Fenwick Elliott
The construction & energy law specialists

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Welcome to the November edition of *Insight*, Fenwick Elliott's newsletter which provides practical information on topical issues affecting the building, engineering and energy sectors.

In this issue we discuss the new tools which enable the Courts to manage electronic disclosure.

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E-disclosure: a modern response to modern business disputes

The arrival of computers and email in the late 1980s and the commonplace use of Blackberrys since their launch in 2003 have completely transformed the way in which modern business is conducted. It will therefore not come as too much of a surprise to hear that around 90% of commercial communication is now conducted electronically, as a result of which the volume of day-to-day business communication has increased exponentially.

The sheer quantity of electronic documents that is now created can, however, become problematic in the context of disputes that reach the English courts (especially construction disputes which are notoriously document heavy), and the review of large numbers of emails and other electronic media can become very expensive unless the process is well managed.

This twenty-ninth issue of *Insight* discusses some of the recent reforms regarding electronic documents that have been implemented under English law as a response to the demands of modern business disputes. It also provides practical tips for those who may find themselves in the early stages of a dispute, on how to stay ahead of the game.

The new reforms

Court of Appeal Judge Lord Justice Jackson conducted a review of civil costs in 2010. As part of that review, he considered how best to deal with electronic documents in the context of litigation in a cost-effective and controlled way. Ultimately, his review led to the implementation of the aptly named "Jackson Reforms", which brought various changes to the law and a new practice direction that deals specifically with the disclosure of electronic documents.

Practice Direction 31B

Practice Direction 31B ("PD31B") was introduced for claims issued after 1 October 2010. Its purpose is to provide practical guidance to parties on the disclosure of electronic documents and it encourages parties to turn their minds to, and commence a dialogue on, how electronic disclosure should be carried out at an early stage in disputes.

CPR 31.5

On 1 April 2013, CPR 31.5 (colloquially known as the Menu Option) came into force, under the terms of which the Court was given new powers to limit disclosure to that which is reasonably necessary to deal with cases justly, and at proportionate cost.

The key point about CPR 31.5 is that it removes the default position whereby parties historically had to disclose documents which either supported or adversely affected their case, or their opponent's case. Under CPR 31.5, disclosure can now be dispensed with completely, or be restricted to certain issues or a chain of enquiry to limit its scope substantially. Alternatively, the default position of standard disclosure can be preserved.

Under CPR 31.5, the Court may also provide detailed instructions on how disclosure is to be given. The Court may require particular searches to be undertaken, or for searches to be limited to particular time periods and/or particular members of the project team.

The intention behind PD31B and CPR 31.5 is to furnish the Court with the necessary tools to restrict the overall scope of litigation disclosure to that which is necessary, having regard to the nature and complexity of the proceedings, the cost of retrieval of electronic documents, and the volume and accessibility of data. The emphasis is thus squarely on dealing with disclosure in a way that is proportionate to the dispute.

Disclosure Report

Since 1 April 2013, parties have also been required to serve a Disclosure Report no later than 14 days before the first Case Management Conference. The Disclosure Report should set out what documents exist that might be relevant to the case, where and how potentially relevant documents are stored, the broad range of likely costs of giving electronic disclosure, and finally, proposed directions as to the scope and form of disclosure.

Electronic Documents Questionnaire

Finally, parties have the option to file an Electronic Documents Questionnaire ("EDQ") with the Disclosure Report. The EDQ contains information about the parties' document retention policies, suggested date ranges, which personnel might be holding documents, types of documents and sources, suggested keywords, whether any automated disclosure techniques should be employed, and also views about the data held by the other party.

Changes in legal practice

In addition to the above new tools to enable the Court to manage electronic disclosure as part of its case management function, inroads have also been made in terms of the development of legal practice relating to electronic disclosure.

