editor, its sender, its recipient, as well as the dates and nature of any changes or amendments. It can also reveal the formulae, code or programming used for accounts, calculations, and models;
- (j) a manual review of a large number of electronic documents, for the purposes of determining relevance and privilege, can be expensive and time-consuming. However, because documents are in electronic form, they can be electronically

¹ For example, Bermuda has enacted the Electronic Transactions Act 1999; Jersey, the Electronic Communications (Jersey) Law 2000; the Cayman Islands, the Electronic Communications Law (2003 Revision); and the Bahamas, the Electronic Communications and Transactions Act 2003.

searched with the use of search parameters. If used sensibly, electronic searches can be of significant assistance to the manual review process, although they are not a substitute for it, because electronic searches may produce incomplete, inaccurate, or indiscriminate results.

Questions and uncertainties

The *ad hoc* approach can leave the parties to litigation in a state of considerable uncertainty as to their rights and obligations. Common questions include:

1. What is the scope of the parties' obligation not to delete relevant electronic documents?
2. When should sanctions be imposed for deletion of relevant electronic documents?
3. Should parties search for relevant electronic documents, if they have been archived, deleted, moved to back up tape, or stored on a server overseas?
4. Should parties describe the nature of their search for electronic documents to the other party, either before or after it is carried out?
5. Should parties be obliged to allow inspection of, or to produce copies of, electronic documents in their 'native' electronic format, and in their 'native' context?

Lack of understanding

These uncertainties are often compounded by a lack of understanding or false assumptions. In particular:

- (a) Lawyers and judges might not understand the available electronic evidence, the electronic document management systems of the parties, or the cost and difficulty of searching for and retrieving electronic documents;
- (b) Parties might not understand what is legally required of them when it comes to electronic disclosure. There is often a tendency for operational members of staff to delegate the electronic disclosure exercise to IT or junior personnel, who may not be sufficiently familiar with the transaction or dispute to carry out a thorough search or review.

Lack of resources

The uncertainties can also be compounded by a party's inability or unwillingness to deploy, and incur the costs of, the legal, IT and management resources that are necessary to search for, search through, review and consider a party's own electronic disclosure, as well as the electronic disclosure provided by the other side.

Strategy and tactics

These uncertainties can occasionally be used for strategic or tactical advantage in litigation. One 'offensive' tactic is to seek extensive disclosure of electronic documents from the other side. This might produce the 'smoking gun', or it might give rise to adverse inferences or other sanctions if an order is not complied with. It might simply force the other side to deploy significant resources and incur costs on the disclosure exercise. This tactic can backfire, however, if the other side is ready and willing to give extensive disclosure, all of which might prove unhelpful to your client.

One 'counter-offensive' tactic is to swamp the other side with your own electronic disclosure, or present it to the other side in a disordered, or illegible, fashion. This might make it impossible for the other side to find or understand the true significance of certain documents, the needles in the haystack. It might simply force the other side to deploy significant resources and incur costs in analysing documents that might ultimately prove to be insignificant or irrelevant. This tactic can also backfire, however, if the other side persuades the Court that the disclosure exercise should be carried out again, at your client's cost.

One 'defensive' tactic might be to offer to carry out an extensive electronic disclosure exercise, if requested to do so, but only on condition that the other side should pay the costs of the exercise, especially if it turns out to have been redundant or unnecessary.

Amendments to the procedural rules in the US and England

In an effort to clarify the issue of electronic disclosure, amendments were made to the procedural rules of both the US and the English Courts.

Amendments were made to the US Federal Rules of Civil Procedure, which came into force on 1st December 2006, although they were published in August 2004. In England, the Practice Direction to Part 31 of the Civil Procedure Rules was amended on 1st October 2005.

The central principal of both sets of procedural amendments is that there should be an agreed framework within which the parties to a dispute, and their lawyers, should give early attention to the process of electronic disclosure. They should, in particular, seek to agree how electronic disclosure should be carried out (known in the US as 'meet and confer'), so as to resolve any contentious issues before they interfere with the procedural timetable of the case.

The courts are also given the power and the obligation to manage the electronic disclosure process, with a view to balancing the legitimate interests of the disclosing party with those of the receiving party.

Although these procedural rules are unlikely to eliminate the arguments that may inevitably arise as to the scope or adequacy of a party's electronic disclosure, they appear to provide a useful framework against which all parties know, or should know, what is expected of them, and what they might expect of the other side and of the Court.

In addition to the procedural rule changes, there have also been a number of initiatives on both sides of the Atlantic, with a view to better educating judges, lawyers, and clients, of the issues related to electronic disclosure.

Digicel (St Lucia) Ltd v Cable & Wireless

A recent decision of the English High Court on the issue of electronic disclosure, *Digicel (St Lucia) v Cable & Wireless* [2008] EWHC 2522, illustrates the point that offshore businesses, and their lawyers, need to be informed of current developments in this area.

The Digicel claimants were mobile phone companies incorporated in various offshore jurisdictions. The Cable & Wireless defendants were incumbent telephone operators. The basic allegation made by Digicel against Cable & Wireless was that, in each jurisdiction, Cable & Wireless deliberately delayed interconnection with its networks by Digicel, thereby causing Digicel loss. There was a dispute between the parties as to the adequacy of Cable & Wireless's electronic disclosure. Digicel criticised the electronic search that had been carried out by Cable & Wireless, since it was limited in scope to certain keywords that had not been agreed. Digicel also criticised Cable & Wireless's failure to restore back-up tapes that might have contained relevant documents and information.

In resolving that dispute, the Court stressed that the parties should at an early stage in any litigation consider and discuss any issues that may arise regarding searches for electronic documents, so that they might be resolved as soon as possible, and before substantial costs have been incurred.

The current procedural position in the offshore jurisdictions

The offshore jurisdictions have not yet introduced specific procedural rules relating to electronic disclosure. The position therefore remains similar to the position in England and in the US, prior to the procedural amendments of 2005 and 2006. Any contentious issues relating to electronic disclosure have to be resolved on a case by case basis.

It is likely that, until specific rules are introduced, the Courts in jurisdictions such as Bermuda, the Cayman Islands, and the British Virgin Islands will be persuaded by the English case law, and influenced by the electronic disclosure rules set out in the Practice Direction to Part 31 of the English Civil Procedure Rules. They might also be persuaded, but to a lesser extent, by the US case law and the amended provisions of the FRCP. There will, however, be significant difficulties accommodating the US concepts of the 'quick peek' and the 'privilege clawback' into the common law relating to legal professional privilege, without specific legislation.

Conclusion

Offshore businesses and lawyers should keep informed of current developments relating to electronic disclosure. Offshore entities are frequently exposed to the risk of litigation, and

electronic disclosure, in the US and England. They will also have to carry out electronic disclosure in any litigation conducted in the offshore jurisdictions as well, although there will be scope for argument in any particular case as to the proper scope of the electronic disclosure exercise to be performed.

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This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.

Notes to Editors

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