MAY 2017

UPDATE

Electronic Discovery and Technology Assisted Review in Jersey

Update prepared by Bruce Lincoln (Partner, Jersey), Stephen Alexander (Counsel, Jersey) and Bethan Watts (Associate, Jersey)

The Royal Court of Jersey has recently published a new Practice Direction (RC17/08) offering guidance on the discovery of documents held in electronic form, which will come into force on 1 June 2017. In this update we discuss the new practice direction, and look at the implications for clients carrying out e-discovery exercises in the future.

The Royal Court of Jersey has recently published a new Practice Direction (RC17/08) offering guidance on the discovery of documents held in electronic form, which will come into force on 1 June 2017. The new Practice Direction will apply in cases where discovery is likely to consist substantially of electronic documents. It is intended to assist parties in providing discovery in a proportionate and cost effective manner.

Discovery is the stage of litigation where each party must furnish the other parties in the litigation with all relevant documents which are in its possession, custody or power. This is a wide-reaching obligation and, without adequate preparation and assistance in the search, collection and organisation of documents, the exercise may be more burdensome than parties sometimes realise.

The new Practice Direction – what does it say?

The new Practice Direction requires that where a case will require electronic discovery, the parties should actively engage with one another at a very early stage to agree a common approach to the production of discoverable documents. This means that before the first directions hearing (i.e. as soon as the parties have all filed their pleadings) the parties should discuss the following:

- What documents are held, and by whom.
- Where the documents are held i.e. on computer servers and document management systems, whether back-up copies exist and how they are stored, whether there is a document-retention policy in place.
- The scope of discovery e.g. limiting the exercise to particular date ranges, custodians, types of documents, or by key-words.
- The use of software to facilitate the review; the parties will most likely need to agree a service provider.
- The manner of exchanging data i.e. what form the documents will be in and whether a staged approach could be taken to the exchange of documents.

A party who provides discovery without first discussing with other parties how to provide discovery in accordance with the terms of the Practice Direction may be required to meet the cost of that discovery at its own expense, and may also be required to carry out further searches for documents at its own expense.

The production of electronic documents is not a new concept and it has long been the case that parties to litigation in Jersey would be well advised in a case with very significant volumes of electronic documentation to seek to agree a reasonable and proportionate approach to electronic discovery, at the earliest opportunity. Indeed, the litigation practice at Mourant Ozannes acted in one of the largest pieces of trust litigation in recent years (the Walker Trust case) and was instrumental in proposing and obtaining

the Court's blessing of an electronic discovery protocol in 2012 which was very similar to the approach now mandated by the new Practice Direction. To our knowledge this case was the first time something like this was done in Jersey. The new Practice Direction now formalises this good practice and makes it obligatory to have the discussion at an early stage of the proceedings.

Advantages of electronic discovery over hardcopy

Historically, discovery had been carried out by a process of hardcopy review, whereby all potentially relevant documents were printed into files, and then were reviewed for relevance and legal privilege. This would usually involve lawyers at multiple levels within a law firm, with the most junior lawyers involved in an initial review and the more experienced lawyers carrying out a subsequent review. In more recent years, there has been a general trend towards reviewing and producing documents (including scanned versions of hard copy documents where necessary) in an electronic format, especially in large cases where the discovery process is particularly burdensome.

Many of our clients hold large numbers of documents in hardcopy form, although most organisations now do operate a central document management system from which electronic documents can be drawn. There are also providers in the market who can scan hardcopy documents and, in many cases, produce 'readable' pdf versions which can be understood and processed by review software.