The eDisclosure Protocol

In conjunction with others, the Technology and Construction Solicitors' Association

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(TeCSA) has spent most of this year developing an electronic disclosure Protocol ("the Protocol") which was formally launched on 1 November 2013. The Protocol's purpose is to underpin and provide a practical framework for the EDQ and the discussions required by PD31B and CPR 31.5 to ensure that the electronic disclosure process is undertaken in a uniform manner by all litigating parties. The Protocol recognises the need for informed discussion at an early stage by making provision for the identification of sources of electronic documents, their collection, processing, review, analysis, and finally the manner in which they are presented to the other party.

At each section of the Protocol, there are issues the parties will need to consider such as the names of those who are likely to hold key information, and there is also scope for the parties to record any agreements they might reach in relation to electronic disclosure.

The Protocol does not yet have the status of a court rule or practice direction (as is the case with CPR 31.5 and PD31B) but it does have the support of the judges of the Technology and Construction Court ("TCC").

The TCC has indicated the Protocol will be adopted in appropriate cases from 1 January 2014 in default of any appropriate agreement having been made by the parties to the contrary. That said, there is nothing to prevent the parties agreeing suitable or case-specific modifications to the Protocol if they so wish, subject always to approval by the Court. The Court may also vary the terms of the Protocol if it considers it necessary to do so.

New timing of the first case management conference

To enable the Protocol to be used to its full effect, the TCC has indicated it will change the current arrangements so that the first Case Management Conference will not take place until 8—10 weeks following service of the Acknowledgment of Service. This will provide parties with a further month, at the very least, to grapple with issues of electronic disclosure.

Practical tips to stay ahead of the game

Organisation is key.

If you are in the early stages of a dispute you think may result in litigation, you should:

- Keep track of all likely sources of electronic stored information ("ESI") that might be relevant to the dispute. ESI includes (amongst other things) Word documents; Excel spreadsheets; PowerPoint presentations; emails; social media; electronic databases; charts; graphs; computer-generated images; and data held on mobile phones and Blackberrys.
- Identify all those who may be in possession of ESI and ascertain where their ESI is located.
- Identify any hard copy documents or ESI that might be stored outside England and Wales.
- Identify any hard copy documents or ESI which exist but which might not be reasonably accessible, or which used to exist but no longer do so.
- Review any document management or retention policies you might have and ensure that all potentially disclosable ESI and hard copy documentation is preserved. Any document destruction policy you have should be suspended for the duration of the dispute.
- Ensure that any devices that contain ESI in any format are not destroyed. If ESI is destroyed, then the Court might draw adverse inferences as to the reason for the destruction.
- Copy all documentation and information pertaining to the dispute in a separate folder to make it easily accessible.

Conclusion

Electronic disclosure will undoubtedly change the face of disclosure in disputes under English law. Its arrival is welcome as it will reduce the costs of litigation in two ways:

First, by letting technology do the work. Electronic disclosure service providers generally offer a de-duplication process whereby, in very simple terms, exact duplicate documents are removed prior to the document review stage. This reduces the number of documents that need to be reviewed by the review team, which in turn provides considerable costs savings. Tools such as predictive coding are also available that use sophisticated technology to train the electronic disclosure system to identify relevant documents and demark and sort them by issue. Again, this substantially reduces document review time, and thus costs.

Secondly, the new rules and practices mentioned above relating to the disclosure of electronic documents are centred on the good management of the electronic disclosure process. Their emphasis is on early and continuing discussions between the parties on how to conduct electronic disclosure in a cost-effective way, which focuses the parties' minds on costs from the outset.

As time goes on, the electronic disclosure market will undoubtedly become more and more sophisticated and the technology will improve in leaps and bounds, to the benefit of all parties to litigation before the English courts.

Should you wish to receive further information in relation to this briefing note or the source material referred to, then please contact Lisa Kingston.
lkingston@fenwickelliott.com.
Tel +44 (0) 207 421 1986

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Fenwick Elliott LLP
Aldwych House
71-91 Aldwych
London WC2B 4HN
www.fenwickelliott.com