

Cross Border Issues on Electronic Disclosure

Val Davies

Partner, Norton Rose

Often in complex litigation, issues which I shall describe as “cross border issues”, arise. Let us consider an action in the High Court of England and Wales which involves, say an English financial institution incorporated in England. The corporation also has a subsidiary in Greece and a parent company in Germany (neither of which are parties to the litigation). In addition to the usual paper disclosure, email and word processing documents, the English company outsourced the maintenance and storage of certain documents to India so that back-up tapes were physically located in India. It is likely that a proportion of the documents will be duplicates, for example, documents on desktop computers and laptops in England (and in mainland Europe) and on the back-up tapes kept in India.

How does one best approach this task?

What constitutes a document?

The first issue is to consider what constitutes a document. CPR31.4 contains a wide definition. It covers electronic documents including email and other electronic communications, databases and documents produced on word processors. Apart from documents which are readily accessible from computer systems, the rule extends to documents stored on servers and backed-up documents. It also covers metadata and documents which have been “deleted”.

The proposals put forward by the working party chaired by Mr Justice Cresswell which have been adopted in the Admiralty and Commercial Courts Guide (“ACCG”) (paragraph E.3.1A) have also, since October 1st, 2005, been included in the Practice Direction supplementing Part 31 (paragraphs 2A.1-2A.5). This provides that prior to the first case management conference the parties “should discuss any issues that may arise regarding searches for and the preservation of electronic documents”. This means that parties to litigation need to establish where their data is stored and who controls it before they reach the CMC stage. The working party considered that metadata in most cases was unlikely to be relevant and this is reflected in the ACCG but interestingly not in the Practice Direction supplementing Part 3.1 which has no such restriction. This may result in more onerous obligations upon parties under the Practice Direction.

Which documents are in your client's control?

The next issue to consider is what documents are within the control of the party to the litigation for whom you are acting. A party's duty to disclose documents is limited to documents which are or have been in its control

CPR31.8 defines control as a document which:

- 1. Is or was in the party's physical possession; or*
- 2. The party has or has had a right to possession of; or*
- 3. The party has or has had a right to inspect or take copies of.*

Are documents within a party's “control” for the purposes of CPR 31.8 when they are physically in the possession of an overseas third party company? Is the situation any different if the overseas company is a subsidiary or related company of the UK company?

a) The outsource company

Taking first of all the position of the documents with the outsourcing company in India. These documents are not in the financial institution's possession. However, note that presumably many of them were originally when the emails were sent or received. It may therefore be necessary to include reference to this in the appropriate part of the list of documents. As to the current situation with the documents being stored on back-up tapes at the outsourcing companies, whilst these may no longer be in the physical possession of your client, it is highly likely that the client will have retained the right to possession of the back-up tapes and to obtain copies of them. One would expect that the outsourcing agreement would require the outsourcing company to maintain and make the retrieval system available to the client. Therefore, in most instances the documents with the outsourcing company will be within the client's control for the purposes of CPR 31.8.

b) The parent and subsidiary in mainland Europe

The leading case on this issue is *Lonhro v Shell Petroleum [1980] 1WLR 627*. Although this predates the CPR, the Lonhro test is still the applicable test (it was for example applied by Tomlinson J. in *Three Rivers*). It concerned a dispute over an African pipeline. Lonhro sued Shell and a number of other oil companies in England for breach of contract and conspiracy. During the disclosure process, the Defendants did not disclose the

documents from their 100%-owned Rhodesian and South African subsidiaries as the local directors had refused to disclose them on the grounds that under local law it would be criminal to do so. Lonhro contended those documents were in the "power" of the parent Defendants, and applied for their disclosure. The House of Lords disagreed and dismissed Lonhro's appeal on the basis that the documents were not in the "power" of the UK parent company, the then relevant test.

Whether or not disclosure of a parent and/or subsidiary documents would be required is very fact specific but it is clear that simply because one company has a controlling interest in the other company this will be insufficient to bring the documents into its control. It is quite a high threshold to fulfil for a subsidiary or parent's documents to be in the control of the party to the litigation. In Lonhro control was described as follows:

"where on the established facts, a company is so utterly subservient or subordinated to the will and the wishes of some other person ... (... or a parent company) that compliance with that other person's demands can be regarded as assured. Each case must depend on its own facts and also upon the nature, degree and context of the control it is sought to exercise".

