Recovery of electronic documents: time for guidance?

This follow-up to the Commercial Court Conference 2018 (an edited version) argues that there is a need for guidance dealing specifically with recovery of electronic documents in commercial actions.

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"Electronic Data" was the topic for the Commercial Court Conference 2018. The conference addressed the adequacy of the Rules of the Court of Session and related guidance in relation to recovery and disclosure of electronic documents in commercial actions.

This article (an edited version of the online article published in June 2018) argues that the current rules and guidance are not adequate and that there is a need for guidance dealing specifically with recovery and disclosure of electronic documents.

The challenges

Compliance with orders for recovery and disclosure of documents can be challenging when the terms of the order necessitate a search of electronic data. The search might relate to large volumes of data. The data may consist of different document types (word documents, emails, CAD drawings, spreadsheets, text messages, web pages), held in different formats, in many different repositories (on a company network, in archives, in cloud storage, memory sticks, laptops and other devices), and by multiple custodians. The documents may have been generated over a period of years. Manual review of such documents may be impractical for reasons of cost and time. Faced with an order for recovery and disclosure of electronic documents, a haver might need to consider the use of technology in order to facilitate the search.

In that situation the haver is faced with a number of difficult choices: which software to use; whether to engage an external supplier, and if so which; whether to rely on a keyword search or use technology-assisted review; which repositories to search; what date range to apply; what level of cost to incur, and so on.

Typically the terms of an order for recovery and disclosure of documents will offer the haver no assistance regarding the means by which they should seek to comply with the order. How should they proceed? They may have little understanding of the technologies available to assist in a search for electronic documents. If they select software that does not succeed in identifying all the documents falling within the scope of the order, they face having to conduct a fresh search. If they carry out a search across all repositories, they may incur costs that are unnecessary and disproportionate.

If these issues create challenges for havers, they also present challenges for commissioners and parties seeking recovery of documents by way of court order. A commissioner may have to make the same kind of decisions as the haver, as to the manner in which and the means by which the documents should be recovered. The party in receipt of an order for recovery wants access to the documents but not, presumably, at any cost. A haver may be entitled to a fee for searching out the documents: Phoenicia Asset Management Sal v Steven Alexander [2010] CSOH 71. The receiving

party will incur the cost of reviewing all that is disclosed. All those involved in litigation have an interest in ensuring that the search for documents falling within the scope of the order is carried out in an efficient and cost-effective manner.

Despite these difficulties, the Rules of the Court of Session (and associated guidance: Practice Note No 1 of 2017, supplemented by Commercial Actions – Guidance for Practitioners) do not offer any guidance specific to the recovery and disclosure of electronic documents.

Views expressed at the conference

The Senators of the College of Justice who spoke at the conference were keen to assert the adequacy of the current rules and appeared to favour the status quo. On the other hand, John Mackenzie (Shepherd and Wedderburn) and Almira Delibegovic-Broome QC spoke about difficulties faced by havers and commissioners respectively.

Perhaps recognising the force of these observations, Lord Doherty concluded the conference by suggesting that some form of additional guidance, dealing expressly with recovery and disclosure of electronic evidence, might be appropriate provided it was the widely held view of practitioners that such guidance was necessary.

Defence of the status quo

Their Lordships' defence of the status quo went hand in hand with the argument that chapter 47 of the rules offers increased flexibility as regards the orders that might be made for recovery and disclosure of electronic documents.

Rule 47.11(1)(b)(iv) enables the commercial judge, at the preliminary hearing, to order "disclosure of... the existence and nature of documents relating to the action or [sic] authority to recover documents either generally or specifically".

In addition, the commercial judge "may make such other order as he thinks fit", whether at the preliminary hearing, the procedural hearing or at any further hearing before final judgment: rules 47.11(1)(e), 47.12(2)(o) and 47.15 respectively.

Chapter 47, it was argued, puts "exceptional" powers in the hands of the judges. These powers, it was said, extend beyond the usual powers to grant orders relevant to a specification of documents and might extend to orders relating to specific search terms.

Selection of appropriate search terms is only one of many difficulties associated with recovery and disclosure of electronic documents. Speakers at the conference alluded to other difficulties including:

- problems associated with identifying and excluding privileged documents (see, for example, Atlantisrealm Ltd v Intelligent Land Investments (Renewable Energy) Ltd [2017] EWCA Civ 1029);
- the choice of method of de-duplication – removing duplicates of a document;
- whether the disclosure exercise might proceed in stages (see Montpellier Estates Ltd v Leeds City Council [2012] EWHC 1343 (QB)).

Presumably the wide powers conferred by chapter 47 would enable the court to make orders about all these matters. These powers are important, but more is needed.

Why chapter 47 is not enough

Once an order for recovery and disclosure of documents has been granted, it will generally be unnecessary for the parties to seek further orders in relation to the process of recovery and disclosure if, either, the process is straightforward or the parties can reach agreement about how to proceed. Moreover, typically the court will only be in a position to grant orders dealing with tricky aspects of the process if the parties are able to address the court properly in relation to the difficulties faced, the options for resolving the difficulties and the reasons for their failure to reach agreement on those options.

