The disease and its cure

In the first of a two-part series Ian Pease examines how the advent of new technology is at once increasing the volume of documents that lawyers have to review and starting to provide the tools to efficiently undertake that process

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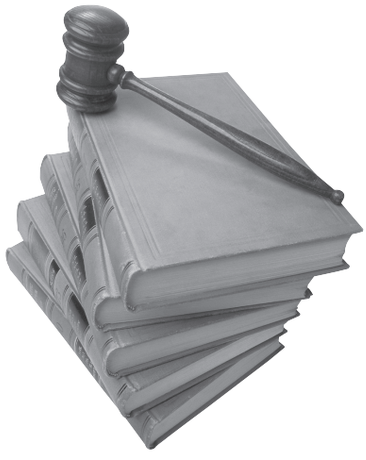
Construction litigation has always been document intensive. Take one project slated to last, say, four years. Mix in one contractor, several sub-contractors and even more materials suppliers. Top it all off with a developer, an architect, a quantity surveyor, a structural engineer and a gamut of other professional advisers. Leave standing for the necessary duration and they will generate a lot of paper… or so it was in the old days. Now they generate an even greater quantity of 'e-traffic'. E-mails, Word documents, spreadsheets, Autocad drawings, programme analyses, etc. All or most of this will not see any printer in its lifetime: it will reside in the basement on some server or on the hard drive of someone's laptop. However, it will still exist and may be relevant to the objective merits of the case should a dispute arise. What's more, when it comes to litigation, arbitration, and, yes, adjudication, these are all documents that need to be reviewed, considered and, if necessary, disclosed.



Pandora's box

In mentioning the repositories of such documents (servers and laptops) I realise that I've left one out: backup tapes –truly the skeletons in the cupboard. There is often a disjoint between the operations guys and those who are not client-facing: the IT guys in the basement. You probably know that in order to guard the data they take a daily backup of it and keep it off-site in case of disaster. You may even know that the company recently invested in some fancy software to do that automatically. But did you know that IT had taken a special one-off backup at the end of 1999 just in case that Y2K problem had not been fixed, or that it was their common practice to do the same whenever there was a major system upgrade?

All these backups generate documents that are potentially relevant to any dispute or court case. They cannot simply be ignored: they are the original toxic assets.

And then there is e-mail – isn't it easy to use? Important (and less important) things can be said quickly and everyone can be copied in so simply (they all have to be kept in the loop, of course!). The trouble is that those fifteen people that you've just e-mailed may each have an opinion and generate a reply, necessarily copying in some of their team. And so it goes on. The really annoying thing is that most of those e-mails will contain a large amount of duplicated material, making printing off the e-mail rather expensive and not very green.

Double whammy

So why does all this matter so much? First because each dispute will start in a very similar way. A disgruntled party approaches their lawyer for advice. How is the lawyer to attain the best outcome, given the problems they face? The lawyer will no doubt be intrigued by what the client says, but more interested in what the 'papers' show. After all, it's on the facts that cases are won or lost.

So what are 'the papers'? In times gone by they were literally that: the

hard copy project file where the relevant exchanges and the contract details had been accumulated. Given the current situation that I've set out above we cannot rely on that being done, for at the same time as there has been the rise of the e-document there has been a decline in the fastidiousness of those compiling such project files.

So the first reason for solicitors to address e-documents is because it's absolutely essential to apprise yourself of the merits of your client's case. If you never look at 90% of the available documents how can you ever properly advise?

The second reason is that the court rules are clear (and made the more so by the recent *Digicel (St Lucia) Ltd v Cable and Wireless plc* [2008], discussed below): these documents cannot be ignored and the rules on their collection and disclosure must be adhered to.

You need to talk

CPR Part 31 and its allied practice direction deal with the disclosure of documents. There has always been a wide definition of 'document' (anything in which information of any description is recorded), and e-documents have always been included. The categories of documents that a party has to disclose (see r31.6) are:

(a) documents on which the party relies;

(b) documents that adversely affect the party's own case or adversely affect another party's case, or support another party's case; and

(c) documents required to be disclosed by a relevant practice direction.

In order to make this disclosure, a party has to make a 'reasonable search' (r31.7), which will vary depending on a number of factors, including the number of documents involved, their likely significance and the ease and expense of retrieval of any particular document. All those factors are relevant to how a party addresses e-documents. At the end of the disclosure process the steps taken and the extent of the search need to be set out in the disclosure statement.