From this it seems clear that if a subsidiary does not trade in any meaningful way or if there is a holding company in the group established for tax reasons, for example, which does not have any other functions then it is likely that disclosure of these company's documents may be required. If, however, a parent or subsidiary has its own board (in particular if it has some directors that are unique to it) and it trades, it is unlikely that disclosure of their documents will need to be made.

Is it proportionate to obtain documents from overseas?

Having established that the documents are in the financial institution's control, the next issue is whether it is proportionate for a party to disclose documents which are overseas.

Guidance is given in CPR 31.7(2) which states that:

"The factors relevant in deciding the reasonableness of a search include the following –

- a) the number of documents involved;*
- b) the nature and complexity of the proceedings;*
- c) the ease and expense of retrieval of any particular document; and*
- d) the significance of any document which is likely to be located during the search."*

As to the ease and expense of retrieval, the recent Admiralty and Commercial Court Guide (paragraph E3.1A(4)) and paragraph 2A of the Practice Direction referred to above provide for the following factors to be considered by the Court in ordering disclosure:

- I. The accessibility of electronic documents or data (including e-mail) on computer systems, servers, back-up systems and other electronic devices or media that may contain such documents taking into account alterations or developments in hardware or software systems used by the disclosing party and/or available to enable access to such documents.
- II. The location of relevant electronic documents, data, computer systems, servers, back-up systems and other electronic devices or media that may contain such documents.
- III. The likelihood of locating relevant data.
- IV. The cost of recovering any electronic documents.
- V. The cost of disclosing and providing inspection of any relevant electronic documents.
- VI. The likelihood that electronic documents will be materially altered in the course of recovery, disclosure or inspection.

Practitioners should take care as the revised list of documents (Standard Disclosure Form N265) contains a new section dealing with electronic disclosure. In summary, what is a reasonable and proportionate search depends on the facts of each case including the amount at stake. If known key documents are overseas then it is unlikely that a party would be able to resist having to disclose them. However, if duplicate sets of documents (for example on back-up tapes or a mirror server) are held overseas, if cogent reasons are put forward that such recovery and disclosure would be too costly the Court will be sympathetic. If the other side is insistent on seeking such disclosure then a cost shifting order should be obtained.

Watch out for local law issues

Local law issues need to be considered. The requirements of data protection vary in different jurisdictions and may restrict the transfer of electronic documents between jurisdictions. Where the main action is in the English Court, the English Court usually has no problem about making an Order for Disclosure of documents located abroad. However, in certain jurisdictions, the proposed disclosure may constitute a criminal offence by the law of the state where the documents are situated. Using the example of the Greek subsidiary, assume the documents were disclosable. However, such disclosure is prima facie a breach of Greek banking laws on the grounds of confidentiality.

Under English law, this will provide an objection to inspection of the documents but may not necessarily prevent their inclusion by the English financial institution in its list of documents. In such a situation local law advice is necessary. In my experience, it may not be clear even with local law advice, whether an Order from the English Court requiring the financial institution to disclose the documents would provide a sufficient reason to constitute a defence to criminal proceedings brought in Greece. In such circumstances the financial institution should apply to the English Court, either seeking an order for disclosure by obtaining the court's assistance and explaining the factual circumstances or an Order from the English Court that disclosure from the Greek subsidiary is not required. The approach adopted may depend on the local law advice.

Conclusion

The parties should seek to agree the extent of the search for documents before the case management conference. In the event agreement is not reached, areas of dispute will need to be raised at the first case management conference. The disclosure statement on the list of documents should state in detail what steps have been taken to search for documents, the extent of the search and what documents are not disclosed (for example by reference to country of location). Whilst the disclosure process can be onerous and time consuming, with proper procedures in place and with proper steps taken once litigation is likely the difficulties can be managed.

Val Davies is a Partner in the Dispute Resolution department of Norton Rose. She is a Solicitor Advocate and a Recorder.

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