

## Electronic Disclosure

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### 1 The Problem of Disclosure of Electronic Documents

1.1 This paper has been produced for consideration by members of the Commercial Litigators' Forum<sup>2</sup> to address the perceived difficulties of dealing with disclosure of electronic documents in commercial disputes. In particular, the following issues arise.

- 1.1.1 What is an electronic document?
- 1.1.2 How do the current Civil Procedure Rules ("CPR") on disclosure apply to electronic documents?
- 1.1.3 What unique problems arise with providing disclosure of electronic documents compared with conventional paper documents?
- 1.1.4 Do the CPR assist practitioners in addressing the problems associated with disclosure of electronic documents?
- 1.1.5 How can the court be assisted to understand the scale of the difficulties posed by disclosure of electronic documents in any given case?

1.2 In the remainder of this paper, we seek to address these and other related issues. In summary, and for the reasons that follow, we consider that:

- 1.2.1 The current definition of 'documents' as it applies to electronic media could be more helpfully clarified;
- 1.2.2 There is an increasing proliferation of data being stored on electronic media with the increasing use of email and business trends towards paperless (or, at least, less paper intensive) offices;

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<sup>2</sup> The Commercial Litigators' Forum ("CLF") was established in July 2002 by a number of the leading dispute resolution law firms to promote informal discussion of, and to promulgate initiatives in, dispute resolution related issues affecting the legal profession and the court system. The authors would welcome comments on this paper. Comments can be sent to [robin.preston-jones@sjberwin.com](mailto:robin.preston-jones@sjberwin.com). These will be posted on the CLF website [www.commerciallitigatorsforum.com](http://www.commerciallitigatorsforum.com).

- 1.2.3 In any given case, there may be an incredible mass of data held on electronic documents which theoretically fall to be disclosed;
- 1.2.4 The CPR do not provide much assistance in terms of limiting the scope of the disclosure and inspection exercise in relation to electronic documents: the parties and the court are largely left to deal with this in an *ad hoc* fashion on a case by case basis;
- 1.2.5 There may be much to be learned from our colleagues in the United States who have grappled with the issue of electronic disclosure for some years and we see some sense in their general approach of considering both accessibility of the documents and whether the costs burden should be shifted to the inspecting party in appropriate circumstances;
- 1.2.6 It may assist the parties, their lawyers and the court if parties were obliged to consider in each case a standard form questionnaire to aid understanding of the architecture of each party's electronic storage systems.

## 2 Document Disclosure in Commercial Dispute Resolution

2.1 A standard feature of commercial dispute resolution processes in England is some form of compulsory disclosure of documents. The extent of the requirement to disclose documents varies from case to case depending on what is necessary to enable the case to be dealt with justly. Of particular importance in deciding what degree of compulsory disclosure is necessary are the following factors:

- 2.1.1 Ensuring that the parties are on an equal footing;
- 2.1.2 Saving expense;
- 2.1.3 Dealing with the case in ways which are proportionate:
  - (i) to the amount of money involved;
  - (ii) to the importance of the case;
  - (iii) to the complexity of the issues;

(iv) to the financial position of each party; and

2.1.4 Ensuring that the case is dealt with expeditiously and fairly.<sup>3</sup>

2.2 The application of these factors to a particular case may result variously in no order being made for any form of compulsory disclosure (for example in a simple case of contract construction), a “standard disclosure” order or (in larger, more complex cases) a wider disclosure order encompassing all other documents relevant to the issues between the parties or even documents not themselves relevant to issues but which may lead to a train of inquiry enabling a party to advance its own case or damage that of its opponent.<sup>4</sup>

2.3 “Standard disclosure”<sup>5</sup> requires disclosure by a party of:

2.3.1 the documents on which it relies;

2.3.2 the documents which

- (i) adversely affect its own case;
- (ii) adversely affect another party’s case; or
- (iii) support another party’s case; and

2.3.3 documents required to be disclosed by a relevant practice direction.<sup>6</sup>

2.4 Whatever the ambit of compulsory disclosure required in a particular case, any party may apply for “specific disclosure”<sup>7</sup> of specific documents or classes of documents.

2.5 Disclosure may also take place pursuant to the terms of a pre-action protocol or an order for pre-action disclosure. Such orders are made where disclosure before proceedings have started is desirable in order to dispose fairly of the anticipated proceedings, to assist the dispute to be resolved without proceedings or to save costs.<sup>8</sup>

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<sup>3</sup> Civil Procedure Rules 1998, Part 1 - the so called “overriding objective”.

<sup>4</sup> See Compagnie Financière et Commerciale du Pacifique -v- Peruvian Guano Co (1882) LR 11 QBD 55 (CA).

<sup>5</sup> CPR Part 31.6.

<sup>6</sup> There is as yet no practice direction in force which extends the ambit of standard disclosure in commercial cases.

<sup>7</sup> CPR Part 31.12.

<sup>8</sup> CPR Part 31.16.