The growing importance of e-disclosure has been recognised by the inclusion of a separate paragraph

The court rules are clear (and made the more so by the recent case of Digicel (St Lucia) Ltd v Cable and Wireless plc *[2008]): e-documents cannot be ignored and the rules on their collection and disclosure must be adhered to.*

(2A) in the practice direction dealing exclusively with its niceties. This section makes it clear to practitioners that the definition covers not only the readily accessible documents but also backup tapes and 'electronic documents that have been deleted', together with 'additional information stored and associated with electronic documents known as metadata'.

For the moment the focus has been upon backup tapes, but the 'deleted' document is a truly horrific prospect and arises from the resilient nature of e-documents, at once so easy to change and duplicate and yet so difficult to eradicate (a command to 'delete' being interpreted by the machine as 'mark in a way that it can no longer be read').

The overall ethos of paragraph 2A is to be open with your opponents, talk to them and explain what e-documents you are likely to come across. Hence:

> 2A.2 The parties should, prior to the first case management conference, discuss any issues that may arise regarding searches for and the preservation of electronic documents. This may involve the parties providing information about the categories of electronic documents within their control, the computer systems, electronic devices and media on which any relevant documents may be held, the storage systems maintained by the parties and their document retention policies. In the case of difficulty or disagreement, the matter should be referred to a judge for directions at the earliest practical date, if possible at the first case management conference.

And:

> 2A.3 The parties should co-operate at an early stage as to the format in which electronic copy documents are to be provided on inspection. In the case of difficulty or disagreement, the matter should be referred to a judge for directions at the earliest practical date, if possible at the first case management conference.

Paragraph (2A) in the practice direction deals exclusively with the niceties of e-diclosure. This section makes it clear that the definition covers not only the readily accessible documents but also backup tapes and 'electronic documents that have been deleted'.

Digicel (St Lucia) Ltd v Cable and Wireless plc [2008] EWHC 2522 (Ch)
Ridehalgh v Horsefield [1994] Ch 205
Zimmers - Hedrich v Standard Bank London Ltd & anor [2008] EWCA Civ 905

Furthermore, special dispensation is given by the CPR such that it is often reasonable, given the sheer quantity of documents, to make a 'keyword search' of the population rather than looking through each one individually. However, the CPR again emphasises co-operation by stating that these keyword searches should be agreed if possible.

Lost connection

Although these principles have been around for a number of years, practitioners' adherence to them appears sketchy, judging from the recent case of *Digicel (St Lucia) Ltd v Cable and Wireless plc* [2008]. The facts of the case can be stated shortly: they relate to allegations that Cable and Wireless deliberately delayed connecting Digicel to its telephony networks. The case proceeded with a case management conference (CMC) in February 2008, ordering standard disclosure by June. There was no discussion of e-documents at that CMC, and apparently no communication between the parties until towards the end of May (about a month before the deadline), when the defendants stated what searches for e-documents they had made. No consensus or agreement was sought as to the proper ambit of those searches. The claimants were not happy with the extent of the searches, and a specific disclosure application ensued, with the court eventually holding that the searches were not reasonable.

Tellingly, the court indicated:

> 47. This case provides an opportunity for the court to emphasise something mentioned in [the] Part 31 Practice Direction which the parties in the present case disregarded. Paragraph 2A.2 of the Practice Direction states that the parties should at an early stage in the litigation discuss issues that may arise regarding searches for electronic documents. Paragraph 2A.5 of the [Practice Direction] states that where key word searches are used they should be agreed as far as possible between the parties. Neither side paid attention to this advice... The result is that the unilateral decisions made by the defendants' solicitors are now under challenge and need to be scrutinised by the court. If the court takes the view that the defendants' solicitors' key word searches were inadequate when they were first carried out and that a wider search should have been carried out, the defendants' solicitors' unilateral action has exposed the defendants to the risk that the court may require the exercise of searching to be done a second time, with the overall cost of two searches being significantly higher than the cost of a wider search carried out on the first occasion.

The result of not talking and agreeing the keyword searches and the position on backup tapes was that the defendants had to redo their searches with additional keywords and were forced to talk to the claimants about how to restore the backup tapes 'so far as reasonably practicable'.