Even where parties have anticipated the kinds of difficulties that may arise, it is impossible to foresee every eventuality. This alone offers a reason to be cautious about seeking (or granting) orders relating to the recovery and disclosure process in terms that offer no room for manoeuvre. It is undesirable that the parties should have to return to the court to seek fresh orders if an order regarding the process of recovery and disclosure proves unworkable, and there are costs implications: see Iomega Corporation v Myrica (UK) Ltd (No 1) 1999 SLT 793. If parties can anticipate and work together to resolve issues, so much the better.

In other words, the key to the efficient conduct of the recovery and disclosure exercise lies not so much in the powers conferred under chapter 47, but in the parties' preparedness to anticipate, discuss and resolve issues.

How might parties and their legal representatives familiarise themselves with the problems, technical and legal, that arise in the context of recovery and disclosure of electronic documents? One of the difficulties about litigation in a small jurisdiction such as Scotland is the relative lack of case law authority. Useful guidance is thin on the ground. Practice Note No 1 of 2017 and the Commercial Actions – Guidance for Practitioners are silent as to the manner in which the exercise of recovery and disclosure of electronic documents should be carried out. This may be less of a problem for large firms, especially large English firms operating in Scotland that can draw on their experience of English litigation practice. However, for firms without such experience – and for parties – some form of guidance or protocol, tailored to the Scottish litigation context would surely be helpful.

If awareness of the issues is important, discussion is crucial. (In an English law context see Digicel (St Lucia) Ltd v Cable & Wireless plc [2008] EWHC 2522 (Ch); Earles v Barclays Bank [2009] EWHC 2500.) Failure to discuss the manner in which recovery and disclosure of electronic documents should be carried out can result in delay and unnecessary expense. An express obligation to discuss the kinds of issues that may arise in recovery and disclosure of electronic documents would focus minds and could readily be taken into account in awards of expenses. It may serve to streamline the process of recovery and disclosure and reduce the risk associated with inadvertent disclosure of privileged documents.

Lessons from another jurisdiction

The courts of England & Wales responded to the challenges presented by disclosure of electronic documents by issuing Practice Direction 31B. (A new draft practice direction is on the

judiciary.gov.uk website.) Paragraph 9 requires parties and their legal representatives to discuss specific issues, including (where appropriate):

"(1) the categories of Electronic Documents within the parties' control, the computer systems, electronic devices and media on which any relevant documents may be held, storage systems and document retention policies;...

"(3) the tools and techniques (if any) which should be considered to reduce the burden and cost of disclosure of Electronic Documents, including –

(a) limiting disclosure of documents or certain categories of documents to particular date ranges, to particular custodians of documents, or to particular types of documents;

(b) the use of agreed Keyword Searches;

(c) the use of agreed software tools;

(d) the methods to be used to identify duplicate documents;

(e) the use of Data Sampling;

(f) the methods to be used to identify privileged documents and other non-disclosable documents, to redact documents (where redaction is appropriate), and for dealing with privileged or other documents which have been inadvertently disclosed; and

(g) the use of a staged approach to the disclosure of Electronic Documents;

"(4) the preservation of Electronic Documents, with a view to preventing loss of such documents before the trial;

"(5) the exchange of data relating to Electronic Documents in an agreed electronic format using agreed fields;

"(6) the formats in which Electronic Documents are to be provided on inspection and the methods to be used;

"(7) the basis of charging for or sharing the cost of the provision of Electronic Documents, and whether any arrangements for charging or sharing of costs are final or are subject to re-allocation in accordance with any order for costs subsequently made; and

"(8) whether it would be appropriate to use the services of a neutral electronic repository for storage of Electronic Documents."

Practice Direction 31B might be characterised as offering a context-specific particularisation of aspects of a general duty of co-operation between the parties to litigation in the English courts. (It does not apply to non-parties, and it is suggested that if similar guidance were to be introduced in Scotland, it should apply to non-party havers, perhaps by making it obligatory for the party in receipt of the order to enter into discussions as to the matters set out in the checklist if the haver so requests.) However, it is also much more. In effect it is a repository of accumulated wisdom concerning the range of matters that may fall to be addressed in the recovery and disclosure of electronic documents. Without such a checklist, would parties and their legal representatives

necessarily consider, for example, whether an agreed mechanism for identifying and excluding privileged documents, data sampling or a staged approach to disclosure would be useful, even if not required in every case?

These provisions could be adapted and updated for use in a Scottish litigation context. (In particular, it would helpful for the guidance to include reference to the use of predictive coding, the use of which was approved in Pyrrho Investments Ltd v MWB Property Ltd [2016] EWHC 256 (Ch).) While there are significant differences in the disclosure rules of the two jurisdictions, these differences do not have a bearing on the recommendations suggested here.

Conclusion

In 2009 Chris Dale, an expert on electronic disclosure, commenting on the failure of the Scottish Civil Courts Review to tackle seriously the issue of recovery and disclosure of electronic documents, tartly observed that: "There is nothing to stop the Top 10 firms in Scotland agreeing that any litigation between their respective clients will start with a discussion about the best way to handle electronic documents in a manner which is efficient for all parties" (Orange Rag: Scottish Civil Costs Review – a missed opportunity (8 December 2009)).

Dale is right, of course, but why perpetuate a situation where best practice is opaque or seen as the preserve of a "Top 10"? Guidance, in the form of a court-issued practice note or other litigation protocol, is needed. Paragraph 9 of Practice Direction 31B offers a useful starting point.

About the author

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