The benefits to our clients of being able to discharge their discovery obligations using electronic discovery tools are as follows:

- Large quantities of documents are significantly easier to manage electronically. It is easy to categorise documents and apply 'tags', and to sort and search documents. Whilst there may be a greater upfront cost involved in, for example, scanning large volumes of hard copy documents for review, and obtaining suitable software, there is likely to be an overall cost saving.
- Metadata can be reviewed and analysed when electronic documents are reviewed in their original, electronic form. Metadata is the 'data about data' which sits behind all electronic documents; in the case of a simple word document, the metadata will include details of when the document was created and by whom. This could assist a case if, for example, a meeting note had been prepared setting out what was said at a meeting, but the metadata reveals that the note was not prepared until 2 years after the meeting took place. This would cast doubt on the reliability of that document in a way which would not have been possible if the same document had been reviewed only in hardcopy. Care has to be taken, however, that during the process of collecting electronic documents, metadata is not altered, so specialists in this area should be used to harvest such documents.
- Where documents are reviewed and analysed in electronic form (including scanned documents), significant options are available in terms of technology assisted review, which is discussed further below.

Technology Assisted Review (TAR)

One important further development with respect to electronic discovery is TAR. TAR (also known as predictive coding) is a review tool which combines manual human review, and technological algorithms which rely on machine learning. In essence, a lawyer will review a sample set of documents (perhaps initially 2,000, although this will vary depending on the documents and the software), and the software will learn from that process and will apply the same principles to the remaining documents.

The level of reliance on TAR can vary hugely between difference cases, depending on the document set and on the approach which the parties agree to take.

- TAR could be used to rank the likelihood that the documents will be relevant, but lawyers will still undertake a manual review of every document. This would mean that they are likely to come across any 'smoking guns' at an early stage of the discovery process, and so could pursue alternative dispute resolution and settlement if it becomes an attractive option.
- TAR could be used merely as a quality-checking mechanism, to identify outliers at a final stage before production, following a full manual review. This would be a 'belt and braces' approach to identify where there may have been human error.
- At the highest level, TAR could be the primary basis for review so that the costs of a manual review are kept to an absolute minimum. Whether this is a viable option will depend on the nature of the case and the documents, the attitude of the other parties, and ultimately the Court.

How are other jurisdictions dealing with TAR?

In both the US and the UK, TAR is far more widely used than currently in Jersey.

In 2016 the English High Court handed down the decision *in Pyrrho Investments Limited & Anr v MWB Property Limited and Others [2016] EWHC 256 (Ch)*. This decision acknowledged the success of predictive coding in the US and Ireland, and noted that there is no evidence that predictive coding is less accurate than a manual review with keyword searches. It could, however, be more expeditious and economical. In that case, Master Matthews found that a full manual review of each document would be unreasonable, at least where a suitable automated alternative exists at a lower cost.

In the Pyrrho judgment, Master Matthews also noted the important point that the ideas behind TAR are by no means cutting-edge. Primitive versions of this kind of process were being rolled out in the mid-1980s, although the modern versions are vastly more reliable.

In the US, TAR was judicially accepted for the first time in 2012. Three years later, in the case of *Rio Tinto PLC v. Vale S.A., 14 Civ. 3042, 2015 WL 872294 (S.D.N.Y. March 2, 2015)*, Judge Peck stated that *"the case law has developed to the point that it is now black letter law that where the producing party wants to utilize TAR for document review, courts will permit it"*.

Conclusions

Just as the world of finance is embracing the challenges of fintech, the legal services industry is coming around to the idea that technology can be a tool which allows lawyers to provide a better service to clients in complex areas such as discovery.

For the time being, the technology will only be as good as the lawyers who use it, and the world of TAR is still heavily reliant on the human element which must go hand-in-hand with the software.

If you would like to learn more about electronic discovery or using TAR, and how this could be beneficial to you in the future, then please do not hesitate to contact us.

Contacts

Bruce Lincoln
Partner, Jersey
+44 1534 676461
bruce.lincoln@mourant.com

Stephen Alexander
Partner, Jersey
+44 1534 676 172
stephen.alexander@mourant.com

Bethan Watts
Associate, Jersey
+44 1534 676 917
bethan.watts@mourant.com