Back-up tapes are a particularly difficult area and in the majority of cases restoration will probably not be deemed reasonable. However, parties should not assume that the court will decide this without some persuasion, and simply putting in the disclosure statement that restoration would be disproportionate due to the significant time and costs involved

will not be enough. *Digicel* probably shows that if these matters are not addressed up front the party at fault will probably have to do far more on court order.

Hold onto your PI cover guys…

The other noteworthy case last year was *Zimmers - Hedrich v Standard Bank London Ltd & anor* [2008], not particularly because of the final outcome but more as a warning to practitioners – there but for the Grace of God…

The underlying facts need not bother us unduly, they revolve around a dispute between Hedrich and Standard Bank concerning the commissions involved in a consultancy agreement between the two. Zimmers was Hedrich's solicitors. The case against the Bank collapsed when, very late in the day, Hedrich disclosed e-mail traffic that undermined his pleaded case. The Bank found itself with an opponent who was unable to pay the substantial (indemnity) costs that the court ordered him to pay and looked around for another source to recover against. They chose Zimmers.

The opening paragraph of the judgment of Ward LJ telegraphs the result:

> A cigarette packet carries the warning that smoking can kill you. Solicitors' standard terms of business should carry a warning that litigation can cost you. For litigation is an inherently risky business: there are no certain winners; and very often even the fruits of success are never recovered. This is just such a case. The moral is caveat litigator.

The form of procedure used by the Bank was a wasted costs order against Zimmers under Section 4 of the Courts and Legal Services Act 1990. What they had to show was that Zimmers had effected an 'improper, unreasonable or negligent act or omission' thereby giving rise to the wasted costs. Hence the Bank had to show that Zimmers had failed to act in a way no reasonably well-informed and competent ordinary member of the profession would have done.

The leading case on this form of action, *Ridehalgh v Horsefield* [1994], demonstrates the innate tension in this form of action (as Ward LJ put it):

> … between two important public interests, one that the wasted costs orders should not become a back-door means of recovering costs not otherwise recoverable against a legally-aided or impoverished litigant and that the remedy should not grow unchecked to become more damaging than the disease and, on the other hand, that litigants should not be financially prejudiced by the unjustifiable conduct of litigation by their or their opponents' lawyers.

It is fair to say that the Bank had something of an uphill struggle on its hands and in the end it failed to make good its case. That does not mean that Zimmers' actions were as they should have been. They appear from the judgment to have been out of their depth with the necessary procedures to properly take charge of and recover the e-documents, choosing to rely upon the technical resources of their less than helpful client. They were also helped by a controversial view expressed by the Court that:

> We have to judge negligence by the standards of a solicitor of ordinary competence, the competence, that is, of a typical, reasonably well informed high street solicitor, just like Mr Zimmer, not the Rolls Royce standards which the big City firms like Jones Day must and do uphold.

Many would say, contrary to this view, that the Court should be expecting all its practitioners to be properly versed in the techniques and procedures to actively investigate the extent of e-documents and to recover them on behalf of the Court.

So the profession could take the *Zimmers* case as 'no cause for concern' but that in my view would be wrong. The case shows that there may be substantial numbers of solicitors that are not able to properly deal with e-documents. That I would suggest is an accident waiting to happen.

In the majority of cases restoration of back-up tapes will probably not be deemed reasonable. However, simply putting in the disclosure statement that restoration would be disproportionate due to the significant time and costs involved will not be enough.

… And the cure

In one sense the cure for the problem is to follow the CPR and to engage in a real dialogue with your opponents. However, those problems technology causes it also cures, and in my next article I'll be looking at the new techniques and software that are emerging to help to find the needle in the haystack. ■

Key points

Zimmers and *Digicel* are a wake up call for the profession. The lessons to be learnt are:

1. The courts and your opponents will in future take a much greater interest in the disclosure of your client's electronic documents.
2. The vast majority of the relevant (and hence disclosable) documents are likely to be electronic (in *Zimmers* it was the e-mails that decided the case).
3. Early discovery of the relevant document population will allow you to take informed decisions on the best direction for the case.
4. Read and act upon s2A of CPR Part 31's Practice Direction. You cannot ignore it.
5. Co-operate and try to agree with your opponent the ambit of your and their e-disclosure searches.
6. The efficient handling of e-documents calls for practitioners to be well versed in the technological solutions that are available.